Effective governance in English Universities: a case study of pre- and post-1992 institutions

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Abstract

There is a marked difference in the governance structures of pre- and post-1992 universities in England. Notably, greater academic representation and involvement is evident in pre-1992 universities. By contrast, post-1992 universities more closely adhere to the 'business model' of governance endorsed by government commissioned reviews of university governance, with greater lay membership of governing bodies, and an extensive executive team, led by the vice-chancellor. It is submitted that the business model is unsuitable for ensuring effective governance, fails to reflect the core educational function of universities, and marginalises academic input into governance processes. This article aims to critically analyse the legal constitutional framework, and the regulatory framework, within which universities in England operate, and the implications for governance. Specific reference is made to the constitutions of pre-1992 universities and post-1992 universities. This article further considers the regulatory framework under the Office for Students (OfS), including the extensive the powers available to the OfS to intervene in universities, and their approach in exercising those powers. Problems in the regulatory framework's reliance on self-reporting by universities are examined, in particular, as well as the Code of Governance for Higher Education. This article concludes that the current legal and governance framework is not conducive to effective governance, and makes a number of recommendations for reform.

Keywords: Higher education governance, corporate governance, universities

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Introduction

Universities in England are corporations aggregate.[1] Until the creation of what is now University College, London in 1826 the two universities of Oxford and Cambridge were the only universities in England.[2] These two ancient English universities were established by charter and later formally incorporated as civil corporations in 1571 by Act of Parliament, to recognise and enshrine their corporate status.[3] The creation of corporations by Charter, in exercise of the Royal Prerogative, may be regarded as an anachronism little used in practice today,[4] but continued as the predominant method to incorporate new universities in England until comparatively recently. Consequently, most universities in England created before 1992 were incorporated by Royal Charter.[5]

The enactment of the Further and Higher Education Act 1992 (FHEA) departed from this model, with post-1992 universities established by, and their constitutions set out within, the Education Reform Act 1988 (ERA), as amended by the FHEA. The significance of the legal and regulatory changes introduced by the FHEA with respect to university governance can be evidenced by the fact that the governance structures of universities in England are frequently differentiated as being either pre-1992 or post-1992.

The legal and regulatory regime in which universities in England operate has undergone further significant change following the enactment of the Higher Education and Research Act 2017 (HERA). This includes the establishment of a new regulator for universities in England, the Office for Students (OfS), and a new regulatory framework under which OfS maintains a register of universities in England.

Ensuring the adequacy and appropriateness of corporate governance is as important in relation to universities as it is to other corporations, as all corporate

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[1] Graeme Moodie and Rowland Eustace, *Power and Authority in British Universities*, (Routledge 1974), p45.
[2] *Ibid.*, p25.
[3] Oxford and Cambridge Act 1571. See also Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), pp134-135.
[4] *Halsbury's Laws* (5th edn, 2010) vol 24, para 406. See also, The Privy Council Office, Royal Charters, available at: https://privycouncil.independent.gov.uk/royal-charters/ [accessed 7 January 2020].
[5] Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), p134.

entities need governing.[6] University governance has been a subject of repeated official and government commissioned scrutiny over the past 35 years.[7] Nonetheless there is evidence of a lack of efficacy of such scrutiny, the associated findings, and recommendations of such scrutiny, and attempts to implement those recommendations.

As the effects of the global Covid-19 pandemic continue to be felt, universities in England are again facing significant resource pressures, with some institutions predicted to lose over forty percent of their annual income and thus facing financial collapse without government intervention.[8] This, arguably creates an environment in which there is an increased likelihood of governance failings at universities in England.

This article examines governance in relation to the two major categories of universities outlined above, namely: pre-1992 universities and post-1992 universities. Particular reference will be made to the legal, constitutional, framework of The University of Birmingham (UoB) and of Coventry University (CU) as illustrative examples of pre-1992 and post-1992 institutions (respectively). This article will consider these examples in the context of their somewhat differing academic emphases. While pre-1992 universities generally seek to place equal emphasis on teaching and research, the educational objectives of post-1992 universities tend to be pre-eminent.

Universities in England operate subject to multiple regulatory regimes.[9] An examination of all such regulatory frameworks is not feasible within the constraints of this article. This examination will, therefore, focus on the

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[6] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (4th edn, Oxford University Press 2019), p3.

[7] See Committee of Vice Chancellors and Principals, Steering Committee for Efficiency Studies in Universities (Jarratt Report). (1985); National Committee of Inquiry into Higher Education, Higher Education in the Learning Society: Report of the Main Committee (Dearing Report). (1997); HM Treasury, Lambert Review of Business-University Collaboration: Final Report. (2003), Chapter 7.

[8] Universities UK, 'Achieving stability in the higher education sector following COVID-19' (10 April 2020), available at: https://universitiesuk.ac.uk/news/Documents/uuk_achieving-stability-higher-education-april-2020.pdf [accessed 10 April 2020]; David Kernohan, 'Will Doubling QR Be Enough?', *Wonkhe* (20 April 2020), available at: https://wonkhe.com/blogs/will-doubling-qr-be-enough/ [accessed 20 April 2020].

[9] Such as the Competition and Markets Authority, United Kingdom Visas and Immigration, Office of the Independent Adjudicator and Information Commissioner's Office.

regulatory framework for higher education in England, for which the OfS is the principal regulator.

This article commences with an examination of the legal and constitutional frameworks in place at pre-1992 universities and post-1992 universities, with reference to the legal frameworks of UoB and CU (respectively). It proceeds to consider whether the regulatory framework within which universities in England operate is conducive to effective governance, with examination of the new regulatory framework under the OfS, and the extent to which it resolves governance issues that had previously been identified in a regulatory context. Consideration will also be given to the approach taken by OfS in balancing the requirement for effective regulation and the principle of institutional autonomy. The adequacy of the CUC Higher Education Code of Governance will also be considered. This article concludes by analysing why the legal and regulatory framework is currently not conducive to ensuring effective governance and summarising the key shortcomings that should be addressed.

Legal and Constitutional Frameworks

There is broad acknowledgement of three components of governance within universities: i) the governing body, responsible for overseeing the activities and governance of the university (analogous to trustees); ii) the academic body, responsible for agreeing academic policies, standards, and awards; and iii) the executive of the university, usually comprised of the Vice Chancellor, Deputy and Pro-Vice Chancellors, and other senior managers who are responsible for the day-to-day management of the university.[10] According to Shattock, modern university governance is characterised by a decline in power amongst the academic body, a constitutional position of pre-eminence for the governing body – theoretically making it the supreme governing organ of a university, and an emerging trend towards an expansive executive, both in terms of size and power, increasingly making the executive the de facto pre-eminent component of modern university governance.[11]

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[10] Mark Taylor, 'Shared Governance in the Modern University' (2013) 67(1) Higher Education Quarterly 80, p88; Michael Shattock, 'University Governance: An Issue for Our Time', (2012) 16(2) Perspectives: Policy and Practice in Higher Education 56, 61
[11] Michael Shattock, *ibid.*, and Centre for Global Higher Education, *Working Paper 13: University Governance in Flux. The Impact of External and Internal Pressures on the Distribution of Authority within British Universities: A Synoptic View (Michael Shattock).* (2017)

Official Reviews of University Governance

Government commissioned and endorsed scrutiny of university governance in England or the whole United Kingdom over the past 35 years has included the Jarratt Report,[12] the Dearing Report,[13] and as part of the Lambert Review.[14] Following devolution this has been mirrored and supplemented by reviews of university governance in other the other nations of the United Kingdom.[15]

The preferred governance model advocated by these official reviews attempts to mirror aspects of governance arrangements favoured by companies, and has been termed the 'business model',[16] the characteristics of which can be summarised as follows:

i)   the university's governing body should be smaller rather than larger;

ii)   the governing body should be separate from, and superior to, the university's academic body;

iii)   the governing body should be comprised by a majority of independent, external, governors who should have knowledge and experience of business;

iv)   representation on the governing body from staff and students of the university should be limited; and

v)   the governing body should be distanced from the work of the university.[17]

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[12] Committee of Vice Chancellors and Principals, Steering Committee for Efficiency Studies in Universities (Jarratt Report) (1985).

[13] National Committee of Inquiry into Higher Education, Higher Education in the Learning Society: Report of the Main Committee (Dearing Report) (1997).

[14] HM Treasury, Lambert Review of Business-University Collaboration: Final Report. (2003), Chapter 7

[15] Welsh Assembly Government, Report of the Independent Review of Higher Education Governance in Wales (McCormick Review) (2011); Scottish Government, Report of the Review of Higher Education Governance in Scotland (von Prondzynski Report) (2012); Universities Wales, A Review of Governance of the Universities in Wales (Camm Review) (2019).

[16] Higher Education Policy Institute, University Governance In A New Age of Regulation (HEPI Report 119) (2019) p4.

[17] Roger Brown, 'What Do We Do About University Governance? (Part 1)', (2011) 15(2) Perspectives: Policy and Practice in Higher Education 53, pp54-55.

