Classification: Official

Publication reference: PR2078

NHS England

Response to NHS England governance consultations

Addendum to guide for foundation trust governors
Good governance and collaboration guidance
Code of governance for NHS provider trusts

27 October 2022

Contents

1. Introduction

1. As part of the development of integrated care systems, we have committed to supporting NHS trusts and NHS foundation trusts in working effectively with their partner organisations and delivering system objectives. This involves helping trust boards and NHS foundation trust councils of governors develop their ways of working, and these changes will need to continue as integrated care systems (ICSs) develop further. As part of this, we developed and consulted on three governance-related documents:

   - An updated code of governance for NHS provider trusts that sets out an overarching framework for the corporate governance of trusts, reflecting developments in UK corporate governance and the introduction of ICSs.
   - An addendum to the existing guide to the duties of NHS foundation trust governors that covers the impact of system working on how councils of governors should undertake their role in holding non-executive directors to account.
   - New guidance on good governance and collaboration that links effective collaboration with the foundation trust governance condition in the NHS provider licence.

2. The consultations ran for six weeks between 27 May and 8 July. We worked closely with stakeholders in the development of these proposals, and also held a series of national and regional engagement events attended by trust and system leaders as part of the consultation process.

3. The number of consultation responses we received on each document is summarised below.

	Code of governance	**Addendum to the guide for governors**	**Guidance on good governance and collaboration**
NHS trust or foundation trust	27	27	12
Individual	9	14	4
Representative body	4	2	1
Other	2	0	4
Total	**42**	**43**	**21**

4. Overall, the response to each draft document was highly positive, with the majority of respondents supporting the approaches set out.

5. This note summarises the background and purpose of each document, the responses received, the revisions we have made to the final documents and next steps.

2. Updated code of governance for NHS foundation trusts and NHS trusts

Introduction and summary of proposed changes

6. The purpose of the code of governance (the code) is to help NHS provider boards deliver effective corporate governance, contribute to better organisational and system performance and improvement, and ultimately discharge their duties in the best interests of patients, service users and the public.

7. The code is built around a series of high-level organisational principles backed by specific provisions that translate these into corporate governance processes. These are divided into five areas:

   - board leadership and purpose
   - division of board responsibilities
   - board composition, succession and evaluation
   - audit, risk and internal control
   - board remuneration.

   The code is based on the Financial Reporting Council's UK Corporate Governance Code, and was last updated in 2014.

8. We consulted on an updated version to reflect both the changes in the NHS and wider UK corporate practice since 2014. The document is intended to reflect the latest best practice and insert, where appropriate, references to how general internal corporate governance processes can support the wider system. The consultation proposals included:

   - The code remains on a 'comply or explain' basis.
   - The code is extended to NHS trusts.

- Updates and positions corporate governance processes in the context of system working and meeting the triple aim covering quality of care, use of resources and health and wellbeing.
- Reflecting the latest NHS England policy in the appointment, appraisal and pay of trust directors, including specific points regarding recruitment to board positions:
  - Selection panels for board appointments should – as best practice – include at least one assessor from NHS England and/or an integrated care board (ICB) representative. Appointments will remain within the power of nominations committees, but this will ensure that the wider NHS has a say in the process.
  - The selection process for board members should, in addition to other criteria, consider ability and willingness to co-operate with the wider system.
  - Chairs should generally only remain in post on the board for up to six years – trusts extending this period should only do so with the agreement of NHS England.
- Embedding equality, diversity and inclusivity considerations in corporate governance processes.

Consultation response

9. We received 42 responses. The overall reaction was positive, with high levels of support for most of the updates:

   - Over 90% of respondents agreed with the code's aims. About 70% of respondents agreed the guidance would meet these aims, with about 20% neutral and 10% disagreeing.
   - The proposed ICB/NHS England role(s) in board appointments was also largely welcomed, with about 64% agreeing and about 25% disagreeing. The concerns of those who disagreed included whether ICBs/NHS England would have the capacity to be involved in every board appointment, the value NHS England would add to the process, and risks of undermining the model of foundation trust autonomy. Some responders proposed an alternative model where board appointments have an independent panel member.

10. Other comments received included:

- The code should make greater reference to quality of care and boards' roles in ensuring staffing levels are sufficient to provide quality care – referencing other tools like the well-led guidance.
- An introduction date of April 2023 would be welcome, allowing organisations to incorporate the principles into governance procedures well in advance.
- Non-executive directors have finite time available and some responders were concerned that the expectations around system working in the document increase the burden of their role.
- The document should clarify the link between the high-level principles of good corporate governance and the more detailed operational provisions intended to enshrine them in day-to-day actions.

