

GETTING TO GRIPS WITH HUMAN RESOURCE MANAGEMENT

RESOURCES FOR GOVERNORS OF UK UNIVERSITIES
AND HIGHER EDUCATION COLLEGES

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FOREWORD

As higher education governance evolves, there are major implications for members of governing bodies: increasing expectations about how they undertake their role; a greater focus on measuring institutional performance with associated implications for information and strategy; coming to terms with an increasingly complex governance environment; and so on. All this means that governors (particularly new ones) need to be well prepared for the challenges they face, so that they can contribute effectively to their boards from the outset.

To support governors in this challenge, this set of materials has been commissioned by the Leadership Foundation for Higher Education and the Committee of University Chairs (CUC)¹ to help governors get to grips with the key resource areas for which they are unambiguously responsible. Produced with financial support from all the UK higher education funding councils (coordinated through Hefce), five different volumes make up the complete set of materials on finance, risk, audit, estates/infrastructure, and - this one - human resources.

In an easy to read format, this particular volume is intended to provide the core information that all governors need for a basic understanding of their responsibilities for HR. It is not intended to provide the specialist information that members of HR or remuneration committees might need, although references to such material are provided.

To support the text there are quotations from governors², self challenge questions, suggested tasks, and critical incidents called 'governors' dilemmas'. The quotations - some provocative - do not represent any 'agreed' view of the topic concerned, but are rather designed to illustrate different opinions. Similarly, the self challenge questions at the end of each chapter are to enable readers to reflect on key issues for them, and not to be used as a vehicle for governors to place unreasonable demands on their governing body clerk or secretary!

For these reasons, the materials - self evidently - do not represent any agreed view which governing bodies are expected to adopt, but rather are intended to encourage self reflection, debate, and critical thinking. Although we expect that readers will agree with most of what is written, we also hope that some things will be contested.

The materials are intended to be used in different ways: as resources for individual governors (designed to be read as individual chapters rather than in one go); by HEIs for in-house governor development; or as web based material (see www.lfhe.ac.uk/governance). The text does not consider broader issues concerning the overall responsibilities of governors and how their effectiveness might be determined. Readers interested in this should consult an earlier companion volume called 'Getting to Grips with Being a Governor' produced in 2006³.

¹ See www.lfhe.ac.uk and www.shef.ac.uk/cuc. The revised CUC Guide for Governors (2009) - available from the CUC website - sets out the definitive responsibilities of governors, and is not duplicated in this material but is cross-referred to where necessary.

² The quotations have been obtained from a wide range of sources, including personal meetings with governors. Where the background of the source governor is known it has been provided at the end of the quotation.

³ SCOP, Getting to Grips with Being a Governor, 2006, available electronically at www.guildHE.ac.uk

A note on terminology and diversity

As most governors know, governance in higher education is complicated by the use of different terms for similar functions, so for simplicity some key words have been standardised throughout the five volumes. In all the materials the terms 'governing body' and 'board' are used generically to include: the governing bodies of post-1992 institutions; the councils of pre-1992 universities; and courts in Scotland. Similarly the word 'governor' indicates a member of these different bodies; 'chair' is used for the person convening governing body meetings; 'head of institution' for the vice-chancellor or principal; and 'executive' for members of the senior management team. Finally, the abbreviation 'HEI' is used as the widely accepted shorthand for 'higher education institution'.

UK higher education is very diverse, and this means that some aspects of governance may differ between HEIs. Moreover, governors will have legitimately different views on the issues presented in this material, as will heads of institutions and other senior managers. It follows that if after working through the text important issues are raised for governors about practice in their own HEI (and we hope they will be), then they may need to obtain more detailed information from the clerk or secretary of their board or its chair. However, throughout the need to distinguish between governance and management has been reinforced.

Because higher education is now the responsibility of the devolved administrations within the UK, another aspect of diversity is the need to recognise differences in governance arrangements in HEIs in England, Scotland, Wales and Northern Ireland. Where variations exist within the different jurisdictions on key HR issues these are pointed out in the text. Where no separate discussion of the different jurisdictions occurs, readers can assume that the content applies to all four higher education systems. The term 'funding councils' is used to indicate the public body which provides primary funding to HEIs in each jurisdiction, although in Northern Ireland this is done directly by the Department for Employment and Learning with no actual funding council intermediary.

Disclaimer

The inevitable disclaimer! Although every care has been taken to try and ensure the accuracy of the content of this material, if in doubt about a specific issue governors should always check with the clerk or secretary of their own board.

Happy reading!

Allan Schofield

Series Editor

Winter 2008

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OVERVIEW

- 1 The governing body is the employer. It has ultimate responsibility for the institution's employment policies.

SEE CHAPTER 1 ►
- 2 People management in some parts of higher education is still relatively under developed, and some academic line managers are reluctant to engage with this aspect of their role. This can affect the successful implementation of HR strategies.

SEE CHAPTER 1 ►
- 3 The HR strategy must be aligned with overall institutional strategy and have the full support of the governing body and senior management. People management capacity and performance should be regularly reviewed, and inform future HR strategy.

SEE CHAPTER 2 ►
- 4 Performance management is more than performance related pay, although financial reward linked to individual contribution may form part of an HEI's performance management system.

SEE CHAPTER 4 ►
- 5 Money spent on training and development of the workforce is an investment - but governing bodies must ensure that its impact is being evaluated effectively.

SEE CHAPTER 4 ►
- 6 HEIs, as publicly funded bodies, have a statutory duty to promote equality in respect of gender, race and disability, and must undertake a number of specific tasks in doing this.

SEE CHAPTER 5 ►
- 7 Although the Equal Pay Act only applies to women and men, other legislation can be used to challenge other pay inequalities. The statutory equality duties mean that HEIs have a duty to review the impact of their reward arrangements by gender, race and disability.

SEE CHAPTER 5 ►
- 8 HEIs (as organisations with more than 50 staff) are required by law to provide information to, and consult with, their workforce on a range of issues.

SEE CHAPTER 7 ►
- 9 The future of national collective bargaining for higher education is in doubt, but all of the alternatives would require significant investment. Few HEIs could contemplate wholly local bargaining in the short term.

SEE CHAPTER 7 ►
- 10 The governing body has ultimate responsibility for the health and safety of its employees and students, and needs to be proactive in undertaking this role.

SEE CHAPTER 7 ►

1. HR GOVERNANCE - WHAT DOES IT MEAN?

- 1.1 When you started as a governor, you may have wondered what your responsibility for human resources (HR) entailed - apart, of course, from being a member of the board which appointed the head of institution, assessed his or her performance, and determined executive remuneration. Surely workforce management is the responsibility of managers? In fact, your responsibilities are wide ranging, and this chapter provides an overview.
- 1.2 HEIs differ in their approach to HR. Some are traditionally cautious, adopting low risk strategies for individual and collective matters. Others have a highly consultative approach and work hard to promote consensus between management and the workforce. Others adopt a more overtly managerial style, particularly when dealing with collective issues. Whatever the organisational culture, as publicly funded bodies there is an expectation that HEIs should go beyond simple legal compliance and promote good practice in HR. Indeed, HEIs have more onerous statutory obligations than those falling on the private sector (for example, in relation to equality).

"I'm still not sure what our approach is to managing academic staff, and I've been a governor now for nearly five years."

LAY GOVERNOR WITH PRIVATE SECTOR BACKGROUND

The responsibilities of governing bodies within HR

- 1.3 Other than for self employed contractors, work undertaken for an HEI - as elsewhere - is regulated by an employment contract, to which there are two parties: the employer and the employee. As corporations (of one kind or another) or companies limited by guarantee, HEIs have a legal personality and can employ staff and engage in contracts. The embodiment of an HEI's personality, for the purposes of employment law, is the governing body, and all employment contracts are issued on its behalf.
- 1.4 Each of the main responsibilities of governing bodies in relation to HR is considered in this volume, and they are:
 - Approving an HR strategy, and ensuring not only that it is consistent with and supports overall institutional mission, vision, values and strategies but also that it is implemented (Chapters 2 and 3).
 - Appointing and setting the terms and conditions for the head of the institution and other senior posts, and ensuring that performance review arrangements are in place (Chapters 4 and 6).
 - Ensuring that arrangements are in place to comply with the HEI's duties as a public body in relation to equality (Chapter 5).
 - Ensuring pay and conditions of employment are determined (Chapter 7).
 - Oversight of other HR related policies, eg those affecting public interest disclosure, discipline and dismissal and so on (Chapter 8).
 - Ensuring the health and safety and well-being of employees (Chapter 9).
- 1.5 In many respects, your responsibilities as a governor in relation to HR are no different from those in any other area, for example, general oversight, offering independent and objective advice, considering your HEI's interest from a broad perspective, and acting as a 'critical friend'. However, given that a very significant proportion of an HEI's expenditure (averaging 58% in 2008) goes on staffing, a governing body has particular responsibility for ensuring good HR practice including giving good value for money.

- 1.6 Some HEIs will have one or more committees devoted to HR which include governors. The need for an HR committee is discussed in Chapter 3, but (where they exist) membership can deepen a governor's understanding of an HEI, and lay members can play a valuable role in challenging introspection and historical practices. In the past it wasn't uncommon for lay governors to be members of trade union joint negotiating committees, but this really is no longer a good idea (if it ever was) as it confuses management and governance. In HEIs with local pension schemes, governors may act as fund trustees (see the separate volume on finance in this series) - although this can lead to conflicts of interests. In many pre-1992 HEIs, there is a role for lay council members (and, in particular, its chair) in academic staff discipline, dismissal and grievance (see Chapter 8).
- 1.7 Where there is no HR committee (or in smaller HEIs with a modest HR infrastructure) governors with a management background may be asked to act in a more direct advisory capacity. Indeed a lay governor specialising in HR may have been appointed to the board for this purpose. However - as with all issues - governors should ensure they do not breach the governance and management divide, or (in the case of HR) deal with individual cases. As a governor you are there to govern not manage, irrespective of the contribution you could make, or the frustrations you might occasionally feel.

The development of employment law

- 1.8 There is a very substantial body of primary and secondary legislation applicable to almost all aspects of employment. There is also a significant body of law covering collective consultation with the workforce, and the conduct of industrial relations in unionised workplaces (not to mention the substantial legislative framework around health and safety at work).
- 1.9 And that's not all - there are the implications of European legislation. The private sector must comply with the UK legislation that gives effect to European directives, but public sector employers and other organisations regarded as 'emanations of the state' (bodies that provide a public service under the control of the government) must comply with the directives themselves, or risk legal challenge. Although HEIs are autonomous, their volume of public funding (as well as the impact of government policy on them) means that in law they are likely to be regarded as emanations of the state. (See Annex B.)
- 1.10 To state the obvious, what this means is that you and your fellow governors must - at a minimum - ensure compliance with the legal and regulatory environment for HR, and ideally go beyond that and ensure the adoption of good practice which commands general confidence.

SUGGESTED TASK

Identify the strengths and weaknesses as you see them of the way that HR is practised in your HEI. What has your governing body done to address any weaknesses?

"I was chair of the administrative staff regrading appeals panel for a number of years and I found this immensely helpful in learning about the variety of ways in which academic departments ran their affairs (or sometimes failed to!)"

LAY GOVERNOR IN A PRE-1992 HEI FROM AN NHS BACKGROUND

Modernising people management in higher education

- 1.11 One thing that may strike you as a governor is the relative absence in some HEIs of 'conventional' people management, at least in relation to some academic staff. Although the position is changing, line management relationships may not be obvious, particularly where the professoriate is concerned. This has its roots in historic academic self governance, and there are still many pre-1992 HEIs where academics hold senior management positions on a rotating basis, with consequent pressure to fit management in alongside research and teaching. The situation is generally different in post-1992 HEIs where line management positions are usually permanent and filled by competitive recruitment. Here post holders are senior managers, who may decide to eschew their erstwhile academic lives.
- 1.12 However, aspects of people management in higher education may be becoming more mainstream. For example, the generalisation that many academic staff look to external peers for recognition, and therefore may have relatively marginal loyalty to their HEI, is no longer unique to higher education. Nor is the tendency of professionals as employees to resent close supervision. Other sectors employing highly qualified knowledge workers face the same challenges in persuading key staff to do things that are in the organisational interest rather than just their own. This isn't a charter for anarchy, but a recognition that styles of HR vary depending upon organisational culture, and governors need to be careful to take their HEI's culture into account in considering HR policy.
- 1.13 One unusual feature of HR in higher education is the extent to which responsibility for people management is diffused throughout an institution. Particularly in research intensive HEIs, a high proportion of relatively inexperienced academics will be responsible for directing teams of researchers, technicians and others, yet these 'managers' are often ill prepared for the task. Aptitude in management rarely features as a selection criterion for academic posts, and career development has traditionally focused on research and teaching.
- 1.14 In this context ensuring effective HR is an obvious challenge, both for HR professionals and you as a governor. In recent years there have been several reports highlighting the need for improvements in HR management⁴, and the funding councils in England, Scotland and Northern Ireland have launched major 'rewarding and developing staff' initiatives. To secure the first tranche of funding, English HEIs had to submit HR strategies addressing priority areas defined by the government and Hefce. For many HEIs developing strategic HRM was a significant challenge.
- 1.15 Subsequently, KPMG evaluated the impact of the first Hefce initiative, concluding that although progress had been made, challenges remained, particularly in relation to pay modernisation, tackling poor performance and rewarding good performance, and sustaining the momentum for HR change.

⁴ For example, the National Committee of Inquiry into Higher Education chaired by Sir Ron Dearing (1997), and the Independent Review of Higher Education Pay and Conditions chaired by Sir Michael Bett (1999)

- 1.16 More recently a study by the Leadership Foundation exploring the impact of HR in higher education⁵ reported that, notwithstanding the significant progress and investment to date, there was no direct association between any measure of HR activity and a range of standard indicators of institutional performance. This should not have come as a surprise, given the features of HR in higher education described above, and there are major issues for governing bodies to address in this area (see Chapter 3).
- 1.17 For many governors (particularly those from a modern private sector environment) all this usually comes as a puzzle, if not a complete surprise. As such, many find it a personal challenge to be involved in HR, in part stimulated, in part frustrated, and in part simply bewildered at the seemingly slow pace of change. Do you?

Self-challenge questions

- Is your governing body given adequate opportunity to discharge fully its responsibilities for HR. If not, why not?
- How is the HR experience of governors utilised in your governing body?
- Are there adequate skills and experience of relevant HR on your governing body, and if not what might be done about it?
- How knowledgeable about HR issues are you as a governor?

