

[DFEE] CONSULTATION ON SCHOOL GOVERNING BODIES

A RESPONSE: "PARENT-CENTRED GOVERNANCE"

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GENERAL COMMENTS

This consultation is to be welcomed. School governors have oversight over the effective use of a substantial value of public funds provided by the taxpayer and it is important that the framework within which they operate is such as to ensure the most effective use of these public funds in achieving the educational goals for which they have been allocated. This is particularly significant if related goals of achieving a "knowledge economy" are to be realised (see, for example, the Department of Trade and Industry White Paper "Our Competitive Future: Building the Knowledge Driven Economy", 1998). Some of the solutions contained in the Consultation Paper are imaginative and are likely to command widespread support; however, the conceptual foundations of the document lack coherence. This response to the Consultation Paper is based on the assumption that the principles which are being developed throughout the corporate "for profit" and "not-for-profit" sectors in relation to institutional governance provide a valuable framework with which to evaluate the governance of schools. It commences in this section with general comments on the theoretical basis of the Consultation Paper. In the second section it comments in detail on the specific questions posed by the Consultation Paper. The third section contains an alternative scheme of proposals.

The Consultation Paper is to be commended for explaining the theoretical basis for the proposals. In particular, paragraph 18 puts the case in the following terms:

"Governing bodies are built up of stakeholders. They bring together parents, school staff, Local Authority and sometimes church representatives, as well as representatives from business and the wider community. Although other models would be possible, we have no wish to change this 'stakeholder model', which is built on well-established principles of democratic accountability, and offers real potential for developing schools as centres of wider community involvement."

We would question this model in the strongest terms.

Stakeholder theory is only one of a number of models commonly applied in management literature: prominent others are agency theory and stewardship theory. The origins of stakeholder theory should not inspire confidence in it as a basis for school governance:

the term originated in the US as a pun on the US equivalent term for “shareholder”, i.e. the “stockholder”. It developed largely away from the public eye as a tool of management analysis, where it has performed a broadly useful role as an analytical tool.

Unquestionably, it is desirable for organisations of all kinds to be able to analyse whom their stakeholders are and how well they are being served by the organisation. In this sense it provides a form of accountability. However, many have attempted to extend the use of stakeholder analysis into what might loosely be termed stakeholder accountability. In this sense, those with management responsibility within an organisation are to be made legally accountable to stakeholder interests, either in an endogenous fashion, say by the inclusion of stakeholder representatives in governance, or in an exogenous fashion, say by requiring the organisation to act in the public interest. Whilst laudable and well-meant such arguments are based on fundamental misapprehensions as to the fundamentals of governance and are inherently dangerous.

The detailed arguments as to the desirability of a stakeholder model – there termed a “pluralist model” - have in fact been recently considered by the Department of Trade and Industry under the auspices of the Company Law Review Steering Group and, in effect, soundly rejected. In our view, this rejection was correct. The stakeholder model of governance does not, and cannot, produce any form of true democratic accountability. By attempting to ensure that, in effect, all interested parties are accountable to all interested parties, the end result is that no-one is accountable to anyone. There is certainly anecdotal evidence from parents to conclude that this is their impression of the present system. Fortunately, many – indeed perhaps most – schools are no doubt well governed and conceptual issues of accountability are therefore of only theoretical interest in such cases. However, the robustness of the system should instead be evaluated by reference to those situations where schools are in difficulties. The experience of parents in such a situation is that they are for practical purposes outside of the loop. The head and board of governors of such a school may well be unable to recognise the problem, constitute the problem or fail to have the skills to deal with the problem or some combination of these. The local education authority will have little incentive, or lack adequate legal powers, to intervene. The DfEE may regard such a matter as a local matter (albeit that in a sense all schools are a local issue). Ofsted is unlikely to become involved other than if a problem becomes apparent on a visit and then it is possible that some time will elapse between a school being given the benefit of the doubt through to there being a sequence of failures. Parents might reasonably conclude that real accountability lies either with the courts or with the media, neither of which is satisfactory. The “stakeholder model” is likely to fail in precisely those situations where a robust model is most required.

