

Feedback statement:

# The practice of minuting meetings

## Contents

- 1 Introduction
- 2 Legal and regulatory framework
- 3 Responsibility for the production of minutes
- 4 Drafting minutes
- 5 Access to minutes
- 6 Retention of company secretary's  
notes of meetings
- 7 The recording of meetings
- 8 Any other business



# The practice of minuting meetings

## 1 Introduction

Taking minutes of meetings is administrative good practice. It creates a record of what has been agreed, and by whom; and of what is to be done, by when and by whom.

For such a basic aspect of the administration of business of all kinds, it is surprising that there is relatively little formal guidance about how the minutes of business meetings might most effectively be taken.

As part of a general update of our guidance for members, ICSA: The Governance Institute had been looking at this area. During our review, we were struck by the changes in practice that have developed over recent years. Board meetings<sup>1</sup> are the highest level internal decision-making forum of an organisation and the proper purpose of minutes is to provide a formal, long-term internal record of those meetings, for the benefit of the organisation rather than for any third party. The minutes may, however, subsequently become relevant in legal proceedings and are increasingly subject to external scrutiny.

For example, a recent Treasury Select Committee review noted in respect of one company that ‘board and committee minutes were frequently not sufficiently full to provide a definitive record of what happened, and in some cases are missing altogether.’

We sought to understand these changes through the questions that we asked in a public consultation issued in May 2016<sup>2</sup>, the purpose of which was to inform our development of revised guidance. We have been delighted, if slightly overwhelmed, by the response. The combination of approaching 100 responses to more than 30 questions took us some time to work through, and there have been moments when we regretted being quite so inquisitive!

But isn't it a tribute to the importance of good governance that so many people, from so many sectors, were prepared to spend time and trouble in contributing their views? The answers that we received were interesting, illuminating and in some cases somewhat surprising. The insight that we have gained from them is really helpful, particularly in seeing the similarities and contrast between minuting in companies, particularly financial services companies and, for example, NHS entities. Your responses have covered an

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<sup>1</sup> Note that although the governing body of an organisation, its members and the governance professional responsible for taking the minutes of its meetings may enjoy a variety of titles, for ease of reference we have referred to that governing body, its members and that person, regardless of sector, as the board, the directors and the company secretary throughout this document. We appreciate that this will not be strictly accurate in all cases, but these are simple and well-understood terms, use of which will shorten our text considerably.

<sup>2</sup> [www.icsa.org.uk/about-us/policy/the-practice-of-minuting-meetings](http://www.icsa.org.uk/about-us/policy/the-practice-of-minuting-meetings)

# The practice of minuting meetings

enormous range of subjects and have demonstrated a similar range of practices, to some of which some of you are fiercely committed.

Some respondents favoured a highly prescriptive style of guidance, including standard forms of language; whilst a number of others wanted to be left to minute as they see fit. We believe that it is up to each individual organisation to decide how best its meetings should be recorded, and so will be seeking to avoid undue prescription in our guidance and to focus on being principles-based rather than prescriptive. There is no 'right way' to draft minutes, but we do believe that it is important that those who are unfamiliar with the minuting of meetings should have some guidance on how issues that they may face might be addressed and on what the risks of certain practices are.

We are grateful to all those who have shared with us the wisdom and experience gained from minuting literally countless meetings. This feedback statement is intended to provide a summary of those responses. For ease of reference it is largely based on the structure of our consultation document, but in the light of some of the feedback received, the resulting guidance will not take the same approach.

# The practice of minuting meetings

## 2 Legal and regulatory framework

Unlike company General Meetings, board meetings are almost entirely unregulated by the Companies Act 2006 (the Act). However, there is a specific requirement in the Act to have board minutes. Section 248 requires minutes of board meetings to be taken and kept for at least 10 years, failure to do so being a criminal offence on the part of the directors, and section 249 stipulates that the minutes are evidence of the proceedings at the meeting, unless the contrary is proved.

Minutes of board meetings form part of the company's records under the Act and can be held as hard copies or in electronic format – but must be capable of being reproduced in hard copy form (see sections 1134 and 1135 of the Act). This is a decision for individual companies.

For companies, directors' statutory duties are set out in sections 170-177 of the Act. They cover duties to act within their powers; to promote the success of the company; to exercise independent judgement, reasonable care, skill and diligence; to avoid conflicts of interest, declare any interest in a proposed transaction and not to accept benefits from third parties. The Act imposes potential liabilities for non-compliance on the company and, usually, on every officer in default. All directors and the company secretary are the officers who are potentially liable for any such default.

The Insolvency Act 1986 imposes potentially more serious liabilities which may be incurred by a director personally when a company becomes insolvent and there has been fraudulent or wrongful trading.

It is therefore important that consideration is given when preparing the minutes of board meetings to what may be appropriate or necessary, depending on the nature of the business or the circumstances, to demonstrate that the board members have observed their responsibilities to the company and complied with their legal and regulatory duties.

Board meetings are an internal matter and therefore the conduct of board meetings is governed by the organisation's constitutional documents. For example, every company must conduct its board meetings in accordance with its articles of association. Companies are free to set their own articles but many companies that have adopted new articles since

# The practice of minuting meetings

1 October 2009 will have included the provisions set out in the Model Articles prescribed by the Act in their articles. Companies with articles adopted before 1 October 2009 are likely to have included the provisions set out in Table A of the Companies Act 1985.

In other sectors, there is even less statutory prescription, although some regulators, notably the Financial Conduct Authority (FCA) and NHS Improvement (formerly Monitor), the sector regulator, have sought evidence of challenge in board minutes.

## **Question 1 – What do you believe to be the principal function of meeting minutes?**

We received 83 responses to this question. Almost all of these included ‘to record key points of discussion, record decisions and the reasons for decisions, and agreed actions’ (or equivalent wording). Words like ‘accurate’, ‘impartial’ and ‘balanced’ appeared in a number of responses.

Many responses also included ‘to demonstrate challenge’. This latter point was particularly interesting as it indicated the degree to which minutes are now being prepared for external as well as internal consumption and the focus on this aspect of the role of the board. As one respondent commented:

*‘It is necessary to include matters which were considered to support the decision made. Need to demonstrate due skill and care, directors took advice where necessary and considered all relevant information at the time the decision was made – in order to protect the directors from claims they have not properly discharged their duties.’*

Other key points that were highlighted included that the minutes evidence the authority for directors to carry out acts on behalf of the company, in particular recording the delegation of responsibility. One respondent noted:

*‘They should be the single source of truth, and should be a complete, self-standing record (together with the papers). They should act as evidence of the meeting and as a record of those matters discussed/noted, concerns raised, decisions made and, where considered helpful, the rationale for those decisions, and demonstrate the directors acting in accordance with their duties under the Companies Act.’*

# The practice of minuting meetings

They need to demonstrate proper consideration of risks and that the impact on stakeholders has been taken into account.

As we suspected might be the case, there were differences in key purpose(s) depending on the type of organisation. A charity or public sector organisation may focus more on ensuring there is clear accountability visible through the minutes, in some cases having consideration for the fact that they will enter the public domain. Alternatively a regulated financial services company is more likely to focus on providing evidence of robust decision making; demonstrating that directors undertook their duties and responsibilities in accordance with statutory requirements and gave matters, particularly those relating to risk, appropriate consideration. In this sector in particular, we heard that:

*'minutes have become much more fulsome in content, documenting both the decisions and discussion that led to the [decisions]' and that they 'are used to demonstrate good governance, a robust decision making process as well as engagement and appropriate challenge.'*

In short the purpose of minutes – and consequently their style, content and structure – will vary, certainly across sectors but also between companies. This variance is not a bad thing, indeed we believe it to be a very good one, but variations from common practice should be made, where appropriate, on the basis of an informed decision. This is an important point which we will bear in mind throughout the development of our guidance.

## **Question 2 - Are you aware of any other significant or regulatory requirements which we should specifically reference in the guidance?**

81 responses to this question were received. Nearly all respondents replied 'no' but a number of responses mentioned regulatory 'guidance' (as opposed to 'requirements') or suggested various other matters to be taken into account.

Many responses restated sections 248 and 249 Companies Act 2006, but other suggestions included taking account of any specific/alternative requirement in the company's Articles of Association; the Pensions Act 1995 section 49 (setting out requirements for trustees); Occupational Pension Schemes Regulations 1996 (SI 1996/1715 Reg 3); and section 90 FSMA in relation to corporate actions. A number of listed companies also drew attention to provision A.4.3 of the UK Corporate Governance Code<sup>3</sup>.

<sup>3</sup> 'A.4.3. Where directors have concerns which cannot be resolved about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes. On resignation, a non-executive director should provide a written statement to the chairman, for circulation to the board, if they have any such concerns'.

# The practice of minuting meetings

Again there were sectoral variations. Most financial services responses make reference to the FCA and Prudential Regulation Authority (PRA), including in relation to Solvency II together with the implications of the Senior Managers Regime (SMR) and Senior Insurance Managers Regime (SIMR). NHS respondents mentioned an awareness of scrutiny from NHS Improvement, the Care Quality Commission and NHS England, with focus on Standing Orders and conflicts of interest. Charity respondents focused on the joint Charity Commission and ICSA guidance CC48<sup>4</sup> on charities and meetings and on guidance from the Office of the Scottish Charity Regulator (OSCR), whilst academy respondents focused on Ofsted reviews, the Higher Education Code of Governance and the Local Government Act 1972. A number of public sector organisations pointed out that they are subject to the Freedom of Information Act 2000. Some respondents also mentioned the Equality Act 2010 and Data Protection Act 1998.

