

| Guidance on Independence for Governors | | | |
|---|------------------------------------|-----------------------------|--|
| Department | Board of Governors | | |
| Author | Welsh Secretaries and Clerks Group | | |
| Authorized by: | Board of Governors | | |
| Implementation by: | Governors | | |
| Reference: | GUIBOG2021053 | | |
| Replaced: | n/a | | |
| Version No: | 1 | Approval Committee: | Nominations & Governance Committee Board of Governors |
| Date approved: | March 2021 Reviewed June 2024 | Minute no: | 20.14.01 20.60.01 23.134 |
| Status: | Final/Adopted | Implementation Date: | March 2021 June 2024 |
| Period of approval: | - | Review Date: | June 2027 |

Contents:

1. Introduction
2. Governance Good Practice
3. Defining independence
4. Principles of independence
5. Ensuring independence:
 - Recruitment and training
 - Declaring interests
 - The role of the Clerk¹
 - Annual reporting on independence
6. University subsidiary companies

INTRODUCTION

1.1 In the Review of Governance of Universities in Wales, author Gillian Camm recommended a higher bar for governor independence was set than existed at the time of the Review (2019); and that guidance on what is meant by independence and those matters which may compromise governor independence be produced and made public. The guidance will be supplemented by information published at least annually by universities.

¹ The term Secretary and Clerk to the Board are used interchangeably although the former normally has additional responsibilities over and above those associated with Board of Governors.

- 1.2 This guidance has been developed by Welsh University Secretaries and Clerks in response to the recommendation and has drawn upon governance good practice in the university and corporate sectors. It is expected that the guidance will be adopted by all university governing bodies in Wales.

Welsh Universities

- 1.3 All universities in Wales are established with governing documents which lay out key matters such as governing body powers and membership. These governing documents are either 'Charter and Statutes' (universities established prior to 1992) or 'Instrument and Articles of Government' (universities² established after 1992). Whilst individual universities' governing documents place different requirements on their operation, all governing bodies have similar responsibilities and powers and must ensure they adhere to appropriate governance good practice guidance.
- 1.4 This independence guidance represents a set of principles to support good governance and there is nothing within the guidance that is intended to conflict with universities' governing documents.

1. GOVERNANCE GOOD PRACTICE

- 2.1 In developing this guidance reference has been made to relevant Codes of Practice. All governors are expected to apply The Seven Principles of Public Life (['Nolan Principles'](#)). Other relevant codes include the [Committee of University Chairs' \(CUC\) Higher Education Code of Governance](#) and the [UK Corporate Governance Code 2018](#) which incorporates recommendations on independence arising from corporate governance reviews such as the Cadbury Report (1992), the Hampel Report (1998) and the Higgs Report (2003).
- 2.2 The CUC Code suggests that Boards consider whether it is beneficial to appoint a Senior Independent Director. This role might in a university be called a Senior Independent Member (of the Governing Body).
- 2.3 This role may in the corporate world be seen as an important aid to good governance; to help advise the Chair; be an intermediary for other board members and to help facilitate an annual appraisal of the Chair. It is suggested that the Senior Independent may be a voice and act as sounding board for other members to sense check the effectiveness of governance arrangements. This may be particularly helpful when situations of potential conflict arise or are perceived to have arisen by others.
- 2.4 The establishment of this role however is a matter for individual governing bodies. In universities (with independent non-executive Chairs) Governing Bodies may feel that the responsibilities of a Senior Independent can be covered adequately by the Vice Chair and/or Chair of Audit.

3. DEFINING INDEPENDENCE.

- 3.1 Governors³ should provide a creative contribution to the Board by providing independent oversight, strategic guidance and constructive challenge to executive management.
- 3.2 *Independence is a quality that can be possessed by individuals and is an essential component of professionalism and professional behavior. It refers to the avoidance of being unduly influenced by a vested interest and to being free from any constraints that*

² Established as Higher Education Corporations (HECs)

³ All universities in Wales are registered Charities and therefore Governors are also Trustees. The term Governor is used in this guidance to also mean Trustee.

would prevent a correct course of action being taken. It is an ability to 'stand apart' from inappropriate influence and to be free of managerial capture, to be able to make the right and uncontaminated decision on a given issue.

