

Opinion

1. I am asked to advise whether the Royal College of General Practitioners (**the College**) has compliant and effective governance, and to identify areas in which its governance can be improved. In addition, I am asked to deal with some specific questions which are addressed below.

Scope of this advice

2. I have considered the documents embodying the College's constitution, and I have outlined my main provisional conclusion at a meeting with some of the College's leading members. I have not carried out any kind of formal consultation with different categories of stakeholders, such as might form part of a full-scale governance review.
3. Because my review has been conducted at a general level, I have so far concentrated on what I see as the main overarching point.

The constitution of the College

4. The College is incorporated by Royal Charter. Its principal governing documents are:
 - (1) its Charter dated 23 October 1972, as largely clarified and restated by a Supplemental Charter dated 27 February 2003 (**the Supplemental Charter**), which in turn was amended in 2008 and 2012. The Charters may be amended by the College in general meeting, subject to the approval of the Privy Council;
 - (2) Ordinances, which may be amended by the College in general meeting, subject to the approval of the Privy Council;
 - (3) Byelaws made by the Trustee Board;
 - (4) Standing Orders made by the Council;

- (5) Regulations of the Trustee Board;
5. The principal bodies constituted by these documents are:
- (1) the Trustee Board, which is to comprise eight members of Council and four lay persons;
 - (2) the Council, which is to comprise no more than 75 persons and to meet no more than five times a year;
 - (3) the General Meeting.
6. The President is appointed by the General Meeting following an election by all members of the College. The Officers of the Council are the Chair and Vice-Chairs of Council, the Hon. Secretary and the Hon. Treasurer, who are all elected by the Council. The Chair of Council, the Hon. Secretary and the Hon. Treasurer are ex officio members of the Board of Trustees. The Council also elects the Chair of the Trustee Board and the remaining four Council members of the Trustee Board, and the four lay members of the Trustee Board (on the recommendation of the Nominations Sub-Committee of the Trustee Board).
7. The College's constitutional documents are well-drafted, but they are somewhat unwieldy.

The College as a charity

8. The Supplemental Charter states that the object for which the Council is established is:
- “ ... to encourage foster and maintain the highest possible standards in general medical practice and for that purpose to have or join with others in taking any steps consistent with the charitable nature of that object which may assist towards the attainment of that object.”

That object is a charitable purpose, and the College is a registered charity.

9. The consequences of the College being a charity include:

- (1) It enjoys various legal and fiscal privileges.
- (2) It may only advance its object for the public benefit. It may confer benefits on individuals only where to do so is incidental to the advancement of its object for the public benefit. Therefore, membership of the College is to be viewed as a means of furthering the College's charitable object, and only incidentally as a personal benefit. This distinguishes the College from bodies such as trades unions, which exist to further the interests of their members.
- (3) Its assets cannot become the property of its members: if it were to be dissolved, its assets would have to be transferred to another entity with charitable objects.
- (4) The members of the College and those who hold offices in the College are fiduciaries in respect of the voting and other rights they have under the constitution of the College. This means that they must exercise their voting and other rights in the way which they decide, in good faith, would be most likely to further the College's object¹. I return to this point below.
- (5) The College is subject to the regulatory regime for charities enacted in the Charities Act 2011. One aspect of that regime is that certain functions are conferred on the "charity trustees". This term means "the persons having the general control and management of the administration of a charity"². The College regards the members of the Trustee Board as its charity trustees: they alone are recorded as such in the register of charities maintained by the Charity Commission.

¹ Children's Investment Fund Foundation v Attorney General [2020] UKSC 33; [2022] AC 155 at [218]
² Charities Act 2011 s 177.

