



Council of Governors 7th October 2014

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Item 12

TITLE OF PAPER	Council of Governors Engagement Policy: Defining the Relationship with the Board of Directors
TO BE PRESENTED BY	Professor Alan Walker CBE, Trust Chair
ACTION REQUIRED	It is a requirement set down in the Code of Governance (A1.1) that the nature of the relationship between the Council of Governors and Board of Directors is defined and that there should be a clear statement of the roles and responsibilities of governors and how disagreements between the Council and Board will be resolved. The policy fulfils that obligation. Council are asked to receive this document which has been approved by the Board at its September meeting.

OUTCOME	The Trust will fulfil all its statutory responsibilities and the Board will have confidence that it is compliant with this element of the Code.
TIMETABLE FOR DECISION	October 2014 Council meeting
LINKS TO OTHER KEY REPORTS / DECISIONS	SHSC NHS FT Constitution Provider Licence Audit Code for Foundation Trusts
LINKS TO OTHER RELEVANT FRAMEWORKS BAF, RISK, OUTCOMES ETC	Risk Assessment Framework NHS Constitution: Patients <input type="checkbox"/> Public <input type="checkbox"/> Staff <input type="checkbox"/> HSE <input type="checkbox"/> MH Act <input type="checkbox"/> Equality Act 2010 <input type="checkbox"/>
IMPLICATIONS FOR SERVICE DELIVERY AND FINANCIAL IMPACT	Failure to comply would require explanation as part of the Trust's annual governance statement
CONSIDERATION OF LEGAL ISSUES	

Author of Report	Sam Stoddart
Designation	Membership Manager
Date of Report	October 2014

SUMMARY REPORT

Report to: Council of Governors

Subject: Governor Engagement Policy: Defining the Relationship between Board and Council

From: Sam Stoddart, Deputy Board Secretary

1. Purpose

The policy will ensure the Trust fulfils its obligations in relation to provision A.1.1 of the Code of Governance.

2. Summary

The Code of Governance provision A.1.1 stipulates:

“There should be a schedule of matters reserved for the board of directors should include a clear statement detailing the roles and responsibilities of the council of governors. This statement should also describe how any disagreements between the council of governors and the board of directors will be resolved.”

This policy, which is based on good practice in other Foundation Trusts, sets out a clear process for the raising of and management of governor concerns in relation to board performance, licence compliance or Trust welfare.

3. Next Steps

The policy has been approved by the Board of Directors and after receipt from the Council of Governors will be made public via the Trust’s website.

4. Required Actions

Council are asked to receive the policy.

5. Monitoring Arrangements

Monitoring will be undertaken through the Board Secretary function.

6. Contact Details

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Council of Governors Engagement Policy:
Defining the relationship between the Board of Directors
and Council of Governors

July 2014



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Executive Summary

- i. The Trust Board and Council of Governors are committed to building and maintaining an open and constructive working relationship. Under-pinning such a relationship is the need for clarity on the respective roles and responsibilities.
- ii. Monitor suggests that each Foundation Trust should have a Policy for Engagement between the Trust Board and the Council of Governors, which clearly sets out how the two bodies will interact with one another for the benefit of the Trust.
- iii. This Policy for Engagement clarifies the respective roles and responsibilities of the Board and the Council of Governors, and describes the information flow between the two groups. The policy describes the involvement of Governors in forward planning, and the role they play in respect of holding the Trust Board to account.
- iv. The Policy for Engagement also sets out a process should the Governors have a concern about the performance of the Board, compliance with the licence or the welfare of the Trust. It also describes the process should the Governors have significant concerns about the performance of the Chair or Non-Executive Directors.
- v. This policy is intended to provide clear guidance and a useful framework for both the Trust Board and Council of Governors and has been approved by each respectively.