Some more complex organisations had specific suggestions which will be important in certain circumstances. These included that organisations active in multiple jurisdictions need to be aware of the requirements of those other countries. For example US directors must not discuss business that would breach US sanctions as a result of which some companies have introduced a 'Recusal Policy'. Similarly, some offshore companies need to clearly evidence that management and control (the decision making process) happens in an appropriate place, to avoid adverse implications for their tax status. There may be specific rules about preventing bribery and managing conflicts of interest that must be observed.

## 3 Responsibility for the production of minutes

The governing body of an organisation is responsible for its management and for ensuring that the organisation is run lawfully.

It is ICSA's view that the company secretary is responsible to the chairman for the preparation and retention of minutes; the chairman and the other members of the board are responsible for confirming their accuracy. An item of business at the succeeding board meeting will usually be to approve the minutes of the last meeting.

As the professional body responsible for encouraging good governance, ICSA has always advocated that organisations appoint a properly qualified individual to take minutes of board meetings. Sometimes the legal counsel and company secretarial roles are

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<sup>4</sup> <https://www.gov.uk/government/publications/charities-and-meetings-cc48>

# The practice of minuting meetings

combined, and someone with another professional background might not necessarily have received the same robust training in the law and practice of meetings that someone with specific company secretarial training will have received.

## **Question 3 - Do you agree with our position [about the company secretary being responsible for the minutes]? If not, who do you believe should be responsible?**

82 responses to this question were received. 69 respondents agreed that the company secretary or a member of their team should be responsible for the minutes; eight respondents disagreed; and five respondents agreed in part.

27 respondents made additional comments, roughly half of which noted that, whilst it would be ideal to have a company secretary/governance manager to take the minutes, this depends on the size of the organisation and many smaller entities do not have a separate role. Other responses commented that it may be better to have a member of the team taking the minutes if the company secretary is to be a participant in the meeting.

Two respondents misread the consultation as suggesting that the company secretary should be ICSA qualified. Whilst, naturally, we do believe that this would provide the best training, what we intended to suggest was that they should have specific company secretarial training. This was supported by very many respondents, both to this question and to question 31 (see below), who emphasised that good minute-writing is a very specific skill. There were mixed views on whether lawyers or accountants were or were not suitable to take minutes, with some respondents for and some against, possibly reflecting individual experiences. There were also mixed views on whether some training in taking minutes should be mandatory.

The gist of most of the responses was, however, that it was the skills of the individual that mattered rather than their specific qualification:

*'whoever takes the minutes they should be an impartial, robust individual who is independent and dispassionate; has an understanding of the business; (and) an understanding of relevant legal and regulatory requirements, the responsibilities of the board, directors duties etc. Minutes need to have a business focussed approach, they need to be true, factual and accurate, and also clear and understandable.'*



# The practice of minuting meetings

The point was made that the company secretary acts always in the interests of the company, the taking of minutes being no exception, and a request was made for some guidance on the skills of a good minute taker.

Several responses suggested that ICSA should review our qualification syllabus and training offering to place additional emphasis on minuting, which we will do.

## 4 Drafting minutes

### 4.1 Preliminary information

All minutes should begin by recording the date, time and venue where the meeting was held, and how it was held (i.e. in person, by telephone etc.). They should record those directors and other attendees present, and whether any were not present for the whole meeting, together with apologies from directors unable to attend. The list of directors present should demonstrate there was a quorum. The required number of directors for a quorum will be set out in the organisation's constitution.

#### **Question 4 - Is there any other preliminary information that you believe should be included in board minutes?**

We received 83 responses to this question, 30 of which took the view that there was no additional preliminary information needed.

Again there were a variety of responses, some favouring considerable prescription, others favouring none. Some of this was undoubtedly influenced by the sector of the respondent. Suggestions for additional preliminary information included:

- The company name in full
- The company number
- Whether the meeting is 'standard' or 'ad hoc' and outside the normal timetable
- Confirmation that the meeting has been duly convened, with appropriate notice given, noting any director claiming not to have received notice or adequate notice, particularly comments that papers have been received late so they have had inadequate time to prepare

# The practice of minuting meetings

- Clear distinction between those directors attending in person, those attending remotely (and how they are doing so), those attending as an alternate and those who are not directors but are in attendance at the meeting
- Identification of the chairman and secretary
- The role, job title and (if applicable) company name of those in attendance.
- The location of any directors who are attending the meeting remotely (important for companies that need to demonstrate the whereabouts of management and control for tax reasons)
- That the meeting was confidential
- The provision(s) in the Articles of Association enabling remote attendance at the meeting (or the holding of a telephone meeting)
- The time zones of attendees attending remotely
- (For legal transactional board minutes) a preliminary section outlining the purpose of the meeting, including the background to the transaction
- A reminder to directors of their statutory duties
- A distinction between those who sent apologies for absence and those who simply didn't turn up (!)

There were also some specific suggestions for those meetings that have to be held in two parts or in public:

- That it should be made clear which part of the meeting is which
- That the public should be acknowledged at the start of the meeting and told how, if at all, they may engage with the meeting. For example, when any public questions will be dealt with.

Some comments which were helpful but did not, perhaps, deal with preliminary information, included:

- The time the meeting closes should be recorded
- Any breaks or interruptions should be recorded
- Minutes should be sequentially numbered to prevent fraudulent alterations and for ease of reference
- Minutes should be indexed
- Minutes should be clearly marked as draft until approved
- Minutes should state whether or not there was a paper for each agenda item. If so,

# The practice of minuting meetings

identify that document and whether it was circulated in advance or tabled at the meeting

- Any section of the minutes subject to legal privilege should be clearly identified as such
- The chairman should draw attention to any pre-meeting comments received from board members, especially those unable to attend. These should have been circulated to all attendees in advance of the meeting
- The guidance should refer to a pre-meeting between the minute-taker and the chairman
- The guidance should emphasise the duty of the minute-taker to seek clarification during the meeting if necessary

## **Question 5 - Is it necessary to include legal boilerplate wording regarding the directors having considered conflicts of interest, the meeting being quorate etc.?**

83 responses to this question were received. 31 respondents agreed it was necessary to include the legal boilerplate wording, 35 respondents thought it was not necessary, and 17 responded that 'it depends'.

There were a variety of strongly held views on this topic – but, they were far from in agreement. One corporate respondent took us to task for referring to them as boilerplate at all:

*'These items are not legal boilerplate and are important. The wording of the guidance should be revised.'*

Arguments in favour of boilerplate included:

- That it serves as a useful reminder to all those present to declare any conflicts of interest
- The evidential value of including them
- It establishes the formality of the proceedings.

Arguments against included:

- It goes without saying
- If it is obvious it doesn't need to be stated

# The practice of minuting meetings

- It is often meaningless and hence may be skipped over on an occasion when it is relevant
- It deflects directors from focus on the issues
- Declaration of conflicts should be a specific agenda item
- Our board takes a dim view of it.

Two respondents summed up the main objection rather well:

*'The use of 'boilerplate' wording can undermine proper consideration of matters such as conflicts of interest and the wording is not always understood. It is rarely read properly, is skipped over and overreliance can be counterproductive.' 'Boilerplate wording suggests the matters were not actually considered.'*

The responses that said 'it depends' were quite clear that there will be different requirements for different sectors and, indeed, for different companies:

*'It depends on the industry/size of business/sector. Not all directors have the disciplined mindset needed.'*

There was a further view that it should only be included if, for whatever reason, there had actually been a proper discussion of the issue and another response said that it should simply be a question of house style.

There was an interesting nuance around two specific issues. Many respondents agreed that quorum was 'boilerplate' wording but disagreed that conflicts of interest could be so described. There also appears to be a marked difference between public entity and corporate responses in that there is a clear process in the corporate sector for keeping a register of directors' interests and for declaration and approval of directors' potential conflicts of interest before appointment. The register is maintained by the company secretary and regularly reviewed by the board. This does not seem to be the case in all other sectors.

## Quorum

A minority of respondents felt that there should be clear reference to the fact that the meeting is quorate:

# The practice of minuting meetings

*'it's a good prompt on the agenda.'*

The majority felt that it was unnecessary as it can be evidenced by the attendance list and some held strong views:

*'This is otiose/nonsense – it was either quorate and can proceed or it was not and would be adjourned or continued on the basis of discussion only. If it is not quorate it cannot act.'*

One response said that this should only be minuted if the chairman made a point of stating it, and another, which might be the sensible solution, that it should only be mentioned if there were a lot of absences, or a high quorum requirement such that there might be doubt. For example, if one or more directors have to absent themselves owing to a conflict of interest.

Whether or not an organisation feels that it is necessary to refer to quorum in the minutes, it is ICOSA's view that it is the responsibility of the company secretary to be aware whether the meeting is quorate at all times, and advise the chairman should this not be the case.

## **Conflicts of interest**

Respondents to the consultation clearly felt that conflicts were a more important issue, but again views diverged sharply.

