Classification: Official

Publications approval reference: PAR348

Standards of corporate governance and financial management

Guidance for independent sector providers of NHS services

Version 1, July 2021

Contents

Scope of this document

NHS Improvement has a statutory duty to publish guidance for providers of commissioner requested services (CRS) in relation to the continuity of service (CoS) conditions of the NHS provider licence[1] (in this document, references to 'NHS Improvement'[2] are references to Monitor).

Independent providers of CRS continue to have an important role to play in Integrated Care Systems (ICSs) and the wider health and care system in England, collaborating with partners to deliver safe and effective services for patients while proactively managing risks to delivery of services.

The NHS Provider licence was introduced in April 2014, so NHS Improvement now has over five years' experience of regulating independent providers. Our understanding of the drivers of financial risk in this sector has evolved and matured. As an organisation, we have developed a knowledge base of good practices regarding governance arrangements.

The purpose of this document is to support our obligation to publish guidance for providers of essential services. It has been developed by using our organisational experience to bring together key elements of good practices to help providers of CRS maintain appropriate standards of corporate governance and financial management and provide reasonable safeguards against going concern risk.

The guidance contained in this document is relevant to licensed independent sector providers of CRS, and covers themes that relate to the requirements of CoS licence condition 3: Standards of Corporate Governance and Financial Management. The content of this document does not constitute mandatory guidance. However, in accordance with the provisions of licence condition G5: Monitor Guidance, licensees are required to have regard for guidance issued by Monitor.

Guidance relating to other CoS conditions has also been published and can be found here.

[1] Annex: NHS provider licence conditions, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285009/Annex_NHS_provider_licence_conditions_-_20120207.pdf
[2] 'NHS England and NHS Improvement' is the operational name for the organisation that brings together the NHS Commissioning Board, Monitor, NHS Trust Development Authority and several other bodies.

Guidance issued by NHS Improvement will continue to evolve as the working practices within the NHS evolve.

Background

The Health and Social Care Act 2012 (the 2012 Act) made changes to the way healthcare is regulated in England. These changes to regulation included the introduction of an NHS provider licence for NHS foundation trusts from 1 April 2013, and other eligible NHS service providers from 1 April 2014. All providers of NHS services (unless exempt under the Exemptions Regulations) are required to hold a licence and comply with its conditions. NHS Improvement monitors providers' compliance with licence conditions and has powers to require providers to remedy licence breaches where there is evidence that these have occurred.

Among NHS Improvement's statutory duties is the assessment of risk to the continued provision of essential services – aka CRS.

CRS are any services that commissioners have formally designated as needing the protection of the continuity of services provisions contained within Section 5 of the NHS provider licence. These are essential services that would need to remain in their area if a provider were to get into difficulty because:

- there is no alternative provider close enough
- and/or removing them would increase health inequalities
- and/or removing them would make dependent services unviable.

Providers of CRS are subject to financial oversight under the Risk Assessment Framework and Reporting manual for Independent Sector Providers of NHS Services (the IPRAF).

The 2012 Act also gives NHS Improvement powers to support the ongoing delivery of these services through enforcement of the CoS conditions contained in Section 5 of the provider licence. These conditions contain safeguards enabling NHS Improvement to ensure that services continue to operate if a provider becomes financially distressed or insolvent.

Where NHS Improvement judges that the risk to continued delivery of CRS is sufficiently serious, it may act to:

- use its powers to investigate whether there has been a breach of the CoS licence conditions and, if so, the extent of the breach
- depending on the outcome of an investigation, initiate enforcement action to address financial failure (see Enforcement guidance for more detail)
- appoint a person (or persons) who can assist in the management of the licensee's affairs. This person's primary objective is to ensure continuity of CRS for the patients that rely on them.

The CoS licence conditions provide regulatory protection which is specifically targeted at ensuring continuity of CRS and is not equivalent to other forms of regulation and oversight undertaken by other bodies. The CoS conditions are detailed in Appendix 1.

Key themes

CoS licence condition 3 requires licensees to adopt and apply adequate standards of corporate governance and financial management at all times. The condition is particularly concerned with providing reasonable safeguards against the risk of the licensee being unable to carry on as a going concern.

