Council of Governors

SUMMARY REPORT	Meeting Date:	13 December 2022
	Agenda Item:	09

Report Title:	**Corporate Governance Report**	
Author(s):	Deborah Lawrenson, Director of Corporate Governance	
Accountable Director:	Deborah Lawrenson, Director of Corporate Governance	
Other Meetings presented to or previously agreed at:	**Committee/Group:**	Board (Public)
	Date:	
Key Points recommendations to or previously agreed at:	Elements of this report were presented in a report to the November 2022 Board meeting. Relevant extracts from that report have been drawn out for the attention of Governors	

Summary of key points in report

Key areas covered in this report are outlined in full below:

Code of Governance for NHS Provider trusts – published 27 October 2022

An updated code of governance for both Foundation Trusts and NHS Trusts was published in October 2022 following consultation. This will come into effect from 1 April 2023 (applicable for the 2023/24 financial year onwards) and replaces the 2014 NHS foundation trust code of governance. It supports delivery of effective corporate governance, understanding of statutory requirements where compliance is mandatory and provisions with which trusts must comply, or explain how the principles have been met in other ways.

We will be undertaking a review of our compliance with the new code as part of our Annual Report 2022/23 preparations and our planning for the Annual Report for 2023/24. Any changes required to the Constitution will be reported through Council of Governors and Board. Below are links to new Code and key associated documents.

Appendix 1 – provides a summary on the Code of Governance and related guidance documents – below are links to the key documents if you wish to read these in more detail:

Governance guidance published following consultation:

Code of governance for NHS providers
Guidance on good governance and collaboration Addendum to existing duties of trust governors

The document outlines the three statutory duties that will be most affected by the transition to system working, setting out additional considerations for each duty, that reflect the new context trusts are operating in:

1. Holding the non-executive directors individually and collectively to account for the performance of the board of directors.
2. Representing the interests of the members of the NHS foundation trust and the public.
3. Approving 'significant transactions', mergers, acquisitions, separations or dissolutions

The statutory duties of councils of governors have not changed, and governors should not anticipate any material change to their day-to-day role.
However, the NHS' move to a new way of working will affect what councils of governors need to consider when performing their statutory duties. Councils of governors will need to be assured their foundation trust board has considered the consequences of decisions on other partners within their system, and the impact on the public at large.

Appendix 2 – Changes to the Code of Governance – for reference an extract from the NHS Providers 'on the day briefing' 27 May 2022 has been provided which outlines the key changes the majority of which have been adopted.

NHS England Operating Framework

The document sets out how the NHS will operate in the new statutory framework created by the Health and Care Act 2022 and reflects the formal establishment of integrated care systems (ICSs) and NHSE's expanding remit. This will be reviewed as part of our review of the new governance documents to understand implications. Provided below are links to the new framework and to the NHS Providers Briefing if you wish to read these in more detail:
https://www.england.nhs.uk/nhs-oversight-framework/

https://nhsproviders.org/resources/briefings/on-the-day-briefing-nhs-englands-new-operating-framework

Consultations on Provider Licence and Enforcement Action

Following the publication of the new code consultations are underway on the provider licence and on enforcement action. The consultations launched on 28 October and close on 9 December 2022.

The provider licence has historically only applied to NHS Foundation Trusts as well as independent sector providers unless exempt and a separate licence was in place for NHS controlled providers. NHS trusts were previously exempt but recent statutory changes will require them to be licenced too.

The proposed changes will bring the licence up to date, reflecting new legislation and supporting providers to work effectively as part of integrated care systems (ICS).
There are four key types of proposed changes to the licence summarised as follows:

1. Supporting effective system working
2. Enhancing the oversight of key services provided by the independent sector
3. Addressing climate change
4. Technical amendments

Through the consultation views have been sought NHS England's (NHSE) intended approach to using its enforcement powers. This includes setting out use of powers to direct an Integrated Care Board (ICB) and the enforcement mechanisms for providers and also explains regulatory and statutory processes in the event of enforcement action and subsequent right of appeal.