- 3.3 Governors must not allow themselves to be captured or unduly influenced by the vested interests of others associated with the University such as executive or middle management, or trade unions. Governors need to be able to challenge effectively and constructively and they cannot do so if they have a vested interest in a matter under discussion.
- 3.4 In universities independent⁴ governor means any person appointed to the governing body who is neither a registered student nor a member of staff of the University, nor a person from an elected local authority.
- 3.5 Independent governors⁵ are required to make up the majority of the governing body as articulated in universities' governing documents.
- 3.6 As independent governors are key to engendering public trust in Universities, the onus is on them to be transparent and demonstrate their independence, to avoid scandals and accusations of self-interest.
- 3.7 Whilst the purpose of this guidance is to provide guidance for independent governors, some aspects will also apply to elected staff and student governors, for example, declaring conflicts of interest.

4. PRINCIPLES OF INDEPENDENCE

- 4.1 There are several circumstances which *may* prevent a person being appointed as an independent member (of a governing body). The Governing Body's Nominations Committee or equivalent, which has oversight of the appointment process, will need to consider⁶ these factors.
- 4.2 Such circumstances include where a person:
 - a) is or has been an employee of the university or one of its subsidiaries during the last 5 years;
 - b) has or has had within the last 3 years a material business relationship with the university, either directly or as a partner, shareholder, director or senior employee⁷ of a company that has such a relationship with the university;
 - c) has already served on the governing body previously⁸;
 - d) represents a significant stakeholder;
 - e) has received or receives additional remuneration from the university apart from independent member-remuneration (if applicable) and legitimate expenses;
 - f) participates in the university's performance-related pay scheme;
 - g) is in receipt of a university pension, noting the potential for conflict is much smaller if it is a large multi-organisation pension scheme but potentially more significant if a single university scheme from that university;

⁴ Independent governors are sometimes referred to as 'Lay' Governors within Higher Education.

⁵ In (some) Higher Education Corporations (HECs) there is another category called 'co-opted members' and it is worth noting that in HECs many co-opted members could be defined as independent.

⁶ The list under 4.2 does not prevent membership but does require the Governing Body's Nominations Committee to consider.

⁷ A senior employee is one who holds a leadership or managerial position and has a title with the Company of, or responsibilities equivalent to, that of either a director or a position senior to director.

⁸ Reference should be made to individual institutions' governing documents for the period that should lapse prior to a person being considered for re appointment if they have previously served as a governor of the university for the maximum term allowed.

- h) has close family ties⁹ with any of the university's advisers, member (of the governing body) or senior employees;
- i) has significant professional, commercial or personal links with other member (of the governing body); or
- j) decides to carry out paid consultancy in business relating in any way to the university whilst a member (of the governing body);

There are several circumstances, normally indicated by a university's governing documents, that automatically prevent a person being appointed as an independent member (of a governing body). Examples are current staff, current students and former trustees who have served their maximum term.

- 4.3 Where such circumstances arise once an independent member has been appointed, they should declare these immediately to the Clerk to the governing body in the first instance, who will advise on any steps to be taken. (See declaring interest below at 6.1-6.5).
- 4.4 Where any of these or other relevant circumstances apply, and the governing body nonetheless considers that the governor is independent, a clear explanation should be provided.

ENSURING INDEPENDENCE

5. Recruitment and training

- 5.1 Independent governors are recruited using processes that are clear and transparent. Recruitment may be targeted in accordance with the specific needs of the governing body (in relation to, for example, skills and experience, and diversity) but in all cases recruitment panels will be mindful of the need to ensure that new governors meet the definition of independence set out in paragraph 3.2 above.
- 5.2 When considering applications and interviewing prospective new governors, recruitment panels should seek evidence that individuals:
 - (a) demonstrate selflessness, integrity, objectivity, accountability, openness, honesty, and leadership;
 - (b) will be able to challenge effectively and constructively;
 - (c) will be able to 'stand apart' from inappropriate influence and to be free of managerial capture;
 - (d) are free of mandates and any constraints that would prevent a correct course of action being taken; and
 - (e) are unrelated ¹⁰ to any employee of the university or of any organisation gaining a pecuniary advantage from the University.
- 5.3 Following appointment, new independent governors will receive an induction which includes a focus on the importance of independence and objectivity, and exploration of

⁹ Close family ties are defined as a spouse or civil/domestic partner, child/stepchild, parent/stepparent, sibling/step sibling, grandparent, grandchild, brother/sister-in-law, aunt, uncle, niece, nephew.

¹⁰ See definition on close family ties at note 7

methods of test and challenge. Thereafter training and development activities will include further coverage of these themes as appropriate.

6. Declaring interests

6.1 Universities are also charities and their governors are charity trustees. Trustees are required by law to act only in the best interests of their charity. Governors' personal and professional connections, whilst bringing benefits to the work of the university, can give rise to conflicts of interest, to which governors must respond effectively.

