



*Draft Addendum to Your statutory duties –  
reference guide for NHS foundation trust  
governors*

**System working and  
collaboration:  
The role of foundation trust  
councils of governors**

May 2022

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## Equality and health inequalities statement

Promoting equality and addressing health inequalities are at the heart of NHS England's values. Throughout the development of the policies and processes cited in this document, we have:

- Given due regard to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who share a relevant protected characteristic (as cited under the Equality Act 2010) and those who do not share it; and
- Given regard to the need to reduce inequalities between patients in access to, and outcomes from healthcare services and to ensure services are provided in an integrated way where this might reduce health inequalities.

# About this document

This addendum supplements existing guidance for NHS foundation trust governors and explains how the legal duties of foundation trust councils of governors support system working and collaboration.

## Key points

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- This addendum is based on the existing statutory duties in the 2006 Act, and the principles regarding collaboration and system working in the June 2021 [Integrated Care Systems: design framework](#).
- To support collaboration between organisations and the delivery of better, joined up care, councils of governors are required to form a rounded view of the interests of the ‘public at large’.
- Updated considerations are set out in respect to the following legal duties of councils of governors: holding the non-executive directors to account, representing the interests of trust members and the public, and approving significant transactions, mergers, acquisitions, separations or dissolutions.
- This addendum only applies to a council of governors’ statutory role within its own foundation trust’s governance.

## Action required

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- NHS England expect councils of governors to act in line with the principles in this addendum.

## Other guidance and resources

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- [Integrated Care Systems: design framework](#)
- [Integrated Care Systems: guidance](#)
- [Your statutory duties: A reference guide for NHS foundation trust governors](#)



# 1. Introduction

This addendum to NHS England's [Your statutory duties - A reference guide for NHS foundation trust governors](#) (the guide for governors), originally published by Monitor, explains how the duties of NHS foundation trust councils of governors support system working and collaboration, and provides examples of good practice. It supplements (rather than replaces) the guide for governors, and the two documents should be used in conjunction.

The guide for governors lays out the statutory duties of NHS foundation trust councils of governors, as provided by the [National Health Service Act 2006](#) (the 2006 Act) and amended by the [Health and Social Care Act 2012](#). It is written for councils of governors (rather than trust boards). The legislation applies to councils of governors as a whole, not individual governors. Councils have no powers of delegation, so they can only take decisions in full council.

There is no change to the statutory duties for councils of governors, as outlined in the 2006 Act. For more details on any of the NHS foundation trust councils of governors' statutory duties and powers, please refer to the legislation or contact your trust secretary.

This addendum is based on the statutory duties in the 2006 Act and the principles regarding collaboration and system working in the June 2021 [Integrated Care Systems: design framework](#) and Health and Care Act 2022. NHS England expect councils of governors to act in line with the principles in this addendum.

This addendum only applies to a council of governors' role **within its own foundation trust's governance**. It does not relate to the governance of the boards of integrated care boards.

## 1.1 What has changed and why?

### Background

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A great deal has changed since the guide for governors was last updated in August 2013. With the publication of the NHS Long Term Plan (a 10-year plan outlining the future of the NHS) in January 2019, the NHS set out its ambition to develop new ways of working based on the principles of co-design and collaboration.<sup>1</sup>

These principles are not new to the NHS, as ‘working together for patients’ has been a core part of the NHS Constitution since 2012. However, the importance of different parts of the health and care system working together in the best interests of patients and the public has been starkly demonstrated during the COVID-19 pandemic. The immediate and long-term challenges facing the NHS such as an ageing population, increased demand for services, and health inequalities can only be solved by organisations working together and putting patients, service users and populations at the heart of decision-making.

A key milestone in achieving this was the establishment of integrated care systems (ICSs) across England. ICSs bring local organisations together to deliver the ‘triple aim’ of better health and wellbeing for everyone, better quality of health services for all individuals and sustainable use of NHS resources.<sup>2</sup> They do this over an agreed geographical area, and depend on NHS organisations, local authorities and other partners that deliver health and care services working together to plan care that meets the needs of their population. This approach is often called ‘system working’.