Arguments in favour of specific mention of conflicts of interest came largely from the public sector and focused on it being a good reminder of usual practice. One respondent went so far as to say that this:

*'should precede the item on 'minutes of last meeting' and regular reminders during the meeting in case it's not clear to an attendee whether or not they have a conflict.'*

Those who felt that an introductory item on conflicts of interest should not be included were almost all from the corporate sector. The view from these respondents was generally that wording about conflicts of interest is only necessary if someone specifically raises one

# The practice of minuting meetings

at a board meeting, when it should be noted under the relevant item; when the conflicts register is circulated or tabled; or where it is necessary to note a change to the register. There was a view that it was sufficient that:

*'boards have a procedure for considering, approving and recording conflicts of interest and this is maintained by the company secretary.'*

There was a concern that:

*'it is important to evidence a robust understanding of the duties around conflicts rather than just that they exist'* and that repetition of a paragraph at the start of every set of minutes might *'look to regulators ... that the board was being complacent over the issue.'*

## 4.2 Style of writing

The company secretary will take notes at board meetings from which they will write up the minutes. Minutes need to be written in such a way that someone who was not present at the meeting can follow the decisions that were made. Minutes can also form part of an external audit and a regulatory review, and may be used in legal proceedings. When writing minutes, it is important to remember that a formal, permanent record is being created, which will form part of the 'corporate memory'.

Minutes should give an accurate, balanced, impartial and objective record of the meeting, but they should also be reasonably concise. The importance of accuracy should not be underestimated as the minutes of a meeting become the definitive evidence of what happened at that meeting and who attended. Courts will rely on them as being evidence unless proved otherwise.

Historically, the convention has been that:

- Minutes should be written in reported speech, i.e. past tense, and in the conditional mood for future actions (i.e. would and should, rather than will and shall)
- The board has collective responsibility for its decisions and therefore the naming of individuals should be avoided wherever possible, although this is not the rule in some specific sectors.

# The practice of minuting meetings

## **Question 6 - Is it your view that minutes should be written in 'reported speech'?**

82 responses to this question were received. 72 respondents said 'yes', three respondents said 'no', and seven respondents said something other than yes or no.

Some respondents didn't regard 'past tense and conditional mood' as the same as 'reported speech' but have been included in the 'yes' responses as that is what we said in the consultation. One response described it as 'past tense and formal prose'.

Arguments in favour of this format included that:

- It depersonalises the minutes and provides consistency
- Clear, concise minutes with the avoidance of ambiguity is the most important thing and the convention was established for good reasons
- Mixing tenses causes confusion.

Those respondents who disagreed were of the view that matters of style were a question for individual organisations. One public sector organisation felt that it is an old-fashioned style and another felt that it takes them longer to draft in this style.

One respondent felt it important that the use of acronyms (unless defined) and jargon should be avoided, whilst others asked for examples of specimen wording.

## **Question 7 - What are your views on the recording of individuals' names? Under what circumstances should this be done?**

84 responses to this question were received. Eleven responses thought that, in general, individual names should be recorded, 51 responses thought that names should not be recorded, except in certain circumstances, and 21 other responses thought that:

- There should be discretion in this area; or
- That names should be recorded in the certain circumstances mentioned by the 51 above but also to evidence participation by individual directors in response to SMR etc. in financial services.

This was a deliberately open question and this is reflected in the variety of responses.

# The practice of minuting meetings

What is clear, particularly in the corporate sector, is that practice is changing in this area. Traditionally, individuals were only named in exceptional circumstances but this seems to be increasingly done in financial services (especially banking) due to the SMR and the need to demonstrate contribution to the board's deliberations. This appears not to be confined to individuals directly affected by SMR, but is also affecting practice in other sectors.

It is clear that the public sector has a very different practice - and always has had whereby individual contributions are often attributed. In some cases, this reflects a regulatory or constitutional requirement, but how and where the minutes are to be made available is an important consideration.

One helpful observation was that:

*'naming individuals can and does affect what directors will say', with the potential to 'inhibit directors from asking an expert to explain their report in simple terms to check whether they truly understand it themselves.'*

There were some circumstances suggested in which naming individuals would more often than not be appropriate. These included:

- individuals presenting a paper or report
- individuals charged with specific actions or to whom responsibility has been delegated
- where declarations of a potential or actual conflict of interest or similar have been made
- individuals objecting to or dissenting from a decision
- where a director abstains from a vote or recuses themselves
- when the individual requests that their name be included and the chairman agrees
- individuals asking a specific question
- individuals making an important comment or observation or a view
- individuals making a recommendation, providing information or answering a question based on their special expertise on the subject, for example the Finance Director
- where personnel issues are being discussed such as appointments, reappointments or resignations; or discussions on board effectiveness.



# The practice of minuting meetings

We were told that it is common practice, particularly where minuting actions, to refer to individuals, particularly executives, by their title rather than their name.

In addition to these, there were a number of circumstances in which respondents noted that they felt it necessary to record individual names in order to demonstrate individual director participation and challenge, particularly where the performance of the director might be scrutinised by the regulator. In many cases this is at the instigation of the director themselves. It must, however, be remembered that the company secretary acts in the interests of the company, not that of individual directors, and the taking of minutes is no exception. Identifying individuals should be considered in this light and more often than not it is the board that is challenging rather than a specific individual.

One respondent asserted that directors and officers need to demonstrate that:

*'they did all they reasonably could to prevent liability for a breach under SMR and to show they have performed their duties conscientiously. PRA and FCA are using minutes to assist in assessing the effectiveness of individual board members and if they are not mentioned by name this is difficult to achieve.'*

There is a clear direction of travel here, which we will need to recognise in the guidance. ICSA was also asked to provide guidance on the risks of naming names.

## 4.3 Level of detail in minutes

This is one of the most contentious issues around the minuting of meetings. Most people would agree that minutes should be neither too long nor too short. They should be detailed enough to confirm that the directors were aware of and have complied with their obligations and duties.

However, exactly what this means is open to debate.

The chairman of a meeting has a significant influence on both the conduct of meetings and, very often, on the style of the minutes produced. The chairman has a responsibility under common law to ensure that all entitled to speak at the meeting have the

# The practice of minuting meetings

opportunity to have their say, and this must include responsibility for allowing adequate time for discussion in order to tease out the issues and for ensuring there is sufficient due diligence for transactions. This should be reflected in the minutes.

There are a number of aspects of minute-taking which could be described as a traditional view:

**Minutes should not be a verbatim record.** They should document the key points of discussion but focus on the decision or, in the case of a committee meeting, any recommendation to the board. A decision of the board should be clearly minuted and the usual wording is 'It was resolved that ...' Likewise board committees might note 'It was agreed that ...'

**Minutes should document the reasons for the decision and include sufficient background information for future reference** – or, perhaps, for an absent board member to understand why the board has taken the decision that it has. In simple terms, their purpose is to record what was done, not what was said. If the board or committee require action to be taken, the minutes should make clear who has responsibility for the action and the date, if applicable, by which it should be completed.

**If board papers are received for noting and no decision is required**, then unless there is material discussion that needs to be recorded, minutes should indicate that the relevant report was 'received and noted'.

**Where reference is made to any board papers signed by the chairman** a hard copy of those board papers must be retained in addition to the hard copy of the minutes themselves.

**Minutes should reflect the business and sector.** Larger, more complex companies and those in regulated industries have additional issues to consider and tend to have longer meetings, so the minutes should reflect this. Minutes of board meetings in some sectors such as financial services have become more detailed and prescriptive in recent years due to increased regulatory oversight and the need to demonstrate appropriate challenge by individual directors.

# The practice of minuting meetings

## **Question 8 - Should minutes be a verbatim record of the meeting?**

We received 82 responses to this question, all but two of which were unequivocal that minutes should not be a verbatim record of the meeting. The other two responses made allowance for a verbatim record where some particular circumstances made this desirable.

There were a number of comments made to support the majority view, not least that this would defeat the whole point of minutes and might be a barrier to full and candid discussion. There is also a significant risk that key points would get lost in the detail.

## **Question 9 - Do you agree with the principle that minutes should document the reasons for the decision and include sufficient background information for future reference or for an absent board member to understand why the board has taken the decision it has? How detailed does this need to be?**

We received 83 responses to this question, of which 59 responses agreed with the principle – but with some differences over the level of detail needed, 13 responses did not agree and a further eleven neither agreed nor disagreed but had views on the level of detail required. Once again there was an interesting split between those who wanted our guidance to be prescriptive and those who preferred the opposite.

With hindsight, this question might have been better worded as ‘someone who wasn’t there’ rather than ‘an absent board member’.