"I was trying to discuss why my instructions had not been carried out by a colleague that I thought subordinate to me. "You cannot tell me to do something" he explained gently "you can only ask me". "On the other hand" he went on rubbing salt into the wound "I don't ask you if I'm going to do something, I tell you"

QUOTED IN HANDY C,
ORGANISATIONS OF CONSENT,
THE CHANGING UNIVERSITY,
NFER 1977

A GOVERNOR'S DILEMMA 1:

Your HR director is negotiating a major collective agreement with all of the recognised trades unions. The plan is for the agreement to be presented to the governing body for ratification at the same time as the unions ballot their membership - if either the governing body or the union members fail to accept what's presented then the whole deal is off. It's a complex agreement and negotiations are being carried out on a very tight schedule. The HR director has briefed the governing body on what the agreement is designed to achieve, but hasn't said much about the detail. You're afraid that the governing body is going to be presented with a fait accompli and that there won't be the opportunity for an informed discussion, let alone proper oversight. What, if anything, can you do about this?

⁵ Guest D E and Clinton M, (2007), Human Resource Management and University Performance, , Leadership Foundation for Higher Education at www.lfhe.ac.uk

2. THE HR STRATEGY

- 2.1 One of the governing body's main responsibilities is to ensure that the people aspects of your HEI are being well managed, taking account of present and future needs within an affordable framework. This means that a suitable HR strategy should exist, which is consistent with the overall mission and values. It should also underpin other relevant strategies such as for learning and teaching. This chapter looks at the role of the governing body in relation to HR strategies, why an HEI needs one, and the importance of aligning it to the overall institutional strategy. It also summarises what key strategic HR challenges are appearing on the horizon.

Why an HEI should have an HR strategy

- 2.2 All organisations need a clear idea of where they wish to go, how they wish to develop and a route map for getting there. This usually results in a series of strategies. HEIs - as large complex organisations - are no different in this respect. As quintessential knowledge intensive organisations, staff are the largest cost in HEIs, and their motivation and productiveness are critical to academic performance and institutional reputation. Acquiring and retaining highly qualified and well trained staff is essential for success. Couple this to an ever changing legal environment, and it's clear why HEIs need an HR strategy.

- 2.3 Above all, an HR strategy is needed to set out a shared and realistic vision of the people that an HEI will need in the future, and the key issues in employing them: the skills they will have to possess; where they will come from and how they will be recruited; how they will be paid and rewarded within available resources; how they will be managed; and all the other issues covered in this volume. Without an HR strategy an HEI may find it more difficult to deal successfully with the issues it faces. Good succession planning; skills development; and institution wide mechanisms to ensure fairness and equity amongst staff are important in leading to an HEI gaining the benefits of being recognised as a 'good employer'.

- 2.4 However, there remain, in some quarters, reservations about the apparently 'utilitarian' approach of strategic HR - indeed, the term 'human resource' rankles with those who believe that a strategic approach is bound to focus on the 'resource' rather than the 'human'. Of course, simply changing the label attached to an HEI's people management activity from 'personnel' to 'HR' does not necessarily change the way it is perceived.

Aligning an HR strategy with the overall institutional mission, vision, values and strategy

- 2.5 However, identifying the need for an HR strategy and writing a realistic one are two different things. The components of a well thought out HR strategy include:
- An opening section that identifies the business strategy - this ensures that what follows supports and integrates with institutional strategy.

"The HR strategy is crucial for us. We [the governing body] spent a great deal of time discussing it, and it is central to everything we do in HR"

CHAIR OF A GOVERNING BODY

- An analysis of the operating context - including the strengths and weaknesses of the HEI, the threats and opportunities it faces, an assessment of how well placed it is to respond to those threats and opportunities in terms of the competencies of its people and the political, economic, social and technological context in which it operates, key aspects of other sub-strategies, and staffing profile data.
 - Identification of the key issues that need to be addressed by the HR strategy which directly affect the achievement of the institution's goals. This section should also address the resources necessary to implement the strategy, which will involve a candid assessment of capacity of the HR department and line management to respond successfully to the new demands.
- 2.6 Usually appended to a strategy should be a detailed plan (assigning responsibility for the delivery of actions to named individuals, with timescales for completion and relevant KPIs), and an equality impact assessment of the overall strategy in relation to sex, race and disability (see Chapter 5)⁶.
- 2.7 In those HEIs with an HR committee, this body is likely to be the 'policy owner' - that is it will oversee strategy development and sponsor it through the governance process. In HEIs without a committee, the executive management group typically takes on the role of sponsor - usually through the director of HR.
- 2.8 As part of the initial determination of strategy the governing body (through an HR committee if one exists) should be very actively involved - perhaps through an awayday or similar process - in 'scoping' the parameters and outline content of an HR strategy. This kind of discussion at an early stage enables the HR committee (and the full board subsequently) to review the draft plan proposed by the HR director and executive in an informed manner. One specific issue that the board or HR committee should also consider is how consultation will be used in preparing the strategy.
- 2.9 Whilst the support of senior managers in strategy development is necessary, it is generally a good idea to involve the HEI as a whole in developing the HR strategy to help produce something that is credible 'on the ground'. Consultation on such issues with the workforce is also a legal requirement (see Chapter 7). How much consultation, and with whom, varies between institutions.
- 2.10 The majority of HEIs recognise one or more trades unions for the collective representation of staff, and they should have the opportunity to comment on the draft strategy. In parallel with this, it is often helpful to give the wider workforce the opportunity to comment. Meaningful consultation takes time and this should be built in to the development timetable, rather than being squeezed in as an afterthought. Fig leaf or window dressing consultation on HR tends to breed cynicism, which will quickly undermine the eventual strategy. A particularly valuable result of such consultation is testing the compatibility of the proposed HR strategy with other institutional strategies. This way some of the frequent weaknesses of previous HR strategies can be addressed.

SUGGESTED TASK

Review your own HEI's HR strategy. How effective is it in setting out the issues facing the HEI, and the action that needs to be taken?

⁶ An example illustrating shared responsibility for implementing HR initiatives is included in the HR section of the higher education governance web site at www.lfhe.ac.uk/governance.

"I don't think most people here would know what it [the HR strategy] looks like. Still less will they have read it. If anyone has, they probably think it was dreamed up by the admin to keep the governors happy, and they're probably right!"

HEAD OF AN ACADEMIC RESEARCH UNIT

HR strategies - funding council requirements

- 2.11 The various funding councils have different requirements concerning institutional HR strategies. In Wales, HEI's HR strategies were reviewed in 2004 by consultants appointed by Hefcw. Although there are no current requirements on HEIs to submit revised strategies, the monitoring of the strategy by the HR committee is reviewed as part of the Hefcw assurance visits. In Scotland, Sfc have concluded that HEIs have made good progress with HR modernisation, particularly in relation to pay and reward, and it has imposed no ongoing requirements for reporting on HR strategies. Sfc's corporate plan for 2006–09⁷ indicates that HEIs will be asked to implement strategies to ensure that the productive capacity of their human resources remains sustainable, and that the Council will continue to support good practice in HR. This includes a study (funded by Sfc) on comparisons of HR management in higher and further education with that in other sectors⁸.
- 2.12 In England (where the investment in HR modernisation has been substantial) and Northern Ireland, in order to secure mainstreaming of the additional funds made available under the Rewarding and Developing Staff Round 2 initiative, HEIs were required to submit the results of a self assessment of their people management practices, together with a commitment to continuous improvement, including plans for a further strategic review.

Future challenges

- 2.13 Effective HR strategies are dynamic 'road maps' rather than rigid manuals. Flexibility must be built into strategies so that an HEI can respond to unexpected opportunities and threats. However, it is possible to anticipate some of the challenges which will have a significant impact on HR strategies, and the following is just a small selection of those that lie ahead:
- Potentially declining recruitment of overseas students may require some HEIs to diversify and develop new products and modes of delivery⁹.
 - Continued pressure on finances due to the 'credit crunch' and the downturn in the UK economy may require reductions in the size of the workforce of some (perhaps many) institutions.
 - The mobility of the global academic workforce may lead to changes in the recruitment of overseas nationals. Additionally, the points based immigration scheme (introduced on a rolling basis from 2008) entails both threats and opportunities, and an over reliance on an international workforce that may return home at any time may leave some HEIs exposed.
 - The RAE has had a very significant effect on the fluidity of the academic labour market. The impact of its replacement by the REF is, as yet, unclear.
 - The abolition of the fixed retirement age would put currently under developed performance management systems under increased pressure (see Chapter 4).

⁷ www.sfc.ac.uk/about/about_strategies_corporate.htm

⁸ Forthcoming. Details should be available in early 2009 at www.sfc.ac.uk

⁹ Universities UK, (2008), *The Future Size and Shape of Higher Education in the UK: Threats and Opportunities*,

Self-challenge questions

- How much involvement did your governing body have in developing the HEI's HR strategy? Was this appropriate?
- On the basis of the information available to the governing body at the moment, can you judge whether your HEI is performing well in relation to people management?
- How committed are the middle managers (both academic and administrative) in giving practical effect to the HR policies adopted by your governing body? How do you know?

A GOVERNOR'S DILEMMA 2:

The governing body of which you are a relatively new member does not have an HR committee, and there is little enthusiasm for one. The board approved an HR strategy two years ago before you became a member, but you are fairly unimpressed with it and it seems to you a little complacent. In particular it says very little about some of the major future staffing challenges that you think the HEI will have to address in the years ahead, and how it should prepare for them. You mention these concerns informally to a couple of other governors, but get little response other than to say we can't predict what's going to happen in the future so we shouldn't be too worried. What action - if any - might you take?

3. HR GOVERNANCE - RELATIONSHIPS AND PERFORMANCE

- 3.1 The effective governance of HR depends in many ways on the relationship between the governing body and the executive, and one based on mutual trust and credibility will ensure that the governing body gets the information it needs to make informed judgements about HR. This chapter examines the role of the executive and the HR director in relation to HR governance, and also looks at the key questions that you as a governor should ask about people management at your institution and the type of information you should expect to receive.

Working with the executive and the director of HR

- 3.2 There is great diversity in management structures involving HR in HEIs. In pre-1992 universities, the head of the administration (to whom the HR director typically reports) often has a significant part to play in HR, particularly in the handling of disciplinary and grievance issues. In post-1992 HEIs the reporting line is usually to the head of institution or a pro-vice-chancellor. The different reporting routes for HR directors are not simply niceties of organisational structure, but reflect perceptions of the role of the HR function in the strategic management of an HEI¹⁰.

- 3.3 There is also diversity between HEIs in the way in which the HR function is organised, partly because of institutional history and culture. Some HEIs group together some or all of personnel, staff development, academic practice, health and safety and occupational health under the HR banner, whilst in others they remain discrete units, with separate reporting lines to senior management.

SUGGESTED TASK

Reflect on how the HR function is carried out in your HEI. Does it have your full confidence as a governor?

- 3.4 Notwithstanding diversity in organisational structures, the HR director is generally seen as the HR lead with the following responsibilities:
- Leadership of the HR department, including the management of resources; budgetary responsibility; and the organisation of, support for and motivation of the HR team.
 - Development of draft HR strategy for approval by the executive and governing body and oversight of the implementation of the approved strategy via appropriate policies, procedures, practices and initiatives.
 - Provision of advice to senior management team and governing body in relation to individual and collective employment matters.
 - Lead responsibility for relationships with recognised trades unions.
 - With other senior managers, contributing to the development of institutional strategy and policy.
- 3.5 As with other members of the executive, it is important that the governing body develops an effective working relationship with the HR director as he or she will be providing most of the staffing information that the board requires. As in other aspects of governance, an important issue is the governing body being clear about what information it wants - in consultation with the executive - in relation to HR policy and practice. In coming to this view, as a governor you should expect a raft of up to date information from the HR director, along with relevant comparative data and benchmarks about practice in other HEIs and beyond. Without such foundations there can be no meaningful HR strategy.

¹⁰ Guest and Clinton found that, compared with other sectors, a relatively low proportion (56%) of HR directors in HEIs were part of the senior management team, and this may have contributed to the underdevelopment of strategic HR management in the sector. Guest D E and Clinton M, (2007), Human Resource Management and University Performance, Leadership Foundation for Higher Education at www.lfhe.ac.uk

3.6 An effective HR director will welcome such expectations (providing they come from a credible and supportive board), although one that cannot easily provide such information should expect robust - but constructive - challenges from governors. In HEIs where the HR director is not a member of the senior management team, it may be more appropriate for the hard questions that governors have to be directed to the head of the institution.

Should there be an HR committee?

3.7 The existence of an HR or staffing committee is by no means universal and, indeed, many are being disbanded as HEIs streamline their governance structures. The membership of HR committees varies between HEIs, and in post-1992 institutions staff and students are forbidden to be members because of a perceived conflict of interest - how can staff as employees determine the policy of their employer? In pre-1992 HEIs staff membership is common, reflecting the tradition of academic self-governance alluded to in Chapter 1. Whilst such representation on an HR committee can be helpful in bringing a broader perspective to the discussion, there are more effective means of consulting staff (see Chapter 7), and there will be times when the subject matter may challenge the objectivity of staff members (for example, if workforce reductions are planned).

3.8 The positive contributions that an HR committee can make include:

- The opportunity for more detailed oversight of HR strategy and policy than is possible for the governing body.
- A broader perspective on proposed changes, with independent governors often ensuring that account is taken of the interests of staff other than academics.
- Scrutinising HR related risks and opportunities and looking at HR KPIs.
- Encouraging the executive and the HR director to take more innovative approaches to HR practice.
- Symbolically demonstrating the importance of HR to the institution.

3.9 There are several potential disadvantages, although some can be overcome by good committee practice (effective chairing, careful selection of members, and so on), but other are generic:

- Duplication of effort, if the governing body repeats the work of the HR committee.
- Delays in policies taking effect, if decisions have to be ratified by the committee first.
- Committee discussions being dominated by members who hold strong opinions but lack appropriate knowledge and expertise, to the detriment of effective decision making.
- The committee failing to take a strategic role and becoming little more than a forum for discussing minor staffing issues and general grievances.

3.10 Provided that governors are prepared to challenge the executive and the HR director there can be effective governance without having a committee. Alternatives include establishing small and time limited working groups involving independent governors to oversee HR strategy development, or designating one or two independent governors to take a special interest in HR on behalf of the governing body, who meet with the HR director regularly for a more detailed briefing on the key HR challenges facing the institution.

SUGGESTED TASK

Suggested task:
Paragraph 13.9 of the volume in this series on finance, contains a diagram about types of governing body working relationships with the director of finance. What are the implications of this diagram for relationships between your board and the director of HR?

"The HR committee is one of the most important we have, and works really well. The staff governors understand that they have to set aside their own interests, and they do."