Principles of Effective University Governance

In establishing principles to understand what effective governance means in relation to universities, Brown suggests the following principles:[18]

  i.   A university must have a governing body, and that governing body must be accountable to the full range of interests in the university for the university's effectiveness and efficiency.
  ii.   For this purpose, the governing body must be broadly representative of the university's main groups of stakeholders.
  iii. The governing body must be able to exercise control over the institution, particularly to ensure that the interests of the various stakeholders in the university's activities are balanced and as far as possible integrated. This control must include control over teaching and research, delegated through the vice- chancellor as 'chief academic officer' to the senate or academic board.
  iv.   The governing body must be able to access specialist professional knowledge in order to be able to appraise the university's performance and to direct or oversee the appropriate remedial actions

Institutional autonomy has long been a fundamental tenet of university governance, with Moodie and Eustace observing that 'universities in the United Kingdom are autonomous institutions. They are, without exception, independent corporations, able to… regulate their own affairs within the wide powers granted to them by the instruments of their incorporation.'[19]

As Christensen has highlighted, in a regulatory context there is an inherent tension between the principle of institutional autonomy and regulatory powers of intervention, with a need to balance the two concepts.[20]

The constitution of pre-1992 universities in England

The constitution of pre-1992 universities in England, established by Royal Charter, primarily comprises its Charter and Statutes, supplemented by other subordinate legislation of the university such as its ordinances and

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[18] *Ibid*., p87.
[19] *Supra* note 1, p45.
[20] Tom Christensen, 'University governance reforms: potential problems of more autonomy?' (2011) 62 Higher Education 503.

regulations.[21] The Royal Charter for UoB was issued on 24 March 1900, and subsequently revised by approval of the Privy Council, most recently in 2009.[22] UoB's Statutes were appended to, and issued with, the Charter and have since been revised by approval of the Privy Council, most recently in 2018.[23] Notably, the constitution of UoB provides a useful illustrative example for the purposes of the review and analysis undertaken below, as UoB was the first unitary civic university[24] established in England and consequently its constitution was replicated for all the subsequent unitary civic universities in England, created from 1900 onwards.[25]

Governing Body: The Council

UoB's constitution establishes its Council as the 'supreme governing body' of the university, with 'absolute power within the university', subject to the Charter, Statutes, and general law. Membership of Council is required to comprise the vice-chancellor, the provost, four academic staff members elected from amongst the academic staff members of the university's Senate, two student members from the university's guild of students, and sixteen independent members (who must not be staff or registered students of the university); giving a total Council membership of 24, two thirds of whom are independent lay members.[26] Independent members are to be selected by a membership committee of Council having regard to the need for diversity and interests on the Council.[27]

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[21] University of Birmingham Legislation, available at:
https://intranet.birmingham.ac.uk/as/registry/legislation/index.aspx [accessed 28 January 2020].
[22] Preamble to Charter of the University of Birmingham, available at:
https://www.birmingham.ac.uk/Documents/university/legal/charter.pdf [accessed 28 January 2020].
[23] Statutes of the University of Birmingham, page 22, available at:
https://www.birmingham.ac.uk/Documents/university/legal/statutes.pdf [accessed 28 January 2020].
[24] As opposed to collegiate universities like Cambridge, Durham, and Oxford.
[25] Centre for Global Higher Education, Working Paper 13: University Governance in Flux. The Impact of External and Internal Pressures on the Distribution of Authority within British Universities: A Synoptic View (Michael Shattock) (2017) p2.
[26] University of Birmingham Statutes, s8.
[27] University of Birmingham Ordinances, s2.16.6.

Academic Body: The Senate

UoB's constitution provides for a Senate, as the highest academic body within the university, responsible for 'regulating and directing the academic work of the University in teaching, examining and research' and for conferring academic awards by the university.[28] Membership of the Senate totals fifty-eight, which includes twenty-one ex officio staff members, including the vice-chancellor and the provost of the university, five academic staff nominated by their head of college, twenty academic staff (including at least one professor from each of the five academic college of the university) elected by their college's academic staff, up to six co-opted members selected by the Senate on the recommendation of the vice-chancellor, and six students of the university, one of whom is the education officer of the university's guild of students ex officio.[29]

The Executive

UoB's Charter and Statutes contains few provisions which provide for an 'executive' function, although it does specify the post of vice-chancellor.[30] The constitutional provisions relating to the role, power and function of the vice-chancellor do not focus on their executive role, but on their role as principal academic officer of the university, such as the vice-chancellor's role in chairing the Senate ex officio, and their membership ex officio of any committees of the Senate.[31]

UoB's ordinances do provide for a 'University Executive Board' comprising the vice-chancellor, the provost, the three pro-vice-chancellors, the five heads of colleges, and the registrar and secretary.[32] Other individuals may join the executive board by approval of Council.[33] Currently membership of the executive board includes twelve individuals, being the eleven ex officio postholders outlined above, together with the university's director of finance.[34]

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[28] University of Birmingham Charter, Article 8.
[29] University of Birmingham Ordinances, s2.9.1.
[30] University of Birmingham Charter, Article 6; and University of Birmingham Statutes, s5.
[31] University of Birmingham Statutes, ss5 & 10.5
[32] University of Birmingham Ordinances, s2.14.1
[33] *Ibid*, s2.14.1
[34] University of Birmingham, University Executive Board Membership, available at: https://www.birmingham.ac.uk/university/governance/ueb/index.aspx [accessed 28 January 2020].

The power and functions of this executive board include taking decisions on university strategy, operation and management, and monitoring the implementation of university strategies and policies. Crucially, however, these powers may be exercised by the executive board only 'within the authority delegated by the Council and specified in terms of reference from time to time.'[35] Furthermore, the constitutional provisions under which the existence, composition, powers, and role of the executive board arise are found within the university's ordinances, which are themselves made by Council, and accordingly Council has power to amend these provisions as it sees fit.[36]

The constitution of post-1992 universities in England

The constitution of post-1992 universities in England, established as higher education corporations, comprises its Instrument of Government and its Articles of Government. Notably, however, these documents are supplemental to, and their form and content dictated by, the statutory provisions of the ERA and associated statutory instruments used to create higher education corporations. For example, the incorporation of CU does not arise by virtue of its Instrument of Government being issued, but by a statutory instrument made by the Secretary of State for Education, pursuant to section 121 of the ERA, under which higher education corporations were incorporated.[37] Similarly the form and content of CU's Instrument of Government and its Articles of Government, issued by the Privy Council, were drafted in accordance with Schedule 7A of the ERA.[38]

Governing Body: The Board of Governors

CU's constitution establishes a Board of Governors as the governing body of the university with ultimate authority and responsibility over the educational and financial affairs of the University, responsibility for oversight of its activities, and for the appointment, appraisal and pay and conditions of executive postholders.[39] A maximum membership of 24 appointed members, plus the vice-chancellor, is mandated for the Board of Governors,[40] of which at least half must be independent lay members (up to a maximum of thirteen

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[35] University of Birmingham Ordinances, s2.14.2.
[36] University of Birmingham Statutes, s12.
[37] The Education (Higher Education Corporations) Order 1988.
[38] Inserted by section 71(4) and Schedule 6 of the Further and Higher Education Act 1992.
[39] Coventry University Articles of Government, Article 3.1.
[40] Coventry University Instrument of Government, Article 3.1.

independent lay members).[41] These lay members are to be selected based on their experience in 'industrial, commercial or employment matters or the practice of any profession.'[42] Of the remaining membership, up to two may be teachers at the university nominated by the university's Academic Board,[43] and up to two may be students of the university nominated by the university's students.[44] Additionally at least one, and up to nine, individual(s) are co-opted members of the Board of Governors, nominated by the non-co-opted members, and are to have 'experience in the provision of education.'[45]

Academic Body: The Academic Board

CU's constitution also provides for an academic body, the Academic Board, with responsibility for academic matters including policies and procedures for the assessment and examination of students.[46] Notably, the role and powers of the Academic Board are expressly 'subject to… the overall responsibility of the Board of Governors',[47] and, accordingly, the Academic Board is subordinate to the Board of Governors within CU's constitutional framework. This hierarchical relationship between the Academic Board and the Board of Governors is further reinforced by provisions in CU's constitution enabling the Board of Governors to determine the scope of the Academic Board's remit,[48] and the fact that the membership of Academic Board is subject to approval by the Board of Governors.[49] The Academic Board may comprise up to 34 members, of which the vice-chancellor, the provost, the deputy-vice-chancellors, the pro-vice-chancellors, and the academic deans of each of the four academic faculties of the university are members ex-officio. Of the Academic Board's total membership at least half is to consist of the holders of senior management posts (i.e. the executive of the University), as determined by the Board of Governors.[50] Of the remaining membership, there is to be at least one member of teaching staff from each of CU's four academic faculties, and up to two students and up to two non-teaching staff, in addition to co-opted

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[41] *Ibid.*, Article 4.3 and Article 3.2(a)
[42] *Ibid.*, Article 3.3
[43] *Ibid.* Article 3.2(b)
[44] *Ibid.*, Article 3.2(b)
[45] *Ibid.*, Article 3.2(c) and Article 3.4
[46] Coventry University Articles of Government, Article 3.3
[47] *Ibid.*, Article 3.3
[48] *Ibid.*, Article 3.3(c)
[49] *Ibid.*, Article 4.1
[50] *Ibid.*, Article 4.2(a) and (b), and Article 1.1(b)

members.[51] Under the terms of reference for the Academic Board approved by the Board of Governors, membership of the Academic Board currently includes, in addition to the ex officio members summarised above, the university's librarian, the registrar, and secretary ex officio, and one representative from each university subsidiary which delivers academic provision.[52] Accordingly, under the terms of reference, the total membership of the Academic Board is currently twenty-nine, of which two are students of the university. The terms of reference also provide that the four teaching staff, one from each of the university's four academic faculties, are to be senior academic staff selected by the executive deans of their respective schools, rather than their selection arising from an electoral process involving their academic colleagues, as seen in relation to UoB's Senate.[53]

The Executive

CU's constitution provides that the vice-chancellor is 'the chief executive' of the university. The vice-chancellor is responsible for the organisation and management of the university, the leadership of its staff, and the appointment, and pay and conditions, of all staff other than holders of executive posts (as determined by the Board of Governors), together with the assignment of duties of all staff including the holders of executive posts.[54]

Besides the role and powers of the vice-chancellor, CU's constitution does not otherwise prescribe specific executive roles. Consequently, the size, roles, and powers of the executive of the university is left to be determined by the vice-chancellor in conjunction with the Board of Governors. Currently, CU has a sizable executive team which, besides the vice-chancellor, comprises a provost, four deputy-vice-chancellors, eight pro-vice-chancellors, six associate pro-

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[51] *Ibid.*, Article 4.2(c) to (f)
[52] Coventry University Academic Board, Constitution and Terms of Reference, Section 3.1, available at: https://www.coventry.ac.uk/globalassets/media/global/06-life-on-campus-section-assets/the-university/key-information-page/governance/academic-board-constitution-and-terms-of-reference.pdf [accessed 4 February 2020].
[53] Coventry University Academic Board, Constitution and Terms of Reference, Section 3.1(d)
[54] Coventry University Articles of Government, Article 3.2

vice-chancellors, the registrar and chief governance officer, a chief finance officer, and chief people officer.[55]

Ensuring effective governance

In order to examine whether or not university governance is effective, it is first necessary to establish principles regarding what effective governance means in relation to universities.[56] Two theories dominate the literature concerning effective governance: agency theory and stakeholder theory.