The Trustee Board and the Council

(1) The current arrangement

10. The most important topic arising from a consideration of the College's constitutional documents is the allocation made by the Supplemental Charter of responsibilities between the Trustee Board and the Council.
11. Broadly, the Trustee Board is responsible for the College's finances and administration, and the Council is responsible for "the direction of the College on all matters which are not the responsibility of the Trustee Board", including "the overall strategic policy direction and leadership of the College in leading the profession.": Articles (15A) and (16). The Supplemental Charter does not state whether the Trustee Board or the Council is subordinate to the other. They appear to be intended to be of equal standing, with separate areas of responsibility.
12. The Supplemental Charter empowers the Trustee Board and the Council to "jointly make arrangements for resolving in relation to any particular matter whether it falls within the functions of the Trustee Board or the Council": Article (16A). The Trustee Board Regulations contain, at Appendix 3, the arrangements the Trustee Board and the Council have made: these consist of a paper intitled "Towards a practical, effective and robust means of joint working in the new College governance structure - a discussion paper" (**the Discussion Paper**).
13. The Discussion Paper treats the Trustee Board as accountable to, and hence, in that sense, subordinate to, the Council. Thus, for example para 3.4 states "The Trustee Board is accountable to Council". See too paras 1.3.
14. The Discussion Paper stresses that the key to effective co-operation between the Trustee Board and the Council is transparency and mutual trust; but the way in which the application of these concepts is explained in the paper seems to me to emphasise the potential for conflict between the two bodies.

(2) The conventional view of best governance practice

15. The conventional view of best governance practice is that a charity should be governed by a board of relatively small size, which has responsibility for all aspects of the charity's operations, but which delegates functions to individuals or committees as appropriate. This approach is illustrated by the Charity Governance Code (2020), which is guidance produced by a steering group whose members have expertise in charity governance³. Section 4 of that code, headed "Decision making, risk and control", provides in part:

"Principle

The board makes sure that its decision-making processes are informed, rigorous and timely, and that effective delegation, control and risk-assessment, and management systems are set up and monitored.

Rationale

The board is ultimately responsible for the decisions and actions of the charity but it cannot and should not do everything. The board may be required by statute or the charity's governing document to make certain decisions but, beyond this, it needs to decide which other matters it will make decisions about and which it can and will delegate.

Trustees delegate authority but not ultimate responsibility, so the board needs to implement suitable financial and related controls and reporting arrangements to make sure it oversees these delegated matters. Trustees must also identify and assess risks and opportunities for the organisation and decide how best to deal with them, including assessing whether they are manageable or worth taking."

³ <https://www.charitygovernancecode.org/en/front-page>.

(3) Comments on the current arrangements

16. Measured against that guidance, the way in which the relationship between the Trustee Board and the Council is defined appears to me to be sub-optimal in the following respects:

- (1) The Supplemental Charter does not identify a body with ultimate responsibility for all aspects of the College's operations. The Trustee Board and the Council appear to have parallel areas of responsibility.
- (2) The Discussion Paper views the Trustee Board as accountable to the Council, but that is not a conclusion that one can reach from the terms of the Supplemental Charter.
- (3) The Discussion Paper, whilst doubtless of great value in 2012, when it was produced, is too discursive a document to perform the function envisaged by Article (15A) of the Supplemental Charter of resolving whether "any particular issue or matter falls within the functions of the Trustee Board or the Council".

(4) Identification of the "charity trustees"

17. As noted above, the Charities Act 2011 confers functions on the "charity trustees" of a charity, who are defined as "the persons the persons having the general control and management of the administration of a charity". In that definition, the phrase "the administration of a charity" refers not only to its financial administration but also to the conduct of its activities⁴. The Trustee Board does not appear to have the "general control and management" of the functions assigned to the Council, so it is arguable that the members of the Council, as well as of the Trustee Board, are the College's "charity trustees".

⁴ This is apparent from the Charities Act 2011 s 17 (5), whereby the charity trustees of a charity are required to have regard to public benefit guidance issued by the Charity Commission.

18. I consider it unlikely that the Charity Commission would seek to impose that view on the College. However, I suggest that it would be appropriate to address this point in any revision of the College's constitution.

(5) Remedial action

19. If there is a desire to tackle the aspects of the current arrangements which I have described as sub-optimal, the simplest course, conceptually, would be to amend the Supplemental Charter to make clear that the Trustee Board is ultimately responsible for all aspects of the affairs of the charity, and for the Trustee Board then to delegate certain functions to the Council. This process would enable the Discussion Paper to be retired as a constitutional document or replaced with something more focused.
20. As appears below, some constitutions of other medical Royal colleges provide, or envisage, that some of the powers of the Councils of those colleges may be derived otherwise than from delegation by the Trustee Board. The College is, therefore, not unique in having a constitution which confers powers directly on the Council, otherwise than by delegation from the Trustee Board; but it is not clear to me that there is any advantage in having a constitution in that form.