It is expected that if a provider's finances and corporate governance are well managed, they are more likely to be financially sustainable in the short and long term, and better placed to manage changes in their services, revenues or unexpected cost pressures. They are therefore less likely to find themselves in financial difficulty and put at risk the continuity of provision of CRS.

Although not within the direct scope of this guidance, effective corporate governance processes should also support the requirements to maintain the standards of quality of care to which providers are subject under contracts with commissioners and regulation by the Care Quality Commission.

When the legal duty regarding the licensing and financial regulation of the providers of services designated as CRS came into effect, NHS Improvement did not have detailed information about the size of the sector or the array of legal forms, financing structures and potential risks. Since the licensing of independent providers began, various types of organisations have provided services designated as CRS including:

- social enterprises (including community interest companies)
- charities
- private and public corporates
- small/medium sized enterprises (SMEs).

Given this variety of organisational forms, specific guidance can be challenging to develop. Therefore, the scope of this document covers several relevant areas of governance. Providers will need to determine which aspects of this guidance are most appropriate for their organisation.

Smaller organisations may find this guidance useful, particularly where organisations are experiencing accelerated growth or are new entrants to the healthcare market. Some themes may be relevant for all independent providers, regardless of their organisational form or size, and are explained further in the following sections.

1. Organisations that deliver NHS services should have an appropriate governance structure

To meet the Health and Social Care Act 2008 (Regulated Activities) Regulation 17, organisations must ensure that the systems and processes that underpin good governance are in place and operate effectively. This includes systems of risk management, assurance and performance monitoring. To meet this regulation, provider organisations should continually evaluate and seek to improve their governance and oversight.

Appropriate governance arrangements and structures within an organisation can provide a basis to manage current and future performance. Good governance should support the organisation to achieve its long-term strategy.

In accordance with the UK Corporate Governance code, the delivery of good governance requires an effective Board of directors, with an appropriate balance of skills and experience to enable them to discharge their respective duties and responsibilities effectively.

The composition of the board, its functions and responsibilities, and its effectiveness, should be considered as significant matters which can impact on the ability of the organisation to deliver its objectives.

For many providers, particularly those that deliver services at scale, it would be reasonable to have the appropriate governance structures with reference to:

- NHS Improvement/Care Quality Commission (CQC) Well-led framework
- FT Governance Code
- Use of Resources framework
- UK corporate governance resources.

According to existing research,[3] prior to the recent pandemic, risks relating to leadership, planning and the decision-making systems of organisation were the most common risks for provider organisations. Due to the complex nature of the healthcare environment, there is an ongoing need for independent providers to demonstrate the effectiveness of their corporate governance arrangements at addressing the risks facing the organisation.

Providers should also conduct regular reviews of their organisational governance including reviews of committees and subgroups. The reviews should ensure the terms of reference and scope of work of the groups are clear and fit for purpose. Any such reviews should also ensure the membership is appropriate for the function of the group, and that the frequency of meetings and the scope of resulting actions cascaded are suitable for the size of the organisation.

Governance processes should appropriately cascade through the organisation with any divisions and subdivisions held to account through the governance structure.

We note that some independent providers of community services contracts have used the Well-led framework and commissioned independent assessment of their corporate governance processes to support continuous improvement.

[3] https://www.360assurance.co.uk/wp-content/uploads/2019/09/Providers-BAF-Benchmarking-Report-final.pdf

2. Decision-making at executive and board level should be robust and supported by an appropriate assurance framework

Senior leaders are responsible for setting the strategic direction of the organisation, and have overall responsibility for delivering the organisational objectives in line with the strategy. The organisations they lead are accountable to regulators and NHS commissioners for the quality and delivery of services and the contribution of the organisation to longer-term objectives of the local health system.

The directors who serve on the board are appointed by the organisation. NB – when referring to 'directors', we include trustees and any persons who perform the functions or functions equivalent or similar to those of, a director within an organisation. It is expected as part of the remit of these directors that they have a role in facilitating the delegation of powers to the executive management and providing assurance to the board that responsibility is being discharged appropriately.

Decision-making at the executive and board level should be supported by a medium-term financial plan that demonstrates how the provider can continue to deliver services for patients whilst maintaining its financial position.