The basic processes that would be followed have not changed for foundation trusts but revised guidance sets out how NHS England will exercise its enforcement powers in line with the principles set out in the NHS Oversight Framework, working with and through ICBs wherever possible and with an emphasis on systems working together to resolve problems. In the event of enforcement action providers may be subject to:

- Discretionary requirements
- Undertakings
- Additional governance licence conditions (foundation trusts only)
- Monetary penalties
- Revocation of licence
- Direction for NHS trusts (s27B NHS Act 2006)

Both consultations opened on 28 October and close on 9 December 2022, with SHSC's response co-ordinated by the Director of Corporate Governance.

Governor elections

A separate report is provided on the outcome of the recent by-election and next steps.

Well Led

The Board has engaged NHS England (NHSE) to provide confirm and challenge support on its annual Well Led self-assessment with a series of interviews with key individuals having taken place during November and a report from NHSE expected before the end of the calendar year to support onward reporting to the Board in the New Year.
Alongside this, leaders across the organisation are undertaking their own local Well Led self-assessments with progress on this reported through our triannual Performance Review process.

Declarations of interests, gifts, hospitality and sponsorship
The Head of Corporate Assurance will be calling in updated declarations of interests, gifts, hospitality and sponsorship from Governors before the end of March to support onward reporting to the Audit and Risk Committee in April 2023.

External Auditors

A separate paper is provided on proposals regarding appointment of External Auditors.

The Council of Governors is asked to:

1) **Receive and Note** the updates provided on key governance matters
2) **Review** the materials provided in respect of the Addendum for Governors to the new Code of Governance with a view to having further discussion on this at the meeting in February
3) **Note –** draft updates to the Constitution will be received for discussion in February

Please identify which strategic priorities will be impacted by this report:				
Covid-19 Getting through safely	***Yes***	***X***	***No***	
CQC Getting Back to Good	***Yes***	***X***	***No***	
Transformation – Changing things that will make a difference	***Yes***	***X***	***No***	
Partnerships – working together to make a bigger impact	***Yes***	***X***	***No***	

Is this report relevant to compliance with any key standards ?					**State specific standard**
Care Quality Commission	*Yes*	***X***	*No*		***"Good Governance*** *- The provider of your care must have plans that ensure they can meet these standards.* *"They must have effective governance and systems to check on the quality and safety of care. These must help the service improve and reduce any risks to your health, safety and welfare."*
IG Governance Toolkit	*Yes*		*No*	***X***	

Have these areas been considered ? YES/NO					If Yes, what are the implications or the impact? If no, please explain why
Patient Safety and Experience	*Yes*	***X***	*No*		NA
Financial (revenue &capital)	*Yes*	***X***	*No*		NA
OD/Workforce	*Yes*	***X***	*No*		NA
Equality, Diversity & Inclusion	*Yes*	***X***	*No*		NA
Legal	*Yes*	***X***	*No*		NA
Environmental Sustainability	*Yes*	***X***	*No*		NA

Appendix 1 – NEW CODE OF GOVERNANCE 2022

Introduction

NHSE have reported there was a high degree of support for the changes proposed to the Code of Governance and the majority of the changes proposed have been retained. The changes made in response to feedback received were as follows:

- NHSE and ICBs will have a role in foundation trust board appointments – agreeing the approach in advance with trusts.
- Each section of the code contains high-level principles and provisions for how these translate into governance processes.
- They have stressed the need to spread responsibilities across the whole board to ensure there is capacity to carry out roles effectively.
- An individual who serves three years as a non-executive director can go on to spend up to six years as a chair without requiring NHS England agreement.

The Code will go 'live' from 1 April 2023 for the 2023/24 financial year.

We are capturing the key changes and will circulate a separate briefing on this in the coming weeks to both the Board and the Council of Governors.

New Code of Governance 2022

The new code will replace the NHS Foundation trust code of governance, which was last updated in 2014 giving trusts some time to review and implement any changes to their arrangements. For the first time, the code will apply to all trusts. The code sets out principles to help trusts deliver effective corporate governance, and provisions with which trusts must comply, or explain how the principles have been met in other ways. Statutory requirements (where compliance is mandatory) are clearly indicated.

The majority of the code will be familiar to foundation trusts. It makes clear where provisions are different depending on the constitution of the provider organisation (notably around the council of governors and board member recruitment, appointments, performance evaluation and remuneration).