Amongst the theories to have shaped the development of corporate governance, agency theory has established a prominent position. Berle and Means highlighted the diminishing control shareholders are able to exercise over the management of their assets, owing to the separation of ownership from management in corporations, and the increasingly dispersed ownership of corporations amongst its numerous shareholders.[57]

Jensen and Meckling and Fama and Jensen have scrutinised the agency relationship inherent in corporations, whereby shareholders (owners) delegate control to management (agents) and have noted the potential for an agent to act in his own self-interest, and the information asymmetry which can prevent owners from effectively scrutinising and holding to account management.[58]

Buckland, however, has suggested that agency theory is not a suitable lens through which to view corporate governance in relation to universities, owing to the diversity of the principals (those with a legitimate interest in the outcome of a university's activities) and the difficult in identifying them.[59]

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[55] Coventry University, Vice-Chancellor's Office, available at: https://www.coventry.ac.uk/the-university/about-coventry-university/governance/vice-chancellors-office/ [accessed 21 January 2020].
[56] See note 18.
[57] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932)
[58] Michael Jensen and William Meckling, 'Theory of the Firm: Management Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305; Eugene Fama and Michael Jensen, 'Separation of Ownership and Control', (1983) 26(2) Journal of Law and Economics 175.
[59] Roger Buckland, 'Universities and Industry: Does the Lambert Code of Governance Meet the Requirements of Good Governance?', (2004) 58(4) Higher Education Quarterly 243.

In contrast, Donaldson and Davis, and Davis, Schoorman and Donaldson have argued that agency theory is built upon a flawed characterisation of managers as untrustworthy, that the interests of managers will not always diverge from those of the principal stakeholders of a corporation, and that the managers of a corporation will not inevitably act in their own self-interest. Instead, they suggest that many managers will act as stewards to safeguard a corporation's resources for the long term, for the mutual benefit of both the principals and managers of the corporation.[60]

Whilst acknowledging that stewardship theory is more sympathetic towards the position of academic staff than agency theory, Shattock nonetheless contends that stewardship theory is unsuitable as a framework for considering university governance issues, as it takes no account of legal and constitutional provisions for academic involvement in university governance.[61] Furthermore Schofield points out that stewardship theory assumes shared interests between a corporation's management and its principal stakeholders, but that it may be difficult for the objectives of an autonomous higher education institution to be fully aligned with those of its numerous stakeholders.[62]

It is, therefore, necessary, to consider the governance of higher education institutions outwith the accepted paradigms and, instead, to evaluate the governance of universities in the context of the stakeholders to whom a university is responsible.

It has been suggested that the concept of a well-governed university means a university 'that conscientiously and clearly seeks to discharge its core functions in the interests of each main group of stakeholders.'[63]This in turn leads to further questions: What are the core functions of a university? What are its objects? Who are its stakeholders?

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[60] Lex Donaldson and James Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns', (1991) 16(1) Australian Journal of Management 49; and James Davis, David Schoorman, and Lex Donaldson, 'Towards a Stewardship Theory of Management', (1997) 22(1) Academy of Management Review 20.
[61] Michael Shattock, *Managing Good Governance in Higher Education* (Open University Press 2006), 3
[62] Allan Schofield, *What is an Effective and High Performing Governing Body in UK Higher Education?* (Leadership Foundation for Higher Education 2009), 22
[63] *Supra* note 17, p87.

The Functions and Stakeholders of Universities

The functions (objects) of a university may be broadly defined as the advancement of education for the public benefit, which has been recognised as a charitable purpose since the sixteenth century,[64] with the charitable status of universities continuing to be recognised.[65] This core function is reflected and expanded upon within both the Charter and Statutes of UoB and within the ERA provisions which set-out CU's powers and objects. UoB's core functions stated to be conducting teaching and examination, furthering the prosecution of original research, and achieving advancement, dissemination and application of knowledge for the public benefit.[66] Similarly CU's core functions, pursuant to the ERA, include providing higher education, carrying out research and publishing the results of research,[67] and it must do so for the public benefit in order to validly discharge its charitable functions.[68] It is notable that in both cases the provision of teaching or education is provided pre-eminence.

The concept of stakeholders of a university is likely to be a dynamic one, changing over time. Such change might occur, for example, where a university expands its operations into a new geographic location, or receives a new source of external funding or other support for its activities. Consequently, effective governance will entail an ongoing process of identifying the university's stakeholders. Nonetheless a university's stakeholders will likely include its 'students, prospective and past students, staff, government, partners, and the

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[64] Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), at pages 7-9 ; see also Minto Felix, 'Lessons for higher education governance from the charity sector', *Wonkhe* (23 June 2019), available at: https://wonkhe.com/blogs/practicing-what-we-preach-lessons-for-university-governors-from-charities/ [accessed 13 December 2019].

[65] See: Charities Act 2011, Schedule 3, paragraphs 2-6. See also, Charity Commission, *The Advancement of Education for the Public Benefit* (2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358536/the-advancement-of-education-for-the-public-benefit.pdf [accessed 13 December 2019].

[66] University of Birmingham Charter, Article 3; and University of Birmingham Statutes, s7.

[67] Education Reform Act 1988, s123A(1).

[68] Charity Commission, *The Advancement of Education for the Public Benefit* (2011); and Charity Commission, *Research by Higher Education Institutions* (2009), pages 7 and 8, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/350471/research_by_higher_education.pdf [accessed 13 December 2019].

wider community',[69] which will include the business community, as the chief source of employment.[70]

Constitutional position of the governing body

From the governance principles suggested by Brown,[71] the key role of the university's governing body as its supreme governing organ is clear. The constitutions of both pre-1992 and post-1992 universities clearly establish the governing body (the Council of UoB and the Board of Governors of CU) as the ultimate decision-making body. There is an important distinction, however, in that in pre-1992 universities there is

> a bicameral system of governance where the senate has 'supreme' powers in academic matters, with the governing body responsible for finance, building and general management of the institution, while in [post-1992 universities] a unicameral system exists with academic affairs clearly subordinate to the authority of the governing body.[72]

As noted above, this is reflected within the constitutional frameworks of UoB and CU, with the role and powers of CU's Academic Board more clearly subordinate to the Board of Governors within CU's constitutional framework than is the case for UoB's Senate in relation to UoB's Council. Nonetheless, both CU's and UoB's constitutions clearly establish the pre-eminence of their respective governing bodies.

The constitutional primacy of the governing body within a university's legal framework is not, however, of itself a guarantee that the governing body of a university can or will discharge its governance role effectively. In particular mis-governance may arise by virtue of the governing body being unable to independently monitor and interpret information about institutional effectiveness; demonstrating an over-reliance on, and failure to exercise proper control over, the executive, especially the vice- chancellor as chief executive

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[69] Garry Carnegie and Jacqueline Tuck, 'Understanding the ABC of University Governance' (2010) 69(4) Australian Journal of Public Administration 431, p437.
[70] Malcolm Gillies, *University Governance: Questions for a New Era (HEPI Paper 52)* (2011) p13, available at: https://www.hepi.ac.uk/wp-content/uploads/2014/02/UniversityGovernance.pdf [accessed 4 April 2020].
[71] See note 18
[72] Michael Shattock, *Managing Successful Universities* (McGraw-Hill Education 2010), p118.

of the university; failing to engage effectively with internal stakeholders, particularly academic staff, or with external stakeholders; allowing too close a relationship to be formed between the vice-chancellor and the chair of the governing body, leading to a concentration of power with individual governors feeling disempowered.[73]

Size of Governing Body

Historically, another notable difference between the governing bodies of pre-1992 and post-1992 universities has been their size and their composition, with the Dearing Report finding that 'for the pre-1992 institutions… larger governing bodies or their equivalent are common' in light of which Dearing recommended that the maximum size of governing bodies for all universities should be 25.[74] Similarly, the Lambert Review criticised traditional governance arrangements at pre-1992 universities, noting that such universities 'were, historically, run as communities of scholars. Their management and governance arrangements were participatory: senates and councils were large and conservative.'[75]