This should generally be supported by an appropriate governance and assurance framework which is likely to be the primary mechanism through which an organisation manages the principal risks to delivering its objectives.

Where appropriate, strategic decisions such as bidding for new contracts and service developments – including service reconfiguration or efficiency initiatives – are likely to be best managed through the project management office (PMO) and reported up to the board or appropriate subcommittee of the board.

Where appropriate, we would also expect to see clear accountability for delivery of the cost improvement plans (CIPs) at board level. It has been our experience from performing our oversight role that good practices such as formal mechanisms for overseeing delivery of CIPs – including an appropriately resourced PMO with senior responsible officers (SROs) and clear reporting lines into the board or a relevant subcommittee, as appropriate for the organisation – contribute significantly to ensuring benefits from change programmes are realised.

2.1 There should be a clear understanding of the interaction between the roles and responsibilities of trustees and senior management of not-for-profit organisations

The decision-making responsibility for non-profit organisations is often held by the trustees[4] of the organisation. This often creates a specific dynamic where senior management must refer decisions regarding the strategic direction of the organisation to the trustees for approval.

There should be adequate understanding of the autonomy that can be exercised by the senior management to lead the strategic direction of the organisation as permitted by the trustees.

There is often a need to balance the responsibility for decision-making between the trustees who are legally accountable for the performance of the organisation and senior management who are charged with delivering the organisational strategy and are accountable to regulators and other stakeholders for the financial performance of the organisation.

Trustees need to be mindful of which decisions sit with them and how often they can meet to facilitate timely decision-making. Hence in some cases, trustees should consider suitable governance arrangements to delegate authority in a way which allows the senior management enough flexibility to make key decisions that impact on the delivery of the organisation's strategy.

2.2 The provider should demonstrate an appropriate understanding of the level of financial risk inherent within its business model

It is important for providers and their senior management to have a clear understanding of the amount and type of risk – that the organisation is willing to accept or retain (risk appetite) in relation to the achievement of the organisational objectives.

Under the UK Corporate Governance code, the directors and boards of organisations are tasked with setting the organisation's risk appetite and ensuring that there is a governance framework in place to manage risks. The risk appetite for

[4] The essential trustee: what you need to know, what you need to do (CC3), https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3

the organisation should be reviewed regularly by the board to encourage growth while minimising risk to financial sustainability.

Any assurance framework for business models with limited balance sheet resilience such as social enterprises needs to be adapted to ensure it is fit for purpose. Such frameworks can be expanded to ensure material bids/business cases are subject to appropriate board scrutiny and challenge, and there is an appropriate level of contract due diligence on the acquisition of new contracts. Senior management can also expect to consider the impact of any material bids on the whole business model to identify any adverse impacts on the financial sustainability of the organisation.

Where appropriate, relevant financial information should be made available to the board and relevant subcommittees (where they exist) to ensure that the board and senior management team are sighted on the profitability of individual contracts. The board should also demonstrate that they understand where there is cross-subsidy of unprofitable contracts and be clear on the appetite of the organisation for running contracts as loss leaders which may not cover their allocation of central overheads.

3. Board oversight and the role of the audit committee

There can often be a group or a subgroup of the board (which is often the audit committee) that is responsible for the overall effectiveness of governance, internal control and risk management.

The audit committee (or equivalent) needs to ensure it can articulate how the governance, risk management and internal control systems are appropriate, operational and effective.

The audit committee should have a purpose and mandate with a clear remit for providing sound independent assurance. Its duties and responsibilities to the board can often be captured through mechanisms such as board assurance framework (BAF) and/or annual risk management programme. These mechanisms can enable the committee leads to set risk management priorities for the organisation.

The audit committee should have members with appropriate skills and experience including independent non-executive membership. There should clear and regular assessment of the independence of external auditors.

There is available literature from several sources about good working practices which can support the structure and operation of the audit committee[5, 6] to ensure it is fit for purpose for providers of healthcare services. These areas of working practices may include but are not limited to documented working methods for the committee, eg frequency of meetings, standard agenda, action follow-up logs and escalation procedures.