1.0 Introduction

This policy has been written in response to the recommendations contained in paragraph A.1.1 of *The NHS Foundation Trust Code of Governance* (Monitor Dec 2013). Its purpose is to describe the methods by which Governors may engage with the Board when they have concerns about the Board's performance, the Trust's compliance with its terms of authorisation or the welfare of the Trust.

2.0 Purpose

This policy:

- outlines the mechanisms by which Governors and directors will interact and communicate with each other and takes into account the expanded role of Governors, set out in the National Health Service Act 2006 as amended by the Health & Social Care Act 2012 (the Act), including the new duty to hold the Non-Executive Directors individually and collectively to account for the performance of the Board of Directors
- describes the methods by which Governors may engage with the board when they have concerns about the performance of the Board of Directors, compliance with the Trust's Licence (as granted by Monitor under the Health & Social Care 2012) or the welfare of the NHS Foundation Trust
- provides details of the panel set up by Monitor for supporting Governors of Foundation Trusts in their new role and to whom Governors may refer a question as to whether the Trust has failed or is failing to act in accordance with its Constitution

3.0 Holding to Account

3.1 The Health and Social Care Act 2012 specifies that it is the duty of the Council of Governors to hold the Non-Executive Directors individually and collectively to account for the performance of the Board of Directors. The relationship between the Council of Governors and Board of Directors is critical and there are a number of ways an open and constructive relationship can be achieved between the two. Board members and Governors should have the opportunity to meet at regular intervals, Governors should feel comfortable asking questions regarding the management of the Trust and directors should keep Governors appropriately informed, particularly about key Board decisions and how they affect the Trust and the wider community.

Governors should be satisfied that Non-Executive Directors provide appropriate challenge and bring to bear their specific skills within the decision-making function of the Board.

The process of engagement between the Council of Governors and Board of Directors is one which is on-going. However this policy, agreed between the Board of Directors and the Council of Governors, aims to outline existing and additional mechanisms which have been agreed and which will be used by the Trust to ensure appropriate and timely communication

between the Council of Governors and the Trust Board and to ensure that Governors are able to discharge the above new duty effectively, harmoniously and recognising the different and complimentary roles of each body.

In support of the duty to hold to account, the Council of Governors also has the statutory power to require one or more of the directors to attend a Governors' meeting for the purpose of obtaining information about the Trust's performance of its functions or the directors' performance of their duties (and for deciding whether to propose a vote on the Trust's or directors' performance). Whilst it is recognised that this power will rarely be exercised, should this power be invoked, it must be reported in the Annual Report and Accounts. The aim of this policy is to have agreed levels of engagement which will eliminate or at least minimise the need of Governors to ever invoke this statutory power.

In performing their duties, Governors should keep in mind that the Board of Directors manages the Trust and continues to bear ultimate responsibility for the Trust's strategic planning and performance and must promote the success of the Trust so as to maximise the benefits for the members of the Trust as a whole and for the public.

3.2 Governors will hold the Chair and other Non-Executive Directors to account partly through effectively undertaking the specific statutory duties summarised here:

- Governors are responsible for appointing the Chair and other Non-Executive Directors and may also remove them in the event of unsatisfactory performance;
- Governors are constituted to receive the annual report and accounts of the Trust, and can use these as the basis for their questioning of Non-Executive Directors;
- Governors have the power to appoint or remove the auditor;
- Directors must take account of Governors' views when setting the forward plan for the Trust, giving Governors the opportunity to feed in the views of trust members and the public and to question the Non-Executive Directors if these views do not appear to be reflected in the strategy. However, Governors should understand there may be valid reasons why member views cannot always be acted upon. Governors and Non-Executive Directors should have enough time to discuss these matters so Governors can be satisfied with the reasons behind the board decisions;
- since 1 October 2012, Governors have also had the specific power of approval on any proposal by the Board of Directors to increase non-NHS income by 5% a year or more. They therefore need to be satisfied with the reasons behind any such proposals;
- Governors also have the power to approve amendments to the Trust's constitution, approve 'significant transactions' and approve any mergers, acquisitions, separation or dissolution and will need to be satisfied with the reasons behind any proposals