Some of the more interesting observations included:

- Yes, the minutes should be sufficient to provide absent members with key relevant discussion; sufficient evidence of progress; comfort the decision was taken properly
- Minutes need to stand alone, be self-contained but identify any important papers considered
- Yes, also as a reminder as to why a decision was made and a summary of the arguments
- No, the purpose of the minute is to record the decision. The minute should not replicate what is in the board paper. The reason for the decision is unnecessary detail, the paper could be referenced instead. Papers will have been circulated in advance and minutes should be read in conjunction with the papers

# The practice of minuting meetings

- No, it is not necessary, and not always possible, to capture the reason for the decision but it's useful to provide some context. It depends on the circumstances
- We agree with the first part, the level of detail depends on the complexity of the matter and may require reference to the specific paper
- The minutes should document the reason for the decision but only in broad terms; only as appropriate; proportionate, not too long - in no more than a paragraph; the main reason and sufficient background; clear and concise but not overly long; with a balance between detail and brevity that provides a solid audit trail. The background information will be in the board papers
- Excessive detail can mean that unwarranted emphasis is placed on matters that are not fully relevant to the decision in question. The minutes should not be discursive
- I don't think minutes should be produced to help absent directors – they will have seen the board papers and have access to anything tabled
- Sometimes the detail is necessary to demonstrate to a regulator why a decision was taken. [Minutes] have a wider audience now. More detail is needed in financial services, especially under the Senior Managers Regime
- Any key information missing from papers needs to be included in the minutes
- The minutes should include any specific risks that were considered
- Some example wording from ICSA would be useful here.

## **Question 10 - Should minutes include allocated actions with deadlines (where appropriate)?**

There were 87 responses to this question, 69 of which said that minutes should include allocated actions, although not all of these agreed that deadlines are necessary. Four responses felt that actions should not be included.

Those who favoured inclusion argued that recording actions is important, especially for committees, as they provide evidence of discharging duties and effectively challenging management, ensuring accountability and that agreed actions are not overlooked. Many respondents maintain a separate actions schedule for details, action owner, deadline etc. along with status. An updated actions schedule is presented to each meeting as part of some board pack and discussed under 'matters arising'.

However, the company secretary should apply a materiality test before recording actions in the minutes. Minutes should focus only on board level actions, not on suggestions to the presenter or to other management.

# The practice of minuting meetings

## **Question 11 - Where papers are received for noting should the minutes indicate simply that the relevant report was received and noted unless there is additional discussion that needs to be recorded? If not, how should this be minuted?**

There were 86 responses to this question, 69 of which agreed that the report should be minuted as received and noted unless there was additional discussion. Six respondents disagreed.

The degree of detail to be included varied between respondents. A number felt that it was necessary that any paper can be readily identified from the minutes and others that the minutes should give the context of why the paper was presented, even if it was only for noting. One respondent suggested that the minutes should record that there were no material issues for the board to consider, in order to satisfy regulatory obligations. However, it would seem likely that, if there were, the board might have discussed them. ICSA does not believe that it is necessary to minute 'nil return' points unless there is a clear statutory or regulatory requirement to do so.

Some respondents suggested that the minutes should indicate that such papers were reviewed and the contents noted by the board (if that were the case) rather than simply that the papers were noted.

Some respondents suggested that papers received for noting might be circulated in a separate part of the board pack and a number suggested that these should be retained with the other board papers – even if only a paper for noting, they still form part of the board pack.

One respondent argued that papers should not routinely come for 'noting' as the board should be active, requiring decisions or actions.

## **Question 12 - Do you include copies of presentations or other papers presented to the board with the board minutes?**

There were 82 responses to this question, of which 65 indicated that they do not include copies of presentations or other papers presented to the board with the board minutes, eight said that they do and nine made other comments.

# The practice of minuting meetings

Those that do argued that papers are integral to the minutes and it is important to be clear about the materials considered by the board. From an administrative viewpoint it is helpful if all materials are kept in one place.

Of those that do not retain papers with the minutes, more than half argued that the papers are not the minutes and do not form part of the minutes. They should be retained, but separately from the minutes, with the other board papers.

Practice varies – some organisations have specific papers initialled by the chairman and included with the minutes, others include copies of items approved by resolution, for example a bank mandate or where the board have specifically requested that this be done. This should not be the norm, however, as it is usually helpful to distinguish between inputs to and outputs from the meeting. All such documents would be included within the board pack.

A couple of individual comments were very helpful here:

*'No, the minutes should stand alone – if the whole paper is attached then it could be construed that the board (is) also resolving to agree with all other statements in the paper.'*

*'There is a danger that papers written by those who have had insufficient training will use imprecise language and/or too great an amount of detail which then becomes part of the record and/or could cause all sorts of issues with documents that have legal privilege.'*

On balance it seems sensible to us that all papers be retained with, but not as part of, the minutes of the meeting but this is a matter for individual organisations to settle.

## **Question 13 - Should minutes be drafted in such a way as to facilitate regulatory oversight? If not, how can regulators satisfy themselves that the boards of regulated organisations are operating appropriately?**

There were 79 responses to this question, but there was not quite the split between corporate, financial services and public sector views that we might have anticipated:

# The practice of minuting meetings

	Yes	No	Maybe	TOTAL
Financial Services	15	5	3	<b>23</b>
Other Corporate	16	12	6	<b>34</b>
Not-for-Profit	17	0	5	<b>22</b>
<b>TOTAL</b>	<b>48</b>	<b>17</b>	<b>14</b>	<b>79</b>

Working out this breakdown was not straightforward and it should not be treated as definitive. Those who agreed that minutes should be drafted to facilitate regulatory oversight often noted that minutes are not the only tool for such oversight. Many also said that it should be a consideration, but not the primary purpose of minutes. Some of those who disagreed made exactly the same observations; and some made similar observations without giving an opinion either way.

We also saw contrasting views on the use of minutes for regulatory purposes. Some saw them as forming part of the regulatory review as providing evidence of leadership, strong challenge and debate; whereas others saw danger in too much focus on compliance aspects which could result in a tick box approach.

Some of the points that were made included:

- Minutes should be appropriate and proportionate to the organisation and its sector
- This is becoming more of an expectation
- Minutes are one piece of the regulatory jigsaw and should not be written with only that function in mind to the detriment of their primary purpose
- The minutes should be drafted to protect the company. They should be mindful of regulatory needs, but not written for regulators
- Minutes always give a good clue to the tone of the organisation and there is an excellent chance that the regulator will choose to read them anyway, even if they do not exercise their right to attend the board meeting. It would be a mistake not to have regard to their expectations when drafting

# The practice of minuting meetings

- The well-written minutes of an effective board meeting should convey all the comfort that a regulator needs. Regulators should be highly suspicious of minutes written to satisfy them
- This is simply good governance
- There was emphasis from a number of respondents on the fact the minutes are the company's record of the meeting and should be written as such; review by the regulator is a separate matter, but should not be ignored.

As one respondent noted:

*'To the extent the directors operate in a regulated sector, there will be an obligation on them to comply with and operate within that framework. Doing so will inevitably be reflected in the minutes ...[but] there is perhaps a chilling effect here: if the minutes are to be used to satisfy regulators then there is anticipation of those minutes being shared and this may stifle discussion at board level, reducing debate to platitudes. For that reason we would not recommend minutes be offered as a first port of call to demonstrate compliance.'*

Those who disagreed that minutes should facilitate regulatory oversight accepted that this is increasingly common practice, and although several deprecated the change some also felt it inevitable. There was also a view that the addition of:

*'text to achieve regulatory compliance seems a nonsense unless the text has meaning for the board. Otherwise it's just a box ticking exercise.'*

To some degree it was seen as an 'easy' solution for the regulator as, if the minutes provide all the evidence that they need, they should not need to question the organisation in more detail.

One respondent felt that if the regulator has specific requirements for the content of minutes they should be clear on this and regulate accordingly, although they also pointed out that this would be subject to a cost/benefit analysis which might not produce the desired result. Another respondent said that ICSA should tell the regulators so, but that may be beyond our influence!



# The practice of minuting meetings

## Content

A concern has been expressed by a number of companies with US listings, whose minutes are consequently examined by their US lawyers, that there is a risk of minutes being included in a discovery process and so excessive detail could leave the organisation vulnerable to legal challenge in the future.

Concern has also been expressed about the recording of privileged legal advice and how this may be done to ensure that it remains privileged.

### **Question 14 - In your opinion, how significant are these risks? What can be done to mitigate them?**

We received 71 responses to this question. The general view was that both issues apply to a minority of organisations, and should not deter the company secretary from minuting the meeting as usual. However, this is one of those areas requiring the necessary skill to understand what should be included and what should be omitted. The minute-taker should be aware of the risks of the legal discovery process and ensure privilege is preserved/conspicuously marked as such in the minutes. This can cause a major problem.

Other observations included that privileged advice itself should not generally be recorded in the minutes, although it might be recorded that advice was received. Legally privileged information should be recorded as such and clearly marked in the minutes with the name of the person giving the legal advice to the board, so as to protect the legally privileged status.

There were a number of requests that the guidance cover this issue and ICSA will seek some detailed legal guidance on how privilege can be protected in board minutes.

## **Subsidiary or transactional meetings**

It has been suggested that minutes of small or non-trading subsidiary companies are relatively minimal and formal, as are minutes prepared by solicitors in relation to, for example, corporate transactions. This is because there is relatively little need for discussion at such meetings as the wider decision will already have been made and the directors are simply formalising the necessary steps and ensuring that they have fulfilled their obligations and duties to the company.

# The practice of minuting meetings

## **Question 15 - Is it appropriate that minutes prepared to address legal formalities are prepared in brief form unless there is material discussion which it is necessary to record?**

There were 77 responses to this question, the overwhelming majority of which agreed with the proposition, although a number qualified their agreement. Of the answers that were caveated, the common theme was that the approach was fine as long as detailed discussion is recorded elsewhere. Other concerns were also highlighted – for example, the importance of keeping the tone and style of minutes consistent and the tendency of lawyers to use overly complicated drafting. Of the three responses that disagreed, one gave no reasons and another seemed to have misunderstood the question. The third emphasised the importance of proper governance in subsidiary companies, with which we would concur.