At the time of the Lambert Review it was found that 'very few pre-1992 universities have managed to meet Dearing's recommendation that governing bodies should have a maximum of 25 members, despite widespread agreement that larger bodies are less effective.'[76] Many pre-1992 universities have now reduced the size of their governing bodies in accordance with Dearing's recommendations.[77] This is reflected in the limits on the size of the governing body set out within the constitutions of both UoB and CU: being twenty-four and twenty-five respectively; and in the number of members actually appointed by UoB and CU: currently twenty-one each.[78] Accordingly, both UoB and CU are adhering to the aspects of the 'business model' of university governance advocated by Dearing and Lambert, with respect to both the constitutional position and the size of their respective governing bodies: that it should occupy

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[73] *Supra* note 17, p55.
[74] *Supra* note 13, p241.
[75] *Supra* note 14, p93.
[76] *Ibid.*, p96.
[77] *Supra* note 26, pp5 & 6; and Shattock *supra* note 12, p59.
[78] See University of Birmingham Senate Membership 2019/20, available at: https://www.birmingham.ac.uk/university/governance/senate/index.aspx [accessed 28 January 2020]; and Coventry University, Board of Governors and Committees, available at: https://www.coventry.ac.uk/the-university/about-coventry-university/governance/board-of-governors/governors/ [accessed 21 January 2020].

a superior position to the senate or academic board, and that the governing body should be smaller rather than larger.[79]

Composition of Governing Body

The third element of the 'business model' relates to the composition of the governing body, with the requirement that it should have a clear majority of external governors, ideally with business backgrounds and expertise.[80] Students are, of course, amongst a university's stakeholder groups, as funders and direct recipients of a university's educational functions. It therefore accords with principles of effective governance that students are included as members of university governing bodies.[81]

The composition of CU's Board of Governors includes a significant majority of external governors. Of the twenty-one current members of the Board of Governors, two are students of the university, two are staff of the university, one (the vice-chancellor) is a member of the university's executive, and the remaining sixteen are external independent lay members. Of the two staff members, only one is a member of academic staff, with the other a member of the university's professional services function. Accordingly independent members comprise 76% of the Board of Governors, whereas academic staff of the university comprise just 5%. This adheres the business model concept of more limited academic representation and involvement in governance, in favour of greater external independent representation.[82]

By contrast, of the twenty-one current members of UoB's Council, two are students of the university, four are academic staff of the university elected by the Senate, two (the vice-chancellor and the provost) are members of the university's executive, and thirteen are external independent lay members, with three current external lay vacancies. Accordingly, independent members currently comprise less than two-thirds (62%) of Council, with academic staff comprising almost a fifth (19%) of Council. Even adjusted based on the three external lay member vacancies being filled, these figures are largely unchanged (67% and 17% respectively). Academic staff are, therefore, more extensively represented and included within the constitutional legal framework of pre-1992

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[79] *Supra* note 17.
[80] *Supra* note 17.
[81] See principle [iii] at *supra* note 18.
[82] *Supra* note 17.

universities than under the legal constitutional framework of post-1992 universities.

It is widely accepted that there are clear governance benefits in including external lay members on university governing bodies. Universities are large, complex, corporate entities and therefore lay members can bring experience and professional expertise in finance, resource management, and other technical areas. In addition, independent members are able to

> take a long view because they are not encumbered with immediate institutional management concerns, they can act as the critical friend and as the referee over internal arguments, and they can offer a reading of the environment which may be broader, and less higher education centred, than that of an institution's senior managers.[83]

Furthermore, the wider community, including the business community, is amongst a university's stakeholder groups and therefore including external lay members from the wider community or business community helps ensure effective representation of these stakeholder groups within the governance process.[84]

This does not, however, negate the value of ensuring representation and involvement of other stakeholder groups. In particular, the business model appears to marginalise the academic community in the governance process. It has been suggested that the business model is founded on the concept that

> both effectiveness and efficiency are most likely to be served by a lean, independent governing body that is able to take decisions quickly and dispassionately, rather than being driven or even distorted by academic issues or interests.[85]

By taking such an approach, the business model fails to recognise that what may, on the face of it, seem to be a purely financial decision can have a significant academic dimension. For example, a decision to close an unprofitable course or department, or to invest in new facilities, will involve

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[83] Michael Shattock, *Managing Good Governance in Higher Education* (Open University Press 2006), pp56 and 57.
[84] See principle [ii] at *supra* note 18.
[85] *Supra* note 17, p55.

academic considerations as much as financial ones.[86] Furthermore, the Covid-19 pandemic has clearly demonstrated that universities, both pre-1992 and post-1992, have been able to rapidly take decisions and implement significant changes at pace on a range of matters, not least of which has been the method of delivery of teaching to students.

Perhaps the biggest shortcoming of the business model of university governance is that it fails to recognise that the functions of a university are different to the functions of a company. It also fails to recognise who contributes towards the operation of a university, as business is only one of the stakeholders in universities. As the core function of universities is educational university governing bodies need the detailed involvement of senior representatives of the academic community in order to properly be effective as a governing body for the university.[87]

Accordingly, there needs to be greater academic representation on university governing bodies than envisaged under the business model. The appointment of additional academics to university governing bodies would enable those individuals to act as a conduit between the governing body and the academic body of a university. This would arguably foster greater cooperative working between each body, and it is submitted that 'a strong senate/academic board, working jointly with the governing body in areas such as strategy and resource allocation, brings together the vital constituents of good governance in a university context.'[88] From this perspective the pre-1992 university legal framework is better suited to ensuring effective governance.

Furthermore, the governing body composition promoted by the business model is not actually representative of the corporate governance arrangements typically found within the business environment. Most UK public companies would have a roughly equal split between executive directors and non-executive directors, or a small majority of non-executive directors.[89] For universities, however, the vice-chancellor may often be the only member of the executive on the university's governing body, particularly at post-1992 universities (as is seen in CU's board composition). The idea of any UK public

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[86] Shattock, *supra* note 12, p57.
[87] *Supra* note 78, p50.
[88] *Supra* note 78, p50.
[89] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (4th edn, Oxford University Press 2019), pp49-50.

company operating on the basis of having only one executive director, approximately 20 non-executive directors, plus staff and consumer representatives is 'impossible to imagine.'[90] To this extent the pre-1992 university governance model may be regarded as closer to the corporate governance model implemented in business, as in pre-1992 universities the provost, pro-vice-chancellors or other members of the university's executive team may be members of the governing body ex officio, and the governing body may also partly comprise academics nominated by the senate, which has executive authority for academic matters.[91] Under UoB's legal constitutional framework both the vice-chancellor and the provost are members of the Council ex officio, and four academic staff are elected to the Council by the Senate.

Moreover, insofar as external independent lay members of university governing bodies can be considered the equivalent of non-executive directors on company boards, it must also be highlighted that non-executive directors have proven to be ineffective in preventing mis-governance. As Brown observes

> [t]he example of the banks is only the latest in a long series of cases where non-executive directors have been shown to be quite ineffectual in controlling executives. Other stakeholders – employees, customers, suppliers, sub-contractors, bondholders, local communities, even the state where it owns part of the company or has lent or given it taxpayers' money – are not formally engaged at all.[92]

Accordingly, attempting to apply a university governance 'business model' which places even greater reliance on the equivalent of non-executive directors is an inadvisable method of seeking to ensure effective governance.

Background and Experience of Governing Body Members

Differences are also revealed when examining the background and experience of the current external members of UoB's and CU's respective governing bodies. UoB's independent Council members predominantly have backgrounds and experience gained in the public sector, including at local

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[90] *Supra* note 78, p47.
[91] *Supra* note 90.
[92] *Supra* note 12, p88.

authorities, or national government departments and agencies. A minority have been in professional practice and hold professional qualifications as solicitors or chartered accountants. CU's independent Board of Governors member predominantly have backgrounds and experience gained in the private sector, including within engineering, manufacturing, and technologies sectors. Again, a minority have been in professional practice and hold professional qualifications as chartered accountants.

Accordingly, the profile of CU's independent governing body members adheres more closely to the business model than UoB, with an emphasis on business, commerce and private sector experience evident amongst CU's independent governing body members. This provides further evidence of a closer adherence to the business model by post-1992 universities than pre-1992 universities, although both UoB and CU have independent governors with backgrounds, experience and professional qualifications gained in professional practice.

Again, the business model is arguably not actually representative of the corporate governance arrangements typically found within the business context, as non-executive directors are selected based on the relevant experience they can bring to a company's business. The selection of external independent members of university governing bodies under the business model, however, is based upon experience and expertise gained from finance, business, and professional backgrounds, and accordingly this fails to recognise the core function of a university, namely: the advancement of education.