The code has been updated to reflect:

- its application to NHS trusts, aligning with the proposed extension of the NHS Provider licence to them
- changes to the UK Corporate Governance Code in 2018 [further detail is available in **appendix 2**]
- the establishment of integrated care systems under the Health and Care Act 2022
- the evolving NHS System Oversight Framework, under which trusts will be treated similarly regardless of their constitution as an NHS trust or foundation trust.

The code is structured in five main sections containing the principles and provisions:

A - Board leadership and purpose;
B - Division of responsibilities;
C - Composition, succession and evaluation [of the board];
D - Audit, risk and internal control; and
E - Remuneration.

The provisions are drawn together in a “disclosures” section: a checklist against which compliance can be self-assessed and which must be reported against in trusts’ annual reports.

Finally, there are three appendices which cover the role of the trust secretary, provisions relating to councils of governors (for foundation trusts only), and the regulatory requirements related to the code and provider licence.

Summary on associated documents

Guidance on Good Governance and Collaboration

This new guidance, seeks to clarify the expectations around collaboration on all provider trusts and to set out the governance characteristics that trusts should NHS have in place to facilitate effective collaboration. It sets the expectation that providers collaborate with partners to agree shared objectives through integrated care partnerships (ICPs) and deliver five-year joint plans and annual capital plans through collaborative arrangements. It links to the NHS Oversight Framework. The guidance includes a section explaining how NHSE will use this guidance in cases of non-compliance, noting that in the first instance integrated care board (ICB) leaders should seek informal resolution of issues locally, with NHSE intervention following if required, and in discussion with ICB leaders.

The guidance details expectations on providers to consistently:

- engage in shared planning and decision-making
- take collective responsibility with partners for delivery of services across various footprints
- take responsibility for delivery of improvements and decisions agreed through any relevant forums.

Illustrative minimum behaviours are described in each case.

A table further describes five characteristics of governance arrangements to support effective collaboration, with key lines of enquiry (KLOEs) for each in the form of questions about providers’ participation, engagement, dialogue, information-sharing and decision- making, among other things.

The five characteristics expected of providers are:

- developing and sustaining strong working relationships with partners
- ensuring decisions are taken at the right level
- setting out clear and system-minded rationale for decisions
- establishing clear lines of accountability for decisions
- ensuring delivery of improvements and decisions.

The appendix to the guidance includes illustrative scenarios of ways in which providers can collaborate effectively.

Addendum to Your statutory duties – reference guide for NHS foundation trust governors: System working and collaboration: role of foundation trust councils of governors

The addendum supplements the existing guidance for governors and explains that governors’ statutory duties have not changed: governors should not expect any material change to their day-to-day role.

However, the context of system working and collaboration brings additional considerations for governors when undertaking their statutory duties. This guidance is applicable from today.

The addendum introduces the system working context in relation to the Health and Care Act 2022 and the removal of legal barriers to collaboration and integrated care. It notes that the performance of provider trusts will increasingly be judged against their contribution to the objectives of their Integrated Care System (ICS). It also goes into some detail on what representing the interests of the public means in the new context, emphasising that 'the public' should include the population of the local system of which the foundation trust is part.

It then focuses on the statutory duties of governors and additional considerations in relation to each: holding the non-executive directors to account for the performance of the board; representing the interests of members and public; and taking decisions on significant transactions. Illustrative scenarios are provided in each case.

Finally, the addendum suggests approaches to support better working between the board and council, with some practical tips and examples of activities trusts are already undertaking. It emphasises that governors' key relationships remain with the directors and the secretary of their own trust, who should facilitate information sharing about, and any engagement with, system partners

Appendix 2

Changes to the Code of Governance extracted from the NHS Providers 'on the day briefing' 27 May 2022 which outlines key changes the majority of which have been adopted

What's new?