LAY GOVERNOR WITH PUBLIC SECTOR BACKGROUND

"The committee [HR] is just a talking shop - a complete waste of time. The trade union members bang on about this and that, and the others have no idea of what modern HR is. Let's just abolish the thing and let me get on with my job!"

HR DIRECTOR

3.11 An interesting example of this latter approach is a research intensive university which has established 'dual assurance' arrangements for the oversight of HR strategy, including the impact of equality and diversity on its employment practices. The management lead is the HR director and the lay lead is the chair of the governing body, with secretariat support provided by a member of the HR department. The small dual assurance group meets three times a year and reports to the board's strategy, performance and resources committee. More innovations of this kind are to be expected.

What information should governors receive to measure HR performance?

3.12 The challenge for governors is to receive data that allows them to assess an HEI's people management performance at a strategic level - remembering, of course, that the effectiveness of the HR department is only one aspect of overall people management performance. The CUC guide on the use of KPIs in assessing institutional performance¹¹ suggests a series of basic self assessment questions that governors should ask:

- How satisfied are we with the HEI's overall management of staff and with the quality of HR strategy and advice to governors? What are the key challenges for us?
- Are we satisfied with the quality of appointments made to senior positions and the way these posts are managed and appraised?
- Do we have a clear framework of succession planning?
- Are we identifying, supporting and investing in our star performers?
- Are our policies for promoting equality and diversity effective?
- Is staff development given appropriate priority, investment and leadership in the institution? Do we see appropriate benefits from this investment? Is it regarded as a 'soft' area for cuts and management neglect when other pressures become acute?
- Do we have an appropriate framework for performance management for all types of staff bearing in mind the nature of academic work?
- Do we invest enough in developing and supporting leadership and management in all units?

SUGGESTED TASK

Reflect on what information your governing board receives on HR and the achievement of the HR strategy. Is it adequate? If not, why not?

3.13 The CUC Guide is predicated on the assumption that in order to review performance effectively governing bodies must measure it, and governors generally feel much more comfortable if they are presented with tangible data to support assertions about HR's contribution to corporate well being. However, some important aspects of HR are subjective and not easy to measure (for example, motivation, commitment and engagement). It follows that governors and the HR director will need to find ways to ensure that such factors are not ignored in the presentation of KPI information.

3.14 Each HEI will have its own set of HR KPIs relevant to its own mission and strategic objectives. The table below includes the key aspects of HR that the CUC Guide suggests governors will be interested in, with some possible sources of data to help answer the questions. As a governor you shouldn't expect to receive all of the information all of the time - the table is a guide to the kinds of information that are available if concerns arise.

¹¹ CUC, (2006) Monitoring of Institutional Performance and the Use of Key Performance Indicators at www.shef.ac.uk/cuc

KEY QUESTIONS	POSSIBLE DATA SOURCES
Is the HR strategy effective and relevant?	<p>HR strategy and action plans (for example, is the HR strategy aligned with institutional strategy; when was the HR strategy last reviewed; is progress being made against targets?).</p> <p>People management self assessment outcomes and action plan.</p> <p>Sources of information on sector workforce trends (for example, Hefce's Higher Education Workforce Framework¹²).</p>
Does the institution have the right staff in the right places?	<p>Staff turnover, absence and vacancies against plans (for example, are there 'difficult to fill' vacancies; have future developments been factored into staffing plans?).</p> <p>Staff-student ratios (for example, are some areas more 'stretched' than others?).</p> <p>Student feedback (eg, is negative feedback in some areas due to understaffing or indicative of development needs?).</p> <p>Academic-support staff ratios (for example, do academic staff in some areas have more admin support than in others?).</p> <p>Staff age, skills and diversity profile (for example, are some areas potentially 'at risk' because they have a higher proportion of academic staff; approaching the age when they might consider retirement; is the workforce in some areas less diverse than the institutional average?).</p>
Is the institution providing support and leadership to its staff?	<p>Measures of staff engagement (for example, staff attitude/satisfaction surveys, grievances, appeals, collective complaints, employment tribunal claims, etc).</p> <p>Correlations with health and safety and occupational health data to disclose measures of employee well being (for example, are there any apparent hot-spots of stress related sickness absence; what use is being made of in house counselling or external employee assistance programmes?).</p> <p>Examples of internal communications with staff (for example, policy consultations, internal newsletters, etc).</p> <p>Proportion of staff participating in succession management/ leadership development programmes.</p> <p>Feedback from exit questionnaires (if used).</p>
Is performance being managed in appropriate ways?	<p>Expenditure on staff development and training.</p> <p>Measures of the effectiveness of staff development and training (for example, the numbers of staff successfully completing accredited courses; correlation between training and performance assessment).</p> <p>Proportion of staff undergoing appraisal and/or performance assessment.</p> <p>Expenditure on performance (contribution) related pay.</p> <p>Proportion of staff benefiting from performance (contribution) related pay.</p>
How do the institution's staffing costs compare with benchmarks?	<p>Cost of staff as % of total costs.</p> <p>Pensions liabilities - funding coverage.</p>
Does the institution have adequate professional HR capability?	<p>Number of professionally qualified HR staff.</p> <p>Structured feedback from service users.</p> <p>Internal/external service reviews.</p> <p>Continuous service improvement action plans.</p>

¹² Hefce, (2006) The Higher Education Workforce in England: A Framework for the Future,

- 3.15 There are other data that HEIs, as publicly funded bodies, are required to collect in relation to sex, race and disability (for example, with regard to pay differentials between different groups, disciplinary action and dismissal and grievances) - see Chapter 5.
- 3.16 Whilst it is important for the governing body to receive qualitative as well as quantitative information about the work force, staff satisfaction data should be interpreted with caution. People may be very satisfied and comfortable working for an organisation, but this does not necessarily correlate with effective performance. What matters is employee engagement, and this requires a more sophisticated approach to measurement, with questions designed to gauge an employee's understanding of the institution's objectives and their role in achieving those objectives, rather than how happy (or not) they are.

What can go wrong?

- 3.17 Well, quite a number of things, as HR is an area where there are often strongly held views. There are probably a small number of typical HR problems involving the governing body:
- First, the over intrusive board which may set HR aspirations that are unrealistic. This situation may occur with a weak HR director, or if a governing body recruits an HR specialist without thinking about the organisational cultures with which he or she is familiar.
 - Second, an overly passive board which has little interest in HR issues. With a competent HR director this may not matter, but if this is not the case then all kinds of problems may occur, and several HEIs have found themselves not complying with aspects of legislation for this reason.
 - Third, an HR director who has little confidence in the governing body. Such a situation is fraught with potential problems, and reporting and information flows to the board may be poor. In this position the governing body needs to get a grip, and the head of institution has to ensure that the HR director performs appropriately.
 - Fourth, a head of institution not engaged with ensuring modern HR practices, which may place a governing body in a difficult position if it wants to encourage change.
 - Finally, a highly unionised position concerning governance which (although rarer than it used to be) still may occur. In this position internal elected staff governors may be trade union members, and rather than considering HR issues objectively, almost any issue can become a matter of negotiation. In extremis, an HR committee can become little more than a forum for bargaining rather than any strategic assessment of HR.
- 3.18 As a governor, do any of these problems apply to your HEI? If so why have they arisen and what needs to be done about them?

Self-challenge questions

- Where does responsibility for HR lie in your executive - with a pro-vice-chancellor, the HR director, or somewhere else? What is the interaction between this person and the governing body, and is this satisfactory?
- Does your governing body pay enough attention to the 'big' HR issues facing your institution?
- What KPIs relevant to HR are reported to your governing body, and are they fit for purpose?

A GOVERNOR'S DILEMMA 3:

The reports that your governing body gets from the HR director suggest that there are no major problems concerning HR and staffing matters. Moreover, when an HR issue comes to the board it is usually dealt with quickly, and the chair does not encourage debate. However, over several months you have informally started to hear stories about widespread staff dissatisfaction, and tales about low morale. What - if anything - do you do?

4. THE GOVERNING BODY AND PERFORMANCE MANAGEMENT

4.1 In recent years, one of the phrases most frequently on the lips of senior managers and governors when thinking about HR has been 'performance management', and research for the Leadership Foundation¹³ in 2007 revealed that this was the practice HR directors would most like to introduce (or improve). But what do governors mean when they talk about it? One thing is certain - they're not all thinking about the same thing. For some, the term is synonymous with performance related pay, and for them performance management is about rewarding their best performers. For others, the term is a euphemism for tackling under-performance, and for them performance management is about cutting out an HEI's 'dead wood'.

SUGGESTED TASK

Identify how the term 'performance management' is used by your governing body and director of HR. Is there agreement and consistency in how the term is used?

4.2 Faced with major financial, competitive and environmental challenges, governing bodies need to encourage their HEIs to ensure that their staff are innovative, flexible and highly adaptable. Effective performance management can be a powerful tool to achieve such responsiveness, but it is difficult to implement properly.

Managing for performance

4.3 In thinking about the effectiveness of their HR strategy, governors need to understand how their director of HR conceives of performance management. Professional practice varies here, with some HR directors concentrating on applying the techniques of performance management (for example, performance review - see below) whilst others emphasise the need for the broader idea of 'managing for performance' to be in place in order for performance management to be successfully introduced.

4.4 'Managing for performance' is typically an approach concerned with creating an environment in which all staff are encouraged to succeed, and includes both overall people management policies and also the way in which leaders and managers interact with their staff. From a governing body perspective, encouraging such an approach may be an important part of adopting good HR practice, although much will, of course, depend on the existing organisational culture and style of management.

4.5 Some principles of 'managing for performance' include¹⁴:

- It relies on consensus and cooperation rather than control or coercion.
- It creates a shared understanding of what is required to improve performance and how this will be achieved amongst all staff.
- It encourages self management of individual performance.
- It requires a management style that is open and encourages two way communication between managers and staff, with continuous feedback.

4.6 'Managing for performance', therefore, is an active process relying on dialogue between managers and staff about what needs to be achieved and how, as well as the measures of performance that will be used. This highlights one of the biggest challenges facing many HEIs that want to develop a performance led culture - the reluctance of many academics in management positions to focus on the people management aspects of their role¹⁵. HEIs which are serious about adopting a 'managing for performance' approach must persuade all their managers (including academic staff) to invest time and effort in developing 'soft' people management skills, for example, active listening, giving feedback, coaching and self-awareness.

¹³ Guest DE and Clinton M, (2007), Human Resource Management and University Performance, Leadership Foundation for Higher Education at www.lfhe.ac.uk

¹⁴ Middlehurst R and Kennie T, (2003), Managing for Performance, pp 76-97 in Hall A (ed), Managing People, Open University Press, McGraw Hill Education, Berkshire

¹⁵ Archer W, (2005), Mission Critical? Modernising Human Resource Management in Higher Education, Higher Education Policy Institute

Performance management processes

4.7 Although HEIs adopt different performance management processes, most involve the following four key stages, and if an HEI appears to be deficient in one or more, governors should ask some searching questions:

- *Planning and defining expectations.* The governing body needs to be confident that processes are in place to define key result areas and associated performance measures across the HEI. This will identify the specific targets to be achieved, associated individual and team action plans, and also the support that can be provided.
- *Implementation and action.* This stage involves the executive and managers supporting their staff and work teams through coaching, mentoring and appropriate delegation.
- *Monitoring performance.* The governing body should expect evidence of performance, using the performance measures agreed at the planning stage. These will link to its own KPIs.
- *Reviewing performance.* All HEIs should have an institution wide appraisal and review process in place. This may take different forms, but will generally provide an assessment of performance over the past period and a revised action plan for the future. Depending on the design of the scheme, the outcomes of the appraisal and review process may inform decisions on promotion and reward. However, governing bodies should recognise that particularly amongst academic staff, performance review mechanisms are often under developed especially where line management structures are weak or even non existent.

4.8 Some HEIs have introduced ambitious institution wide performance management programmes, and although this is a management responsibility the governing body might expect to be informed - at least about outcomes. Where an HR committee exists there may be greater involvement. For example, a large research intensive university has introduced a 'success factors' initiative to develop high quality support services, which involves clarifying the staff behaviours associated with superior performance and then providing support and training to achieve them.

Performance related pay

4.9 Whilst performance management is not a synonym for performance related pay (PRP), the extension of 'contribution pay' to a wide range of staff in HEIs as a result of the Framework Agreement (see Chapter 7) has highlighted the need for effective measures of performance to ensure transparency and fairness in 'discretionary' elements of the pay system.

4.10 Linking personal pay to personal performance is, undoubtedly, an effective motivator for some people in some circumstances, particularly where measurable outputs can be linked directly to individual pay (for example, royalties schemes where academic staff have been involved in product or service development). However, in many sectors (including higher education), the idea of 'contribution pay' has been introduced in order to recognise broader definitions of 'contribution' rather than simple measures of output.

"As a vice-chancellor you're not so much trying to turn a tanker in mid-flow as to get a flotilla of boats to go in the right direction"

PHIL HAMMOND, VICE-CHANCELLOR OF SHEFFIELD HALLAM UNIVERSITY, SPEECH TO THE ANNUAL CONFERENCE OF THE AUA, APRIL 2008 (REPORTED IN TIMES HIGHER EDUCATION, 10 APRIL 2008)

"The director of HR tells me that we can't introduce PRP for academic staff because more money is not a major incentive for all of them. Perhaps, but at the same time we run a PRP scheme for the university executive. Are we being consistent?"

LAY GOVERNOR WITH PRIVATE SECTOR BACKGROUND

- 4.11 Overall, the use of PRP remains uncommon in higher education other than at senior levels, for a number of reasons:
- A reluctance to weaken the collegial ethos that exists in many HEIs.
 - The perceived potential difficulty of measuring individual performance in teaching or in service delivery roles.
 - There are often limited funds available for discretionary pay awards, and restricted availability means that a scheme either has no impact on performance or the awards are too small to act as motivators.
 - The absence of appropriately developed management structures and competence to deliver credible assessments.
 - For some staff non-financial rewards may be more motivating than individual financial rewards. For example, for academic staff, alternatives to PRP which are often used include additional study leave, relief from teaching duties, etc.

All these factors reinforce the value of the broader idea of contribution pay rather than the narrow one of PRP.