Considering the typical background and experience of university governing body external members it has, therefore, been suggested that certain functions that would be typically undertaken by a company board drawing on the experience and expertise of its non-executive directors may, therefore, be undertaken in a university context not by its governing body but by its academic board or senate, whose members will have relevant experience and expertise gained in a higher education setting.[93]

It is submitted that executive scrutiny by university governing bodies would be enhanced, and therefore governance in universities strengthened, if a university governing body's external members included at least one individual who had

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[93] *Supra* note 78, p47.

previously held office as a vice-chancellor, deputy or pro-vice-chancellor, university registrar, or other senior executive post at a university.[94]

Engagement with the Academic Community

The ability for the academic community to input into the university's strategic decision-making process is also an important aspect of effective governance in universities. The business model appears to marginalise the academic community in the governance process. This can be seen in the conclusions of the Lambert Review which criticised traditional 'participatory' governance seen in pre-1992 universities, and praised what it described as 'dynamic management in an environment where decisions cannot wait for the next committee meeting.'[95]

Following the 'dynamic management' approach endorsed by the business model, universities in England have seen a trend towards an expansive executive within universities, both in terms of size and power, and a concurrent diminishing role for participatory governance involving the academic community. This increasingly makes the executive the de facto pre-eminent component of modern university governance. It has been suggested that the transfer of strategic decision-making powers over to 'chief executives' and executive teams in universities comprised of 'manager academics', and away from academic bodies, has been 'perhaps the greatest transformation in university governance.'[96] The trend towards a sizable and increasingly powerful executive function has been seen in pre-1992 universities,[97] but is often more clearly evident in post-1992 universities.[98] The comparative size of UoB's and CU's executive teams reflects this, with the large size of CU's executive team having been noted in Parliamentary debate.[99]

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[94] *Supra* note 18, p89.
[95] *Supra* note 14, p93.
[96] *Supra* note 26, p6. See also: Rosemary Deem, Sam Hillyard and Michael Reed, Knowledge, Higher Education, and the New Managerialism: The Changing Management of UK Universities (Oxford University Press 2008).
[97] Sue Shepherd, 'Strengthening the university executive: The expanding roles and remit of deputy and pro-vice-chancellors', (2018) 72 Higher Education Quarterly 40.
[98] Shattock, *supra* note 12, p59.
[99] See: House of Lords Written Question – HL151, 7 January 2020, available at: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-01-07/HL151 [accessed 15 January 2020].

It is submitted, however, that this trend is not conducive to ensuring effective governance. Shattock correctly observes that the 'dynamic management' approach advocated by the business model, and the move away from participatory governance involving the academic community, entails management decisions being made without consultation, proper oversight, and/or collaboration across the institution, which encapsulates 'the root cause of some of the cases of mis-governance' at universities,[100] further noting that 'it has often been in those universities where dynamic management was most exercised that scandals and disasters have taken place.'[101]

Additionally, the lack of meaningful representation and involvement of university staff within governance processes has led to governing bodies being seen by university staff as remote and disconnected, such that 'the vast majority of staff – both academic and professional services – are simply unaware of the role, function, composition, power and meeting arrangements of their institution's governing body.'[102]

The position may be improved by include additional academic staff representatives on both the governing body and academic body of universities, selected via an electoral process from amongst their peers, as is seen at UoB in relation to its Senate and Council. Effective governance requires greater discursive input from the academic community into decision making processes, rather than the 'dynamic management' approach endorsed by the business model. Accordingly, a 'shared governance' approach is required which seeks to ensure that the academic community is not merely represented but is genuinely engaged in strategic decision making.[103] Such participatory governance is workable, and found within a business context, for example in large law firms, where partners of the firm (which may number several hundred in the largest firms) are balloted multiple times each year on the most important decisions made in relation to the business of the firm.[104]

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[100] *Supra* note 78, p53.
[101] *Supra* note 67, p120.
[102] Paul Greatrix, 'Governing for good: getting university governance right', *Wonkhe* (8 July 2019), available at: https://wonkhe.com/blogs/governing-for-good-getting-university-governance-right/ [accessed 5 January 2020].
[103] Mark Taylor, 'Shared Governance in the Modern University' (2013) 67(1) Higher Education Quarterly 80.
[104] *Supra* note 78, p55.

It must be recognised that merely focussing on legal structure is not a guarantee of ensuring effective participatory involvement of a university's stakeholders in its governance within universities and that

> unicameralism and multicameralism, when it comes to a university's main decision-making bodies, are neither a guarantor of improved representation of stakeholders, nor can they ensure an effective, fair, and equitable decision-making process. Such a process is also shaped by many other variables, including the composition and number of members of the assembly, the method in which they are appointed, the term of their mandate, their re-eligibility, the frequency and dynamics of meetings, and the transparency and accessibility of information relevant to deliberation and the decision-making process.[105]

As examined above, these issues are shaped by legal constitution frameworks within which universities operate. They are also shaped, however, by the regulatory framework within which universities operate, including applicable codes of governance for the sector. Consideration of this regulatory framework will be undertaken below.

The external regulatory framework

The regulatory framework within which universities in England operate has recently undergone significant change, following the enactment of HERA, with the establishment of a new regulator, the Office for Students (OfS). This has coincided with a new regulatory framework implemented by OfS, pursuant to HERA,[106] including requirements that a university is registered with OfS where it wishes to receive public grant funding, utilises the student support system to enable the university's students to access student finance facilities for payment of tuition fees and maintenance costs, and applies for and holds a Tier 4 sponsorship licence to enable the university to sponsor international

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[105] Dalie Giroux, Dimitrios Karmis, and Christian Rouillard, 'Between the Managerial and the Democratic University: Governance Structure and Academic Freedom as Sites of Political Struggle', (2015) 9(2) Studies in Social Justice 142, p155.
[106] s5, Higher Education and Research Act 2017. See also Office for Students, Securing student success: Regulatory framework for higher education in England (February 2018), available at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf [accessed 7 December 2019].

students.[107] Both UoB and CU are registered with OfS, along with almost four hundred other registered providers of higher education in England.[108]

This new regulatory framework has reaffirmed the general principle of governing bodies being ultimately accountable for their institution, including their institution's compliance with the conditions which allow the institution's registration with OfS.[109] In addition, the new regulatory framework imposed greater responsibilities upon governing bodies in relation to specific matters. For example, governing bodies are now required to approve their institution's financial forecasts, including financial and student number forecasts over a four-year period,[110] approve and monitor their institution's performance against its access and participation plan,[111] and notify the OfS upon becoming aware of any change in relation to the university which makes information held on the OfS Register inaccurate.[112]

In addition, as a condition of OfS registration universities are expected to demonstrate to the OfS that they have in place adequate and effective management and governance arrangements to deliver public interest governance principles.[113] These public interest principles include requirements for a university's governing body to ensure adequate and effective student engagement, academic freedom, academic governance, transparency about value for money for its students, and a requirement for the size, composition, diversity and skills mix of the university's governing body to be appropriate for the nature, scale and complexity of the university.[114] Where a university receives public funds from utilising the student support (tuition fee) system, the public interest principles also require that the university's governing body has at least one external independent member.[115]

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[107] Office for Students, Securing student success: Regulatory framework for higher education in England (February 2018), at pages 28 and 29, available at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf [accessed 7 December 2019].

[108] OfS Register, available at: https://www.officeforstudents.org.uk/advice-and-guidance/the-register/the-ofs-register/ [accessed 7 December 2019].

[109] *Supra* note 107, p118 (Registration Condition E3).

[110] *Ibid.,* p107 (Registration Condition D).

[111] *Ibid.*, p84 (Registration Condition A1).

[112] *Ibid.*, p120 (Registration Condition E4).

[113] *Ibid.*, p112 (Registration Condition E2).

[114] *Ibid*., p145 (Annex B: Public Interest Governance Principles).

[115] *Ibid*., p146 (Annex B: Public Interest Governance Principles, paragraph XI).

In assessing the adequacy and effectiveness of a university's management and governance arrangement the OfS will consider whether the university has committed to adhere to any code of governance. The Higher Education Code of Governance published by the Committee of University Chairs had previously been endorsed by the previous regulator (HEFCE),[116] but OfS has not opted to do so. Nonetheless, the Committee of University Chairs Code of Governance (hereafter 'CUC Code') remains one of only two specific codes of governance developed for the UK higher education sector, with a separate governance code developed for universities in Scotland – the Scottish Code of Good Higher Education Governance.[117] The CUC Code is used extensively by universities in England, and both UoB and CU have committed to adhere to the CUC Code.[118]

It has been widely recognised by that HERA and the new regulatory framework under OfS places greater responsibility and obligations onto universities and university governing bodies than under the previous regulatory regime for universities in England. It has been observed that HERA 'puts far more onus on governors - including for the self-reporting of problems… [but it is unclear that] governance has changed as fast as regulation.'[119] Given the predominantly lay member composition of university governing bodies, and the infrequency with which university governing bodies meet, it has been suggested that 'more and more responsibility [is] being thrust onto these boards, and they are less and less able to cope with it.'[120]

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[116] Gill Evans, 'Has the OfS got its thinking straight on governance?' *Wonkhe* (23 May 2018), available at: https://wonkhe.com/blogs/has-the-office-for-students-got-its-thinking-straight-on-governance/ [accessed 7 March 2020].

[117] Advance HE, Codes of Governance, available at: https://www.advance-he.ac.uk/guidance/governance/codes-governance [accessed 24 March 2020].

[118] See: University of Birmingham Code of Practice on Corporate Governance and Related Procedural Matters, at page 4, available at: https://www.birmingham.ac.uk/Documents/university/governance/CODE-OF-PRACTICE-ON-CORPORATE-GOVERNANCE.pdf [accessed 6 March 2020]; and Coventry University Board of Governors Meeting Minutes, 21 July 2015, page 4, available at: https://www.coventry.ac.uk/globalassets/media/documents/board-of-governor-minutes/gm159-minutes-21-july-2015.pdf [accessed 6 March 2020].

[119] *Supra* note 16, p14.

[120] Michael Shattock, in John Morgan, 'Sudden V-C exits raise big question: who should run universities?', *Times Higher Education* (20 February 2019), available at: https://www.timeshighereducation.com/news/sudden-v-c-exits-raise-big-question-who-should-run-universities [accessed 29 January 2020].

Considering such concerns there is evidence that the current regulatory framework for university governance has so far failed to resolve governance issues that had previously been identified in a regulatory context. The OfS's own post-implementation report found that there is 'a lack of convincing evidence about the adequacy and effectiveness of providers' management and governance arrangements.'[121]

Brown identifies the regulatory framework issues facing university governance as including:

  i.   Lack of clarity regarding to whom governing bodies are accountable, and for what;
  ii. Lack of clarity regarding what mechanisms exist where a governing body is clearly ineffectual; and
  iii. Governing bodies are not representative, and there is lack of clarity regarding how governors are selected, on what basis, and by whom.[122]

These issues are considered below.