The Health and Care Act 2022 will remove legal barriers to collaboration and integrated care and put ICSs on a statutory footing by establishing for each ICS:

- An Integrated Care Partnership (ICP), a statutory joint committee of the Integrated Care Board and the upper tier local authorities in the ICS, bringing together organisations and representatives concerned with improving the care, health and wellbeing of the population. Each partnership will be established by the NHS and local government as equal partners and will develop an integrated care strategy proposing how the NHS and local government should exercise their

<sup>1</sup> [NHS Long Term Plan](#), p110, 7.1

<sup>2</sup> [Integration and Innovation: working together to improve health and social care for all](#) p23, pt 3.11



functions to integrate health and care and address the needs of the population identified in the local Joint Strategic Needs Assessment(s).

- An Integrated Care Board (ICB), which brings the NHS together locally, to improve population health and care; its unitary board will allocate NHS budget and commission services, and – having regard to the ICP’s integrated care strategy – produce a five-year joint plan for health services and annual capital plan agreed with its partner NHS trusts and foundation trusts.

The ICP and ICB, together with other key elements of the new arrangements including place-based partnerships and provider collaboratives, will bring together all partners within an ICS.

As ICSs develop, organisations are not only expected to provide high-quality care and manage their own finances, but to take on responsibility for wider objectives relating to NHS resources and population health jointly with other providers. This means that system and place-based partnerships will plan and co-ordinate services in a way that improves population health and reduces inequalities.

The success of individual trusts and foundation trusts will increasingly be judged against their contribution to the objectives of the ICS, in addition to their existing duties to deliver safe, effective care, and effective use of resources.<sup>3</sup> Trusts are also expected to avoid making decisions that might benefit their own institution but worsen the position for the system overall.<sup>4</sup>

## **Forming a rounded view in representing ‘the public’**

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The 2006 Act provides councils of governors with their statutory duties. Within those duties, councils of governors are legally responsible for representing the interests of the members of the NHS foundation trust and the public.<sup>5</sup>

While the meaning of ‘the public’ is not specified in legislation, councils of governors are not restricted to representing the interests of a narrow section of the public served by

<sup>3</sup> [Integrated Care Systems: design framework](#), p30

<sup>4</sup> [NHS Long Term Plan](#), p112, 7.9

<sup>5</sup> Paragraph 10A(b) of Schedule 7 to the [NHS Act 2006](#)

the NHS foundation trust – that is, patients and the public within the vicinity of the trust or those who form governors' own electorates.

To support collaboration between organisations and the delivery of better, joined up care, councils of governors are required to form a rounded view of the interests of the 'public at large'. This includes the population of the local system of which the NHS foundation trust is part. No organisation can operate in isolation, and each is dependent on the efforts of others.

While staff governors and patient, carer and service user governors represent specific constituencies, they are also expected to represent the interests of the members of the trust as a whole and the public. Therefore, they are required to seek and form a view of the interests of the 'public at large'.

## 2. Updated considerations for the statutory duties of councils of governors

The NHS's move to a new way of working does not change the role councils of governors have within their trusts, but it 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. This section provides clarity on the three statutory duties that will be most affected by the transition to system-working:

- a. Holding the non-executive directors individually and collectively to account for the performance of the board of directors.
- b. Representing the interests of the members of the NHS foundation trust and the public.
- c. Approving 'significant transactions', mergers, acquisitions, separations or dissolutions.<sup>6</sup>

Chapter 3 of the guide for governors gives the complete statutory duties and powers of the council of governors.

<sup>6</sup> [Your statutory duties – a reference guide for governors](#), p19

## 2.1 General duties of the council of governors (Chapter 4 of the guide for governors)

### a. Holding the non-executive directors to account

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#### What are the legal requirements?

The council of governors has a duty to hold the non-executive directors individually and collectively to account for the performance of the board of directors.

#### General considerations

The guide for governors stipulates: “Holding the non-executive directors to account for the performance of the board does not mean the governors should question every decision or every plan. The role of governors in ‘holding to account’ is one of assurance of the performance of the board.”<sup>7</sup> It suggests that the council of governors should therefore assess what it believes are the key areas of enquiry and provide appropriate challenge. These could be for example:

- due process is not being followed
- the interests of the members and of the public are not being appropriately represented
- the trust is at risk of breaching the conditions of its licence.

