



INSTITUTE OF DIRECTORS  
SOUTHERN AFRICA

# Governing bodies' role in preserving the broad moral landscape

Corporate Governance Network



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# Introduction

This document reflects on the considerations relevant to members of an organisation's governing body, and the duty of that governing body to provide ethical and effective leadership to the organisation. The exercise of such leadership by members of the governing body goes beyond the affairs and direct interests of the organisation, in order to play a role in the broader moral landscape. In light of the turbulent economic and political landscape in South Africa, it is likely that governing bodies will continue to be faced with questions around the extent of the governing body's responsibilities outside its direct commercial concerns. For multi-national firms, the relevant moral landscape extends to all countries in which the organisation has an interest.

It has long been a cornerstone of corporate governance in South Africa that members of the governing body have a crucial role to play in the ethics of the organisation in which they hold office, ensuring that ethical behaviour is embedded in the organisation's internal and external interactions.<sup>1</sup> Linked to the concept of ethics is the organisation's role as a corporate citizen. The point of departure for the governing body in deciding the extent to which ethical leadership and corporate citizenship requires it to concern itself with the moral behaviour of third parties, is its fiduciary and statutory duties relating to the organisation. In this regard, the long-term sustainability of companies are directly affected by the environment within which the organisation operates.

# Why is the external moral landscape relevant to the organisation?

The fiduciary and statutory duties of members of the governing body are closely linked to ensuring the sustainability of the business. The more severe the erosion of the moral landscape within which the organisation operates, the more likely such moral decline is to impact negatively on the long-term stability of society<sup>2</sup>. Given that the sustainability of an organisation is inextricably linked to the society in which it operates, the fiduciary and statutory duties of members of the governing body require that governing bodies take due cognisance of the moral landscape.

# Steps to determine the governing body's role in the moral landscape

## 1. What aspects of the moral landscape are relevant to the organisation?

The aspects of the external moral landscape that are relevant to the organisation is likely to be highlighted in the normal course of the governing body's governance processes and oversight.

Examples of information that governing bodies typically receive (and which are likely to elevate concerns relating to the external moral environment) include, client and supplier due diligence reports, risk reports, information received by way of whistleblowing facilities and reports relating to stakeholder relationships.

### *The role of the Social and Ethics Committee*

In Part 2 of the King IV report, it states that:

*"...the role ascribed to the Social and Ethics Committee is that of oversight and reporting on organisational ethics, responsible corporate citizenship, sustainable development and stakeholder relationships.*

*This role includes organisational ethics and cover the statutory duties, but the intent is to encourage leading practice by having the Social and Ethics Committee progress beyond mere compliance to contribute to the creation of value..."<sup>3</sup>*

Where an organisation has a Social and Ethics Committee (as recommended by the King IV Report), the committee's contemplation of the external moral landscape is an important component of the committee's responsibilities, given that it is so strongly linked to all of the organisation's ethics, corporate citizenship, sustainability and stakeholder relationships. Although the entire governing body is responsible for ethical leadership, the Social and Ethics Committee is typically well placed to advise the governing body on the organisation's involvement in respect of society's moral landscape.

In order to ensure that the Social and Ethics Committee is effective in carrying out its role, the members of the committee should be experienced and the governing body should support and respect the role of the Social and Ethics Committee.

<sup>1</sup> As expressed in Principles 1 to 3 of the King IV Report on Corporate Governance (King IV Report); Principles 1.1 to 1.3 of King III; Paragraph 5.2 of King II and Paragraph 13 of King I

<sup>2</sup> The King IV Report refers to "corporate citizenship" as the recognition that the organisation is an integral part of the broader society in which it operates, affording the organisation standing

<sup>3</sup> as a juristic person in that society with rights but also responsibilities and obligations. It is also the recognition that the broader society is the licensor of the organisation. (Part 1, Page 11)

King IV Report, Part 2, pg 29, under heading "Social and Ethics Committee"

## 2. What should be done to address concerning aspects relating to the moral landscape within which an organisation operates?

Principle 2 (recommended Practice 6.a.) of the King IV Report proposes that the establishment of an ethical culture in the organisation should “encompass the organisation’s interaction with both internal and external stakeholders and the broader society...”

### Internal measures

The organisation’s response to its observations in respect of the moral landscape has traditionally involved “internal” measures, such as a strengthening of the organisation’s policies and procedures. Such measures remain crucial to the sustainability of the organisation and should be re-assessed from time to time.

### External measures

In the exercise of its fiduciary duties, the governing body may be compelled to take external measures if the governing body concludes that the decline in the moral landscape is likely to affect the long-term sustainability of the organisation. External measures may include any or all of public comment, financial support for business or civil organisations and support for civil initiatives. The exact nature of the measures taken will depend on the governing body’s view of what constitutes the most effective intervention with the resources at the relevant organisation’s disposal.