We believe that the most effective model to apply to the governance of schools is the classical economic model for the achievement of allocative efficiency. This economic model and its underlying assumptions have been set out elsewhere by members of the European Centre for Corporate Governance (see for example, Maughan, C.W. and Copp, S.F. “The Law Commission and Economic Methodology: Values, Efficiency and Directors’ Duties” (1999) 20 *The Company Lawyer* 109 and “Company Law Reform and Economic Methodology Revisited” (2000) 21 *The Company Lawyer* 14). The following economic methods of analysis are applicable here. Firstly, we assume that the relevant

actors, whether heads, governors or regulators are rational actors. Second, we see the governance system of a school as a typical example of a principal/ agency relationship giving rise to moral hazard and opportunism. Third, we see the role of the regulatory authorities, namely the local education authorities and the relevant organs of the DfEE through the lens of public choice theory as typical bureaucracies, leading to allocative inefficiency.

Let us commence by explaining further our view on the relevant actors as being rational actors. For economic purposes it is assumed that when individuals make choices this is done rationally, in other words, to improve their personal well-being, in other words their “utility”, “welfare” or “wealth”. In terms of school governance the question posed then is what are these various actors maximising (to paraphrase the title of a paper by the US writer Richard Posner in “Overcoming Law” (Harvard University Press, 1995) called “What do Judges Maximise?”)? Let us consider the position of a school governor. Many no doubt are motivated by a sense of altruism. However, given the onerous nature of the office of a governor one must treat with scepticism claims to altruism. There are many other possible motivations for becoming a governor which perhaps are more consistent with the assumptions of the economic model. High on the list of potential sources of motivation might be a desire to further the governor’s own children’s interests or those of their close associates. For others it might be to gain a sense of status and authority denied them in their occupation. For some it might be seen as a way to further their business interests by providing possible business. However, as governors are progressively given a greater role there are other possibilities which should be of concern. There might be opportunities for fraud. Special interest groups, whether based on political affiliation, religious belief or sexual orientation, may see this as a route to promote their wares. Whilst it might be hoped that such motivations might be rare it is important to ensure that the governance system is robust enough to withstand this. The purpose of a good governance system is not to assume good motivation but to protect against base motivation.

The principal/ agency problem that has been identified applies in essence where an individual/ group becomes responsible for “other people’s money”, to be more precise where one party, the “principal”, delegates some decision-making authority to another, the “agent”. In such situations the law normally imposes some fiduciary obligation on the agent to ensure that the agent acts in accordance with the interests of the principal. However, the position is more complex under the present “stakeholder model” applied in school governance. It has been well argued by Anthony Ogus that:

“In a public, institutional setting, agent accountability poses greater challenges. In the first place, there is not a single, homogenous group of principals concerned to monitor the performance of regulators, but rather a diverse set of interests, including politicians and citizens. Secondly, performance is, in any event, more difficult to monitor, there being no conventional, profit and loss accounts. Thirdly, except for the limited experiments with competitive self-regulation ... there is no market for the control of regulators; and the principals (politicians and citizens) cannot easily dismiss ineffectual officials.”

(“Regulation, Legal Form and Economic Theory”, Oxford University Press: 1994 at page 112)

The classic way to seek to resolve the principal/ agency problem is to seek to align the interests of the principals and agents. This however presupposes that it is possible to identify with any precision who the principals and agents are, what their respective interests are and whether these are in common or in conflict. It is exactly these questions which are difficult to answer with a stakeholder model: in other words who is accountable to whom, for what, and what happens if they fail? We see the strongest solution to the principal/ agency problem as having evolved in the corporate context. Directors are accountable to shareholders: the shareholders have the power, subject to very few conditions, to call a meeting and sack the board of directors. Consumers in competitive markets may take their custom elsewhere. Both shareholders and consumers are protected by copious legislation evolved over some time. These basic mechanisms for accountability are non-existent to weak for many parents. From a parental perspective, there is no ability to call a meeting and sack an ineffective board of governors or head. There are weak competitive markets: in effect many schools possess a local monopoly (and indeed some demonstrate the characteristics of a monopolist). In this latter regard the limit imposed by law on class sizes has played a significant part and is believed to be under challenge as a matter of human rights’ law in the High Court, London, at the present time.