4. Strengthened governance to support organisational growth

Some providers may experience rapid growth through contract acquisition, and this growth can often ensue without corresponding timely improvements in governance. Rapid growth can lead to increased risk if governance structures and reporting lines do not fit the new size and complexity of the organisation, or are not sufficient to meet the needs of the enlarged organisation.

There should be appropriate post-implementation review for any significant transactions or change programme, such as service reconfiguration, which is expected to have a significant impact on the operations of the organisation. This will ensure any lessons learnt from the management of the implementation process are captured and disseminated within the organisation.

In current times and despite funding challenges, organisations should ensure sufficiency of resources to support effective corporate governance and financial reporting functions. This would continue to ensure that potential risks to financial sustainability are identified early enough to be addressed particularly during periods of rapid growth.

5. Leadership and culture should provide an enabling environment for good governance

Leaders should demonstrate a common understanding of the key risk, issues and priorities for the organisation. The strategy, including a clear vision and supporting values for the organisation, should be well communicated and understood by staff.

[5] https://www.360assurance.co.uk/wp-content/uploads/2019/07/Audit-Committee-Sub-Committees-Final.pdf
[6] https://www.hfma.org.uk/online-learning/bitesize-courses/detail/nhs-audit-committee-handbook

Management should assure itself that the culture in an organisation is seen to be open, honest and accountable with employees who feel able to raise concerns and are assured that such concerns will be acted upon by the organisation. The culture should also allow for non-executive directors to challenge the executive team constructively whilst maintaining professionalism and good relationships.

The importance of demonstrating the values and good organisational culture of high-quality sustainable care can be reinforced through communication. This can also be supported by the senior leaders who are visible and demonstrate values of compassionate and inclusive leadership.

This supports an environment where staff within the organisation feel valued and contribute positively to a common purpose to make a difference for patients. This also encourages staff and leaders to take responsibility for improving quality, learning and exploring better ways of doing things.

There should also be succession planning in place and targeted leadership programmes aimed at various staff levels and divisions throughout the organisation.

6. Organisations should be led by fit and proper persons

Providers should have a formal, rigorous, and transparent procedure for the appointment of new directors to the board.

Providers should also have established policies and procedures in place to ensure that directors are fit and proper for the role their role, at the time of their appointment and on an ongoing basis. Guidance can be found in the requirements laid out by relevant regulators, including Monitor (licence condition G4: Fit and proper persons) and the CQC (Regulation 5: Fit and Proper persons – directors).

7. Timely and robust reporting and oversight of financial information

For many providers that deliver NHS services, their ability to implement and maintain sound financial management and governance processes is important to the effectiveness of the organisation.

The purpose of financial management processes is to produce accurate financial information in a timely manner to support the objective of the organisation to deliver high quality and sustainable services to patients.

The financial governance processes implemented within the organisation should be supported by a timely and robust annual planning cycle.

A lesson learned from our oversight approach has been that some of the concerns about financial governance can be driven by the quality and timeliness of financial reporting of some smaller organisations due to the relative size of the finance team and the maturity of the finance systems used to collate and report financial information.

It can often be the case that insufficient substantive capacity and continuity in finance team can result in loss of institutional knowledge and insufficient financial grip. The Board or an appropriate group should undertake regular assessment of the current establishment of the finance team and determine if it meets the requirements of the business.

Organisations can experience a cash pressure resulting from increasing demand and funding restrictions. An efficient cash flow forecasting process provides visibility and control over the cash position, thereby keeping management abreast of future cash pressures. This gives management time to plan how such pressures can be addressed and managed.

It is helpful for management to have valuable planning time to develop a response in the event of a cash shortfall to ensure they can afford to pay key suppliers and employees. A 12-month cash forecast (or as appropriate for the organisation) which is updated regularly can be used by senior management and the board to monitor performance and maker longer term financing decisions.

Regular cashflow forecasts which are updated frequently also give management sight of the impact of intra month movements and can be used to better manage unexpected cash pressures.

8. Joint venture arrangements and other complex contracting forms should be well managed to mitigate risk

Examples of providers entering into joint venture (JV) partnerships, provider collaboratives and other subcontracting arrangements to deliver CRS services are becoming increasingly common. It is important that these arrangements are clear and robust, particularly with regards to where liabilities fall and how risk may be shared. With regards to risk share arrangements between JV partners, these need to be documented and well understood as they have the potential to leave providers with significant, unanticipated unfunded costs and/or revenue short falls.