3.3 It is clear that there are already a number of well-defined mechanisms in existence within the Trust for Governors to receive or seek information from and hold the Board and the directors and Non-Executive Directors to account including:

- receiving the agenda and minutes of Board meetings and requesting any specific papers. Governors are also invited to pose questions to the Board, answers of which are recorded in Board minutes and reported to the Council of Governors;
- receiving the annual report and accounts and asking questions on their content;
- receiving a monthly update from the Chair detailing both open and confidential business discussed at the Board meeting;
- receiving the Chief Executive's staff brief;
- receiving regular performance information updates and asking questions on and/or challenging their content;
- meeting with the Directors of HR, Finance and Planning and Performance (Performance Overview Group) every quarter to undertake a more detailed discussion about Trust performance against its targets and objectives;
- receiving performance appraisal information for the Chair and other Non-Executive Directors, via the Nomination & Remuneration Committee, and using this to inform decisions on remuneration for the Chair and the other Non-Executive Directors;
- the informal meetings with Non-Executive Directors prior to each Council meeting in which Governors can question NEDs on the activities and how they have been providing challenge at Board meetings and within other arenas;
- the attendance of the Chief Executive, other executive and Non-Executive Directors at Council of Governors meetings and using these opportunities to ask them questions;
- the annual development session between the Board of Directors and Council of Governors in which the focus is on questioning the Trust's performance in the previous year;
- including the Lead Governor in the annual appraisal of Non-Executive Directors;
- receiving information on internal consultations, developments and media releases;
- receiving information on issues or concerns likely to generate adverse media interest and providing Governors with the opportunity to raise questions or seek information or assurances (through the Council of Governors meeting);
- involvement of Governors in the Trust's strategy and planning process through the holding of an annual planning session for Governors led by the Director of Planning & Performance.

3.4 The following additional measures (some of which are mandatory under the Health & Social Care Act) and which are intended to support Governors in their extended role and to ensure that Governors are well briefed about the decisions which they may be required to make and about the context in which the Board of Directors is working including the requirements of relevant external stakeholders including Commissioners, Monitor and the CQC, have and are being introduced:

- receiving information on proposed significant transactions, mergers, acquisitions, separations or dissolutions and questioning the directors on these
- receiving information on documents relating to non-NHS income, in particular any proposals to increase this by 5% a year or more, and questioning the directors on these;
- direct involvement of individual Governors in the annual appraisal of Non-Executive Directors;
- the holding of annual development workshops – not least in order to ensure that Governors are equipped with the skills and knowledge they require in order to fulfil their expanded role;

4.0 Raising Concerns

- 4.1 Notwithstanding the role of the Chair in providing the link between the Council of Governors and Board of Directors, it is recommended that any governor or group of Governors (the petitioner/s) who have concerns covered by this policy should, in the first instance, consult the Board Secretary as she may be able to resolve the matter informally and will certainly be able to advise the petitioner/s on the acceptability of the evidence offered and so whether it is appropriate to take their concerns to the Chair. The advice of the Board Secretary is not, however, binding, and the petitioner/s retain the right at all times to raise the matter with the Chair. For concerns which it would be inappropriate to raise with the Chair, the role of the Chair will be undertaken by the Senior Independent Director.
- 4.2 Where material concerns exist regarding the performance of the Board of Directors, compliance with the Trust’s Licence or matters relating to the general well-being of the Trust, this policy should be followed. This policy is not to be invoked for minor issues raised by an individual governor. A concern, in the meaning of this policy, must be directly related to:
- the performance of the Board of Directors
 - compliance with the Trust’s Licence
 - the welfare of the Foundation Trust
- 4.3 The procedure for a situation in which the Council of Governors as a whole is in dispute with the Board of Directors is covered in Annex 9, section 6.13 of the Trust Constitution. Governors should acknowledge the overall responsibility of the Board of Directors for running the Trust and should not try to use the powers of the Council, or the provisions of this policy, to impede the Board in fulfilling its duty.
- 4.4 To support Governors in their new expanded role, Monitor has set up a ‘Panel for Advising Governors of FTs’ who may refer a question as to whether the Trust has failed or is failing to act in accordance with its Constitution. The Council of Governors should only consider referring a question to the panel in exceptional circumstances, where there is uncertainty within the Council about whether the Trust may have failed, or is failing, to act in accordance with the Trust’s Constitution or with Chapter 5 of the 2006 Act, and this uncertainty cannot be resolved through repeated discussions with the Chair or another Non-Executive Director. Please also see section 4.13 below.