Lack of clarity regarding to whom governing bodies are accountable, and for what

As outlined above, the new regulatory framework does provide greater clarity regarding matters for which the governing body of a university is accountable, including several specific matters such as monitoring the university's access and participation plan. The regulatory framework also provides some direction regarding to whom governing bodies are expected to be accountable, besides the regulator itself. For example, in relation to the 'academic freedom' public interest governance principle, a governing body is required to discharge its responsibility such that the academic staff of the university have freedom within the law 'to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions' without the threat of losing their jobs or other benefits they may have at the university.[123] Similarly, in relation

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[121] OfS, Registration Process and Outcomes 2019-20: Key Themes and Analysis (30 October 2019), at page 5; available at:
https://www.officeforstudents.org.uk/media/1266f7d9-047c-492e-94a8-0eb6c937b983/registration-key-themes-and-analysis.pdf [accessed 7 December 2019] .
[122] *Supra* note 17, p55.
[123] *Supra* note 107, p145 (Annex B: Public Interest Governance Principles, paragraph I).

to the 'student engagement' and 'value for money' public interest governance principles, university governing bodies are expected to discharge these responsibilities for the benefit of the university's students.[124]

The regulatory framework also provides some indication of the groups of stakeholders to whom a governing body is to have accountability, including engaging in relation to academic governance with 'stakeholders, especially prospective, current and completed students,'[125] and seeking to ensure appropriate management of public funds by seeking to protect "the interests of taxpayers and other stakeholders."[126] The regulatory framework, however, does not provide adequate details of the stakeholders to whom a university's governing body is to be accountable, nor guidance on a process by which a governing body should seek to identify and engage with those stakeholders.

Furthermore, 'accountability' is itself included as a public interest governance principle, with the requirement that the university acts 'openly, honestly, accountably and with integrity and demonstrates the values appropriate to be recognised as an English higher education provider.'[127] This wording, however, is very much lacking in clarity regarding the values considered to be appropriate for universities in England, and for what, and to whom, governing bodies are expected to be accountable.

Lack of clarity regarding what mechanisms exist where a governing body is clearly ineffectual

Before considering intervention mechanisms available to the OfS under the regulatory framework it is first necessary to examine what metrics the regulatory framework uses to identify a 'clearly ineffectual' governing body.

Under the regulatory framework, OfS monitors the performance of universities in England using a range of metrics. The foundation for this monitoring comprises 'lead indicator' data routinely collected and submitted by universities, such as overall student numbers; the number of applications, offers and acceptances for students with different characteristics; student continuation and completion rates; the number, nature or pattern of student complaints to the Office of the Independent Adjudicator; and financial viability

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[124] *Ibid.,* p145 (Annex B: Public Interest Governance Principles, paragraphs III and VI).
[125] *Ibid.*, p148 (Annex C: Criterion A1: Academic governance).
[126] *Ibid.*, p146 (Annex B: Public Interest Governance Principles, paragraph XII).
[127] *Ibid.*, p145 (Annex B: Public Interest Governance Principles, paragraph II).

based on annual financial statements and forecasts.[128] OfS will not, however, apply performance thresholds in relation to this 'lead indicator' data, but will instead seek to determine whether the data reveals trends indicating potential mis-governance at a university, for example falls in overall student numbers, increases in the number of student complaints, or declining financial resources.[129]

In addition to the 'lead indicator' data OfS will also rely on information regarding the occurrence of 'reportable events' that universities must notify to OfS, as well as information revealed via whistleblowing and student complaints.[130] The concept of 'reportable events' is construed broadly within the regulatory framework as meaning 'any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration.'[131] Specific examples included within the regulatory framework include a change in the ownership or control of a university, the university becoming aware of fraud or financial irregularity, the university becoming aware of any legal or court action, investigation or sanctions imposed by other regulators such as the Home Office, or the sale of significant assets of the university.[132] OfS has provided further guidance on what constitutes a 'reportable event' under the regulatory framework, which states that the occurrence of any of the examples provided within the regulatory framework must always be reported to the OfS.[133] Accordingly this guidance appears to suggest that the OfS considers the examples listed within the regulatory framework will always be 'material', irrespective of their relevance, significance or financial value. Whilst some of the examples provided within the framework include materiality considerations, others such as 'legal or court action' do not. The regulatory framework also lacks clarity regarding whether a reference to legal or court action would include circumstances where a university was a claimant in such proceedings, rather than a defendant,

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[128] *Ibid.*, pp49-50.
[129] *Ibid.*, p50.
[130] *Ibid.*, p49.
[131] *Ibid.*, p128 (Registration Condition F3).
[132] *Ibid.*, pp129-130 (Registration Condition F3).
[133] Office for Students, Regulatory Advice 16: Reportable events (15 October 2019), available at: https://www.officeforstudents.org.uk/media/768cbcfb-1669-4f97-abe6-6e61a81d8d75/regulatory-advice-16-reportable-events.pdf [accessed 7 March 2020].

although it has since been clarified within the OfS guidance that this relates to actions brought against a university.[134]

Nonetheless, the suggestion that OfS considers all legal or court action to be material, and thus constituting a 'reportable event' under the regulatory framework, has been flagged as contrary to the principles of institutional autonomy and regulatory proportionality that OfS is required by HERA to adhere to in performing its regulatory functions.[135] Further questions remain unanswered. If a university receives a clearly spurious legal claim should it really be required to report this to OfS? Similarly, if, for example, a university fails to pay a supplier on time and consequently faces a minor legal claim of, say, twenty pounds in respect of the unpaid invoice, can this truly be considered likely to have a material effect on the university's operations, or evidence of mis-governance, justifying its inclusion as a 'reportable event'? Accordingly, whilst the regulatory framework and guidance issued by the OfS has helped provide greater clarity regarding what metrics the regulatory framework uses to assess the performance of universities, including the competence and effectiveness of their governing bodies, some uncertainty remains.

The extent of the regulatory framework's reliance on self-reporting by universities is also a concern. Where serious incidents of mis-governance have occurred, it has usually been members of a university's academic community who have raised concerns with regulators, rather than members of an institution's governing body. It is submitted that those universities with the most effective institutional governance will be most pro-active in ensuring comprehensive, accurate and timely self-reporting to the OfS under the regulatory framework. Conversely, those universities with the weakest institutional governance, and which are, consequently, most at risk of serious mis-governance, will be least able to furnish the OfS with the relevant information required to ensure a proper assessment of governance effectiveness can be made by the OfS.

Where, as a result of the information available to it, OfS has concerns regarding the competence and effectiveness of a university's governing body, or other

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[134] *Ibid*. p8.
[135] s2 Higher Education and Research Act 2017. See also Gary Attlee, 'The Limits of Regulation' (6 January 2020), available at: https://www.ahua.ac.uk/the-limits-of-regulation/ [accessed 23 February 2020].

governance concerns, OfS has a range of interventions available to it. These include:

i.   enhanced monitoring of the university by OfS: for example, where the OfS's concern relates to financial matters the OfS may require the university to submit monthly management accounts;[136]

ii.   imposing specific ongoing conditions of registration with OfS: for example, a requirement that a university makes specific progress towards the targets in its access and participation plan before the university is permitted to increase the number of students it can recruit;[137]

iii.   imposing financial penalties on the university;[138]

iv.   suspending or terminating the university's registration with OfS;[139]

v.   stripping the university of the use of "university" within its title;[140] and

vi.   removing the university's degree awarding powers.[141]

Accordingly, the regulatory framework gives OfS wide-ranging and significant powers of intervention. What is less clear is the manner in which OfS will choose to exercise those powers, particularly in relation to concerns regarding the competence and effectiveness of a university's governing body. As outlined above, HERA requires that the OfS adheres to the principles of institutional autonomy and regulatory proportionality in performing its regulatory functions.[142] Institutional autonomy has long been a fundamental principle of university governance,[143] and recognition of institutional autonomy has been enshrined within HERA to seek to allay fears that the new regulatory framework represents an erosion of that autonomy and an intrusion of the state into universities.[144] Such fears would be exacerbated should the OfS take an

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[136] *Supra* note 102, p55.
[137] *Ibid.*, p57.
[138] s15 Higher Education and Research Act 2017.
[139] ss16 & 18 Higher Education and Research Act 2017.
[140] s58 Higher Education and Research Act 2017.
[141] s45 Higher Education and Research Act 2017.
[142] *Supra* note 135.
[143] *Supra* note 1, p45.
[144] Department for Business Innovation and Skills, Higher Education and Research Bill: Factsheet, at page 2, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543500/bis-16-285-higher-education-research-bill-summary.pdf [accessed 6 January 2020]. See also: Chris Patten, 'Leave state control of universities to China', *The*

overly interventionist approach as regulator, and accordingly OfS is required by HERA to act proportionately, striking a balance between effective application of the regulatory framework, and respect of institutional autonomy. OfS has indicated that whilst it will strike such a balance, it does not regard institutional autonomy as unassailable and

> there will be times, particularly when the risk to students is great, when it will be trumped: the greater the risk to students, the less right a [university] has to institutional autonomy.[145]

Further clarity regarding OfS's approach to exercising the intervention mechanisms available to it under the regulatory framework is also emerging from practice, including an illustration of the approach the OfS will take upon receiving evidence of an ineffectual university governing body. Following such concerns having been raised with OfS in relation to De Montfort University ('DMU') the OfS instigated an investigation into governance at DMU. The OfS investigation found evidence of 'significant and systemic' mis-governance, as a result of which DMU was required to issue a public statement and produce a detailed action plan setting out how the university proposed to remedy the governance failings revealed by the OfS investigation.[146] In accordance with the action plan DMU commissioned an external review of its governance.[147] The OfS's own statements have been extremely brief compared with the public statement, action plan, and governance effectiveness review published by DMU and, accordingly, it can be inferred that OfS will limit its interventions and defer to institutional autonomy where it is satisfied that remedial actions

Guardian (1 January 2017), available at: https://www.theguardian.com/commentisfree/2017/jan/01/leave-state-control-of-universities-to-china [accessed 12 January 2020].