Some of the caveats here were particularly helpful, emphasising that whilst the use of pro-forma minutes provide a good basis for dealing with legal formalities, often at the end of a process, they remain, in a legal sense, board minutes of the company and should be consistent with the style and tone used in other minutes. They should, therefore, follow the essential principle of recording the rationale for decisions being taken. In many cases, the detail underlying these decisions has been discussed at previous meetings and will be fully covered in the minutes of those meetings.

In these cases and in cases where an administrative arrangement is being made, for example opening a new banking relationship or signing authority, the text of the resolution may be mandated by legal agreement or by a third party. In such cases, phrasing such as *'In order to execute the decision to x made at the board meeting on y, it was necessary to z'* can be very useful. The important point is that the board meeting should be held and not fabricated.

Where the same group of people are needed for meetings for multiple companies, all discussing the same subject, guidance was requested on how this should be managed.

Any pro-forma minutes should be supplemented as necessary to include any discussions of substance that do take place. It is the responsibility of the directors, supported by the

# The practice of minuting meetings

company secretary, to ensure that they fully understand what they are being asked to do. It is therefore important that pro-forma minutes are scrutinised by the whole board and especially the company secretary to ensure that they are actually fit for purpose. As one respondent commented:

*'In many cases where legal advice is sought, draft minutes will be provided by the lawyers. If the draft is taken from the lawyers' agreed precedents they should be used verbatim, but in general should be carefully reviewed as the lawyers are not always as expert in drafting minutes as a Chartered Secretary!'*

## Dissent

The board has collective responsibility for its decisions and so care should be taken to ensure that views expressed during discussion are not attributed to individual directors.

However, in exceptional circumstances, where agreement by the whole board cannot be reached, individual directors may request that their dissenting view be recorded in the minutes. Any such request should be complied with.

### **Question 16 - How and in what circumstances do you believe dissenting views should be recorded?**

There were 77 responses to this question, not all of which addressed both elements of the question, and some answers gave multiple examples of when dissenting views should be recorded.

The most popular circumstance, cited by 41 respondents, was at the request of the dissenter(s), with three more respondents saying also on request by the chairman. The next most popular scenario, cited by 14 respondents, was similar, but either expressly or implicitly suggested that a request from the dissenter was not necessary – the fact of their significant disagreement was sufficient.

Other circumstances suggested included:

- Where the dissenters' judgement might be questioned (five responses)

# The practice of minuting meetings

- For protection in relation to future legal challenge / liability (six responses)
- Matters of conscience (seven responses)
- Where dissent might justify resignation in the future (one response)

The 'how' aspect of the question was less frequently addressed by respondents. The implication from many answers was that the dissent would be attributed by name to the relevant individual(s). However, some gave more details about their preferred approach:

- Without names (four responses)
- By job title (two responses)
- With reasons (five responses)
- Without reasons (three responses).

One suggestion for specimen wording might be:

*'There was a robust discussion about x, with considerable challenge around a, b, c and d. The board agreed to y, with Mr z requesting that his dissent be recorded.'*

Mr z's reasons should be covered, amongst others, under a, b, c and d.

## **Question 17 - Is it reasonable to say that in the overwhelming majority of cases all board decisions are reached by consensus?**

79 of the 82 responses to this question agreed with the proposition. One respondent disagreed without providing further reasoning. Another could be taken to disagree, but this seemed to be based on an interpretation of 'consensus' as meaning 'unanimous agreement'.

The trend across the answers was to note that consensus is usually the outcome of constructive discussion, and that an inability to reach a consensus may indicate that further consideration and debate is needed and should be encouraged. Some respondents saw guiding the meeting towards consensus as a role of the chairman.

## **Question 18 - When the minutes are reviewed at the succeeding meeting of the board, is there always an opportunity for a director to correct errors and indicate dissent if appropriate?**

# The practice of minuting meetings

All 82 respondents agreed that there is (or should be) always an opportunity for a director to correct errors in the minutes at the succeeding meeting of the board. However five respondents particularly highlighted the question's reference to indicating dissent and noted that this is not appropriate at the succeeding meeting. They were right to do so as it was not intended to suggest that this is the appropriate time to express dissent, but rather that, if the dissent expressed at the meeting has not been adequately recorded, this is an opportunity to make that correction.

38 respondents explicitly mentioned that the review at the succeeding meeting should not be the first opportunity for directors to correct errors – the minutes should be circulated in draft as soon as possible after the meeting in order to deal with director feedback prior to the next meeting. A minority of responses suggested timeframes for circulating the draft minutes, ranging up to a week after the meeting, but this seems rather too prescriptive for guidance.

One respondent asked for clarification as to whether it is an absolute requirement that the review and finalisation of the minutes of the last meeting take place as the first agenda item at the next:

*'There may be a misunderstanding that this is a legal requirement, and it would be helpful if the guidance clarified the position. The guidance could suggest expediting finalisation of minutes through the use of email or other technologies, particularly if meetings are infrequent.'*

## **Publishing minutes**

Some organisations such as public bodies and regulators choose to provide complete transparency over their board meetings by publishing board papers and minutes on their websites. However, it has been suggested that this level of transparency might result in the board meetings ceasing to be the decision-making body for the organisation, with confidential or 'water cooler' meetings held separately from board meetings to discuss matters and agree a position, before the matter is 'discussed' by the board and made public.

# The practice of minuting meetings

In a similar vein, a number of organisations, particularly in the public sector have an obligation to respond to Freedom of Information requests, which may require the publication of minutes.

## Question 19 - What are your views on the publication of board minutes?

There were 83 responses to this question, which showed a significant difference of view between corporate and public sector respondents:

	For	Against
Corporate	4	55
Not for Profit	16	8
<b>TOTAL</b>	<b>20</b>	<b>63</b>

It was acknowledged by some corporate respondents that other organisations (particularly in the public sector) might be required to publish minutes by their constitutions or other relevant regulations, but on the whole this was considered not to be applicable or desirable in the context of corporate organisations. One company summed this up rather well:

*'I understand there may be a requirement for public bodies, but for private companies, board meetings are a private and internal matter, and for meetings to be effective and directors to speak freely at the meeting, privacy should be assured.'*

Arguments in favour of publication tended to emphasise transparency and openness, and at least one respondent saw this as a more modern approach. However, there was a very strong opposing view that, in addition to the issues of commercial sensitivity and confidentiality associated with publishing minutes, publication would actually undermine transparency by impeding open discussion in board meetings and by adversely affecting the quality of the minutes. It would create a risk that significant decisions would be taken outside the board and that minutes would be written with publication in mind. As one respondent commented:

# The practice of minuting meetings

*'My experience of reading minutes published by public bodies and regulators suggests that they are very circumspectly written, but not so much so as to be of no value at all.'* Another noted that *'minutes should be kept confidential to avoid 'theatre' mentality. If members know the minutes will be published, they are much less likely to speak openly and honestly in the meeting'* and a third that *'Our minutes will often contain commercially confidential information. If we had to publish minutes we would be likely to need to omit this from the minutes, thereby making the minutes less useful for the board and the organisation.'*

All this can be summed up in one response, which said that:

*'My view is that it is difficult to satisfy both the requirements (of) the board to have appropriate professional minutes, which will stand the test of time, and at the same time produce a set of minutes of the same meeting, which are appropriate for public / wider consumption.'*

## **Question 20 - Do you believe that there are risks associated with publication and, if so, what might these be? Are these the same risks as those associated with responding to Freedom of Information requests and, if not, what are the differences?**

There were 68 responses to this question. These largely overlapped with those to question 19, and not all respondents felt capable of offering a view on Freedom of Information requests. As mentioned above, the principal risks identified were those of commercial sensitivity and the disclosure of confidential information, the inhibiting of discussion and its taking place elsewhere and the likelihood of a change to minuting style. There was also concern about the implications of access to minutes by those without sufficient knowledge of the background, or access to supporting papers, to understand the full context of the minutes. This would risk misinterpretation, reputational issues and, for one respondent:

*'interference from stakeholders to the detriment of good management.'*

# The practice of minuting meetings

There was concern about breaching data protection requirements and, from one respondent, a concern that particular directors in sensitive industries may be victimised by activists for their views or actions.

Of the responses that addressed Freedom of Information, five respondents thought the risks were similar and eight considered them to be different, all eight taking the view that the general publication of minutes carries greater risks than disclosures under the Freedom of Information Act (FOIA). This is because requests under FOIA are generally more limited in impact – either because the information requested is more specific and exemptions apply to what must be provided, or because it is being provided to a limited audience rather than being published on a website available worldwide.