Other models

21. I am specifically asked to provide examples of other models or approaches used by similarly constituted bodies which might usefully be considered by the College. I have reviewed the constitutions of the ten other medical colleges incorporated by Royal Charter that are members of the Academy of Medical Royal Colleges, and I record some features of their constitutions in the appendix. My overall conclusions from this review are:

- (1) The constitutions of all of the colleges provide for boards of trustees, councils, and meetings of members.

- (2) In the case of one college (No. 4 in the appendix), the details available online are insufficient to enable any further analysis.
- (3) In five cases (Nos . 2, 3, 6, 7 and 10 in the appendix), the constitutions provide for the powers of the Council to be derived entirely from delegation by the Trustee Board.
- (4) In the case of the remaining four (Nos. 1, 5, 8 and 9 in the appendix), the constitutions provide, or envisage, that some of the powers of the Council may be derived otherwise than from delegation by the Trustee Board.
- (5) In the case of one of these four, (No. 1 in the appendix, the Royal College of Anaesthetists), the Ordinances give the Council “oversight of all clinical, professional and health policy matters”, otherwise than by delegation from the Trustee Board. This is the closest parallel I have seen to the College’s current arrangement.
- (6) In the case of another of these four (No 9 in the appendix, the Royal College of Radiologists), the Council is given an express function of providing “scrutiny of, and constructive challenge to, the Trustee Board”. This is the only articulation I have seen of the approach in the College’s Discussion Paper.
- (7) I have not found any example of a medical college incorporated by Royal Charter in which the college is described, even informally, as being “governed by the Trustee Board and the Council”, the phrase appearing on the College’s website.

Remuneration and expenses

22. I am asked to comment on aspects of the current arrangements for making payments to members of the Trustee Board and the Council for work done for the College.

23. Article 5 of the Supplemental Charter provides that, subject to Article 6, no part of the property and income of the College shall be used for “for the benefit of the members of the College”.
24. At present, Article 6 (b) of the Supplemental Charter permits payments to members of the Council who are members of the Trustee Board⁵ for “services rendered to the College by virtue of their skills and experience in general medical practice”, and Article 6 (d) permits the making of payments “to not more than three members of the Trustee Board who are Officers of the College, in respect of their work as members of the Trustee Board, subject to the prior written consent of the Charity Commission for England and Wales”.
25. Clause 18 of the College’s Standing Orders, approved by the Council, makes provision for the payment of:
- (1) certain expenses incurred by Officer, Council Members, Chairs of Boards and Working Group Members;
 - (2) “Per diem” payments to College examiners, who I assume may simply be members of the College;
 - (3) “Payments / backfill” “where hardship is incurred” in respect of attendance at certain types of meetings. The scope of this provision is not entirely clear to me.

Clause 18 also prohibits the payment of certain types of potential expenses.

26. As my instructions point out, the Charities Act 2011 s 185 contains provisions authorising the payment to charity trustees of remuneration for the provision of goods and services. The Commission’s guidance “Trustee expenses and payments”, at para 4.1, helpfully gives as an example of such a payment the payment of a fee for the

⁵ There seems to be a misalignment between this provision and the recitals to the Supplemental Charter, which envisage payments for professional services being made to members of the Council whether or not they are members of the Trustee Board.

delivery of a lecture. These provisions do not extend to the authorisation of payment for work done by a charity trustee in carrying out his or her duties as such: s 185 (3).