Critical to the problem of accountability is the way in which governing bodies are now incorporated, i.e. each governing body has its own separate legal existence. The members of the governing body have no personal financial liability for any of its actions, broadly, provided that it acts within the law and in good faith, i.e. consistently and after considering any necessary advice. In our view, this approach to incorporation is hopelessly confused. The governors of a school may be equated with the shareholders in a company registered under the Companies Act 1985 by virtue of their status as members of an incorporated body. Yet shareholders will usually have a clear financial interest in their company’s success: governors in a school have no such clear interest. The shareholders in a company hold the directors accountable for their stewardship of the company. In school corporations it seems that the governors are in effect holding themselves accountable. This confusion is reflected in the procedures to remove a governor which in general terms depend on the particular type of governor. A clearer model would regard the parents as members who would hold the board of governors accountable as if the board of directors in a company. Other constituencies might also be represented, such as church interests in appropriate cases, but not local education authorities since as we will proceed to demonstrate, local education authorities should be dispensed with.

The way in which we understand the regulatory system is derived from public choice theory. It may be contrasted to the public interest theory of regulation which attributes to legislators and others a desire to pursue collective goals. The private interest theory of regulation takes the view that political and law-making processes can be used by private interest groups to secure regulatory benefits. In return, regulatory failure may result from

the capture of the regulatory body by private interests. Such an approach leads to a re-evaluation of other agencies, such as local education authorities, which are presumed to act in the public interest. These may be seen as a bureaucracy where bureaucrats are themselves simple utility maximisers. As with governors of schools, the question must be asked as to what local education authority bureaucrats maximise? Following the classic arguments of Niskanen (see *Bureaucracy: Servant or Master?*, Institute of Economic Affairs, London 1973), it would be expected that such bureaucrats would seek to maximise their salary, the size of staff working for them and their salaries, their public reputation, their perks and their power and status. If this theory is correct, then it would seem that local education authority bureaucrats will be ineffective because they will have inappropriate incentives. In particular, the need to maintain a public reputation will give rise to a conflict of interest over any function where transparency would be desirable. Similar factors apply to the exercise of any regulatory function by the DfEE. However, the problem is most acute in the case of local education authorities because in practice democratic controls over local authorities are weak because of voter apathy.

We believe that the most effective system of accountability in school governance is one which is based upon the transfer of significant powers to parents. In a corporate context, Vanessa Finch has demonstrated (“Company Directors: Who Cares About Skill and Care?” [1992] *Modern Law Review* 179) how it is only shareholders who can be effective monitors of corporate management. Similarly, in a school context it will usually be parents who care most about their childrens’ education rather than those with a professional interest, and governance structures should reflect this. We will set out at the end of this Response our specific proposals for how this might be achieved.

SPECIFIC COMMENTS

1. We believe a more radical solution is required as set out generally in this Response. The respective roles of the board of governors and the head should be for the board of governors to determine in accordance with a constitution which, in our view, should be approved by the parents.
2. See response to question 1.
3. See response to question 1.
4. See response to question 1.
5. We believe in a more radical solution, including the abolition of local education authorities and improving competition in educational provision. Under such an approach schools would have more authority over such issues.
6. See response to question 5.
7. We believe that if new duties are imposed then appropriate incentives/ sanctions must be incorporated in the legislation to ensure compliance as otherwise the