As one respondent commented:

*'The Freedom of Information Act contains a number of exemptions, including for information of a commercially sensitive nature and this allows for redactions to minutes to take place before they are released. The information is provided to a specified individual in response to a particular request with the company controlling in what form it is sent (e.g. complete or redacted), this is very different to, say, publishing minutes on a website and having no idea by whom or how often or when information is accessed.'*

Whilst we will comment on this issue in guidance, we agree with the view of one of our respondents that:

*'We do not believe there is a need to address this in ICSA guidance. For those subject to a legal obligation to publish, the Information Commissioner already issues detailed guidance and a model publication scheme. Others wanting to do this voluntarily should take their own advice.'*

## **Question 21 - Should the holding of unminuted or 'informal' board meetings where decisions are actually made be discouraged? If so, how can this more effectively be done?**

We received 82 responses to this question. Respondents interpreted this question in different ways. Generally, the responses tended to agree informal meetings should be discouraged, 44 explicitly so, but the extent to which people noted the emphasis on these



# The practice of minuting meetings

meetings being forums 'where decisions are actually made' (rather than just informal discussions of the issues) varied across the responses. The lack of clarity is best summed up in this response:

*'We are not clear on what this question is intended to address. All board meetings [are required] to be minuted under the Companies Act 2006 so there should not be any 'unminuted' or 'informal' board meetings which are considering matters that are reserved to the board. It is not uncommon for there to be pre-meetings with board and committee chairs to discuss the agenda and prepare for the upcoming meetings but these are not considered board meetings and nor are decisions taken at these pre-meetings on matters that are reserved to the board. Likewise, the board will delegate authority to management for the day to day running of the business but any informal meetings in this respect would not be considered a board meeting.'*

Despite the confusion, the strong consensus was that actual decisions must be formally minuted. However, around 20 respondents also highlighted the benefits of discussions about relevant issues ahead of the board meeting. The main two arguments in favour of these informal discussions were (i) to assist the board members by providing a deeper level of information and more time for consideration and debate; and (ii) to help pre-empt and possibly resolve areas of conflict.

As one respondent commented:

*'...in the lead up to a matter being discussed at board level, we accept that it might be important for informal preliminary discussions to be held, for example on a one-to-one basis or with a small group of individuals present, to enhance the understanding of the matter being discussed and possibly pre-empt any common questions or information gaps that may arise.'* Another noted that *'...it is not unreasonable for key players to have discussed preferred outcomes before the full board meets, so long as this does not result in the full board's discussion being curtailed or stage-managed.'*

However, one response strongly made the opposite case against using informal meetings as a tool to prevent conflict at the board meeting:

# The practice of minuting meetings

*'The chairman should be encouraging a climate where directors all trust each other to arrive at the optimal decision for the organisation in a properly convened, quorate board meeting, without subsets of them having previously discussed the matters concerned to an advanced stage.'*

Most of those in favour of informal discussions took care to make a distinction between the discussion process and making a formal decision. Nine responses explicitly stated that informal meetings should still be minuted and twelve responses said that the content of informal meetings would need to be followed up on, reported back to and / or ratified at the next formal board meeting. Specific observations included:

*'Although we acknowledge that discussions between directors will inevitably take place outside of the boardroom, we believe that a distinction should be made between these types of peer discussions and the true decision-making that happens in the boardroom.'*

*'Executives discuss and agree matters all the time, that is the reality and I don't think this can or should be stopped. But, executives do need to be aware of what formal approval processes are required for particular decisions...'*

*'Board meetings are either properly convened according to the company's constitution or they do not constitute a validly held meeting (and) are, therefore, simply a conversation between the directors. If the matter concerned requires a board decision to be made, then a board meeting should be convened and the decision made according to the company's constitutional requirements and any adopted governance standards.'*

A few respondents made suggestions about how decision-making outside board meetings can be discouraged. These included:

- Training – e.g. from external lawyers
- Relevant constitutional documents – e.g. Articles of Association, Matters Reserved for the Board, Standing Orders, Board Charter of Expectations
- Improved supporting papers to increase the effectiveness of discussions in board meetings
- D&O insurance policies disincentives – i.e. decisions made outside the proper context explicitly excluded from cover.

# The practice of minuting meetings

## 4.4 Conflicts of interest

Some transactions involving the company and a director might give rise to a conflict between the interests of the company and the personal interests of the director. An example is where the company is agreeing a director's service contract. The director has a duty to the company to get the best contractual terms for the company but this conflicts with his or her personal interest in obtaining favourable terms. Conflict of interest rules apply to protect the company but, generally, the director should declare any personal interest before the matter is discussed. In certain circumstances a director will need to recuse themselves from discussion and decisions on such matters. There are also certain circumstances when an individual director may need to ensure they do not participate in discussion of a sensitive matter that conflicts with other obligations due to their nationality or country of residence. In such circumstances they may be committing a criminal or regulatory offence in their home country if they participate in the discussion. In any conflicts of interest situation it is important that the minutes note that the director in question was not present for, or did not contribute to, the relevant discussion if applicable.

### **Question 22 - How do you believe conflicts of interest should be addressed in board minutes? Should minutes be redacted when circulated to a conflicted director or, as a director, are they entitled to receive full minutes?**

There were 85 responses to this question. Not for the first time, the majority response was very much along the lines of 'it all depends'. Generally, there was a consensus that:

- The director should be identified in the minutes;
- The nature of the conflict, the decision as to whether or not the director should attend the section of the meeting in which he/she is conflicted and any other action taken by the board to address the conflict should be recorded in the minutes;
- Whether or not the director concerned leaves the room, the minutes should make it clear that he/she took no part in that section of the meeting and, where applicable, should confirm that the meeting remained quorate;
- Having conflicts of interest on the board agenda can help to ensure that this issue is kept front of mind, but can be seen as unnecessary bureaucracy. Some organisations take a formal resolution to approve such conflicts at the start of the meeting.

# The practice of minuting meetings

The question of whether the director should remain at the meeting, but take no part in the discussion of the conflicted issue, or leave the room was felt to be one for a decision by the chairman or the board as a whole, and would depend on the individual circumstances or the policy of the organisation.

On the point of redaction, 39 responses said that the minutes should not be redacted, 22 said that they should, 15 said that 'it depends' and nine didn't answer the question. Those saying that minutes should not be redacted generally took the view that the director has responsibilities as a member of the board and so it is inappropriate that he/she not have access to the full minutes. Some respondents who took this view noted that the minutes would be drafted to address any sensitivities and the very pragmatic point was made that multiple sets of minutes, redacted to reflect the conflicts of various directors would create an administrative nightmare.

Those who felt that minutes should be redacted generally focused on situations of commercial conflict or of the discussion of service contracts. There were some respondents that produce a separate set of 'private' minutes. Another took the view that the director is entitled to know the decision, but not any detail of the discussion.

Several respondents offered solutions to this issue, including:

- For the board to instruct the chairman to discuss personal matters with the individual concerned
- For the board to form a committee of the unconflicted members of the board, which can hold minuted meetings in the normal way, with those meetings then being reported back to the main board.

One respondent noted that this is a particular area of focus for US directors and that they are asked to send the minutes to the director's lawyer, marked 'Attorney/Client Privileged'

One legally expert respondent commented that:

*'Although the situation would depend on the specific facts we believe it likely that if a director had a genuine conflict of interest they would have no legal entitlement to receive that part of the minutes notwithstanding their general entitlement to board*

# The practice of minuting meetings

*minutes. If nothing else they would have difficulty demonstrating that they were acting for proper purposes.'*

Interestingly, there was a strong bias towards redaction from larger companies, particularly those in the financial services sector.

ICSA will seek legal and regulatory views on this issue.

## 4.5 Editing minutes

If minutes are well written there should be little need for editing by the directors. Apart from the company secretary, the biggest influence on the style and content of minutes is the chairman; it is important, however, that the content of minutes are acceptable to all directors. Amendments to draft minutes around matters of style and content are acceptable, provided all the key points of discussion and the decisions or recommendations are recorded. It is also acceptable to allow an executive who has made a technical presentation to the board to comment on the minute relating to that section, provided that their suggestions do not conflict with the company secretary's contemporaneous notes, which should always take precedence. Under no circumstances should a director or anyone else be permitted to insert points not made at the meeting, or to delete those that were.

Once the minutes have been approved by the whole board, they should not be amended. If, exceptionally, an error is discovered at a later date, the error should be agreed and minuted at a subsequent meeting and reference to this amendment should be noted on the original minutes.

### **Question 23 – Do you agree with this analysis of the process for editing draft minutes? If not, how do you differ?**

There were 78 responses to this question, mostly in agreement, with 60 respondents stating they agreed with the analysis and making no further comment, or just re-iterating the points stated in the consultation document. A further 15 respondents agreed with most of the analysis but raised some alternative approaches or areas of disagreement; whilst three respondents disagreed with the majority of the analysis.