- 4.12 This is not to suggest, of course, that HEIs cannot be creative about taking initiatives which link performance improvement to incentives of some kind. For example, a large HEI in the Million+ Group agreed with the UCU and Unison to introduce a new staff performance and development system in 2008 based on defined attitudes, characters and talents that are expected of its staff. The intention is that attitude, behaviour and performance will be aligned with the governors' statement of the university's vision and character. The system is linked to the new pay framework, and access to merit related pay rises will be related to assessments of individual contribution. Initial suspicion of the proposals was allayed by assurances that poor performance would not result in financial penalties.
- 4.13 A report by the Hefcw Audit Service which reviewed the remuneration and severance governance processes for senior staff in Welsh HEIs¹⁶ found that formal performance related pay was rare, at least in part because performance assessment is still not highly developed in the higher education sector.
- 4.14 However, despite the comments above, many governing bodies are keen to see a much more explicit link between performance and reward, and not just for senior staff. As a result, a number of HEIs have introduced, or are planning to introduce, performance assessment which can feed into decisions about pay and contribution. Some key points for governing bodies to bear in mind when linking pay to performance are:
- Who will assess performance? Are they competent to do so? Will their decisions have credibility with those whose performance is being assessed?
 - Are there agreed objectives against which performance will be measured? Are the objectives specific and measurable?
 - Does the evidence by which performance will be assessed exist, and is it agreed by all concerned to be accurate?
 - How will consistency of application be assured?

Performance related pay for heads of institutions and other senior staff is discussed in Chapter 6.

¹⁶ Hefcw Audit Service, (2006), Review of the Remuneration and Severance Governance Processes for Senior Staff at Higher Education Institutions in Wales at www.hefcw.ac.uk

Learning, training and development

- 4.15 An important part of performance management is the active development of staff in their roles. Traditionally, many HEIs have been fairly generous in providing resources for staff to undertake individual activities, but poor in systematically organising development. Training and development in HEIs is a strange beast, ranging from relatively orthodox activities for many staff through to some unique challenges for others. For example, trying to involve a senior professor in a development activity which will benefit the management of the institution but may be of little personal interest, is a task to challenge the most experienced professional developer.
- 4.16 For this and other reasons, providing institutionally planned training and development is a task that some HEIs have only relatively recently started to address in a coordinated way, sometimes with support from bodies like the Leadership Foundation for Higher Education¹⁷. It follows that if training and development is to be effective from a performance management perspective, investment must be focused on achieving institutional priorities, with all the planning that this entails. Although an obvious management responsibility, this is an area in which a governing body might take an active interest - indeed this is expected by bodies such as Investors in People. It is important, therefore, that the governing body is informed about the results of any evaluation of the effectiveness of training and development so that the value of the investment is assessed.

Succession management

- 4.17 A crucial medium and long term issue concerning performance management is planning for succession management, as the failure to identify, develop and retain quality leaders has a direct impact on institutional success. At its best, succession management produces a continuous stream of potential leaders - the so-called 'talent pipeline'. However, all too often, even now, HEIs turn on the tap and find that the supply doesn't meet their needs, and lack of encouragement means that potential candidates may be uninterested and lack confidence, and there are too many HEIs chasing too few high quality candidates.
- 4.18 In other sectors, an organisation as large and complex as an HEI would not leave the filling of its senior roles to chance, but there has been a reluctance in higher education to engage in such activity. Times are changing, and some institutions have already adopted a more systematic approach to identifying and developing their future leaders. This is frequently an area where external governors can have a much better understanding of the issues than staff, and governing bodies should ensure that effective mechanisms for succession planning are part of HR strategies.
- 4.19 The following three examples summarise different approaches of HEIs to succession planning:

Example a: A large, research intensive university has developed a leadership capabilities framework setting out the knowledge, skills and capabilities needed to perform senior management roles which is used as the basis for a development centre for middle managers.

¹⁷ See www.lfhe.ac.uk

Example b: At a medium sized research intensive university, heads of school are appointed on a five year rotational basis. The university aims to appoint new heads at least 12 months in advance of taking up the role. During their time as head of school designate, incoming heads shadow the existing head of school and participate in both the 1994 Group Leadership Programme and Leadership Foundation's Top Management Programme.

Example c: A medium sized research intensive university has introduced a two-day 'Enhanced Performance' programme to broaden and deepen leadership capacity. The programme, targeted at 300 of those identified as leading 'opinion formers' in the institution, includes both knowledge based sessions on institutional strategy and context and interactive sessions to develop leadership skills.

Self-challenge questions

- Are your HEI's corporate HR goals capable of being translated in a way which is meaningful at departmental, team and individual levels? If not, what implications does this have for the governing body in its oversight of managing performance?
- Has your governing body approved a policy on contribution related pay or PRP? What evidence exists that it is working?
- Is the expectation of your governing body that poor performance will be dealt with effectively in the institution? What evidence exists that it is?

A GOVERNOR'S DILEMMA 4:

There has been a system of annual appraisal at your institution for years but it doesn't seem to be taken seriously - barely half of the staff have had an appraisal in the last twelve months. The personal development plans that result from those appraisals that do happen seem to be of the 'warm and fluffy' variety, with little or no attempt to agree performance targets. The governing body is keen to see a more professional approach to performance management implemented and the HR director agrees - but always seems to come up with more urgent priorities. What, if anything, can you do to move this forward?

5. ENSURING EQUALITY AND DIVERSITY¹⁸

- 5.1 Your governing body has a number of responsibilities for ensuring that the HEI adopts effective policies and practices concerning equality and diversity. Ensuring diversity goes beyond legal compliance, recognising that people have different needs that must be addressed in different ways, and that treating everyone the same will not necessarily create equality of opportunity. Many HEIs have adopted the diversity approach as a matter of principle and also because it makes good operational sense. However, because legal compliance in this area is so vital to good governance, most of the chapter is devoted to equal opportunities and the legislative obligations of HEIs.
- 5.2 Legislation in this area in the UK has a history of almost 40 years. More recently, after the European Framework Directive¹⁹ (also known as the European Employment Directive) established a general framework and minimum standards for equal treatment in employment across the EU, legislation now covers gender, race, disability, religion and belief, sexual orientation and age. Annex B to this volume includes an overview of the main provisions of this legislation, and the definitions of the equality terms which governors are most likely to come across. If you are unfamiliar with these, you might want to read the Annex. The clerk to your governing body will also be able to provide answers to any specific questions you may have.
- 5.3 The lead body for equality and diversity in higher education is the Equality Challenge Unit (ECU)²⁰, which produces a wealth of guidance. The funding councils have statutory obligations to oversee compliance with equality and diversity legislation in their respective jurisdictions. Nationally, the Equality and Human Rights Commission has the remit to promote equality for all in society and to combat discrimination affecting specific groups. It covers England, Scotland and Wales, but in Northern Ireland the remit is undertaken by the Equality Commission for Northern Ireland.
- 5.4 The governing body's legal responsibilities in this area are to ensure compliance with both its general and specific duties as set out in the legislation. Two points are worth bearing in mind: first, there is no limit to the damages employment tribunals can award if a claim of unlawful discrimination succeeds²¹; second, where UK legislation does not support European directives, public bodies may be vulnerable to challenge. The CUC Guide states that "the governing body should ensure that non-discriminatory systems are in place to provide equality and diversity of opportunity for staff and students", and in relation to institutions in England, the associated Code states that "governing bodies should ensure ... that action plans are progressed throughout the institution", and that "the governing body has a duty to take such steps as are reasonably practicable to ensure freedom of speech within the law for students and members of staff of the institution and for visiting speakers".

SUGGESTED TASK

With the help of your governing body clerk, review what information on equality and diversity has gone to the board in the last year. Has this been adequate to enable it to meet its responsibilities in this area?

¹⁸ Further information and examples of good practice in many of the areas discussed in this Chapter are available in the section on diversity and equality in the higher education governance web site www.lfhe.ac.uk/governance

¹⁹ Council Directive 2000/78/EC of 27 November 2000

²⁰ See www.ecu.ac.uk

²¹ For example, in the case of *Combarel v Boots Opticians Ltd*, an award of £144,931 was made when a tribunal found that Boots had discriminated against an employee because of her disability. The award included £20,000 for personal injury, £22,000 for injury to feelings and almost £80,000 for loss of earnings.

"On the surface everything in the gender and diversity garden looks rosy in the university. But if you look more closely there are some real issues we have to confront, and most members of our staffing committee now seem to understand that"

**LAY GOVERNOR
WITH HR EXPERIENCE**

The general and specific duties of public bodies

5.5 Newly recruited governors with a private sector background are sometimes surprised to learn that, in publicly funded bodies, simply avoiding unlawful discrimination is not enough - public bodies, including HEIs, have positive statutory obligations in relation to sex, race and disability that go much further²². These fall under the categories of general and specific duties. The general duties have been summarised by the ECU as follows²³:

RACE EQUALITY DUTY	DISABILITY EQUALITY DUTY	GENDER EQUALITY DUTY
<ul style="list-style-type: none"> • The need to eliminate unlawful racial discrimination. • The need to promote equality of opportunity between persons of different racial groups. • The need to promote good relations between persons of different racial groups. 	<ul style="list-style-type: none"> • Promote equality of opportunity between disabled persons and other persons. • Eliminate discrimination that is unlawful under the Disability Discrimination Act (2005). • Eliminate harassment of disabled persons that is related to their disabilities. • Promote positive attitudes towards disabled persons. • Take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons. 	<ul style="list-style-type: none"> • Eliminate sex discrimination. • Promote gender equality.

5.6 In addition, HEIs have the following specific duties:

- To monitor recruitment and promotion of all staff by sex, race and disability and to publish the results of that monitoring.
- To assess the impact of all their policies, procedures and practices on women and men, on people of different races, and on those with and without disabilities, and to take action to mitigate any inequalities disclosed by the assessment (see below).
- To publish a race equality policy, a gender discrimination scheme and a disability discrimination scheme and ensure implementation.

²² In Northern Ireland, the general duties on public bodies to promote equality are similar but broader in extent, as they cover religious belief, political opinion, age, marital status, sexual orientation and whether or not people have dependants. The duty to promote good relations is extended to include different religious beliefs and political opinions.

²³ Conducting Equality Impact Assessments in Higher Education, ECU, 2007

Disability - reasonable adjustments and positive discrimination

- 5.7 There are two aspects of law in this area of which governors need to be aware. First, employers have to make reasonable adjustments so as not to disadvantage those with a disability compared with those without. This doesn't just apply to access to facilities and the physical environment, but also to working hours, the provision of specialist equipment and assistance with its use, the allocation of duties and so on. There is no absolute definition of 'reasonable' in relation to the adjustments to be made, and an employment tribunal judges on the merits of each case. For example, an HEI might not be expected to install a lift in a building without one for an employee with impaired mobility, but moving their regular place of work (even if remote from their colleagues) might be considered reasonable. When assessing claims of discrimination, tribunals tend to expect larger and relatively well resourced employers to 'think outside the box' to accommodate the needs of employees with disabilities.
- 5.8 Second, the Disability Equality Duty states explicitly that treating people with disabilities equally does not necessarily mean treating them the same as people without disabilities. It also allows for positive discrimination, such as guaranteeing an interview to all disabled applicants or restricting nominations for committee vacancies to disabled applicants to ensure greater participation of disabled people in institutional decision making.

Retirement age

- 5.9 The retirement age of 65 has been challenged in the European Courts of Justice as being incompatible with the European Employment Directive. If the challenge succeeds, it will not be possible to require retirement at a certain age. Although compulsory retirements would still be possible, HEIs would need to demonstrate an objective justification (for example, based on the individual's performance or the need for workforce mobility) but this could be difficult to establish. In addition, the government intends to conduct a review in 2011 which may abolish the default retirement age. A few HEIs have already abandoned fixed retirement ages.

Equality impact assessments

- 5.10 Publicly funded bodies are required by law to ensure that their policies and practices are fair and free of unlawful discrimination, and this is achieved by undertaking equality impact assessment (EIA) of existing and proposed policies, procedures and practices - both formal and informal. Conducting EIAs and publishing the outcomes also demonstrate an HEI's engagement with the general duty to promote racial, gender and disability equality. The ECU has produced comprehensive guidance on conducting EIAs²⁴, which emphasises the positive contribution that impact assessment can make to other aspects of institutional performance. As EIA is outcome driven, a governing body should expect recommendations for change to result from it. Indeed, it could be argued that a measure of whether EIA is being undertaken properly is that something changes as a result of it.

²⁴ Op cit, ECU, 2007

The Human Rights Act, academic freedom and freedom of speech

- 5.11 The main source of protection of human rights in the UK is the Human Rights Act 2000 (the HRA), which gives effect in UK law to the rights and freedoms contained within the European Convention on Human Rights (ECHR). Jisc has produced a useful overview of the HRA and the implications for higher and further education²⁵.
- 5.12 Two of the Articles of the ECHR are particularly important to HEIs: Article 9 (freedom of thought) and Article 10 (freedom of expression), which offer protection for academic freedom and freedom of speech. Governors need to recognise that there is some protection for the academic freedom of academics in the Education Reform Act 1988 (ERA) and the Further and Higher Education (Scotland) Act 2005, but the HRA applies to everyone, including students. In some pre-1992 HEIs, the wording of the Model Statute may also provide some contractual protection for academic freedom.

Practical considerations

- 5.13 The governing body should receive an HEI's annual equality monitoring report which should include:
- Monitoring data which public bodies are required to collect to comply with their specific duties in relation to sex, race and disability²⁶.
 - Progress towards meeting its equality and diversity targets.
 - Issues and challenges that have arisen during the previous year.
- 5.14 There are various ways in which governors can learn about best practice in equality and diversity in higher education, with comparative data available from a range of sources. Every HEI receives a substantial body of data from the ECU annually, and information about other HEIs can also be obtained from the Higher Education Statistics Agency (Hesa). Information about other sectors is available from the Equality and Human Rights Commission (see also the resources in Annex A).
- 5.15 Within HEIs the operational responsibility for equality and diversity is organised in different ways, and this generally will not be a matter for governors, but it is important that the governing body is seen to provide support for the efforts of the executive in this area. ECU published research in 2007²⁷ that indicated that most equality and diversity specialists working in HEIs felt that academics were the staff group least likely to be engaged with equality and diversity, in part because of lack of time but also because academics often did not see equality as a problem and therefore as a priority. However, a lack of interest in, or resistance to, equality and diversity can be encountered at every level of an HEI - including a governing body.
- 5.16 In practice, HEIs have found the following to be effective in overcoming resistance, and governing bodies might expect some or all to be in place:
- Senior level support from the head of institution and executive.
 - A member of the executive taking on the role of institutional equality champion.
 - The inclusion of equality and diversity targets in institutional plans.
 - A meaningful budget for equality and diversity initiatives.
 - A network of departmental equality and diversity champions in every area of the institution.

²⁵ www.jisclegal.ac.uk/humanrights/humanrights.htm#_Toc185823064, JISC, January 2008

²⁶ There is currently no duty to monitor age, sexual orientation, religion (except in Northern Ireland), and belief in the same way, but some institutions are already doing so

²⁷ The Role of the Equality Specialist in Higher Education Institutions, ECU 2007

- Diversity awareness raising programmes for all staff, and skills training for managers and staff.
- Including equality and diversity matters in all relevant committees.