27. The position can, in my view, be explained as follows:

- (1) In Children's Investment Fund Foundation v Attorney General [2020] UKSC 33; [2022] AC 155 the Supreme Court held that members of charitable companies limited by guarantee were fiduciaries in respect of their voting rights. The Supreme Court refrained from exploring the implications of this conclusion for other types of membership of charities (for example membership of the National Trust, a charity established by statute), but it must, in my view, follow that members of the College are fiduciaries in respect of the voting rights they hold as such.
- (2) The conclusion that a person is a fiduciary in respect of a right or power does not necessarily mean that he or she is subject to unreasonable burdens. The key attribute of being a fiduciary is an obligation to act in good faith in relation to matters within the scope of the obligation.
- (3) As a general principle a fiduciary is not, unless authorised in a permissible manner, allowed to obtain a benefit by virtue of his or her fiduciary position.
- (4) The repayment of expenses incurred by a fiduciary in the performance of his or her fiduciary duties is not normally regarded as the obtaining of a benefit, although it is prudent to make this clear when the opportunity arises.
- (5) Clause 19 of the College's Standing Orders, referred to above, deals both with reimbursement of expenses and with the making of payments which appear to go beyond reimbursement of expenses. I expect that it was approved by the Council in the belief that members of the Council were not fiduciaries. Now that the decision of the Supreme Court in Children's Investment Fund Foundation v Attorney General establishes that members of the College, necessarily including members of the Council, are fiduciaries in respect of their

voting rights, there may be some doubt as to whether the Council was able to enact that clause, at all events insofar as it goes beyond authorising the reimbursement of expenses.

- (6) In view of this doubt, it would be appropriate for the College to move towards an amendment of the Supplemental Charter to provide a clear basis for the authorisation of such payments as the College thinks it is appropriate to make to members of the College, members of the Council and members of the Trustee Board as remuneration in respect of activities which advance the College's object.
 - (7) It is beyond the scope of this advice to set out the precise scope of the authorisation to be sought. However, I would expect it to be possible to develop a justification for the payment of remuneration for the provision of services, whether professional, administrative, or a mixture of the two, which benefit the College, where the absence of such provision would result in a shortage of suitable individuals willing and able to serve the College.
28. The focus of the question I am asked on this topic is on the potential for members of the Council to be found to be "charity trustees" within the meaning of the Charities Act 2011. As appears above, I think the scope of the issue is wider than this: if members of the College, and a fortiori members of the Council, are fiduciaries in respect of their powers under the constitution of the College, it is desirable for the Supplemental Charter to be amended to authorise the provision of remuneration to members in appropriate circumstances, whether or not they are additionally "charity trustees".
29. There is no conceptual difficulty in amending the Supplemental Charter to deal with this issue, because the consent of the Privy Council will be required for the amendment to take effect. The Privy Council will, however, require any amendment to be properly justified as being in the interests of charity.

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Appendix

Summary of some provisions of constitutions of medical colleges incorporated by Royal Charter

1. Royal College of Anaesthetists:

Its constitution is available online. The most relevant of its Ordinances provide:

“The Board of Trustees shall manage the business of the College and may exercise all of the powers of the College unless it is subject to any restrictions imposed by the College's Charter or these Ordinances”: Ordinance 11.1.

“The College shall have a Council consisting of elected and co-opted Council Members to which the Board of Trustees shall delegate such of its functions and powers as shall be set out in the Regulations and in any Scheme of Delegation. The Council shall have oversight of all clinical, professional and health policy matters and may exercise such other functions as are delegated to it by the Board of Trustees subject to any restrictions imposed by the College's Charter, these Ordinances or the Regulations”: Ordinance 13:1.

The Ordinances envisage that the Board of Trustees will delegate functions to the Council, but it appears from the second sentence of Ordinance 13.1 that the Council will have “oversight of all clinical, professional and health policy matters” otherwise than by delegation by the Board of Trustees.

2. The Royal College of Emergency Medicine

Its constitution is available online. Its Charter refers only to its Board of Trustees. Its by-laws constitute a Council as a standing committee of the Board of Trustees. The relationship between the Board of Trustees and the Council is, therefore, that functions of the Board of Trustees are delegated to the Council.

3. The Royal College of Obstetricians and Gynaecologists

I have not found Its full constitution online. Its regulations provide:

“6.1 The College shall have a Council to which the following functions and powers are delegated by the Board of Trustees:

6.1.1 to develop, and recommend to the Board of Trustees, policies and activities on all clinical and professional matters for women’s health;

6.1.2 any expressly conferred on the Council by these Regulations”,

“11.1 The control, direction and management of the policies and affairs of the College shall be vested in the Board of Trustees in accordance with the Charter”.