Councils of governors may not always agree with the decisions taken by the directors, and directors do not always have to adhere to the council’s preferences. However, the board of directors, as a whole, does have to give due consideration to the views of the council of governors, especially in relation to matters which concern the interests of the members of the NHS foundation trust and the public.<sup>8</sup>

Chapter 4, section 4.1 of the guide for governors gives a complete description of this duty.

<sup>7</sup> [Your statutory duties – a reference guide for governors](#), p28

<sup>8</sup> *Ibid.*

## **What is the role of councils of governors?**

Overall responsibility for running an NHS foundation trust lies with the board of directors, and the council of governors is the collective body through which directors explain and justify their actions. Holding to account is therefore not about the performance of individual directors, nor performance management of the board.

The council's role is as follows:

1. To consider the board's account of its performance against the criteria that the council has agreed with the board and based on the conditions in the provider licence.
2. To question the board on its account and feed back in a considered manner based on the evidence presented (asking for more evidence if necessary and reasonable).
3. In extreme cases, to raise difficult issues and, after listening to the account of the board, to consider contacting NHS England if it forms a reasonable belief that the trust is in danger of breaching the terms of its licence.

### **Updated considerations for governors to discuss with their trust's board regarding system-working**

1. The success of an individual foundation trust will increasingly be judged against its contribution to the objectives of the ICS. This means the board's performance must now be seen in part as the trust's contribution to system-wide plans and their delivery, and its openness to collaboration with other partners, including with other providers through provider collaboratives. In holding non-executive directors to account for the performance of the board, NHS foundation trust councils of governors should consider whether the interests of the public at large are the primary consideration in board decision-making, and whether the trust's performance has been considered as part of the system as a whole, and as part of the wider provision of health and social care. Councils of governors are permitted to demonstrate the interests of the public at large to the board if they feel that the board is not operating in the public's interests. (For further detail, please see Section 2.1b: Representing the interests of trust members and the public.)

2. Consideration should also be given to how the trust board is having regard in its decision-making to the 'triple aim' duty of better health and wellbeing for everyone, better quality of health services for all individuals and sustainable use of NHS resources, as well as the role the trust is playing in reducing health inequalities in access, experience and outcomes.

**Illustrative scenario 1: A council of governors considers the role the NHS foundation trust has played within the ICS in holding the non-executive directors to account for the performance of the board**

To hold the non-executive directors to account, the council of governors may already have a number of approaches in place, including:

1. observing the contributions of the non-executive directors at board meetings and during meetings with governors
2. gathering information on the performance of the board against its strategy and plans
3. receiving the trust's quality report and accounts and questioning the non-executive directors on their content.

These allow the council of governors to determine its key areas of concern and provide appropriate challenge.

The council of governors is mindful that NHS England has now set a clear expectation that NHS foundation trusts will collaborate effectively with system partners to co-design and deliver plans, and that the failure of a trust to do so may be treated as a breach of governance licence conditions.

To form a view about the trust's contribution to system performance and development, the council of governors may need to adapt its approaches.

1. Seeking to understand the arrangements for the trust's contribution to shared planning and decision-making forums – eg system and place-based

arrangements and provider collaboratives – and how the interests of patients and the public are considered.

2. Requesting information on the ICP's integrated care strategy and the ICB's five-year joint plan from the board to understand how the trust's plans relate to overarching system development.
3. Requesting information on the ICB's performance from the board to understand how the trust's performance relates to that of its system.
4. Receiving assurance from non-executive directors that the board's decisions have regard to the 'triple aim' duty – better health and wellbeing for everyone, better quality of health services for all individuals and sustainable use of NHS resources – and have the opportunity to question the non-executive directors about this.

The trust is expected to ensure that the council of governors is provided with appropriate information, and that the governors are given opportunities to meet the board to raise questions about the trust's role within the system, or systems, of which it is part.

## **b. Representing the interests of trust members and the public**

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### **What are the legal requirements?**

Under the 2006 Act, councils of governors have a duty to represent the interests of the members of the NHS foundation trust and the public.