Self-challenge questions

- What is the level of awareness about equality and diversity in your governing body?
- Is there a substantive discussion when your institution's annual equality report is presented to the governing body? If not, why not?
- Does your institution's corporate plan include specific equality and diversity targets? If not, how does the governing body monitor institutional progress in this area?
- Does senior management at your institution champion equality and diversity initiatives? If not, what effect does this appear to have on governing body engagement with equality issues?

A GOVERNOR'S DILEMMA 5:

Your governing body has approved an equality and diversity policy as part of its HR strategy, and there seems to be commitment from the executive and the director of HR for tackling the resulting issues. Nonetheless, you have some mild concerns about the speed of progress, particularly in relation to race equality. For example, as you wander round the campus the staff you see seem generally not to be representative of the community your HEI serves. What might you do about your concerns?

6. APPOINTING AND REMUNERATING SENIOR STAFF

6.1 Whilst the involvement of the governing body in most of the areas addressed in this volume is normally at one or two steps removed from practice on the ground, the appointment of the head of institution and determining his or her remuneration and conditions of service (and sometimes those of other senior staff) are areas where it is directly involved.

"Appointing the next vice-chancellor will be just about the most important thing that this governing body does, so we have to get it right"

CHAIR OF A UNIVERSITY GOVERNING BODY

Appointing the head of institution

6.2 There are several useful guides to good practice in this area. Universities UK has produced two, one on the legal aspects of recruitment and selection²⁸ and a second on best practice for recruitment to senior roles in higher education²⁹. In addition, Hefcw have produced a helpful good practice checklist for governing bodies and remuneration committees covering senior staff pay, severance arrangements and remuneration committees' practice^{30,31}. The second UUK Guide sets out seven good practice principles for the recruitment process:

- Clearly identify the essential and desired criteria required to fulfil the duties of the post and judge each candidate against them.
- Be consistent and objective in the way it gathers, judges and records evidence on each candidate against the criteria identified.
- Seek to select from a diverse pool of candidates.
- Ensure that everyone involved with the selection understands and implements robust standards in equal opportunities.
- Ensure that none of the selection processes, methods or arrangements unfairly disadvantages any individual applicant or potential applicant.
- Give all applicants a clear understanding of the institution and what is expected of them.
- Leave a positive image of the institution with unsuccessful candidates.

6.3 Typically most governing bodies will establish a special group to undertake the appointment of a new head of institution, perhaps with members from the remuneration committee. It may also have external advisers. The opportunities for input by individual governors may be limited, and in most HEIs are likely to exist only for lay members. Nonetheless it is imperative that all governors have confidence in the process.

6.4 Identifying essential and desired criteria is critical to successful recruitment - there needs to be absolute clarity about the qualities the new head of institution will need. This will involve a frank assessment of where the institution is, where it wants to be, and what is necessary to take it there. On these issues there should be consultation with the whole governing body. Where senior appointments go wrong (and they do, to the disappointment of all involved) it is frequently because this groundwork has not been done, and the candidate who 'looks best' on the day is appointed rather than the one who is best able to take forward the institutional strategy.

²⁸ Pensions for UUK, (2004), A guide to discrimination law and recruitment, selection and appointment

²⁹ UUK, (2004) Appointing senior managers in higher education: a guide to best practice

³⁰ Hefcw Audit Service, (2006), Review of the Remuneration and Severance Governance Processes for Senior Staff at Higher Education Institutions in Wales,

³¹ See also the 'Reward and Senior Pay Toolkit, produced by ECC Ltd at www.ecc.ac.uk

- 6.5 It is now common practice for HEIs to engage executive search agencies ('headhunters') although this remains controversial. Despite their advantages, it is vital they are carefully selected and thoroughly briefed about requirements, with the HEI remaining firmly in control of the process. In particular, research indicates that women continue to find themselves at a disadvantage when seeking promotion or appointment to the highest levels of management in higher education. Therefore, search consultants must be fully briefed on an HEI's equal opportunities policy and its statutory equality duties. The Office of the Commissioner for Public Appointments (Ocpa) has produced two useful documents addressing the issues arising when such agencies are used for public sector appointments³².
- 6.6 The actual selection process will usually be led by the chair of the governing body, but it is increasingly common for shortlisted candidates to be asked to make presentations to the whole board (or at least the external members). Typically the selection methods for senior staff in most HEIs are very traditional, and have often been in the past - frankly - poor. Few institutions use approaches that are the norm in other sectors, such as selection centres, and governors could do much to encourage the use of more effective techniques.
- 6.7 A governing body should ensure that the recruitment and selection arrangements for other senior appointments are also carried out effectively. Quality assurance can be achieved in a variety of ways, for example:
- The receipt of a brief professional biography of each person appointed to a senior role.
 - Independent governors acting as members of appointment panels for senior roles.
 - Annual reports from the HR or staffing committee on the qualifications of new appointees to senior roles during the previous twelve months.

"The biggest challenge is defining your role as vice-chancellor. You don't actually have a job to do... and that's incredibly difficult to get used to."

PHIL HAMMOND, VICE-CHANCELLOR OF SHEFFIELD HALLAM UNIVERSITY: SPEECH OF THE AUA, APRIL 2008, REPORTED IN THE, 10 APRIL 2008

Supporting the head of institution

- 6.8 The responsibility of the governing body does not end with the appointment of a new institutional head, and there is an ongoing need to provide support, particularly in the early stages of appointment. The role of the head of the institution (like that of the CEO of any large organisation) can be a very lonely one, and a relationship based on mutual trust with governors (particularly the chair of the governing body) is essential. This is a difficult balancing act: being open and honest, but - in the interests of good governance - avoiding the relationship being too 'cosy'. Some heads of institution find it helpful for their own development to identify a mentor or to work with an executive coach.

The remuneration committee

- 6.9 The governing body must establish a remuneration committee, including the governing body chair, at least three other lay members (who may be coopted) and the lay treasurer (where the office exists). At least some - ideally all - members should have relevant HR or senior staff management expertise. The head of institution is frequently also a committee member, and if not should attend the meetings, except where his or her own remuneration and performance are considered.

³² Ocpa, (2005), Review on working with recruitment consultants in the public appointments process, OCPA, 2003 and Making Public Appointments - a guide for recruitment consultants

- 6.10 The scope of the committee varies - but in most HEIs it includes:
- Determining the remuneration and conditions of service of the senior team.
 - Reviewing the performance of the head of institution (and usually other senior team members) and determining annual salary awards.
 - Approving the severance payments of the head of the institution and usually of other senior staff.

In some HEIs the committee it is concerned only with the remuneration of the senior team, where as in others it may be all staff in a certain category (the professoriate) or above a given salary figure. This latter (and broader) remit may involve several hundred remuneration decisions, which may be dealt with by subcommittees.

- 6.11 In general, the role of the remuneration committee is probably rather under developed in most HEIs, and typically it does not play the proactive and strategic role that is increasingly the case in the private sector. This may at least partly be because of potential confusion in responsibilities between it and an HR committee.
- 6.12 The degree of authority delegated from the governing body also varies. In some HEIs, the board retains the authority to approve the recommendations of its remuneration committee. In HEIs where the remuneration committee has fully delegated authority, the committee's decisions are simply reported to the board, but in these instances the governing body should approve a remunerations policy which sets out the parameters within which the remuneration committee will operate.
- 6.13 It is important for the governing body to retain oversight of the remuneration committee's operations, given the potential political sensitivity of its decisions. The report by the Hefcw Audit Service of a review of the remuneration and severance governance processes for senior staff in Welsh HEIs³³ summarises the potential damage that could result from weak governance processes in this area:
- Adverse publicity and a negative impact on the institution's reputation.
 - A loss of stakeholder confidence.
 - Worsened employee relations and reduced staff morale.
 - Higher costs with no obvious benefit.
 - The loss of key staff to other institutions or employers.
- 6.14 Very careful thought should be given to the arrangements for determining senior staff remuneration - at least 10% of academic staff in the higher education sector fall into the senior staff category (including the professoriate)³⁴ which represents a very significant investment: the political consequences of getting it wrong can be severe. It is important that arrangements are transparent, fair, consistently applied, and meet equality and diversity requirements. Self evidently all boards should take affordability into account when making remuneration decisions, not least to instil confidence in their stewardship of public funds.

³³ Hefcw Audit Service (2006) op cit

³⁴ HESA 2006/07 Staff Record

What governors should expect from the remunerations committee

- 6.15 As the investment, both financial and political, in senior staff remuneration is considerable, the first thing governors should expect is a remunerations policy that ensures a strategic view of senior staff pay. The governing body itself should assume responsibility for this, and not delegate it to the remuneration committee. A remunerations policy will usually set out:
- How it will assist the HEI in achieving its strategic objectives.
 - The guiding principles in operating the policy (for example, fairness, transparency, consistency, clarity in decision making and reporting).
 - The scheme of delegation to the remuneration committee.
 - The composition of the remuneration committee.
 - The roles the remuneration committee will consider (eg the head of institution only, other senior staff, etc).
 - The frequency of remuneration reviews.
 - The data that the remuneration will take into account (internal and external).
 - The basis on which reviews will be conducted (for example, self-submissions, input from managers, appraisal records).
 - How the components of pay will be identified (cost-of-living awards, performance related elements, market-related elements).
 - How performance will be measured and the evidence to be used.
 - What, if any, account will be taken of non-financial benefits.
 - The parameters within which awards may be made (with reference to affordability).
 - How decisions will be recorded and reported.
- 6.16 A governing body must ensure that an HEI meets its statutory equality duties (see Chapter 5) including ensuring that its pay and grading systems are compliant with equal pay principles (Chapter 7). Whilst implementation of the Framework Agreement has been a significant step towards resolving equal pay anomalies, senior staff were, by and large, excluded from this exercise. It is important, therefore, that HEIs:
- Include senior staff in all equal pay reviews that are conducted.
 - Diagnose the causes of any pay anomalies that are identified.
 - Take action to remedy pay anomalies that cannot be justified.
- 6.17 Governors should also expect their board and the remuneration committee to have a policy on market supplementation, which allows for a rapid response to market pressures without distorting the arrangements for determining basic pay. Such a policy will also help to ensure that the perceived 'market rate' is not paid unnecessarily. Market supplements should be underpinned by robust, equality proofed, data that demonstrates the business case for their application; they should be kept under regular review and, if necessary, withdrawn when conditions change.

"To be honest, the governing body probably doesn't know as much as it should about how the remuneration committee goes about its work. There's a feeling that it's all a bit too sensitive to discuss"

LAY GOVERNOR

Reviewing senior staff performance and performance related pay

- 6.18 Many remuneration committees and governing body chairs find this a difficult area. Therefore, by definition, it is a difficult area for the governing body as a whole. A key issue is the extent to which institutional and individual performance can be separated, but this should be attempted for two reasons. First, it can happen that the head of institution performs well but that institutional performance does not meet expectations. Second, there has been a trend for some years for heads of institution to enjoy proportionately larger salary increases than the majority their staff. Having a clear answer to the question 'in what ways has the institution benefited directly from the performance of this individual?' allows above average pay increases - if appropriate - to be justified more easily.
- 6.19 Of course, a remuneration committee will usually want to benchmark senior staff remuneration against appropriate comparators. These should be chosen with care, or an HEI may pay more than it needs to attract and retain good staff. There is a variety of benchmarking data, the most useful being the annual CUC survey on heads of institutions' remuneration (which is confidential to the chairs of governing bodies). The THES also publishes annual data³⁵.

Severance arrangements

- 6.20 Severance can be controversial, and there is always a temptation for HEIs to pay more than they have to in terminating a contract. The CUC Guide states: "if considering severance arrangements for senior staff, the remuneration committee must represent the public interest and avoid any inappropriate use of public funds. The committee should be careful not to agree to a severance package which staff, students and the public might deem excessive. Contracts of employment for senior staff should specify notice periods of not more than 12 months and should not provide for pension enhancements".
- 6.21 Fortunately, comparatively few senior staff leave in such circumstances, but a severance payment policy approved by the board is helpful in ensuring consistency and accountability. All of the funding councils have produced guidance on severance arrangements and, at the very least, the policy should include formal adoption of the relevant guidance. Hefcw recommends that a policy should include the following elements:
- How to apply the funding council guidance.
 - Which staff are covered by the policy.
 - Which body is responsible for reviewing and approving severances.
 - The scope for discretion in individual cases, and who may exercise it.
 - Financial and management criteria to be applied.
 - The value for money test.
 - Legal and contractual constraints.

³⁵ See www.timeshighereducation.co.uk

Self-challenge questions

- Does your institution have a remunerations policy for senior staff? Does it cover all the areas suggested in 6.15?
- As a governor, are you clear about the role that the remuneration committee should play?
- Have senior staff at your institution been included in an equal pay audit? Is the governing body satisfied that remuneration arrangements for senior staff have been equality proofed?
- Does your institution have a severance payment policy? If not, should one be introduced?

A GOVERNOR'S DILEMMA 6:

Every year the Times Higher Education newspaper produces a list of the salaries of heads of institutions, and as a governor you feel you should read it. For several years now, the head of your own institution seems to be very well paid by comparison with those in similar HEIs. You tentatively raised this informally last year with the chair of your governing body, and were told that the remuneration committee had looked at appropriate comparators and had taken particular circumstances into account. However, you remain slightly uneasy, although it's not an issue you feel very strongly about. What actions - if any - might you take?

7 WHAT GOVERNORS NEED TO KNOW ABOUT REWARD, RECOGNITION AND COLLECTIVE BARGAINING

7.1 A governing body's responsibility for HR includes ensuring that pay and conditions of employment are properly determined and implemented. Given the scale of investment in staff, making sure your HEI is getting value for money is important. As a governor, what is your view about whether your HEI's reward and recognition arrangements are both fair and effective? Of course, reward is not just about pay, nor even financial and other benefits (such as pensions) but also includes intangible things (such as public esteem, and - usually - a pleasant working environment), and HEIs typically underestimate the value of their total reward package. This chapter addresses these issues. The arrangements by which these processes are collectively agreed is also summarised.