[145] Susan Lapworth, 'Having regard to institutional autonomy', *Office for Students* (26 October 2018), available at: https://www.officeforstudents.org.uk/news-blog-and-events/blog/having-regard-to-institutional-autonomy/ [accessed 12 January 2020].

[146] Office for Students, Statement on De Montfort University investigation (1 July 2019), available at: https://www.officeforstudents.org.uk/news-blog-and-events/press-and-media/de-montfort-university/ [accessed 15 January 2020]; De Montford University, Public Statement, available at: https://www.dmu.ac.uk/about-dmu/university-governance/public-statement/office-for-students-public-statement.aspx [accessed 15 January 2020]; and De Montford University, Office for Students' Investigation: DMU action plan, available at: https://www.dmu.ac.uk/Documents/university-governance/office-for-students-action-plan.pdf [accessed 15 January 2020].

[147] Advance HE, 'De Montfort University - Governance Effectiveness Review' (5 March 2020), available at: https://www.dmu.ac.uk/documents/university-governance/effectiveness-review-document.pdf [accessed 17 March 2020]

being taken by a university are appropriate.[148] DMU's vice-chancellor and the chair of its governing body resigned following the initiation of the OfS investigation, but before publication of its findings.[149]

Accordingly, the new regulatory framework, together with guidance and statements by OfS, and details of the approach taken in practice by OfS, provides much greater clarity regarding the intervention mechanisms available to OfS and the approach OfS will take in exercising those mechanism. Following the publication of OfS's findings on DMU's governance, it has subsequently emerged that DMU's vice-chancellor received a severance payment from DMU of £270,000 upon his departure, attracting widespread criticism.[150] Accordingly, it can be argued that the regulatory framework has failed to prevent mis-governance by universities adopting inappropriate remuneration schemes that seem to reward failure by senior university executives, and that the regulatory framework also lacks a mechanism which ensures individual accountability of the most senior university executives in the event of mis-governance during their tenure. It is, therefore, submitted that, in addition to its existing power to levy fines on institutions, consideration should also be given to vesting OfS with powers to set-aside or claw-back payments made to senior university executives where significant mis-governance has occurred during their tenure, in order to enhance individual accountability under the regulatory framework.

Furthermore, the fact that the OfS's investigation into DMU was prompted by a whistleblower raising concerns with OfS, rather than DMU's governing body raised concerns itself with the OfS is further evidence of the ineffectiveness of reliance on a self-reporting mechanism within a regulatory framework.

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[148] *Supra* note 102.
[149] Robert Wright, 'Vice-chancellor of De Montfort University resigns', *Financial Times* (11 February 2019); available at: https://www.ft.com/content/f1fb6bdc-2e0b-11e9-8744-e7016697f225 [accessed 15 January 2020].
[150] Sally Weale, 'University vice-chancellor given £270k payoff after resigning', *The Guardian* (1 July 2019), available at:
https://www.theguardian.com/education/2019/jul/01/university-vice-chancellor-dominic-shellard-payoff-resigning-de-montfort [accessed 15 January 2020].

Governing bodies are not representative, and there is lack of clarity regarding how governors are selected, on what basis, and by whom

It is widely acknowledged that governing bodies are not reflective of either the diversity of their institutions, nor of society more generally, and they are frequently characterised as 'pale, male, and stale.'[151] This is reflected in data on equality characteristics collected by Higher Education Statistics Agency ('HESA'), with the latest data revealing that for academic year 2018/19 in England 92% of governing body members were white, 60% were male, and 91% were aged over 35 (of which 57% were aged over 55).[152] By contrast, HESA data for students at English universities for 2018/19 reveals that only 72% were white, 43% were male and 19% were aged over 30.[153]

Similarly, only 5% of governing body members in England declared themselves has having a disability,[154] compared with 19% of working age adults in the UK,[155] and 14% of students at English universities.[156]

As noted above, as a condition of OfS registration universities are expected to demonstrate to the OfS that they have in place adequate and effective management and governance arrangements to deliver public interest governance principles, which includes a requirement for the size, composition, diversity, and skills mix of the university's governing body to be appropriate for the nature, scale and complexity of the university.[157] In addition, the OfS requires information from universities regarding governing body recruitment and induction processes as part of a university's registration with OfS.[158]

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[151] Higher Education Policy Institute, University Governance in A New Age of Regulation (HEPI Report 119) (2019), p17.
[152] Higher Education Statistics Agency, Table 25 - Governor equality characteristics by country of HE provider 2018/19 (published February 2020), available at: https://www.hesa.ac.uk/data-and-analysis/staff/table-25 [accessed 24 March 2020].
[153] Higher Education Statistics Agency, HE student enrolments by personal characteristics (Academic years 2014/15 to 2018/19), available at: https://www.hesa.ac.uk/data-and-analysis/students/whos-in-he#characteristics [accessed 24 March 2020].
[154] *Supra* note 152.
[155] Office for National Statistics, Family Resources Survey 2018/19, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874507/family-resources-survey-2018-19.pdf [accessed 24 March 2020].
[156] *Supra* note 153.
[157] *Supra* note 107, p112 (Registration Condition E2) p145 (Annex B: Public Interest Governance Principles, paragraph VIII).
[158] *Supra* note 107, p114 (Registration Condition E2).

There is little detail within the regulatory framework regarding the level of importance attached by the OfS to seeking to ensure governing bodies are more representative of their staff, students and other stakeholders, including society more generally. The regulatory framework also provides little clarity regarding the processes expected to be adopted in relation to the recruitment and re-appointment of governing body members, the skills, background, experience, and other personal characteristics expected, and the stakeholders who should be engaged in such processes. Accordingly, it is submitted that the new regulatory framework does little to improve this shortcoming in the previous regulatory regime.

CUC Higher Education Code of Governance

As noted above, in assessing the adequacy and effectiveness of a university's management and governance arrangement the OfS will consider whether the university has committed to adhere to any code of governance, with the CUC Code widely used by universities in England. An examination of the CUC Code is therefore an important component in assessing whether the regulatory framework within which university in England operate is conducive to effective governance. The CUC periodically reviews and updates its Code, typically every four years, with the current version published in December 2014 and revised in 2018,[159] and consultation recently undertaken on a further update.[160]

The publication and adoption of such a code by universities in England was recommended by the Dearing Report, which suggested the purposes of a governance code included 'to provide a basis for familiarity with the governance arrangements within institutions' and 'to ensure there is appropriate membership of the ultimate decision-making body.'[161] It is not clear, however, that such benefits have been realised in relation to the CUC Code, or governance codes more generally, and critics note that 'observance of

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[159] Committee of University Chairs, The Higher Education Code of Governance (2018 Revision), available at: https://www.universitychairs.ac.uk/wp-content/uploads/2018/06/HE-Code-of-Governance-Updated-2018.pdf [accessed 19 March 2020].

[160] Committee of University Chairs, Consultation on the Higher Education Code of Governance, available at: https://www.universitychairs.ac.uk/consultation-on-the-higher-education-code-of-governance/ [accessed 19 March 2020].

[161] *Supra* note 13, 238.

Cadbury rules did not avert a banking crisis any more than the CUC Guides did not prevent a new series of governance crises in universities in 2008–9.'[162]

Furthermore, to the extent that such governance codes are conducive to ensuring effective governance, there are shortcomings in the CUC Code and its application. These are outlined below.

First, the CUC Code is maintained as a voluntary code of governance, and it is therefore at the discretion of universities whether or not they choose to adopt it.[163]

Second, university governing bodies assess themselves against the CUC Code, and assess their own governance effectiveness. The CUC Code states that such a review should be conducted at least every four years, but there is no requirement under the CUC Code for governance effectiveness reviews to be conducted by an external reviewer, and instead it is merely noted that governing bodies can find external input into such a process 'useful.'[164]

Even if a university governing body does engage external consultants to undertake or contribute to a governance effectiveness review that the fact that such consultants would be appointed by, and reporting to, the governing body, thereby gives rise to concerns regarding an actual or perceived lack of independence and thoroughness.

Third, to the extent non-adherence with the Code is found, compliance is merely on an 'apply or explain' basis.[165] Accordingly, adoption of the CUC Code by a university should not be regarded as a guarantee of adherence by that university to its provisions and principles. By contrast, in Scotland the Scottish Government has enacted legislation to impose specific governance requirements at Scottish universities,[166] such as requiring a minimum proportion of elected academic staff representation on university governing bodies and academic boards,[167] rather than continuing to rely on a voluntary

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[162] *Supra* note 72, p117.
[163] *Supra* note 159, p6.
[164] *Ibid.*, p26.
[165] *Supra* note 159, p6.
[166] Higher Education Governance (Scotland) Act 2016.
[167] ss10 & 15 Higher Education Governance (Scotland) Act 2016.

code of governance for the sector to seek to drive positive behaviours in relation university governance.