# The practice of minuting meetings

## Corrections to the draft minutes

There were a number of helpful points made here, suggesting that our original drafting may have been insufficiently clear. In particular, it was pointed out that the heading should refer to the editing of draft minutes. One response summed this up rather well:

*'Whilst I agree generally with the analysis I do not agree that the company secretary's notes should necessarily take precedence over the subject expert. It is entirely possible that the company secretary might not fully appreciate the nuances of another technical discipline e.g. engineering, in which they might not be fully conversant. I consider that in any dispute as to the matters discussed at a meeting and the content of the minutes in these circumstances, should be determined ultimately by the chairman of the board in consultation with the company secretary, having regard to any general consensus.'*

One response was particularly detailed, and we feel it worth quoting at length. Although they disagree with detail in our original drafting, we agree with the sense of their comments:

*'The inference that the need for editing implies that the minutes were not well drafted is not one that we share. There is a world of difference between poorly drafted minutes where the secretary has not understood what has gone on at the meeting and the careful editing of a well drafted set of minutes by board members. This goes to the very heart of the responsibility for accuracy of the minutes which clearly rests with the board/committee in question and is a matter of judgement that will often give rise to debate and differences of opinion.'*

*Minute writing is an art. Whilst for routine meetings, minimal changes to the minutes should be the norm, it is not realistic to expect minutes always to be 'right first time', particularly when dealing with highly sensitive or complex business matters in the course of a lengthy board meeting. Opinion will often vary on how certain points should be expressed; this may simply be a matter of emphasis or nuance but getting this right is important particularly if the minutes will be shared with a regulator or third party. Editing by board members who are ultimately responsible for the accuracy should not be regarded as a failing on the part of the person drafting the minutes but a sign that responsibilities are understood and taken seriously.'*

# The practice of minuting meetings

*With the primary aim being to ensure completeness and accuracy, a review of technical content by specialist functions or executives is a good discipline and should not be discouraged. It goes without saying that any conflict with the company secretary's notes would need to be explored. In the event of conflicting views on the draft minutes, the chairman should be the final arbiter.'*

It is, of course, absolutely right that the board and others in attendance provide input to the editing process once the company secretary has provided a draft and rewording may help with clarity. One respondent read an implication that we regarded the editing of draft minutes as unusual, which is not the case. What we intended to convey was that the editing process should not be permitted to 'rewrite history'. As one respondent commented:

*'Editing minutes is problematic. Sometimes directors try to include content to make themselves look better or to add detail to a point they made. The company secretary needs to have sufficient authority to resist these changes and for that needs the support of the chairman. If the minutes are to be of sufficient quality to minimise the need for editing, this reinforces the need for education and standards for minuting.'*

This is quite right. It should be for the company secretary, in discussion with the chairman, to decide to whom the draft minutes should be submitted for technical review and the decision as to whether their suggestions should be adopted rests with the company secretary, and, ultimately, the chairman.

One slightly fraught issue on the deletion of points from draft minutes is where matters have been mentioned 'not for the minutes'. A purist view is that if they are not for the minutes, then they should not be discussed at the meeting, but in the real world this phrase is only too familiar and that reality should be accepted.

The process for editing draft minutes cannot be prescribed in detail as it will, rightly, vary between companies, but we do believe that it is important that the process is agreed and recorded. This will help the company secretary in those circumstances where they are put under pressure to produce minutes that they do not believe to be accurate. One respondent commented:

# The practice of minuting meetings

*'Circumstances in which a chair or director has had the influence to prevail upon a secretary to amend minutes have been documented in various places. We can envisage circumstances in which a secretary's role, with the wrong chairman in place, could become very uncomfortable. In order to mitigate against this, we would recommend agreeing a process by which minutes are taken, reviewed and circulated. This process should be documented and agreed between all of the directors, and any exceptions to the process will need to be justified to the board.'*

This seems a sensible solution.

## **Question 24 – How do you deal with material events that arise between the board meeting and the review of minutes? Might these be noted in parentheses, for example?**

There were 83 responses to this question, fairly evenly split between two main approaches: some sort of clearly identified 'post meeting note', flagged by parentheses or italics or both (48 responses); or alternatively dealing with the issue in the discussion and minutes of the next meeting – either in 'matters arising' at the next scheduled meeting, or at a meeting specifically convened to deal with the issue (39 responses). Some respondents suggested that both approaches would be possible, with the most acceptable on any given occasion being dependent on the materiality of the event.

One respondent differentiated between material events arising before the minutes have been reviewed by the chairman (which they felt could be noted in parentheses), and those occurring after the chairman's review but before the approval of the minutes at the meeting (which they thought should be dealt with as 'matters arising').

However, other respondents were more cautious about the addition of post-meeting notes – either stating they thought it should not be done at all, or only in very exceptional circumstances. These respondents emphasised the nature of minutes as a contemporaneous record of the events of the meeting:

*'...care needs to be taken that the history of a matter is not inadvertently re-written' and 'minutes should be accurate and paint a picture at a particular point in time. They should not be re-engineered to reflect an event following the meeting...'*



# The practice of minuting meetings

However, equally, the key issue with minutes is that they are an accurate record and, should it come to light that, for example:

*'a decision to proceed with a project might be made based on a cost of £X, but after the meeting it comes to light that it actually cost £Y. In these sort of circumstances it should be possible to insert a note to add the later information – however it must be inserted in such a way that it's clearly a postscript, and not be interpreted as having been said in the meeting.'*

Where a decision is required as a result of the material events, a number of respondents suggested it could be appropriate to deal with this via a written resolution.

There were a number of comments about how to treat such amendments, with some suggesting that the original erroneous minute should be destroyed and replaced, rather than the error being recorded at a later meeting and one respondent suggesting that:

*'it should however be possible for the company secretary to correct typographical errors without resubmitting the minutes to the board.'*

One respondent asked for this issue to be addressed in our guidance:

*'What would be useful would be some guidance from the ICSA as to exactly how this [errors discovered at a later date after the approval of the minutes] should be noted in the original minutes. For small simple errors e.g. a typo, we would usually have this changed in manuscript and initialled by the chairman. However for more substantial changes how would the ICSA recommend this be recorded, a file note attached to the original meeting minutes, referring to the subsequent meeting and the agreed wording?'*

We will incorporate separate sections in the guidance about the editing of draft and approved minutes. Obviously, the process will be one for the individual company to choose, but our view is that a sensible way of dealing with changes to approved minutes might be for this to be minuted at the meeting at which the change is agreed and then a copy of that minute filed with the original minutes with an appropriate manuscript note on the original document.

# The practice of minuting meetings

## 5 Access to minutes

Minutes of board meetings are internal records of the company and, as such, shareholders have no legal right to see board minutes. However, as noted above, some organisations such as regulatory bodies now publish minutes of board meetings and associated papers on their websites. Careful consideration should be given to a decision to publish details of internal matters in this way and consideration should be given to the potential impact on this important decision-making function within the organisation.

Auditors sometimes request to see board minutes as part of their audit inspection. Some companies will allow this, others only allow the audit partner to read the minutes and others will only allow them to see specific minutes. One suggestion was that any section of the minutes which should not be released can be marked so that when they are prepared for external review redaction is simple.

In some regulated sectors, the regulator will request copies of board minutes.

### **Question 25 - How do you deal with requests from auditors to review board minutes?**

There were 79 responses to this question, the overwhelming majority (72) of which provide auditors with access to their full board minutes although 28 respondents explicitly noted that they impose restrictions on the use of those minutes. These restrictions include:

- Restricting access to particular people – e.g. senior audit partner only
- Emphasising confidentiality
- View-only access (either by requiring inspection in person and note-taking only, or by protecting electronic documents).

Six respondents provide auditors with board minutes that have been altered or redacted prior to granting access, typically by removing: items about the appointment and performance of other professional advisers; and commercially sensitive or confidential items that are outside the scope of the audit.

# The practice of minuting meetings

Three respondents noted that the provision of access to the board minutes would be subject to board approval, and two commented that if the minutes have not yet been approved they make a note to draw the auditor's attention to this.

On a practical level, a number of different approaches are taken to granting access to the auditors:

- Electronically – i.e. by email, password protected PDF etc.
- On-site (unspecified whether this is soft or hard copy review)
- Access to the hard copy minute book
- Link to a password protected portal – e.g. Blueprint.

## **Question 26 - How do you deal with requests from regulators to review board minutes?**

77 respondents answered this question, 50 of whom stated that they would provide regulators with access to their full board minutes or otherwise fully comply with whatever information was requested. Seven respondents would provide redacted minutes or extract the parts of the minutes relevant to the request.

Eight respondents stated that their approach would be considered on a case by case basis and would depend on the regulator and their authority, the nature of the request and – where relevant – the views of the chairman and/or CEO.

Twelve respondents replied that the question was not applicable or that they had no experience in this area.

## **Question 27 - Is there anyone else to whom you would grant access to board minutes, other than pursuant to a Court Order?**

There were 79 responses to this question, with 21 respondents replying 'no' or 'not generally'.

Where it was contemplated that access could be given to others, examples included:

# The practice of minuting meetings

- Internal functions – e.g. risk/compliance (twelve responses)
- Lawyers (nine responses)
- Funders / lenders (eight responses)
- Other external / professional advisors (five responses)
- Acquirers in M&A context (five responses)
- Parent company / key shareholders (five responses)
- Directors (three responses)
- As requested under Freedom of Information Act – redacted if necessary (three responses)
- In response to specific requests from staff – extracts only (two responses)
- Board evaluator (one response)
- Standards verification teams – e.g. ISO (one response)
- HMRC (one response)
- Competition Commission (one response)
- Parliamentary select committee (one response).

We were surprised that board evaluators did not feature more prominently.

## 6 Retention of company secretary's notes of meetings

It is usual practice for company secretaries to keep their written notes of board meetings until the final version of the minutes are formally approved at a subsequent board meeting.

Some company secretaries keep their written notes indefinitely but it should be understood that any such notes would be 'discoverable' or disclosable in the context of any future litigation.