Information and consultation

- 7.2 As a governor you need to recognise that under the Information and Consultation of Employees Regulations 2004 (2005 in Northern Ireland), your HEI has a duty to provide information to employees on:
- Recent and probable developments in your HEI's activities and financial situation.
 - The structure and probable development of employment in the HEI and any measures envisaged, in particular, where there is a threat to employment.
 - Decisions likely to lead to substantial changes in work organisation or contractual relations (for example, changes in working hours, etc).
- 7.3 Most HEIs have long standing agreements with one or more trades unions. In most cases, these constitute 'pre-existing agreements' under the Regulations. Employees can use these Regulations to compel employers (under certain conditions) to introduce or change arrangements for providing information to and consulting with the workforce. Most HEIs make efforts to consult widely with the workforce (for example, through staff newsletters, the intranet, staff forums, etc) in parallel with formal consultative mechanisms with trades union representatives.
- 7.4 Consultation and collective bargaining are most acute in relation to industrial action, and there have been two episodes of sector wide industrial action in higher education in recent years - in 2004 and 2006. In both cases, apart from one or two days of strike action, the academic unions focused their attention on action short of a strike (Asos), the most disruptive form of which was an assessment boycott, when staff refused to set exam papers or undertake marking. Whilst the case law governing industrial action is frequently unclear and, in relation to Asos, not recent and sometimes contradictory, the experience of the 2006 dispute suggests that there would be value in institutions deciding in advance how they would respond to Asos and advising staff accordingly in the normal course of events, rather than waiting until a dispute has begun and feelings are running high.

National bodies, bargaining and joint working

- 7.5 There are two national bodies involved in aspects of collective bargaining that all governors need to be aware of: the Universities and Colleges Employers Association (Ucea) and the Joint Negotiating Committee for Higher Education Staff (Jnches)³⁶.
- 7.6 Ucea is a company limited by guarantee³⁷ which provides a single employers' organisation for higher education. Membership is open to all UK HEIs and its activities are financed by members' subscriptions. The members of the company nominate a board of directors, which comprises heads of institutions and chairs (or deputy chairs) of governing bodies. Ucea offers a number of services to subscribing HEIs including: providing advice on all aspects of HR; commissioning legal advice on sector wide issues; research (particularly in relation to pay and conditions and recruitment and retention); negotiation on behalf of higher education employers with the major trades unions; policy development; and lobbying on behalf of the sector on matters related to employment.
- 7.7 The origins of collective bargaining in the sector are diverse, but in 2001 agreement was reached on new negotiating machinery between Ucea (on behalf of HEI employers) and the main trades unions representing staff, and Jnches was established. It has a membership of up to 41 - an independent chair and 20 members each nominated by the employers and trades unions³⁸. It was agreed in 2001 that, for a transitional period, there would be two subcommittees - one dealing with all academic staff, and academic related staff in pre-1992 HEIs, and the other dealing with support staff covered by national agreements.
- 7.8 The Jnches 2006-09 pay agreement included a commitment by all parties to agree changes to the national bargaining arrangements by July 2007. At the time of writing, a provisional agreement for new arrangements, based on single table bargaining, had been accepted by Ucea and the support staff unions, but rejected by the members of the Universities and Colleges Union (UCU) in a ballot - alternatives to national collective bargaining are discussed in paragraph 7.17.

Does your HEI operate equal pay arrangements?

- 7.9 'Yes of course it does', may be your initial reaction, but can you be sure? In 2006, an average female full time lecturer in an HEI earned 17.2% less than her male counterparts³⁹. The Equal Pay Act 1975 gives women and men the right to be paid the same for the same work, work rated as equivalent by an analytical job evaluation scheme, or work of equal value. Additionally, statutory equality duties (see Chapter 5) mean that HEIs have a duty to review the impact of their reward arrangements by gender, race and disability.
- 7.10 An equal pay review highlights areas where there are pay gaps between different groups doing the same job (women and men, different ethnic groups, people with and without disabilities). All HEIs which have introduced new arrangements under the Framework Agreement (see below) should have conducted an equal pay review within a year of implementation.

³⁶ For details see www.ucea.ac.uk

³⁷ The four members of the company are the CUC, GuildHE, Universities UK and Universities Scotland

³⁸ EIS-ULA, GMB, UCU, Unison and Unite (formerly Amicus and the TGWU)

³⁹ Facts about Women and Men in Great Britain 2006, EOC

The Framework Agreement

- 7.11 Recent years have seen substantial discontent about pay and conditions. In general, pay levels in higher education in the period around 2000 had fallen behind private and public sector comparators, and the pay structures were no longer fit for purpose. This was the background to the Framework Agreement for the Modernisation of Higher Education Pay Structures which was concluded between Ucea and seven of the trades unions representing staff in July 2003. The Agreement's main provision was that, by 1 August 2006, HEIs would introduce new pay structures for all staff covered by existing national pay agreements, which would support the achievement of equal pay for equal value and which would be:
- Based on a national 51 point single salary spine.
 - Underpinned by job evaluation.
 - Developed in partnership with local trades unions.
- 7.12 As national agreements on pay are now restricted to annual uplifts to the single salary spine, there is considerable diversity in pay structures across the sector, with wide variations at both the bottom and top of grades for the same jobs in different institutions. There is also increasing variability in pay rates between HEIs. Indications are that the post-Framework Agreement pay structures are more competitive than those they replaced. Data from the Office of National Statistics Annual Survey of Hours and Earnings 2007, indicates that average professorial salary exceeded that of pilots, flight engineers and solicitors. Average pay for lecturers exceeded that of secondary school teachers, civil servants and quantity surveyors.
- 7.13 However, the Framework Agreement was more expensive than many HEIs had anticipated, and Ucea reported that starting salaries for lecturers were (on average) 12% higher post-implementation, and that twice as many staff were upgraded as downgraded following job evaluation⁴⁰. The salary settlement for 2008 has added to these costs. Overall, salary costs have exceeded the additional funding made available. Much of the increased cost is ongoing and, to an extent, cumulative because it results from structural rather than one off factors. In the majority of HEIs, the Framework Agreement was implemented on a 'something for something' basis, with agreements to adopt new working practices and performance management systems, all designed to improve productivity. However, it is inevitable, given the other upward pressures on the pay bill, that some HEIs will have no alternative but to reduce the size of their workforces.
- 7.14 Post-Framework Agreement pay structures have been tailored to the particular needs and market position of each HEI, and many now have much more flexibility in responding to recruitment and retention issues and rewarding contribution. However, the value of salary points on which the post-Framework pay structures are based are fixed nationally and can only be changed by an HEI withdrawing from the national machinery. The cost of Framework has prompted some governing bodies to consider opting out of national pay bargaining (see below).

⁴⁰ Facts and Figures Briefing 2007, UCEA

Pensions

- 7.15 HEIs participate in a number of pension arrangements, and in addition, many pre-1992 universities maintain local schemes for their own support staff - in these instances, lay members of the university's council may be trustees of the local pension fund. Ucea has produced a briefing note on pensions in higher education⁴¹ and the topic is covered in more depth in the volume on finance in this series.
- 7.16 Pension provision is an important element in the total reward package and there has been a growing recognition that staff find the final salary pension schemes in higher education attractive. However, the costs of providing them have increased significantly, and there have already been rule changes to some (including increasing the retirement age of new entrants, reducing pension benefits on premature retirement and changes in the funding of early retirement costs) in order to ensure their long term viability. Options available for the long term sustainability of high quality occupational pension scheme provision for the sector are being reviewed. The clerk of your board will be able to update you with the latest national discussions.

Alternatives to national collective pay bargaining

- 7.17 Many governors wonder if the national pay bargaining system provides advantages to their HEI, and there are different views on this. All HEIs are likely to engage in some form of collective bargaining to negotiate terms and conditions for their workforce. The principal advantage of national collective pay bargaining lies in economies of scale - undertaking the market analysis and preparation necessary for a deliverable bargaining strategy is time consuming, and it is cost effective for an employers' organisation, such as Ucea, to undertake this on behalf of its members. Other advantages include PR activity that has greater impact because it is conducted on behalf of the sector as a whole, and negotiations conducted by people whose primary professional role is to negotiate.
- 7.18 The major disadvantage of national collective bargaining (particularly for a sector as diverse as higher education) is that the negotiating remit is bound to involve compromises - there will always be members of the employers' group who could pay substantially more than the maximum limit of the remit and there will be some for whom even the smallest increase is unaffordable. Another disadvantage of large employer groupings can be a fragmented response to industrial action - the employers' negotiating position is significantly weakened if the local responses to nationally directed action are inconsistent.
- 7.19 The increasing fragmentation of the sector, perceived weaknesses of national collective bargaining (particularly in the wake of the 2006 pay dispute) and the UCU's stance in relation to single table bargaining, mean that the continuation of universal national pay bargaining after 2009 is in some doubt, although it may persist for a subset of HEIs. Some alternatives are available, but none of the main trades unions are in favour of any weakening of national pay bargaining.

SUGGESTED TASK

As a governor you might want to ensure that you are fully aware of the issues facing your HEI over future pensions provision.

"We need to get out of national bargaining just as soon as we can - it's costing us a fortune"

LAY GOVERNOR

"Local bargaining sounds attractive, but the fact is that we haven't got the HR expertise to do it ourselves. Perhaps we are paying slightly more than we should, but the reality is that it may be good value for money"

LAY GOVERNOR OF SMALL HEI

⁴¹ Ucea, (2008), Pension Provision in HE: Briefing and Q&A,

7.20 The main alternatives to national collective bargaining are:

- a) *Group (or consortium) bargaining*: in principle, this brings together comparable HEIs which should result in a negotiating remit that involves fewer compromises. Also, a smaller grouping is likely to find it easier to agree on, and implement, a consistent response to industrial action. However, none of the mission groups of HEIs are homogeneous, and this means that there will still be tensions both in establishing the negotiating remit and in responding to industrial action.
- b) *Regional bargaining*: groups of HEIs in the same geographical regions would come together to form a bargaining unit. This would have potential advantages in relation to negotiating the terms and conditions of staff recruited within the geographical region but not in respect of academic and specialist staff recruited nationally or internationally, and to split the bargaining remits could work against efforts to achieve equal pay for work of equal value.
- c) *Institutional bargaining*: local bargaining can be a very powerful means of driving change, and the implementation of the Framework Agreement demonstrated that bargaining at institutional level delivers benefits if it is on a 'something for something' basis. However, this would involve a large shift in expectations on the part of unions and staff if applied to pay, and would require high levels of skill and commitment from managers to realise the potential benefits. HEIs and governing bodies would need to be very clear about the potential gains from local pay bargaining and convinced that these justified the increased costs.
- d) *Workforce councils*: this is institutional bargaining, but with representatives elected by the workforce rather than with trades unions officials. Some institutions have established a workforce council or forum as an additional means of consulting with the workforce in parallel with existing formal consultative.

SUGGESTED TASK

Consider which of the approaches to collective pay bargaining in paragraph 7.20 would best suit your own HEI?

Self-challenge questions

- Has your HEI conducted an equal pay review? Were the findings reported to the governing body?
- What mechanisms, both formal and informal, does your HEI use to inform and consult with staff? How effective are they from a governing body perspective?
- How would you characterise relationships between management and the trades unions in your HEI? Is the governing body content with the position?
- Is your governing body content with the arrangements for determining salaries? If not, what changes would it like to see, and why?

A GOVERNOR'S DILEMMA 7:

When the governing body of your institution approved a new pay and grading structure as part of the implementation of the Framework Agreement you were assured that the additional costs would be offset by improved efficiency and productivity because the agreement delivered 'added value'. Several years on, the institution's pay bill is going through the roof and you don't seem to have the evidence of improved productivity. A number of governors, including yourself, are beginning to get frustrated by this. What, if anything, can you do about the situation?

8. DISCIPLINE, DISMISSAL AND GRIEVANCES

- 8.1 Why do governors need to know anything about staff discipline, dismissal and grievances? After all, it would be unusual if they were considered by a private company board. There are two main answers: first, governors need to be sure that their HEI is complying with the extensive regulation of these areas, as penalties for non-compliance can be high including to institutional reputation. Second, in some pre-1992 universities governors may be directly involved in handling such cases, and need to be clear about their position.
- 8.2 Of course, the handling of staff disciplinary, dismissal and grievance matters are generally management responsibilities. However, in most HEIs the governing body and/or individual governors have a role to play in the final stages of the internal procedures, and this chapter examines some of the practical issues that arise.

Statutory dispute resolution procedures

- 8.3 The Employment Act 2002 (Dispute Resolution) Regulations 2004⁴² introduced a prescriptive minimum standard for dealing with disciplinary and grievance matters in the workplace. The key features of the Regulations are:
- A three step disciplinary, dismissal and grievance procedure (a written complaint, formal meeting and right of appeal) which must be followed in the majority of cases⁴³.
 - Failure to follow the procedures prior to dismissal automatically makes the dismissal unfair and the employer liable to an increase in compensation awarded of 10-50%.
 - In general, employees are prevented from bringing an employment tribunal claim in respect of a complaint unless they have first raised it with the employer via the internal grievance procedure.
- 8.4 The Regulations have led to an increase in the complexity of employment tribunal cases; the result for most employers - including HEIs - has been to divert significant resources in terms of time spent on investigating unnecessarily complex grievances and money spent on increased legal costs. A number of governing bodies have expressed concern about this. Following an independent review, the statutory dispute resolution procedures are to be repealed by a further Employment Act, probably in April 2009, but in the meantime employers must comply with the current framework.

The Acas Code of Practice on Discipline and Grievance⁴⁴

- 8.5 With the abolition of the statutory discipline and grievance procedures, HEIs will be expected to comply with a revised Acas Code of Practice on Discipline and Grievance. This is not legally binding, so failure to follow the recommended dismissal procedure will not render a dismissal automatically unfair, but employment tribunals can take into account an employer's failure to follow the Code's provisions and increase a compensatory award by up to 25%. The main features of the (draft) Code of Practice are:

⁴² IN Northern Ireland the equivalent legislation was The Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004

⁴³ A simpler and modified grievance procedure that involves no meetings or right of appeal is available to deal with grievances raised after an individual has left the employer, if both sides agree to its use

⁴⁴ At the time of writing, publication of the final version of a revised ACAS Code of Practice on Discipline and Grievance is awaited

- *Principles:* Issues should be dealt with promptly and consistently with appropriate investigation. Employees should have the opportunity to put their case before a decision is made, and have the right to be accompanied at meetings. Employees who have brought a grievance or who are subject to disciplinary action should be allowed to appeal.
- *Discipline:* If there is a case to answer, the employee must be informed of the allegations in writing and a disciplinary meeting held promptly. Warnings should set out the change in behaviour or improvement in performance required and the consequences of further misconduct.
- *Grievance:* The employee should inform the employer of their grievance, preferably in writing, and there should then be a formal meeting at which the employee can explain their grievance and how they would like it to be resolved. Decisions on action following the meeting should be communicated to the employee without undue delay.