### **General considerations**

The general duty to represent the interests of members and the public includes (but is not limited to) all other statutory duties that councils of governors are expected to fulfil, and should underpin all elements of their role as outlined in the guide for governors and the NHS foundation trust's own constitution. The council of governors should therefore interact regularly with the members of the trust and the public to ensure it understands their views, and to clearly communicate information on trust and system performance

and planning in return. However, governors should take care to disclose only those matters which the trust considers non-confidential.<sup>9</sup>

Councils of governors must be mindful that a number of different bodies and organisations (such as Healthwatch) represent the interests of the public, and governors should therefore work collaboratively with one another and with other representative bodies, to ensure that the public has been as broadly represented as possible.

It should be noted that while staff, patient, carer and service user governors represent specific constituencies, they are also expected to represent the interests of the members of the trust as a whole and the public at large.

Chapter 4, section 4.2 of the guide for governors gives a complete description of this duty.

### **Updated considerations for governors to discuss with their trust's board regarding system-working**

1. Each ICB will be expected to build a range of engagement approaches into its activities at every level, and to prioritise engaging with groups affected by health inequalities in access, experience and outcomes, in a culturally competent way. This will be supported by a legal duty for ICB to make arrangements to involve patients, unpaid carers and the public in planning and commissioning arrangements, and by a continuation of existing foundation trust duties relating to patient and public involvement, including the role of foundation trust governors.
2. Councils of governors are not restricted to representing the interests of a narrow section of the public served by the NHS foundation trust – that is, patients and the public within the vicinity of the trust or those who form governors' own electorates. To discharge this statutory duty, councils of governors are required to take account of the interests of the 'public at large'. This includes the population of the local system of which the trust is part.

<sup>9</sup> [Your statutory duties – a reference guide for governors](#), p31



3. When engaging with the public, councils of governors need not limit their engagement to the public and patients in their electorate or personal networks. They must also adhere to their trust's communications or media policies when engaging and communicating with the public.

Councils of governors should also be assured that their trust is engaging widely.

### **Illustrative scenario 2: An NHS foundation trust and its council of governors work together to strengthen mechanisms by which the council of governors can consider the views of the wider public**

The council of governors may already have various ways through which it engages with members and the public. These may include governor drop-in events where members and the public can meet governors, a dedicated page on the foundation trust's website to share information and surveys to gather members' and the public's views. The council of governors may also have agreed routes for feeding views back to the board, such as regular reports or presentations at council meetings.

To strengthen mechanisms to consider the views of the wider public, the council of governors should take additional steps:

1. Working with the trust to use technology to engage with members and the public. This could include adding to face-to-face interactions with virtual engagement via online events, which could improve accessibility for some patient cohorts and the public.
2. Considering how it can engage with other stakeholders that have a role in promoting the interests of patients and the public, eg local branches of Healthwatch and voluntary sector organisations. Governors may also work with their trust to build relationships with organisations that can help gather the views of seldom heard groups.
3. Asking for information on how the trust intends to address health inequalities in both its own plan and contributing to that for the wider system. This could be

supplemented as appropriate with the population health data (e.g. demographics and deprivation data) that underpins the ICB's planning, including the identification of unmet need. This helps the council of governors understand the impact of action taken by the trust to address health inequalities.

## 2.2 Taking decisions on significant transactions, mergers, acquisitions, separations and dissolutions (Chapter 10 of the guide for governors)

### c. Approving significant transactions, mergers, acquisitions, separations or dissolutions

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Chapter 10 of the guide for governors explains what a 'significant transaction' is.

It may also be helpful to refer to Appendix 1: Legal and regulatory requirements for transactions of the [Transactions guidance](#) for a more detailed and operational definition.

#### What are the legal requirements?

Under the 2012 Act:

- **More than half the members of the full council of governors of the trust voting** need to approve the foundation trust entering into any significant transaction, as specified in the trust's constitution. This means more than half the governors who are in attendance at the meeting and who vote at that meeting.
- **More than half the members of the full council of governors** must approve any application by the foundation trust to merge with or acquire another trust, to separate the trust into two or more new NHS foundation trusts or to dissolve the trust. This means more than half the total number of governors, not just half the number who attend the meeting at which the decision is taken. If the other party to

the proposed transaction is also an NHS foundation trust, more than half the governors of that foundation trust must also approve the transaction.<sup>10</sup>

### **What are councils of governors asked to take a decision on?**

The 2006 Act states that the foundation trust's constitution "must provide for all the powers of the organisation to be exercisable by the board of directors on its behalf"<sup>11</sup>. As such it is the board of directors that must decide whether a transaction should proceed.