In general, the provisions of the code do not greatly differ from the 2014 version since the Health and Care Act 2022 does not change the statutory role, responsibilities and liabilities of provider trust boards of directors. However, there are some themes underlying the key changes, most of which should come as no surprise to trusts but are now included in the code for the first time:

- Incorporation of the requirement for boards of directors to assess the trust's "contribution to the objectives of the Integrated Care Partnership (ICP) and Integrated Care Board (ICB), and place-based partnerships" as part of its assessment of its performance, and "system and place-based partners" are highlighted as key stakeholders throughout.
- The inclusion of the board's role in assessing and monitoring the culture of the organisation and taking corrective action as required, alongside "investing in, rewarding and promoting the wellbeing of its workforce". The previous code only mentioned wellbeing in the context of the finances of the organisation.
- A new focus on equality, diversity and inclusion, among board members but also training in EDI should be provided for those undertaking director-level recruitment. The board should have a plan in place for the board and senior management of the organisation to reflect the diversity of the local community or workforce, whichever is higher.
- For foundation trusts, potentially greater involvement for NHSE in recruitment and appointment processes, including utilising NHSE's Non-Executive (NED) Talent and Appointments team in preference to external recruitment consultancies and having representation from NHSE on NED recruitment panels. When setting remuneration for NEDs, including the chair, foundation trusts should use the *Chair and non-executive director remuneration structure*.

- Terminology has been updated (for example because since the new Act, Monitor is no more) and there are links to other relevant frameworks, manuals, and guidance (such as the *Well-led framework*). More detail about key changes below.

The code

Set out in five sections, the code describes principles of good governance and the provisions (based on the principles) with which provider trusts must comply or explain. The required disclosures are then set out in tables, depending on what they require of the trust (commentary in the annual report, publication on their website etc.). There are appendices covering the role of the company secretary, principles and provisions related to councils of governors (for foundation trusts only), and how the code relates to other regulatory requirements.

Section A: Board leadership and purpose

The principles here are updated to align with current NHS policy. They stress the importance of an effective, diverse and entrepreneurial board which sets the trust's vision, values and strategy. It should do so with regard to the triple aim duty of better health and wellbeing for everyone, better quality services, and the sustainable use of resources. There is now also specific reference to the trust's role in reducing health inequalities, assessing and monitoring culture, and investing in, rewarding and promoting the wellbeing of its workforce.

Ensuring effective management of resources, risk management through internal controls, and stakeholder engagement (which now includes system partners) are part of the role of the board. The provisions now include that boards should have systems and processes in place to assess the contribution of the trust to the objectives of the ICS as well as assessing the performance of the trust in relation to effectiveness, efficiency and economy and focusing on quality, risk management, clinical governance and stakeholder engagement, making use of independent advice as required. The trust's vision and values should now include the trust's role "with reference to the ICP's integrated care strategy and the trust's role within system and place-based partnerships, and provider collaboratives."

The metrics and measures used to assess performance should now be disaggregated by ethnicity and deprivation where relevant. The new code is more specific that while the chair should ensure the board as a whole has a clear understanding of the views of stakeholders (including system partners), the committee chairs now have particular responsibility for stakeholder engagement on significant matters within their purview. When the chair undertakes their own engagement with stakeholders, they should now do this in a "culturally competent" way. The annual report should describe how the interests of system and place-based partners have been considered in decisions, and set out key "partnerships for collaboration" that the trust is part of.

Section B: Division of responsibilities

Section B sets out the role of the chair and notes the need for clear division between the leadership of the board and executive leadership of the trust's operations. The board's collective responsibility for the performance of the trust and infrastructure and resources needed to function is specified, along with the role of the non-executives and their need for sufficient time to meet their board responsibilities. The provisions remain almost unchanged from the previous code, however the appointment and removal of the company secretary becomes a matter for the board as a whole, rather than the chair and chief executive jointly.

Section C: Composition, succession and evaluation

The principles here cover the need for formal, rigorous and transparent procedures for making board appointments. The board should be constituted, in terms of size, diversity of skills etc. to undertake its duties, and an annual evaluation of its effectiveness undertaken.
There is a new requirement for the board to have published plans "for how the board and senior managers will in percentage terms at least match the overall black and minority composition of its overall workforce, or its local community, whichever is the higher" and consideration of diversity is now included within the annual board evaluation.

The code now refers to the *Well-led framework* and *Competency Frameworks – NHS Senior Leadership Onboarding and Support* to support evaluation of the board's effectiveness. It adds an expectation that directors should engage with their evaluation process and take appropriate action when development needs are identified. The code also strengthens the fit and proper persons requirement from "abide by Care Quality Commission (CQC) guidance" to "have a policy for ensuring compliance". Any extension of the chair's term beyond nine years should be agreed with NHSE.