6.1.1 A *conflict of interest* is defined by the Charity Commission as any situation in which a trustee's personal interests or loyalties could, or could be seen to, prevent the trustee from making a decision only in the best interests of the charity. Conflicts of interest usually arise where either there is a potential financial or measurable benefit directly to a trustee, or indirectly through a connected person; or a trustee's duty to the charity may compete with a duty or loyalty they owe to another organisation or person.

6.1.2 A *conflict of loyalty* is defined by the Charity Commission as a conflict of interest that arises because, although the affected trustee does not stand to gain any benefit, the trustee's decision making at the charity could be influenced by his or her other interests. The term 'duality of interest' may also be used to describe this situation. In accordance with Charity Commission guidance, the trustees may decide that, where such a conflict of interest poses no risk or a low risk to decision-making in the best interests of the charity, the affected trustee, having declared the interest, may participate in decision-making.

6.2 All governors, whether independent or appointed from the staff or students of the university, must seek to avoid putting themselves in the position where there is a conflict (actual or potential) between their personal or professional interests and loyalties and their duties to the governing body or its committees. They should not allow any conflict of interest or loyalty to arise that might interfere with the exercise of their independent judgement.

6.3 To this end, governors are expected to:

- a) make an annual declaration of interests to the university at the start of each academic year, providing the details requested and using the format prescribed by the Clerk;
- b) seek written approval from the Chair prior to engaging in any new external activity or business development which may have a bearing, either direct or indirect, on the work of the university;
- c) inform the Clerk of any changes to their circumstances during the year which have a bearing on their declaration of interests;
- d) at the start of each meeting, proactively identify and inform members of any specific item on which their declared interests may have a bearing and, if required by the Chair, not take part in the relevant discussion or decision-making, or leave the meeting at the appropriate point;
- e) at the end of each meeting, declare any unforeseen conflict of interest or loyalty that has arisen during the discussion;

- 6.4. In all cases where a conflict has been identified at a meeting, the minutes of the discussion will record the process that has been followed and the level of participation that has been permitted.
- 6.5 An annual register of interests is compiled by the Clerk and published on the university website.

7. Role of the Clerk

- 7.1 In accordance with the CUC Code, all governors should have independent access to the advice and services of a Clerk who must ensure that governing body members are fully aware of the appropriate rules, regulations and procedures. The Clerk should be senior enough to ensure the governing body and the executive act in a way which is compliant with the university's regulations, and independent enough to provide challenge when this is not the case.
- 7.2 The Clerk is accountable for highlighting issues of independence or conflict to the Chair.
- 7.3 In accordance with the expectations of HEFCW's Financial Management Code, where the Clerk has significant responsibilities at senior executive team level within the university, the governing body must review, at least every three years, whether the independence of the Clerk's position is at risk of being compromised and, if so, whether the role should be transferred to someone else or sufficient safeguards can be built into existing arrangements.

8. Annual reporting on independence

- 8.1 The university will report annually, through its annual report, on how the independence of its independent governors has been verified and secured.

9. Subsidiary companies

- 9.1 From time to time a university may appoint a governor to act as a director of one of its subsidiary companies¹¹, to represent the University's interests as a member or shareholder of that company. If the company is also charity, the director will be a trustee of the charity. In such cases, the member may be seen to have a conflict of loyalty.
- 9.2 In addition to charity law, the *Companies Act 2006* sets out the law relating to conflicts of interests affecting directors. The general procedures for managing conflicts of interest (see above, paragraphs 6.1-6.5) enable university-appointed directors to comply with their duties towards the university. However, a university-appointed director also has a statutory duty under company law to avoid a situation where they have, or could have, a direct or indirect interest which conflicts, or possibly may conflict, with the company's interests.
- 9.3 Many companies have their own codes of practice or conduct, which include policies to enable their directors to comply with their statutory duty to avoid conflicts. Any university-appointed director is expected to either comply with the policy of the company of which they are a director; or, where such a policy does not exist or is inadequate, to alert the university accordingly.
- 9.4 Occasionally the duties a university-appointed director owes to the university may conflict with the duties that he or she owes to the company. If a university-appointed director is unsure about whether a particular situation amounts to a conflict of interest,

¹¹ This guidance would also apply if a governor is appointed to the board of an in-house pension scheme

they should discuss the matter with the Clerk and, where applicable, the company secretary. Exceptionally, legal advice may be sought, and a university-appointed director may be required to step down as a director where the conflicting duties cannot be managed to the benefit of both the university and the company.

10. Monitoring and Review

Following adoption the guidance will be kept under review to take account of any new or additional good practice.

End