Fourth, there is a lack of cohesion with the wider regulatory framework, and in particular the public interest governance principles developed by the OfS. Indeed, the latest iteration of CUC Code circulated for consultation makes no reference to or attempt to integrate the Code with these OfS principles.[168] One factor is that the CUC Code is intended to be utilised by universities throughout the UK, whereas the OfS's regulatory framework applies to universities in England only. Nonetheless, the lack of cohesion can be contrasted with the approach taken in the charity sector where the Charity Governance Code was developed collaboratively by a committee which included its sector's regulator, the Charity Commission, as a non-voting member.[169]

Finally, the level of ambition to develop and require behaviours intended to ensure effective governance is notably lacking under the CUC Code compared with the Charity Governance Code.[170] For example, in relation to accountability, whilst the CUC Code details matters for which governing bodies are expected to be accountable, the Charity Code goes further and focusses on to whom trustees are accountable, with potential stakeholders identified by the Charity Code, including beneficiaries, volunteers, staff, donors and local communities.[171] The Charity Code requires regular and effective communication and engagement with these stakeholders, with the supply of sufficient information to stakeholders to enable them to measure a charity's success in achieving its objectives.[172] Charity boards must ensure there are agreed processes and routes through which stakeholders can hold the board to account.[173] Similarly in relation to board appointments, the CUC Code requires a nominations committee to be established, whose function includes seeking to ensure an appropriate skills balance for the governing body.[174] The

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[168] Committee of University Chairs, The Draft Higher Education Code of Governance 2020, available at: https://www.universitychairs.ac.uk/wp-content/uploads/2020/01/HE-Code-of-Governance-DRAFT.pdf [accessed 19 March 2020].
[169] Jim Dickinson, Does university governance need incremental or radical change?, Wonkhe (23 January 2020), available at: https://wonkhe.com/blogs/does-university-governance-need-incremental-or-radical-change/ [accessed 25 January 2020].
[170] *Supra* note 169.
[171] Charity Governance Code for Larger Charities, at page 22, available at: https://www.charitygovernancecode.org/en/pdf [accessed 27 January 2020].
[172] *Supra* note 171.
[173] *Ibid.*, p23.
[174] *Ibid.*, p 25

Charity Code, by contrast, requires a 'formal, rigorous and transparent procedure' is in place to appoint new board members and that reappointments must be subject to 'particularly rigorous review.'[175] Furthermore, on inclusion and diversity, the CUC Code notes that universities are bound by legal duties in relation to equality and diversity, and requires governing bodies to satisfy themselves that agreed action plans are in place to implement equality and diversity policies, including reflecting on the governing body's own composition.[176] Under the Charity Code charity boards are required to undertake 'training and/or reflection about diversity,' make a 'positive effort to remove, reduce or prevent obstacles to people being trustees.'[177] Additionally there is a requirement under the Charity Code that the chair 'regularly asks for feedback on how meetings can be made more accessible' and that the board publishes

> an annual description of what it has done to address the diversity of the board and the charity's leadership and its performance against its diversity objectives, with an explanation where they have not been met.[178]

As noted above, the charitable status of universities is recognised and enshrined in law.[179] Universities are mostly exempt charities and are, therefore, subject to regulation by the regulatory framework under the OfS as principal regulator, rather than the Charity Commission.[180] Accordingly, most universities in England will look to the CUC Code rather than the Charity Code in ascertaining the behaviour and standards relevant to their governance arrangements. It is, therefore, notable that bodies such as university student unions are non-exempt charities, and therefore will be expected to adhere to the Charity Code. Consequently, there frequently exists a perverse situation whereby student representative bodies at universities in England are compelled by a governance code to undertake greater measures to promote effective governance than the

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[175] *Ibid.*, pp18 & 19.
[176] *Ibid.*, p23.
[177] *Ibid.*, p20.
[178] *Ibid.*, p21.
[179] *Supra* note 65.
[180] Office for Students and Charity Commission, Memorandum of Understanding between The Charity Commission for England and Wales and The Office for Students (February 2019), at paragraph 1.3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810662/OfS_and_Charity_Commission_Collaboration_agreement__final_signed_.pdf [accessed 27 January 2020].

measures prescribed by the governance code applicable to their parent universities.[181]

It appears, therefore, that the effectiveness of the CUC Code is severely limited. While it may not be necessary for the CUC Code to become a statutory code, a number of changes to the voluntary code and the way in which is applied may well be desirable. This might include a truly independent audit process to assess the effectiveness of university governance structures. It is also proposed that the OfS should seek to actively engage with and apply the code across the sector, as was previously the case under HEFCE. It is also proposed that the code should specify upon whom the onus for achieving particular objectives falls and to which stakeholders they are responsible should these objectives fail to be met.

Whilst the regulatory framework plays a crucial role in ensuring effective governance, it is important to recognise that regulation is not a panacea. There is need a to be 'careful about assuming that bureaucratic remedies will resolve the problems of failing company boards, any more than they can failing university governing bodies.'[182] Within the charity sector, the 2016 inquiry following governance failings at the Kids Company concluded that 'no system of regulation can substitute effective governance by [a governing body].'[183]

Conclusion

The legal and regulatory framework within which universities in England operate is not currently conducive to ensuring effective governance. There are a number of aspects where improvement can be achieved.

The business model fails to recognise that the functions of a university are fundamentally different to those of a business, and consequently fails to recognise who contributes to the core functions of universities. Furthermore, the business model is a governance model that prescribes an overly external member dominated governing body for universities, and fails to ensure an

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[181] See note 169
[182] *Supra* note 78, page 55.
[183] House of Commons Public Administration and Constitutional Affairs Committee, 'The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators' (HC Paper 431) (25 January 2016), p3, available at: https://publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/431/431.pdf [accessed 18 March 2020].

appropriate range of experience amongst external members, related to the core functions of universities. External members can, and do, make valuable contributions to university governance, but their use has proven ineffective in preventing mis-governance in a university context, and in a business context in relation to non-executive directors. University governance would be enhanced if external members included at least one individual who had held a university executive post, to ensure relevant experience and expertise amongst external members.

Governing bodies and governance processes are often seen as remote and disconnected by academic staff. Accordingly, there should be greater academic representation on governing bodies, including academics elected from amongst their peers. The legal constitutional framework of pre-1992 universities may be regarded as better in this regard.

In addition, the executive of universities should ensure the academic community is genuinely consulted and engaged in relation to strategic decision, with an emphasis on participatory 'shared' governance rather than the dynamic management approach advocated under the business model. It is submitted that 'the essence of good governance in the modern age is that it delivers strategic decisions quickly and effectively with a maximum of degree of participation by the university community.'[184] A viable participatory approach of this nature is not without precedent in a business context and can be found in large professional firms.

Under the regulatory framework a greater emphasis should be placed upon universities identifying, engaging with, and demonstrating accountability to their stakeholders. Additionally, there should be greater emphasis on ensuring university governing bodies are more representative of the diversity of their institutions, and of society generally. The OfS should provide guidance on a process by which universities should seek to identify and engage with their stakeholders, and on improving governing body diversity. The CUC Code should also include enhanced requirements on these points, as is seen in the Charity Code. The CUC should also ensure its code accords with the OfS public governance principles, with guidance on the interaction between the two and how the principles have been reflected in the CUC Code.

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[184] *Supra* note 72, p118.

The regulatory framework's reliance on self-reporting is an ineffective method of seeking to monitor and prevent mis-governance. Those universities with the most effective institutional governance will be most pro-active in ensuring comprehensive, accurate and timely self-reporting to the OfS under the regulatory framework, whilst those universities with the weakest institutional governance, and which are consequently most at risk of serious mis-governance, will be least able to furnish the OfS with the relevant information required to ensure a proper assessment of governance effectiveness can be made by the OfS. The lack of clarity regarding what constitutes a 'reportable event' is also unhelpful.

From the available evidence the balance being struck by OfS between regulatory intervention and institutional autonomy seems appropriate, with OfS undertaking an investigation, and ensuring transparency via public statements summarising the incidents of mis-governance, but not directly intervening in relation to remedial action upon being satisfied of its suitability. However, the regulatory framework is still relatively new, and therefore further examples of its application by OfS are required in order to properly assess the balance being struck by OfS between regulatory intervention and institutional autonomy.

In addition to its existing power to levy fines on institutions, consideration should also be given to vesting OfS with powers to set-aside or claw-back payments made to senior university executives where significant mis-governance has occurred during their tenure, in order to enhance individual accountability under the regulatory framework.

However, regulation is not a panacea, and effective governance must be led by universities themselves. Accordingly, the focus should be on ensuring university governing bodies have the composition and relevant skills and experience they require, and that stakeholders, especially academic staff, are being effectively engaged and involved in strategic decision-making processes. In relation to academic staff this should be achieved via elected staff positions on governing bodies and academic bodies, and by participatory 'shared governance' approach led by university executive teams working in partnership with the academic community, involving regular consultation and involvement with academic staff.

It is clear that lessons can be learned from the governance of universities in England. The most successful and well-governed universities seek to achieve a balance between their legal constitutional components, and involve all groups of stakeholders. It may therefore be concluded that

> governing bodies remain a crucial element in institutional governance and… lay members make key contributions, but successful universities try to ensure that governance is kept in balance between an active lay contribution, strong corporate leadership, an effective central steering core and an involved and participative senate/academic board and academic community. Where any element is weak the institution is disadvantaged.[185]

It can be seen from the foregoing analysis that adequate academic involvement in the oversight, leadership, and senior management of universities enhances the standards of governance in higher education institutions.

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[185] *Supra* note 72, p116.