- 4.5 Governors should not raise concerns that are not supported by evidence. That evidence must satisfy the following criteria:
- any written statement must be from an identifiable person or persons who must sign the statement and indicate that they are willing to be interviewed about its contents
 - other documentation must originate from a bona fide organisation and the source must be clearly identifiable
- 4.6 Newspaper or other media articles will not be accepted as prima facie evidence, but may be accepted as supporting evidence
- 4.7 The Chair shall investigate all concerns brought by Governors, involving other executive directors at his discretion. The investigation shall include a review of the evidence offered and discussions with trust officers as appropriate.
- 4.8 As soon as practicable after the conclusion of the investigation the Chair shall meet with the Governor/s to discuss the findings. This meeting has three possible outcomes:
- the Governor/s are satisfied that their concerns were unjustified and withdraw them unreservedly. In this case no further action is required
 - the Governor/s are satisfied that their concerns have been resolved during the course of the investigation. The Chair shall write a report on the concerns and the actions taken and present this the Council of Governors
 - the matter is not resolved to the satisfaction of the Governor/s. The Chair shall call a closed extraordinary meeting of the Council of Governors as soon as possible in accordance with the terms of the Trust Constitution to consider the matter further. That meeting may choose either to take no further action or, if two thirds of the Governors present agree, to invoke the escalation process described from section 2.3.1 onwards

5.0 Escalating Concerns

- 5.1 At this stage of the process the SID takes over the lead role from the Chair. Should the SID be unavailable, or be prevented from participating because of a conflict of interests, then the Council of Governors may choose any other Non-Executive Director to fulfil the role.
- 5.2 The first duty of the SID is to establish the facts of the matter. This will be accomplished by reviewing the evidence offered by the petitioner/s, the process of the investigation and any documentation produced and also by meetings/interviews with the Governor/s and any trust officers involved. In carrying out this process the SID shall seek the agreement of all interested parties and shall have the authority to commission whatever legal or other advice is required.
- 5.3 Once the facts are established to his or her satisfaction, the SID shall make a decision on the course of action to be followed in the best interests of the trust and shall describe the reasons for that decision in a written report. The decision of the SID shall be binding upon the trust. In the first instance, the SID shall present the decision and the report to the Governor/s and to interested parties within the organisation.

5.4 The Chair shall then, at the request of the SID, call a closed extraordinary meeting of the Council of Governors as soon as possible in accordance with the terms of the Trust Constitution. The purpose of this meeting, and the sole item on the agenda, will be for the SID to present his or her report and decision and for the Council to give its response. Three outcomes are possible:

- the Council accepts the decision of the SID. In this case no further action is necessary
- the Council does not accept the decision of the SID but chooses not to escalate the matter further. No further action is prescribed by this policy but the Council of Governors may choose to keep the matter under review at future meetings
- the Council votes to refer a question for legal review or make a formal notification to the Panel for Advising Governors of FTs. The seriousness of the latter cannot be overemphasised. If such a question or any other important issue or uncertainty arises, Governors should always seek to discuss it in the first instance with the Chair or another Non-Executive Director. Monitor strongly encourages all FTs and Governors to try to resolve questions internally before posing a question to the Panel only as a last resort. The Council of Governors should only consider referring a question to the panel in exceptional circumstances, where there is uncertainty within the Council about whether the Trust may have failed, or is failing, to act in accordance with the Trust's Constitution or with Chapter 5 of the 2006 Act, and this uncertainty cannot be resolved through repeated discussions with the Chair or another Non-Executive Director. A governor may only refer a question to the Panel if more than half of the members of the Council of Governors voting approve the referral. Individual Governors may not bring a question to the panel without the approval of the Council as a whole. The panel will then decide whether to carry out an investigation on a question referred to it. If an investigation is carried out, the panel will publish a report on the conclusion. It is noted that the Trust will not necessarily be required to adhere to the panel's decision.

6.0 Roles and Responsibilities

6.1 Chair

The Trust Chair:

- acts as the principal link between the Council of Governors and the Board of Directors. He or she will, therefore, have the main role in dealing with any issues raised by Governors, and will involve the Chief Executive and any other directors as necessary.
- ensures that the Board of Directors and Council of Governors work together effectively and enjoy constructive working relationships (including the resolution of any disagreements).
- ensures good information from and between the Board of Directors, Committees, Council of Governors and members and between the Senior Management and Non-Executive Directors, members of the Council of Governors and Senior Management.
- ensures that the Council of Governors and Board of Directors receive accurate, timely and clear information that is appropriate for their respective duties.

- constructs the agendas for both the Board of Directors and Council of Governors (with the input of others as appropriate)

6.2 Chief Executive

The Trust Chief Executive:

- ensures the provision of information and support to the Board of Directors and Council of Governors and ensures that Board of Directors' decisions are implemented
- facilitates and supports effective joint working between the Board of Directors and Council of Governors
- supports the Chair in his/her task of facilitating effective contributions and sustaining constructive relations between Executive and Non-Executive members of the Board of Directors, elected and appointed members of the Council of Governors and between the Board of Directors and Council of Governors
- with the Chair, ensures that the Council of Governors and Board of Directors receive accurate, timely and clear information that is appropriate for their respective duties
- with the Chair, constructs the agendas for both the Board of Directors and Council of Governors (with the input of others as appropriate)

6.3 Senior Independent Director

The Senior Independent Director (SID):

- acts as an alternative source of advice to Governors. His or her function is to deal with concerns which would be inappropriate to take to the Chair, or where engagement with the Chair has not resolved the matter.

6.4 Lead Governor

The Council of Governors appoints from within one governor to act as the Lead Governor to communicate directly with Monitor in the event that the Foundation Trust is at risk of breaching its terms of authorisation.

6.5 Governors

Individual Governors have a responsibility to act in accordance with this policy, to raise concerns (as defined in this policy) and to assure themselves that issues have been resolved. In addition, the Council of Governors as a body has a duty to inform Monitor if the Trust is at risk of breaching the terms of its Licence.

7.0 Monitoring Compliance and Effectiveness

This policy will be kept under review, compared with the provisions developed by other foundation trusts and revised in accordance with emerging best practice and guidance from Monitor.

8.0 Associated Documents and References

- 8.1 Monitor (Dec 2013) The NHS Foundation Trust Code of Governance.
- 8.2 Trust Constitution.
- 8.3 Monitor (Aug 2013) Your statutory duties: a reference guide for NHS Foundation Trust Governors.

9.0 Definitions

- 9.1 Monitor – The independent regulator of NHS foundation trusts
- 9.2 Petitioner/s – A governor or Governors raising concerns under this policy
- 9.3 SID – Senior Independent Director, one of the Non-Executive Directors appointed by the board to provide an alternative to the Chair as source of advice to Governors.

10.0 Dissemination

- 10.1 This policy will be made available to trust staff in the policies section of the intranet. It will also be available on the Trust's external website on the governor pages.
- 10.2 This policy will be distributed in hard copy to all Governors as soon as possible after their election or appointment and whenever it is revised.