- duties will be little more than aspirations, a criticism already made over duties imposed in recent legislation requiring, for example, policies on bullying to be produced by schools. Such legislation brings the legislative process itself into disrepute.
8. We agree with the proposal that there should be “gate-keeping” to prevent governing bodies becoming overloaded. We would also agree with the proposal to empower governing bodies to provide child-care.
 9. We believe that more radical solutions are required as set out generally in this Response.
 10. We do not agree that grouped governing bodies should be possible. A more effective solution to the problem of weak governing bodies would be, for the reasons set out in the general section above, for there to be paid professional bodies of governors who are subject to parental control by parents being empowered to call a parents’ meeting and dismiss a weak governing body. The problem with grouped governing bodies is that it would be more difficult as a consequence to introduce this more effective approach to accountability. Indeed, it might well be argued that if a school is for whatever reason incapable of possessing an effective governing body then it would be better closed.
 11. No. We believe this power should be located in parents. It would have been interesting had the Consultation Paper contained statistical evidence as to the present exercise of the powers held by the Secretary of State, including how many times there had been requests made for the existing powers to be exercised, how many times it had been so exercised and on what grounds the power had been exercised or refused to be exercised. Following the public choice/ bureaucratic models applied in the general section above, we would as a matter of concept see no reason to extend the powers to local education authorities but rather to strip the DfEE of these powers and transfer them to an independent body charged with representing parental interests, in effect, an “Educational Ombudsman”, a role which might indeed be capable of combination with the present jurisdiction of Ofsted which has developed a robust reputation. The principles that should underpin its jurisdiction are: (1) a transparent, independent and full analysis of why the school has failed is essential for an appropriate solution to be devised; (2) remedial action is usually required swiftly: the interests of parents and their children are more important than those of regulators, school employees or others; (3) removal of the head and/ or all/ some of the board of governors is usually required;
 12. We believe the “special measures” restriction to be too strict and liable to result in excessive delays in exercising any powers, during which pupils may be adversely affected. See further the response to question 11.

13. Yes, as explained in the general section above provided they satisfy the tests of competence and independence. Payments to parent governors would be inappropriate.
14. We believe that the present dependence on amateur governors would require such training. It would be preferable in our view if there was a fully professional paid body.
15. None.
16. We believe that caution should be exercised with these proposals. For example, we would believe it inappropriate for there to be an honorarium in the absence of proposals for greater governor competence, independence and accountability.
17. We agree. However, we believe that this should be the natural function of the creation of an effective board in line with usual corporate governance principles.
18. We believe that local education authorities should be abolished.
19. See response to question 18.
20. We agree as this would facilitate the recruitment of a professional body of governors.

PROPOSALS

We commenced this Response under the title “Parent-centred Governance”. In the course of this Response we have sought to outline what the true theoretical basis for school governance should be and have indicated where appropriate alternative approaches to those set out in the Consultation Paper. We believe that these alternative approaches result in a more coherent set of proposals for reform. They can be summarised as follows:

- The role of local education authorities and the related role of the DfEE in relation to school education and, in particular, governance should be removed enabling substantial cost savings.
- These cost savings should be used to enable the creation of a professional and paid body of school governors whose recruitment would follow a similar pattern to that for company directors in listed companies who perform a similar gubernatorial role. The professionalism of this body would be secured by the establishment and /or recognition of a professional body to possess self-regulatory functions as to education, standard setting and discipline.
- Governors should be competent and independent if they are to be effective. Competence should be secured by requiring minimum standards of qualification and/ or experience, usually in a professional or managerial capacity. Independence should be secured by strengthening the legal rules to

deal with conflicts of interest and ceasing the practice of appointing parent governors.

- Schools should be required to disclose details of governors and their qualifications and experience to parents and potential parents since, given their pivotal role in school governance, this is a vital aspect of ensuring competition between schools through informed choice.
- Boards of governors should be fully accountable to parents. In a thoroughly revised corporate model of school governance, parents should be given rights more comparable to those of shareholders in a company. The role of the Annual Parents' Meeting and Annual Report should be significantly enhanced and new powers conferred upon parents to call an Extraordinary Parents' Meeting where circumstances require this. In either event, parents should have a range of powers conferred to give their role "teeth."
- An Education Ombudsman should be appointed under the auspices of Ofsted to represent parental interests and conduct an investigation into a school, where specified grounds are satisfied, including but not limited to numerical strength. The Education Ombudsman would owe a duty to parents in law for the discharge of its functions enforceable through the courts. The Education Ombudsman would be given a wide range of powers to enable its functions to be discharged effectively, including the power to make interim awards.
- The present cap on class numbers in schools should be removed so as to permit competitive forces to work in relation to schools.