Public interest disclosure (whistleblowing)

- 8.6 A number of statutes and regulations cover circumstances where an employee raises concerns regarding possible danger or illegality, but the main piece of legislation in this area is the Public Interest Disclosure Act 1998⁴⁵. Under this, it is automatically unfair to dismiss an employee for making a disclosure in good faith, and there is no limit on the compensation that a tribunal may award. In order for the disclosure to be protected, the whistleblower must have a genuine belief in the information being disclosed, not disclose the information for personal gain and demonstrate that it was reasonable to make the disclosure.
- 8.7 It is beneficial for all HEIs to have a clearly communicated policy on whistleblowing, and your governing body should have approved one. This should promote a high standard of behaviour, and an effective internal procedure for responding to issues about standards can forestall damaging public disclosures. The CUC has produced guidance on whistleblowing, which appears as Annex A4 to its Guide for Members of Higher Education Governing Bodies⁴⁶.

The Model Statute

- 8.8 In the majority of the pre-1992 HEIs, the dismissal of academic staff and disciplinary and grievance matters affecting these staff, are governed by the Model Statute. This complex internal legislation was imposed by the Education Reform Act 1988, and was designed to ensure that all universities were in a position to dismiss academic staff by reason of redundancy as well as for misconduct or incapacity. The Model Statute provisions are cumbersome and ambiguous, and in some instances do not comply with employment law. The Privy Council has approved a Revised Model Statute which addresses some of these shortcomings. However, it is not a perfect solution and take up has been low. Also, interest has been growing in a much more radical approach where Privy Council approval has been secured for much simplified charter and statutes⁴⁷.

⁴⁵ In Northern Ireland the relevant legislation was the Public Interest Disclosure (Northern Ireland) Order, 1998

⁴⁶ CUC, (2009), Guide for Members of Higher Education Governing Bodies in the UK (revised edition), available from www.shef.ac.uk/cuc

⁴⁷ More information about the Model Statute and its revision is included in the HR section of the HE governance web site at www.lfhe.ac.uk/governance

- 8.9 The Model Statute in pre-1992 universities makes the governing body responsible for approving any policy of making redundancies amongst academic staff. It must appoint a redundancy committee to select and recommend to the governing body the individuals to be made redundant. In these universities, the governing body is also responsible for appointment of individuals, tribunals or committees to consider disciplinary charges which could lead to the dismissal of academic staff, and to hear appeals and grievances from academic staff.
- 8.10 The Model Statute does not apply in post-1992 HEIs. In these institutions, the articles of government require the governing body to put in place disciplinary, dismissal and grievance procedures for all staff, and these are either implied or explicitly incorporated into contracts of employment. In most post-1992 HEIs staff have the right to appeal to the governing body against dismissal for any reason.

The role of independent governors in grievance and discipline

- 8.11 Under the Model Statute of pre-1992 universities, independent governors are called upon to be members of redundancy committees, grievance committees, tribunals to consider dismissals on the grounds of medical incapacity, and appeals committees. In post-1992 HEIs, the involvement of independent governors is usually at the appeals stage. In larger institutions, a member of the HR department who has not previously been involved in the case will often act as secretary and provide support and advice. However, independent governors may be called upon to be more directly involved with the investigation of grievances or disciplinary matters involving senior staff.
- 8.12 Cases which have progressed to the point of involving independent governors are invariably complex and, particularly with staff grievances, may have become acrimonious. Adherence to approved procedure is important so as to minimise the risk of a successful legal challenge on the basis of a procedural irregularity. If there are good reasons for varying the approved procedure, then the agreement of all parties should be secured in advance.
- 8.13 In smaller HEIs with a limited administrative infrastructure, access to professional HR support may not be possible, and the institution should consider engaging professional HR advice on a consultancy basis. This can provide a degree of pragmatism and a more rounded risk assessment than may be the case if only legal advice is available. When legal advice is sought, professional legal privilege (which protects the confidentiality of the advice) is preserved when the legal adviser communicates directly with the investigator or with the committee considering the matter, rather than through a third party (such as the HR department). However, the procedures of some institutions stipulate that a written record of legal briefings provided to the appeals committee will be released to the appellant on the conclusion of the internal proceedings⁴⁸.

"It's really not clear to me why governors get involved in staff appeals and all the other stuff. In fact, in some ways it makes life more difficult for the governing body if one of its members has been involved at too early a stage"

LAY GOVERNOR AND MEMBER OF A STAFFING COMMITTEE

⁴⁸ A possible framework for considering a grievance or a disciplinary matter is provided in the HR section of the higher education governance website at www.lfhe.ac.uk/governance

Self-challenge questions

- Has your governing body received assurance that the disciplinary and grievance procedures at your HEI comply with the provisions of the (draft) Acas Code of Practice on Discipline and Grievance?
- Has your governing body approved a policy on whistleblowing, and are there effective internal procedures for dealing with disclosures about standards and behaviour?

A GOVERNOR'S DILEMMA 8:

The disciplinary procedure in your HEI specifies that an independent governor should hear appeals from members of staff who have been disciplined or dismissed. The appellant in a case you are dealing with (a member of clerical staff in the finance office) has claimed that he was disciplined because he had evidence of wrongdoing by his line manager. How do you think you should proceed?

9. OCCUPATIONAL HEALTH, SAFETY AND WELL-BEING

9.1 Considering the range of hazards arising from research and teaching to be found in the majority of HEIs, the sector has an excellent safety record. Overall, the sector reported far fewer accidents/illnesses than the UK average⁴⁹. However, Ucea data suggests that up to 25% of all sickness could be attributed to occupational induced accidents and illnesses⁵⁰. If this is correct, then there is ample scope for improvements, and a good case for HEIs to look carefully at their own practice.

The legal context

9.2 Beyond the extensive legislative framework governing health and safety at work, there is a fundamental common law obligation on HEIs as employers to protect their employees - the "duty of care". A clause is also implied in every contract of employment that the employer will take care of their employees' health and safety. This obligation includes providing: a safe place of work; a safe system of work; adequate plant and equipment; and recruiting competent and safety conscious staff.

9.3 The main statutory health and safety legislation is the Health and Safety at Work Act 1974 (HSWA)⁵¹. Applicable to every workplace, it requires HEIs as employers to do everything reasonably practicable to ensure a safe and healthy workplace. The Health and Safety Executive (HSE) is responsible for deciding upon and implementing national health and safety policy⁵². It has wide ranging powers to investigate serious accidents in the workplace and to enforce statutory duties. The legislative framework is intended to promote a proactive approach to health and safety - employers are required to assess the risks to the health and safety of their employees and others affected by their activities and take action to eliminate or at least reduce any identified risks.

9.4 Employers have a legal duty to consult with their workforces on health and safety - and have obligations towards safety representatives appointed by recognised trades unions. The HSE's Higher and Further Education Advisory Committee (HIFEAC) recommends adopting the Safety Representatives' Charter⁵³ as part of an HEI's health and safety policy.

9.5 The majority of the Corporate Manslaughter and Corporate Homicide Act 2007 provisions came into force in April 2008, although it will be several years before they are fully implemented. Under the Act, an HEI can be prosecuted where there has been a gross failure by its senior managers to take reasonable care of workers' safety and/or the public, and this has resulted in a person's death. Penalties are fines (without limit on the amount) and remedial orders requiring the failings to be addressed. The Act does not impose any new health and safety requirements, but governing bodies should review relevant practices to ensure that there are no serious shortcomings in the management of health and safety risks.

⁴⁹ Ucea Health and Safety Annual Report 2007, Ucea, 2007

⁵⁰ *ibid*

⁵¹ The Health and Safety at Work (Northern Ireland) Order 1978 replicates the Health and Safety at Work Act 1974

⁵² The Health and Safety Commission (HSC) and Health and Safety Executive were merged in 2008 and the HSE became the single national regulatory body promoting better health and safety at work

⁵³ Safety Representatives' Charter, HSC, 2003 www.hse.gov.uk/aboutus/hsc/iacs/hifeac/rep charter.pdf

Responsibilities of the governing body for health and safety

- 9.6 The CUC Guide usefully summarises these as: "the governing body carries ultimate responsibility for the health and safety of employees, students and other individuals while they are on the institution's premises and in other places where they may be affected by its operations..." In practice, management responsibility for health and safety is usually delegated to a lead health and safety professional, but the governing body's duties include⁵⁴:
- Ensuring that the HEI has a written statement of policy on health and safety and that the policy is brought to the attention of staff.
 - Putting in place arrangements for the implementation of the policy, including the allocation of management responsibility for health and safety and the provision of advice and relevant training.
 - Ensuring that there are mechanisms for consultation with staff about health and safety policy and arrangements, including the appointment of safety representatives by recognised trades unions.
 - Setting health and safety standards and monitoring the institution's activities to ensure that the standards are met.

Occupational health, employee well-being and stress

- 9.7 Occupational health was traditionally viewed as a reactive service; however, in recent years, it has been used in a much more proactive way. Increasingly, organisations are adopting a 'well-being' approach to occupational health which focuses on preventing staff illness in the first place. This is underpinned by the recognition that preventing absence due to ill health is cost effective, and improving the working experience makes a positive contribution to the intangible part of the reward package.
- 9.8 An important related issue is stress, and the 2007 Chartered Institute of Personnel and Development (CIPD) survey of employee absence revealed that stress was the most common reason for long term absence (that is, longer than four weeks) amongst non-manual workers, particularly in the public sector. In 2006-07, a total of 13.8 million working days were lost to work related stress, depression and anxiety⁵⁵. There are powerful financial and operational reasons to reduce the amount of unhealthy stress to which staff are exposed and to provide support for those whose mental and/or physical health has been affected by stress (for example, by providing access to counselling on a confidential, self referral basis). In addition, there are the legal duties that employers owe to their employees in providing a safe working environment.
- 9.9 The landmark case for governors is that of Walker v Northumberland County Council [1995], where the employer was held liable not for Mr Walker's first nervous breakdown, which was unforeseeable, but for his second, which was foreseeable and which would not have occurred if the employer had undertaken a risk assessment and provided support. The total financial costs to the council amounted to almost £400,000.

⁵⁴ There is useful guidance on health and safety at work for directors, governors, trustees and equivalent, produced jointly by the Institute of Directors and the former HSC: see HSE, (2007), *Leading Health and Safety at Work*

⁵⁵ HSE, (2007), *Self-Reported Work Related Illness Survey (SWI06/07)*

9.10 The HSE has suggested that stress is likely to become the most dangerous risk to businesses in the short to medium term, and its data demonstrates that education is one of five sectors reporting the highest incidence of work related stress. The CIPD and HSE have jointly produced guidance on line management behaviour and stress, including a competency framework for developing the skills necessary to limit stress at work⁵⁶.

Self-challenge questions

- Does your governing body ensure appropriate oversight of health and safety at your institution?
- What information does your governing body receive about health and safety, and is it fit for purpose in the governing body's oversight role?
- Has your governing body approved targets for improving health and safety, and is performance benchmarked against other organisations?

A GOVERNOR'S DILEMMA 9:

As a relatively new member of the governing body, you've been shocked at the levels of sickness absence at your HEI and particularly at the amount that is reported to be due to work related stress. You've discussed this informally with one or two fellow governors but no one else seems over concerned - they seem to feel that the stress policy demonstrates that the institution takes the matter seriously. The newly appointed HR director is keen to promote a 'well-being' approach to managing stress, but hasn't properly explained to you what that means, and is reluctant to carry out a stress audit. You feel that this whole area is a significant risk but that yours is a lone voice. What action, if any, do you think you should take?

⁵⁶ CIPD, (2008), Line Management Behaviour and Stress - Updated Guidance for Line Managers

ANNEX A: SOME KEY REFERENCES

There is a large amount written about HR in higher education, but some of the following are the most useful references for governors.

- a) The UUK website has several useful publications on specific aspects of HR. In addition to the guidance on appointing senior managers referred to in Chapter 6 (see <http://bookshop.universitiesuk.ac.uk/show/Default.aspx?category=7>) there are two publications relating to pensions: *Strategic enquiry into the pension arrangements for the higher education sector* and *Pension provision in the higher education sector: initial report* (see <http://bookshop.universitiesuk.ac.uk/show/?category=2>).
- b) The website of the Universities and Colleges Employers' Association (Ucea) has useful information on pay structures, national bargaining, joint working and health and safety: www.ucea.ac.uk. To utilise fully the site you may need to liaise with your institution's HR director as some of the site is not open access.
- c) The Hefce web site has information on various aspects of HR, which can be found at www.hefce.ac.uk/lgm/hr/. In particular, see the Higher Education Workforce Framework (at www.hefce.ac.uk/lgm/hr/frame/) which includes trend information for the sector as a whole and information about HR projects supported by the LGM fund (at www.hefce.ac.uk/lgm/build/lgmfund/projects/showcats.asp?cat=7) Much of the information provided by Hefce is also of relevance to HEIs outside England.
- d) The other funding bodies also produce information on HR relevant to their own jurisdictions which can be found at: www.sfc.ac.uk for Scotland; www.hefcw.ac.uk for Wales; www.delni.gov.uk for Northern Ireland).
- e) *Hall A, (2003), Managing People, Open University Press, 2003* is a practical guide to people management in HEIs. Some of the information may be too detailed for governors. However, readers with a particular interest in performance management will find the chapter on this topic useful.
- f) The website of the Equality Challenge Unit (ECU) has a wealth of information guidance on all aspects of equality and diversity in higher education: www.ecu.ac.uk. In particular, see *Equality and Diversity: Responsibilities and Challenges*, a guide for members of governing bodies, by following the link from the Joint Publications page. Other useful sources of information about equality in HE are: the Athena SWAN Charter (www.athenaswan.org.uk/html/athena-swan), launched in 2005 to recognise excellence in the employment of women in science, engineering and technology and the Higher Education Equal Opportunities Network (www.heeon.ac.uk) which organises an annual conference and also maintains a mail base. During 2009 the ECU will be publishing a study on governing bodies and diversity.
- g) The Association of Commonwealth Universities Human Resource Management Programme facilitates the sharing of good practice between 500 HEIs throughout the Commonwealth. See the website at www.acu.ac.uk/hrm

ANNEX B: EQUALITY LEGISLATION AND DEFINITIONS

The following provides an overview of equality legislation as it affects HEIs and their governing bodies. It does not duplicate information provided in Chapter 5, for example, in relation to the positive duties on HEIs and governing bodies to promote equality.