Councils of governors are responsible for assuring themselves that the board of directors has been thorough and comprehensive in reaching its decision to undertake a transaction (that is, has undertaken due diligence), and that it has appropriately considered the interests of members and the public as part of the decision-making process.<sup>12</sup> As long as they are appropriately assured of this, governors should not unreasonably withhold their consent for a proposal to go ahead.<sup>13</sup> They should consider the implications of withholding consent in terms of the key risks the transaction was designed to address.

Given councils of governors have no power of delegation, they can only make decisions in full council. Hence they should attempt to reach a consensus based on the broad views of the council members. In common with boards of directors, they should not allow themselves to be unduly influenced by the views of individuals, but instead should attempt to ensure that all voices are heard and considered.

The council of governors must obtain sufficient information from the board of directors on the proposed significant transaction, merger, acquisition, separation or dissolution to make an informed decision.<sup>14</sup>

Chapter 10 of the guide for governors gives a more complete description of this duty.

<sup>10</sup> [Your statutory duties – a reference guide for governors](#), p60

<sup>11</sup> Paragraph 15(2) of Schedule 7 to the [NHS Act 2006](#)

<sup>12</sup> [Your statutory duties – a reference guide for governors](#), p63-64

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

## **Updated considerations for governors to discuss with their trust's board regarding system-working**

1. Governors need to be assured that the process undertaken by the board in reaching its decision was appropriate, and that the interests of the 'public at large' were considered. A council can disagree with the merits of a particular decision of the board on a transaction, but still give its consent because due diligence has been followed and assurance received. To withhold its consent, the council of governors would need to establish that appropriate due diligence was either not undertaken or properly factored into decision-making.
2. All transaction proposals need to demonstrate a clear case for change in order to meet NHS England's assurance requirements, including how they will result in material improvements to the quality of services. Benefits arising from the transaction could be to the patients served by the trust or to the wider public, for example by impacting patients of other providers or reducing health inequalities across the population. In the context of the NHS's new way of working, this means that councils of governors may well be expected to consent to decisions that benefit the broader public interest while not being of immediate advantage to or creating some level of risk for their NHS foundation trust. Consent should not be given for decisions that benefit the NHS foundation trust without regard for the effect on other NHS organisations, or the overall position of a wider footprint such as an ICS.

**Illustrative scenario 3: A council of governors approves a significant transaction that may not immediately benefit the individual trust but overall does benefit the population of the wider ICS**

The council of governors provides consent because the board has adequately assured it that the appropriate process has been followed.

This significant transaction may not immediately benefit the individual NHS foundation trust but overall is expected to benefit the population of the wider ICS. Some governors disagreed with the merits of the board's proposed transaction, but the full council gave consent because all processes have been followed, the interests of the public at large have been considered and assurance has been received.

To reach this decision:

1. The board provided the council of governors with appropriate information on the proposed transaction, including the benefits for patients and the public in the wider ICS, and the impact on quality of services, system performance and the system's financial position.
2. The board was open about any risks and opportunities for the NHS foundation trust and how these would be addressed.
3. The board provided evidence that the interests of the public were appropriately considered, and effective engagement processes were followed. The council of governors was given the opportunity to challenge the processes and to ask the non-executive directors questions around any key areas of concern.

## 3. Working with the board

This section contains suggested approaches to support better working between the council of governors and the board, along with examples of developmental activities already underway across trusts.

### 3.1 Building relationships and understanding roles

#### Key relationships

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- Trust secretary/membership manager and governor liaison role
- Trust Chair
- Trust's Non-executive directors
- Trust Chief executive officer
- Trust Board and/executive directors
- Foundation trust Members

#### Practical tips

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Governors will receive an induction from their organisation. They should familiarise themselves with the following documents, along with any others their trust secretary, membership manager or anyone in a governor liaison role sign-posts them to:

- Trust's constitution
- Code of Conduct
- confidentiality and data protection policies
- conflict of interest policies
- communications policy
- Nolan Principles.