The King IV Report states that compliance should be understood not only as an obligation, but also as a source of rights and protections.<sup>4</sup> It follows that where third parties do not act within the law, for example in compliance with the Competition Act<sup>5</sup> or the Prevention and Combatting of Corrupt Activities Act<sup>6</sup>, the governing body should apply its mind to the protection offered by legislation and whether it is in the interest of the organisation to invoke such protections.

## 3. What if the governing body members cannot agree on measures to be taken on behalf of the organisation?

Individual value systems and the judging of “right and wrong” in terms of those systems may differ. Differences may be particularly pertinent in the governing body’s assessment of the external moral landscape and its likely consequences for the business environment. The differences in value systems could lead to significantly different views among members of the governing body on the most appropriate action to take on behalf of the organisation.

Although individual value systems will play a role in members’ evaluation of the external environment, taking “reasonably diligent steps to become informed about the matter” as contemplated in section 76(4)(a)(i) (the so-called “business judgement rule”<sup>7</sup>) of the Companies Act<sup>8</sup>, should improve the level of objectivity in the assessment of the organisation’s role in the moral environment. In assessing the most appropriate response on behalf of the organisation, each member of the governing body should remain cognisant of his or her common law<sup>9</sup> and statutory<sup>10</sup> fiduciary duties.

See the CGN paper on the IoDSA website entitled “The Dissenting Director”<sup>11</sup> for a detailed analysis of the director’s potential remedies in the event that the members of the governing body have significantly different views.

## 4. What about the risk to the organisation in the event that it takes public action against immoral conduct?

Governing bodies will be aware of the possible negative consequences for organisations that publicly comment or act against the unethical conduct of third parties. These consequences may include victimisation, public attacks through the press, consumer boycotts, costly litigation, etc. However, there is a balance between potential short-term risk to an organisation and the likely long-term consequences for the organisation, should the unethical behaviour in question persist. This is particularly pertinent where organs of state, which are tasked with maintaining society’s moral landscape, do not function effectively. It may, as with all business decisions, therefore be necessary to take on the risk associated with the organisation’s chosen course of action with regards to the moral landscape. The organisation’s normal risk management processes will apply to the management of this risk.

4 King IV Report, Part 2, pg 30, under heading “Compliance” and King IV Code on Corporate Governance, Part 5.4 of the King IV Report, p64, Principle 13, Recommended Practices par 21, a

5 Act 89 of 1998

6 Act 12 of 2004

7 A more detailed assessment of this matter is done in the corporate governance network’s position paper, available at: [http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/10D\\_Business\\_JudgementEmail.pdf](http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/10D_Business_JudgementEmail.pdf)

8 Act 71 of 2008

9 For a summary of the common law fiduciary duties, refer to the IoDSA publication [http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/49D62EF3-F749-403C-BE47-73C50F27F30F/General\\_Guidance\\_Note\\_on\\_Directors\\_Duties.pdf](http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/49D62EF3-F749-403C-BE47-73C50F27F30F/General_Guidance_Note_on_Directors_Duties.pdf)

10 The common law fiduciary duties are enhanced by statutory fiduciary duties, such as the duties contemplated in sections 76(2), (3) and (4) of the Companies Act, 71 of 2008.

11 [http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/CGN\\_Position\\_Paper\\_1\\_The\\_Dissenting\\_Director.pdf](http://c.yimcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/CGN_Position_Paper_1_The_Dissenting_Director.pdf)

# What about the societal involvement of members of the governing body in their personal capacities?

Members of the governing body should take care that their personal relationships and political involvement do not place them in a position where the organisation on which governing body they serve is perceived to be involved in unethical behaviour. Members of the governing body should be alert to real or perceived conflicts of interests and manage these in accordance with the Companies Act and King IV Report guidelines.

Members of the governing body should also be aware that any action taken in their personal capacities could reflect on the organisation in which they hold office. Therefore, even where an individual believes that a particular course of action is the “right thing to do”, it will be necessary to consider the implications for the organisation and prudent to consult the other governing body members, prior to taking such action.

If a member of the governing body has an intended course of action and it cannot be reconciled with the long-term strategic interests of the organisation, that member should consider resigning from the governing body.

## Conclusion

In the interest of the organisation’s long-term sustainability, governing bodies are encouraged to participate actively in debate and initiatives which are aimed at improving the broader moral landscape. Ethical leadership does not only entail the relationship between a member of the governing body and the organisation, but also the organisation and society.

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