The direct effect of European legislation in the public sector

Where EU law has direct effect this will take precedence over domestic law and individuals are able to rely on EU law where domestic law does not provide a remedy. Article 141 of the EC Treaty (in relation to equal pay) has direct effect and so do European Directives - but the latter only in relation to public sector employees. Thus, whilst private sector employers must simply comply with the UK legislation that gives effect to European directives and are only directly vulnerable in relation to EU law on equal pay, individuals bringing a claim against an "emanation of the state" can rely on the provisions of any EU Directives where those provisions are: sufficiently clear and precise; unconditional and unqualified; and not subject to further implementing measures⁵⁷. Whilst the statutory jurisdiction of employment tribunals is limited to UK legislation, pleading a case under domestic legislation as well as European legislation gets round these jurisdictional issues. For example, if the UK provisions in relation to a fixed retirement age are deemed to be incompatible with the relevant Directive, public sector employees will be able to challenge their employers on the basis of the Directive, not the UK Regulations.

Sex

Higher education is becoming an increasingly feminised sector - projections based on 2005/2006 HESA data indicate that women will outnumber men by 2009 and form the majority of all academic staff by 2020⁵⁸. However, women are, as yet, under-represented in promoted grades, with parity between the sexes in the professoriate being rare⁵⁹.

The first relevant legislation in the gender arena was the Equal Pay Act 1970. However, almost 40 years on, pay parity between men and women undertaking the same work has still not been achieved - on average, in 2006, women earned 17% less per hour than men for full time work⁶⁰. Whilst the gender pay gap for teaching staff in further education is 11%, female full time lecturers in HEIs earned, on average, 17.2% less than their male counterparts⁶¹. One of the main objectives of the very significant changes in pay and grading structures used by HEIs that have taken place in recent years was to eliminate the historical anomalies that are responsible for much of the gender pay gap.

Under the Sex Discrimination Act 1975, discrimination on the grounds of sex or marital status is illegal. Direct and indirect discrimination are covered, as are victimisation and harassment. Any unfavourable treatment on grounds related to pregnancy, childbirth or maternity leave is unlawful and likely to constitute sex discrimination. Transsexuals and those seeking gender reassignment are covered by the sex discrimination legislation. The ECU has produced guidance⁶² on the legal and practical issues that arise when an institution has a member of staff or a student undergoing gender reassignment.

⁵⁷ www.equalityhumanrights.com/en/foradvisers/eoclaws/eoclawsenglandwales/legalframeworkandprocedure/theeffectofeuropeanlaw/pages/interpretinguklawtocomplywiththeclaw.aspx EHRC, 2006

⁵⁸ Research conducted by Emeritus Professor John Pratt, reported in the THES, 27 March 2008

⁵⁹ More information about this apparent glass ceiling and initiatives to tackle it is included in the section on diversity and equality in the HE governance web site at www.lfhe.ac.uk/governance

⁶⁰ Facts about Women and Men in Great Britain 2006, EOC

⁶¹ Office of National Statistics, 2007

⁶² Trans staff and students in higher education, ECU, 2008

Race

Under the Race Relations Act 1976⁶³, it is illegal to discriminate against someone, either directly or indirectly, on the grounds of their race, nationality, colour or ethnic, racial or national origin. The act also outlaws victimisation and harassment on the same grounds.

Disability

Although disability is very common - almost 20% of people of working age are disabled - people with disabilities are far less likely to be in employment, as only half of disabled people of working age are in a job, compared with 80% of people without a disability⁶⁴. Under the Disability Discrimination Act 1995 (DDA), it is unlawful for an employer (or prospective employer) to discriminate against someone, either directly or indirectly, on the grounds of their disability. The act also outlaws victimisation and harassment on the same grounds. Up to date guidance specific to the higher education sector has been produced by the former Disability Rights Commission⁶⁵.

Age

Although there is a common perception that it is older workers who are typically discriminated against, research by Eversheds⁶⁶ found that 60% of 16 - 24 years olds who were surveyed felt that they had been discriminated against because of their youth and lack of experience. Both direct and indirect discrimination on the grounds of age are illegal and workers of all ages are protected. However, discrimination is allowable if the employer can demonstrate it is a "proportionate means of achieving a legitimate aim".

There is extensive guidance for employers to help them comply with both letter and spirit of the legislation. For example, the TUC and the CIPD have jointly produced a guide to good employment practice in relation to age⁶⁷, and the ECU in partnership with the Ucea has produced a series of guidance notes⁶⁸ covering all aspects of employment.

Religion and belief

The UK has a very high level of religious diversity, and a significant proportion of the population claim a religious affiliation. However, except for Northern Ireland (where legislation prohibiting discrimination on the grounds of religious belief has been in place since the 1970s), comprehensive protection against unfavourable treatment in the workplace on these grounds has only existed since 2003. The legislation, which applies to both staff and students, provides protection for all religions and beliefs with a clear structure and belief system and philosophical beliefs - thereby extending protection to agnostics and atheists. However, whether a particular belief system is afforded protection is determined by case law. The ECU guidance, *Employing People in HE: Religion and Belief*⁶⁹, includes many practical examples of the types of issues typically encountered by HEIs in this area and suggests ways to resolve them.

⁶³ As amended by the Race Relations Act 1976 (Amendment) Regulations 2003

⁶⁴ Factsheet on Disability and Employment, CIPD, December 2007

⁶⁵ Understanding the Disability Discrimination Act – a guide for universities, colleges and adult community learning providers in Great Britain, DRC, 2007

⁶⁶ A Working Wonder, Eversheds, 2004

⁶⁷ Managing age, a guide to good employment practice, TUC and CIPD, 2007

⁶⁸ See <http://www.ecu.ac.uk/guidance/age/jointworkinggroup.htm>

⁶⁹ ECU, 2005

Sexual orientation

The term 'sexual orientation' refers to an individual's orientation to members of the same sex, the opposite sex or both sexes, and therefore refers to heterosexuals as well as lesbian, gay and bisexual people. The legislation introduced in 2003 is intended to provide privacy, respect and equality for people in the workplace regardless of their sexual orientation. It applies to the orientations listed above, but not to sexual preferences or practices (for example, sadomasochism or paedophilia). Discrimination or harassment on the grounds of sexual orientation is prohibited, even when the unfavourable treatment is based on a perception of sexual orientation rather than actual sexual orientation. This means that a man who is denied promotion because his manager perceives him to be gay would be able to bring a claim under the regulations even if he were, in fact, heterosexual. The ECU has produced practical guidance in relation to sexual orientation in the workplace⁷⁰ and also on the implications of the Civil Partnership Act⁷¹.

Equality definitions

There are a range of terms common to equalities legislation which governors are likely to come across:

Direct discrimination occurs when a person is treated less favourably because of their sex, race, disability, age, religion or belief or sexual orientation than a person not sharing that characteristic. For example, if an employer refused to appoint a woman of childbearing age in order to avoid the potential costs of maternity leave, they would be guilty of direct discrimination on the basis of both sex and age.

Indirect discrimination occurs when an unjustifiable condition or requirement is applied equally to all persons, but which has the effect of disadvantaging people of a particular sex, race, religious belief, sexual orientation or those with disabilities because a smaller proportion of persons with that characteristic are able to comply. For example, (i) specifying an arbitrary number of years experience as an essential requirement for a post may disproportionately disadvantage younger applicants and women, (ii) a too rigid dress code may disadvantage those whose religious practices require them to adopt particular forms of dress.

Harassment occurs when a person is subjected to unwanted treatment that creates an intimidating, hostile or degrading atmosphere because of their sex, race, disability, age, religion or belief or sexual orientation. Examples would include:

- Unwelcome sexual advances (physical or verbal).
- Blocking a person's access to promotion or training.
- Name-calling, jokes or graffiti.
- Unreasonable work expectations and/or a refusal to accept the limitations placed on a person's performance by their disability.

Victimisation is distinct from harassment in the legislation. It occurs when someone is subjected to unfavourable treatment because they have (or it is believed that they have or intend to have):

⁷⁰ Employing People in Higher Education: Sexual Orientation, ECU, 2004

⁷¹ The Civil Partnership Act, ECU, 2005

- Brought proceedings under a relevant aspect of discrimination legislation.
- Given evidence or information in connection with proceedings brought under a relevant aspect of discrimination legislation.
- Otherwise acted under the relevant discrimination legislation.
- Alleged (in good faith) that there has been a contravention of a relevant aspect of discrimination legislation.

An example of victimisation would be the unwarranted blocking of a woman's promotion because she had submitted an equal pay questionnaire.

A shorthand term that is often used to refer to minority racial groups is Black Minority Ethnic (*BME*), and a shorthand term that is often used to refer to sexual orientations other than heterosexual is Lesbian, Gay, Bisexual and Transsexual (*LGBT*).

Whilst positive discrimination is unlawful (except in some circumstances in relation to disability, see Chapter 5), the law does permit certain types of *positive action* in order to redress gender or racial imbalances in the workplace. For example, if women or BME individuals have been significantly under-represented in a particular type of work in the preceding 12 months, an employer is permitted to encourage applications from the under-represented group.

In very limited circumstances, an employer may be able to demonstrate that there is a *Genuine occupational qualification* (GOQ) for employing a man or a woman, or a member of a particular racial group, in a specific job. In general, a GOQ can be demonstrated where the primary purpose of the role is to provide individual services to promote welfare and education or for reasons of decency and privacy.

Employers are liable for the actions of employees which are carried out in the course of employment (*vicarious liability*) unless the employer can demonstrate that it took adequate measures to prevent the actions (by way of awareness raising, specific training, relevant and properly publicised policies and so on).

ANNEX C: SUGGESTED ANSWERS TO GOVERNORS' DILEMMAS

Dilemma 1 (page 9)

In order to protect the HEIs negotiating position, it's sensible to restrict the number of people who know the details of the HR director's negotiating remit. However, the governing body shouldn't be asked to approve an agreement in ignorance of the potential implications of approval (or failure to approve). Ask the chair of the governing body if it would be possible to invite the HR director to address an informal and confidential meeting of independent governors (before the agreement is presented for ratification), to provide more information, particularly on the likely impact both if the agreement is approved and if it isn't. Also, you could ask the chair (or the HR director) about the process of agreeing, approving and reviewing the negotiating remit without needing to know the details. For significant issues affecting the whole workforce, the governing body should expect the head of institution and the director of finance to have approved the remit.

Dilemma 2 (page 13)

With the support of the governing body clerk, look at your HEI's risk register - major future staffing challenges should have been identified, together with the action proposed to mitigate the risks. If the risks have been identified then it's possible that the governing body is simply uninterested in HR and that, behind the scenes, the HR director has everything under control. However, if the risks haven't been identified then (in the absence of effective oversight) the HEI could be sleepwalking into major difficulties. Ask the chair of the governing body about the process for monitoring progress towards achieving the targets in the HR strategy and the timetable for a review of the strategy itself. If there is a review process, ask to see the minutes of the review group's meetings. If there isn't a process in place, you could propose to the chair that a small review group (perhaps involving an independent governor) be set up to review progress and report to the governing body.

Dilemma 3 (page 19)

Check that the governing body is receiving the 'soft' HR information that will give an indication of staff engagement, for example, results from staff attitude surveys, staff grievances, employment tribunal claims and so on. If the HEI is going through a period of significant change, ask the HR director and other senior managers about how staff are responding to it in different areas - if they don't know or suggest that everything is fine, press for more details. If you are member of other committees, use these as an opportunity to talk to people in the institution about their perceptions of staff morale. You might want to suggest to the chair of the governing body that the HR director be invited to make a presentation to the board on the key HR issues facing the institution, and use this as a vehicle for a more substantive discussion.

Dilemma 4 (page 24)

Moving from a purely developmental appraisal scheme to one including performance targets has been a significant challenge for many HEIs, let alone moving to a fully fledged performance management system, and requires effective project management. You should first check the institution's HR strategy to see whether the implementation of a performance management scheme was included as a specific objective. If it wasn't, consider proposing that it is when the HR strategy is next reviewed. If it was, ask the HR director (copying your request to the governing body clerk) for (i) details of the project plan for implementation, including timescales and key milestones, and (ii) a list of the other HR project work currently underway and anticipated. In talking to the HR director and other senior managers, try to get a sense of whether there is common agreement about the relative weighting of a performance management system and the other priorities. If this is lacking, the HR director may be trying to balance conflicting priorities without a clear steer, and this will be particularly difficult if he or she isn't a member of the senior management group.

Dilemma 5 (page 29)

Look at the HEI's race equality policy and action plan and, in particular, at the targets that have been agreed. If they seem lacking in ambition, ask the clerk or secretary to the governing body to find out how they were arrived at. The institution's annual equality report will include details of the ethnic breakdown of job applicants and appointees - ask about any anomalies. Positive discrimination on the grounds of race is illegal but it is appropriate to encourage applications from ethnic minority groups if they are under-represented in that job type, so also ask about any positive action that's been taken.

Dilemma 6 (page 35)

receive reports of the committee's decisions and may have no right to know the details of the circumstances that were taken into account. However, ask to see a copy of the HEI's remuneration policy - this will include information about the internal and external data sources that the remuneration committee draws on when considering the VC's salary, how performance will be measured and the components of pay. If the institution has decided that its remuneration policy will be, for example, to pay in the upper quartile of institutions in its mission group, then this too will be mentioned. If you're still concerned, ask the chair of the governing body if it would be possible to have a discussion about the remuneration policy before the remuneration committee meets again.

Dilemma 7 (page 40)

Because some cost increases will be due to factors other than implementing the Framework Agreement, it won't be easy to disaggregate the figures, but the finance director should be able to assist. Also, savings from downgraded posts won't occur until after any period of salary protection has been completed - again, the finance director will be able to advise. Ask the director of HR (copying your request to the governing body clerk) for an update on those aspects of the agreement expected to deliver improved efficiency and productivity (for example, reduced premiums for overtime or evening/night work; revised shift patterns to reduce shift work). It perhaps took longer to implement the changes than originally anticipated and savings have been slower to accrue, or it may be that further productivity improvement must be sought.

Dilemma 8 (page 44)

The information that the appellant has may be covered by the Public Interest Disclosure Act. If the information was disclosed during the disciplinary proceedings, it should have been dealt with in accordance with the HEI's public interest disclosure policy before a decision on the disciplinary matter was reached. If this didn't happen, with the support of the clerk you will need to look carefully at the basis for the decision to impose a disciplinary sanction to ensure that there was no unfairness. If the information was not disclosed in the earlier proceedings, you should adjourn the appeal until after it has been dealt with under the PID process. The implied duty of trust and confidence in the contract of employment means that the appellant must disclose any information of wrongdoing or risk the consequences.

Dilemma 9 (page 47)

Meet the HR director and find out about the 'well-being' approach, and about his/her reluctance to conduct a stress audit. If health and safety is separate from HR, via the clerk or director of HR encourage the departments to work together on both occupational health and the management of stress. Look at the risk register and press for occupational health risks to be properly reflected. Ditto for the HR strategy. Suggest to the clerk or governing body chair that mental health and the management of stress would be a useful governor development topic.

ABOUT THE AUTHOR:

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