More recently some company secretaries began recording board meetings in order to clarify the nuances of a debate over controversial discussions and also to provide a continuous record of discussions when a company secretary is required to participate in discussions at a board meeting and/or leave the room during the course of the meeting.

# The practice of minuting meetings

The difficulty of participating in a meeting and also taking minutes is acknowledged but a solution might be to have a deputy or other minute taker attend the meetings to allow the company secretary to participate freely.

## **Question 28 - How long do you retain your notes of meetings, and why?**

This was one of the more interesting areas of the consultation and we received 79 responses.

The majority of respondents (47) keep notes until the approval of the minutes, normally at the next meeting. A number of those respondents (20) noted that the approval process involved the minutes being signed the chairman. The justifications for this approach reiterated that the approved minutes are the official record of the meeting (24 responses); and there were specific references to destroying or securely disposing of the notes (24 responses), sometimes subject to legal restrictions (two responses).

Where notes are retained for longer, some respondents have specific time-frames for retention and others depend on the occurrence of particular events:

- 3 months after approval (one response)
- 12 months (six responses)
- 2 years (one response)
- 'around 5 years' (two responses)
- 6-10 years (one response)
- 7 years (one response)
- 20 years (one response)
- 'indefinitely' (three responses)
- 'permanently' (two responses)
- 'beyond signing – part of a book' (one response)
- 'until the conclusion of the next audit' (one response)
- 'until I leave the job' (three responses)
- 'until the completion of [a] notebook' (three responses).

One public sector respondent replied:

# The practice of minuting meetings

*'Until the draft minutes have been reviewed by the chairman and the board and substantially agreed in principle prior to formal approval at the next board meeting.'*

We would have thought that they should probably be retained until approval in case of queries.

The most frequent justification given for retaining notes after approval was to refer back to details, but even then some respondents recognised the risks:

*'Sometimes someone refers back to the detail of a previous discussion and it is useful to be able to pull back the more detailed notes; however I wouldn't want discoverable records to be available indefinitely. If a particularly sensitive issue has been discussed then notes may go through the shredder shortly after the meeting that approved the minutes.'* This can, however, be a two-edged sword. One respondent noted that *'It's not unknown for directors who were present at the meeting to want to look back on what was actually said as opposed to minuted'*. We find this rather worrying. As one respondent in favour of destroying notes once the minutes are approved commented, *'I have always shredded my notes once minutes have been approved and signed. Only one version of the truth is required.'*

Some comments noted that technology has changed the way they draft and retain minutes, for example taking notes directly onto a laptop and then overwriting once the minutes are approved.

Discussion of the risks associated with discovery also begged the question of what to do with draft minutes or directors' notes. One respondent commented:

*'As a result of the SMR and the SIMR, some [Senior Managers] may want to keep their own notes from board and committee meetings as evidence that they have taken reasonable steps against their prescribed responsibilities. This practice will need to be carefully managed as it could potentially lead to issues if there were any conflicts between the formal minutes and the personal notes of those senior managers.'*

It is for each company to set its own process in this regard, but the important thing in our

# The practice of minuting meetings

view is that this be done with a recognition of the issues. One respondent commented that:

*'I have never given very much thought to this area, and so have tended to keep old meeting notebooks indefinitely, or at least until I change job. I may well review my practice as a result of this question.'*

One final observation was that it is important to consider what the secretary includes in their notes – especially if they are to be retained after the minutes have been approved – as they will be disclosable and, therefore, potentially embarrassing.

## 7 The recording of meetings

### **Question 29 - What are your views on the recording of board meetings?**

There were 79 responses, of which only nine favoured the recording of board meetings. 51 were against the idea and 19 were neutral or felt that it should only be done in specific circumstances.

Although the majority of respondents oppose recording board meetings, there are supporters and critics of the approach across both the corporate and public sectors. Several of the same negatives and positives were highlighted by respondents from across the spectrum with the most common being that it was felt that it might stifle debate which was raised by a third of those against the idea, especially as it would be necessary to seek consent from those recorded. One respondent was particularly concerned that it might:

*'stifle discussion or drive discussion outside of the meeting. In a regulated environment, the Regulator will ask for recordings as soon as they know they are made'. This is because it 'creates an alternative form of record of the meeting which risks inconsistency with the primary written minute'.*

The other most common issue was that it might detract from minute taking skills. One responded commented that:

# The practice of minuting meetings

*'this suggestion is one step away from having a verbatim record of meetings which is not the purpose of minute taking' whilst another was concerned that it 'doesn't help the title of company secretary, as it would give the perception of an admin secretary which is enough of a challenge as it is.'*

Other concerns included that the recording might fall into the wrong hands and that any recording could be disclosable in future litigation. This might be particularly embarrassing were a point made 'off the record' to be included.

On the positive side, there were those who felt that recording would improve the accuracy of minutes as misheard or misunderstood points could be clarified easily and one respondent felt that it would help with poor boardroom acoustics. Exactly the same points were argued from the opposite side – that comments from quietly-spoken individuals or those furthest from the microphone might be missed and that nuances of tone or body language might be missed.

We must also remember that in some sectors this ship has sailed:

*'Until recently it was seen as poor practice to take audio recordings of council meetings, and to retain them, because they represented an alternative record of proceedings where the minutes should be final. The advent of audio and video webcasting, and the right of the public to record meetings using their own equipment, has rendered this point moot.'*

## **Question 30 - How long should such recordings be retained?**

There were 71 respondents to this question, 15 of whom had said that they were against recording meetings and so marked the question 'not applicable.'

Of those respondents who did suggest a timescale, 42 said 'until the minutes have been approved', seven kept them in line with the company secretary's notes, three for as long as the approved minutes are kept, two permanently and two until the notes have been written up (i.e. before the minutes have been approved).

In most cases, the suggested retention period was a function of the purpose of the recording – whether it was an aide-memoire for the company secretary or served some



# The practice of minuting meetings

purpose of record. Again, in the public sector, where the primary purpose of recording is transparency and so audio-visual recording or live streaming are sometimes used, they may be held permanently.

## 8 Any other business

### **Question 31 - Do you have any other observations on the minuting of meetings which might be helpful?**

There were 66 responses to this question. They covered an enormous range of subjects and shared with us the wisdom and experience gained by respondents from minuting countless meetings. Some respondents favoured a highly prescriptive style of guidance, including standard forms of language; others wanted to see nothing more than suggestions. The following are a flavour of some of the responses to this question which we thought might be of wider help or interest:

- Good minuting is a deceptively difficult and time consuming task – more than one respondent described it as an art – which is often under-valued, notably by directors. It is far more than an administrative formality and there is scope for additional use of electronic solutions in the future.
- There is no one size fits all approach for minute-writing. Context is always important and each chairman and each board will have their own preference for minuting style.
- A key factor in the ease of minuting a meeting is how well it is chaired. The quality of papers presented to the meeting is also important. It is helpful if the chairman makes a brief summation of the outcome of discussions, as he sees it, giving members opportunity to agree or suggest amendments to that summation. It is the responsibility of the minute-taker to request clarification if there is any doubt as to the outcome of discussions or the conclusion reached.
- The person taking minutes should be suitably qualified (ICSA, lawyer who has studied corporate law, corporate governance) and with suitable experience particularly for PLCs and quoted and listed companies or Private Equity companies. Too often minuting a meeting is left (at short notice) to a junior member of staff without the experience or training to fulfil this role.
- The person taking the minutes should not be participating in the meeting.
- The ICSA qualification should include a specific paper on meetings, including their

# The practice of minuting meetings

minuting – this is a much overlooked area.

- Minutes, as a board responsibility, should be included as part of the board evaluation process and, where minutes are felt to be in need of improvement, training is provided for the relevant minute-taker.
- Key skills of a good minute taker include being able to:
  - listen to multiple voices at the same time and capture both their arguments and tone;
  - summarise an argument accurately and to record decisions taken and action points on which to follow up;
  - the confidence to ask for clarification or for the decision to be spelt out; and
  - the confidence to stand firm when someone asks for you to deviate from what you actually recorded.

Some technical suggestions included:

- for organisations with a large number of subsidiary boards / committees, it is helpful to ensure consistency across all boards and committees through a Minute Taking Policy and Style Guide to agree the house style and conventions. This can be approved by the board;
- bold capitalisation of key words such as APPROVED, DECIDED, RESOLVED, NOTED, ACCEPTED, AGREED etc. can be helpful in quickly reviewing minutes;
- each item should show whether the directors agreed / resolved / noted / received the item. I'm constantly surprised to see minutes which record an action without any conclusion, or even no conclusion;
- use of the formula 'key points discussed by the directors included' followed by a bullet point list makes it clear that they discussed the topic and key issues without necessarily going into them all in detail (or all of the issues covered);
- use simple English, but with a 'boardroom' tone; and
- A PDF soft copy of the signed hard copy act as backup for each other.

# The practice of minuting meetings

## Next steps

All this may suggest that minute-taking is a thankless task, but as one respondent commented, how many other people in an organisation get their work (the minutes) in front of senior management (the board) as frequently and consistently as company secretaries?

We are grateful for all the responses received, and they will be taken into consideration in the drafting of a new guidance note on minute taking.

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September 2016



The Governance  
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September 2016