These documents help governors understand the principles and processes by which their trust is governed, outline the composition and general duties of the board, and set out expectations of governor conduct.

It is important that trust boards and their governors act in line with the Nolan Principles and are open and transparent with one another. Doing so creates a better environment for challenging conversations.

For more information please refer to Chapter 2 of [Your statutory duties - A reference guide for NHS foundation trust governors](#) which outlines the governance structure of NHS foundation trusts. Please also see your trust's own constitution for information that is specific to your own organisation.

## 3.2 Supporting governors to fulfil the duties of a council of governors

### Key relationships

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- Trust secretaries/membership manager and governor liaison role
- Trust Chair
- Trust non-executive directors
- Trust Chief executive officer
- Trust Board /executive directors

### Expectations: communications and engagement

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Governors can expect to attend a variety of meetings organised by the trust, which intend to help inform their decision-making, and to support governors in fulfilling their duties. Formally, this will include council of governor meetings and annual members meetings. Governors should also be encouraged to attend public trust board meetings. The trust may also organise other meetings or forms of engagement such as:

- informal meetings such as Q&As with the chief executive or chair, and workshops with the non-executive directors or board
- regular briefings to members and governors from the chief executive or chair
- ad-hoc briefings or dissemination of information as an issue arises
- non-executive director updates at council of governor meetings.

The board should engage early with the governors about transaction plans. From the outset directors and governors should agree a process for engagement on the transaction, to include:

- the content and timing of information to be provided to governors and any training needs
- how the views of members will be sought and stakeholders kept informed
- how governors can get involved with developing the future governance model, eg by working on the constitution for the post-transaction foundation trust.<sup>15</sup>

### 3.3 Supporting governors to understand their duties in the context of ICSs and system working

#### Key relationships

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- Trust Chair
- Trust Chief executive officer
- Trust board secretary/membership manager and governor liaison role

#### Expectations: communications and engagement

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- The trust's chair should facilitate engagement between the ICB, the ICP and the trust's council of governors.
- The trust should also ensure governors are updated in a timely way on system plans, decisions and delivery.
- The trust should ensure governors receive information on the ICP's integrated care strategy and the ICB's five-year forward plan, as decisions and aspects of delivery that directly affect the trust and its patients.
- The council of governors should consider how it can support its board to engage with patients and the community across the geography of the ICS.

There is no agreed way that a trust should do this. Suggestions based on existing examples are:

- Attending public trust board meetings to listen to the discussion on ICS arrangements. This should also indicate whether the board is acting in the wider public interest and provides an opportunity to hear the types of questions non-executive directors are asking in this respect.

<sup>15</sup> Transactions guidance, Appendix 1 pp35-6



- Board members providing ICS updates at council meetings to ensure that governors are well informed and have an opportunity to ask questions.
- Governor engagement sessions arranged by the ICB or ICP to update on progress in the delivery of system plans.
- The chair cascading key messages after an ICP or ICB meeting.

## **Practical tips**

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Your trust should work with governors to understand the following:

- What is the foundation trust's ICS footprint?
- Who are the key partners in the system?
- What is the membership of the ICP?
- What is the membership of the board and committees of the ICB?
- How is the trust contributing to the ICS, and what is the impact of the ICS on existing trust plans?
- How is the trust having regard in its decision-making to the triple aim duty of better health and wellbeing for everyone, better quality of health services for all individuals and sustainable use of NHS resources?
- How can the council of governors support the trust in leading in or contributing to its ICS?
- How can the council of governors best communicate the ICS plans to the trust members and public?

# 4. Further information

For national context:

- [NHS Long Term Plan](#)
- [Integration and innovation: working together to improve health and social care for all](#)
- [Integrated Care Systems: design framework](#)

Relevant NHS England guidance:

- [Transactions guidance](#)
- [Guidance on pay for very senior managers in NHS trusts and foundation trusts](#)
- [System Oversight Framework 2021/22](#)
- [Guidance on good governance and collaboration](#) [Currently out for consultation]

Other resources for governors:

- [GovernWell – NHS Providers' national training programme for governors](#)

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