The relationship between the Board of Trustees and the Council is, therefore, that functions of the Board of Trustees are delegated to the Council.

4. The Royal College of Ophthalmologists

I have not found Its full constitution online. It has a board of trustees and a council, but I have not been able to find a statement of the relationship between them.

5. The Royal College of Pathologists

Its constitution is available online. Its Charter provides for a Board of Trustees and a Council and provides:

“7. The management, control and administration of the College shall be vested in the Board ... , The Board shall administer the affairs of the College in accordance with this Our Charter and the Ordinances and shall exercise such powers and do such acts and things as may be exercised or done by the College and are not by the provisions of this Our Charter or the Ordinances directed to be exercised or done by the Council or by the College in General Meeting.”

The Charter, therefore, envisages that the Charter and the Ordinances may confer functions on the Council, otherwise than by delegation from the Board of Trustees. The Ordinances confer certain functions, relating to membership, on the Council: see Ordinances 5 and 6.

6. The Royal College of Paediatrics and Child Health

Its constitution is available online. Its Charter refers only to its Board of Trustees. Its by-laws constitute a Council as a standing committee of the Board of Trustees. The relationship between the Board of Trustees and the Council is, therefore, that functions of the Board of Trustees are delegated to the Council.

7. The Royal College of Physicians

I have not found Its full constitution online. Its website states:

“The Board of Trustees is the RCP’s governing body. It meets four times a year and is responsible for:

- defining RCP policy, agreeing the RCP business plan and monitoring the progress of RCP affairs
- the custody of the RCP, ensuring effective management and administration.

It has the authority to carry out the RCP’s charitable responsibilities, and can delegate to the RCP’s boards and committees. It works closely and liaises with the Council but ultimately, all decisions (apart from changes to the bye-laws and regulations) are either taken by, or on behalf of, the Board of Trustees and reported to the fellows at the AGM.”

Its Annual Report 2023 states, at p 41, that the Board of Trustees has responsibility for the overall direction of the College, but delegates all substantive matters relating to professional and public policy to the Council and allows the Council to further delegate its powers.

The relationship between the Board of Trustees and the Council appears, therefore, to be that functions of the Board of Trustees are delegated to the Council.

8. Royal College of Psychiatrists

Its constitution is available online. Its Charter provides:

“11 (a) The general management and control of the administration of the College, its property and affairs (other than the affairs referred to in Article 11(b) of this Our Supplemental Charter) shall be vested in the Board of Trustees ...”.

“11 (b) the Council shall ... be responsible for such of the affairs of the College as the Bye-Laws shall prescribe”: Article 11 (b)

The Bye-Laws are made by the General Meeting, subject to the approval of the Privy Council. The Charter, therefore, envisages that the Bye-laws may confer functions on the Council, otherwise than by delegation from the Board of Trustees.

9. Royal College of Radiologists

Its constitution is available online. Its Charter refers only to its Trustee Board. Its By-Laws are made by the General Meeting, subject to the approval of the Privy Council.

The By-laws state that the Trustee Board is to manage the business of the College and act as its charity trustees, and “set the strategic direction of the College” and “make strategic decisions”: By-law 18 (1).

The By-laws constitute a Council, which shall “provide scrutiny of, and constructive challenge to, the Trustee Board”, and be responsible for certain other functions, for example discipline: By-law 27.

The By-laws therefore assigns functions to the Trustee Board and to the Council. The functions assigned to the Council by the by-laws are not expressed to be delegated by the Trustees. The Trustee Board is given functions relating to overall strategy. The Council is given a function of scrutinising the Trustee Board.

10. Royal College of Surgeons.

I have not found Its full constitution online. Its website states:

“The College's governing body is its Board of Trustees ...

Under its Charter, the Board delegates matters relating to professional and public policy, and matters which support members, to the College's Council.”

The relationship between the Board of Trustees and the Council appears, therefore, to be that functions of the Board of Trustees are delegated to the Council.