Annual reporting on the work of the nominations committee includes the new provision to describe the trust's policy on diversity and inclusion including in relation to disability, reference to indicator nine of the *NHS Workforce Race Equality Standard*, and the gender balance of senior management and their direct reports. Directors or governors involved in recruitment should receive training in equality, diversity and inclusion, including unconscious bias.

For foundation trusts, the inclusion of the expectation to involve NHSE in advertising and on selection panels is new, though there is the "and/or" option of having a representative from a relevant ICB on recruitment panels. If external recruitment consultancies are used instead, they should be identified in the annual report along with any connection they have with the trust or its directors. There is new provision for trusts to set a lower threshold for a council of governors' vote to remove a governor from the council and the code describes the limited circumstances in which NHSE may act to remove a governor. In addition, "foundation trust governors should be provided with information on ICS plans, decisions and delivery that directly affect the organisation and its patients".

Section D: Audit, risk and internal control

This section sets out the principles around having independent and effective internal and external audit functions, and procedures for managing risk and determining long-term risk appetite. Changes are minimal. Smaller trusts are now able to establish an audit committee of only two non-executives (the previous code stipulated a minimum of three) and neither the vice chair nor senior independent director should chair the committee. The code extends the maximum external auditor contractual period for foundation trusts to ten years, though it still recognises that audit services should usually be refreshed more frequently, and the requirement to include the value of external audit services in a trust's annual report has been removed.

Foundation trusts may note that the council of governors' role in appointing the auditor is not mentioned here, though it remains their statutory duty, and audit committees should now report to the board on how they have discharged their responsibilities, not the council of governors.

Section E: Remuneration

Section E covers suitable remuneration, pay, and benefit arrangements, including performance-related pay and the role, responsibilities and composition of remuneration committees. The principles now refer trusts to NHSE's pay frameworks for very senior managers and, for NHS trusts, *Guidance on senior appointments in NHS trusts*. The code states trusts should await notification and instruction from NHSE before implementing any cost of living increases and it now sets expectations for all trusts around adhering to the *Chair and non-executive director remuneration structure*. Executive director bonuses and incentives are now limited "to the lower of £17,500 or 10% of basic salary". Director-level severance payments should be discussed with NHSE regional directors at the earliest opportunity.

Schedule A: Disclosure of corporate governance arrangements

The disclosures pull together the provisions from the commentary above, setting out the provisions that trusts should comply with or explain how alternative arrangements comply. The disclosures are broken down into sections depending on what trusts should do. The various requirements are:

- provide a supporting explanation of compliance or explain non-compliance in the annual report
- "basic" comply or explain – where trusts are welcome but not required to provide statements of compliance but should explain where they have deviated from the code (most provisions fall into this category)

- provide information to the governors or make information available to members (FTs only).
- make information publicly available.

Appendices

A: The role of the trust secretary

The significance of the role and its responsibilities for corporate administration and providing advice on all governance matters is retained from the previous code. As noted, the appointment/removal of a company secretary is now a matter for the whole board instead of the chair and chief executive.

B: Council of governors and the role of the nominated lead governor
Many provisions relating to councils of governors are now only included in appendix B rather than the body of the code and the disclosures section. The role and responsibilities of councils in law does not change with the new act, and so there is very little to note here for foundation trusts save:

- The description of councils of governors' duty to represent the interests of the "public at large" is fleshed out: "this includes the population of the local system of which the trust is part and the whole population of England as served by the wider NHS."
- A new suggestion that the council may look at the nature of the trust's "collaboration with system partners" as an indicator of organisational performance
- A clarification of the council's role in relation to approving significant transactions, mergers and acquisitions so that "to withhold its consent, the council of governors would need to provide evidence that due diligence was not undertaken." This was always the intention of their role in this regard however this perhaps sets it out more explicitly than previous guidance.

C: The code and other regulatory requirements

NHSE sets out the priority of compliance with relevant legislation as set out in the 2006 Act (as amended by the 2012 Act) and reflected in the NHS provider licence. They also explain how the code's disclosure requirements sit alongside the corporate governance statement required in the annual plan (a forward-looking statement of arrangements for the coming year) and the annual governance statement required in the annual report (a backward look over the past year). These are both distinct requirements, not related to the code. The code disclosures provide an additional evaluation of corporate governance arrangements over the preceding year and are included within a trust's annual report.