Decision-making regarding these kinds of complex contractual arrangements should be subject to appropriate scrutiny and challenge at the board level, supported by adequate downside risk assessment to ensure the level of financial risk from the contractual arrangement is understood and quantified.

9. Knowledge of changes in national healthcare policy

Providers should ensure there are established processes for identifying, anticipating and planning for any potential financial impact resulting from changes to national policy, for example national pay awards. Without adequate planning such changes can result in significant unplanned cost pressures, which can have consequences for financial performance and sustainability.

10. Working collaboratively with local health partners to provide CRS

The recent collaborative working arrangements in response to COVID-19 have reinforced for many providers the benefits of system working. It has allowed providers to demonstrate that collaboration and working with neighbouring organisations provides additional resilience to tackle challenges within local health economies.

Licence condition IC1: Integrated Care requires providers to have regard to guidance as may have been issued by Monitor concerning actions or behaviours that might reasonably be regarded as detrimental to enabling integration and co-operation with other providers and parties with a view to achieving the stated objectives within the condition:

- improving the quality of healthcare services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision
- reducing inequalities between persons with respect to their ability to access those services
- reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.

NHS England and NHS Improvement are actively making changes to its support offer to better enable collaboration between providers and systems and providers are being actively encouraged to work collaboratively to support the development of the ICSs.

There is currently significant variation across the country regarding the number of providers within the systems; the relative size and focus of the different providers and existing working relationships between the providers.

System-minded leadership and strong working relationships between partners to develop shared objectives and ensure their delivery will need to be supported by organisational and individual behaviours which create the right environment for collaborative change.

Good governance enabled by strong working relationships and cooperative behaviours can help to ensure that the necessary mechanisms are in place and are used to deliver system improvements. To this end, NHS England and Improvement will issue further guidance on good governance and collaboration in 2021.

We note, however, that there may be conflicts of interest between the organisational objectives of independent providers of healthcare and the aims and priorities of local partners, ICS and local health system. It would be appropriate for providers of CRS to have robust governance processes within their organisation for managing conflicts between organisational objectives and system requirements.

Effective collaboration would require the coordination and alignment of some of each provider’s decision-making arrangements with partners to support the ICS while retaining some independent governance arrangements to assess and manage conflicts of interest.

Appendix 1: Licence conditions[7]

Continuity of service condition	Description of conditions
Continuity of Services Condition 1: Continuing provision of Commissioner Requested Services (CRS)	This condition prevents licensees from ceasing to provide CRS, or from changing the way in which they provide CRS, without the agreement of relevant commissioners.
Continuity of Services Condition 2: Restriction on the disposal of assets	This licence condition ensures that licensees keep an up-to-date register of **relevant** assets used in the provision of CRS. It also creates a requirement for licensees to obtain Monitor's consent before disposing of these assets when Monitor is concerned about the ability of the licensee to carry on as a going concern.
Continuity of Services Condition 3: Monitor risk rating	This condition requires licensees to have due regard to adequate standards of corporate governance and financial management.
Continuity of Services Condition 4: Undertaking from the ultimate controller	This condition requires licensees to put in place a legally enforceable agreement with their 'ultimate controller' to stop ultimate controllers from taking any action that would cause licensees to breach the licence conditions. This condition specifies who is considered to be an ultimate controller
Continuity of Services Condition 5: Risk pool levy	This licence condition obliges licensees to contribute, if required, towards the funding of the 'risk pool' - this is like an insurance mechanism to pay for CRS if a provider fails. This condition is not currently applicable.
Continuity of Services Condition 6: Co-operation in the event of financial stress	This licence condition applies when a licensee fails a test of sound finances, and obliges the licensee to cooperate with Monitor in these circumstances
Continuity of Services Condition 7: Availability of resources	This condition requires licensees to act in a way that secures access to the resources needed to operate CRS.

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285009/Annex_NHS_provider_licence_conditions_-_20120207.pdf

NHS England and NHS Improvement
Skipton House
80 London Road
London
SE1 6LH

This publication can be made available in a number of other formats on request.

Publication approval reference: PAR348