Our response

11. Given the high level of support for the majority of the proposals across the document, we have generally not made substantial changes to the final version of the Code. However, we have made some changes in response to the feedback which are set out below.

12. We note the concerns expressed by some respondents in relation to the proposed role of NHS England and ICBs in foundation trust board appointments. However, as these board roles are important system roles we consider it appropriate to have a broad set of perspectives in their appointment. Therefore, we have decided to proceed with this change and have further clarified that NHS England should be engaged in advance to agree the approach with the trust. NHS England will liaise with the ICB as part of this process. This approach reflects existing practice across many systems and will also help address concerns around ICB and NHS England capacity.

13. We have also made a number of other changes to clarify particular points or provide additional context, including:

    - Clarifying the link between principles and provisions in the code (each section contains a set of high-level principles; the provisions that follow translate these into governance processes).
    - Stressing the need to spread responsibilities across the whole board to ensure that individual chairs, non-executive directors and executive directors have enough capacity to carry out their roles effectively.

- Referencing links between quality of care and operational governance where appropriate – though it should be noted that the code is concerned with setting effective corporate governance practices, rather than well-led criteria supporting day-to-day operations.
- Clarifying that an individual who serves three years as a non-executive director can go on to spend up to six years as chair without requiring NHS England agreement.

14. In response to feedback, the revised code will go 'live' from 1 April 2023 for the 2023/24 financial year. As ever, we will also follow the development of the UK Corporate Governance Code and consider the implications of any changes to this as they arise.

3. Addendum to the guide for governors

Summary of proposals

15. NHS foundation trust governors have a formal role to hold the chair and non-executives to account for the overall performance of their trust's board. With the move to system working, they should now also assess how their trust's board is supporting the system(s) it is a partner of and considering how its decisions affect the system(s). To support this, we developed and consulted on an addendum to the existing guide for foundation trust governors, which:

- Explains how the duties of foundation trust councils of governors can support system working and collaboration.
- Highlights the importance of considering the impact of the board's decisions on the wider public inside and outside the ICS.
- Gives examples of how councils of governors and boards can work well together.
- Sets out further considerations of the duty of councils of governors in respect of corporate activity.[1]

Consultation response

16. We received 43 responses. As with the code, there was broad support for the proposed addendum, with over 85% of respondents agreeing with its aims. 58% of

respondents agreed it would meet these aims, 29% were neutral and 10% disagreed.

On some of the detailed proposals:

- Regarding the further considerations around the duty to hold non-executive directors to account for the performance of the board, 74% agreed or strongly agreed, with 11% neutral.
- Regarding the further considerations around representing members and the public, 69% agreed or strongly agreed.
- Regarding further considerations relating to the role of governors in approving significant transactions, 82% agreed or strongly agreed.

Other responses/comments included:

- Requests from governors for additional detail and examples/scenarios.
- Concerns that representing the interests of the wider public (ie across the whole ICS) may be seen as a step increase in the scale of the governor role.
- Requests for greater clarity on the role of governors in situations where a trust sits on the border between two or more systems with material numbers of patients in each.

17. Where respondents were either 'neutral' or 'disagreed' with the proposals (or felt the document would not achieve its aims), further analysis showed this was generally due to a broader concern/uncertainty regarding the move to system working and what this meant for governors.

    - Some respondents requested more information on what system working means in practice.
    - Some respondents queried why the present arrangements need to change.
    - Some respondents were concerned that system working expanded the formal role of the governor beyond their foundation trust – that is, to the ICB and/or other organisations without the resources/statutory basis necessary to carry this out effectively.

18. Some responses disagreed with the descriptions of the statutory duties themselves, notably the duty to hold non-executives to account for the performance

of the board (these were not in scope for the consultation). Foundation trust governors were introduced in 2004, with the latest guide for governors published in 2012. How they undertake their role has likely evolved over nearly two decades and there may be variation across the sector in how different governors and councils carry out their role. We will consider this in further work.

Our response

19. Given the support for the proposed addendum, we have generally limited any changes to points of clarification to address some of the issues that may be underpinning some respondents' concerns, including:

    - A reference to appointed governors, to ensure that the guidance is understood to be applicable to all types of foundation trust governor.
    - Additional clarity on the scope and intentions for system working and implications for providers.
    - Stressing that the present arrangements and nature of the governor role remain the same – there is no expectation that the governor role should increase materially in response to the establishment of ICBs. Working in a system means providers are now expected to collaborate with other organisations to support their systems, as well as deliver high-quality NHS care in an efficient manner. Governors should work through their boards to assess how the trust is collaborating to support their system – eg by requesting information on this from the trust board rather than reaching out to other organisations or the ICB itself. Governors do not have a formal role regarding other providers or the ICB.
    - Where a trust sits near a system boundary and has material numbers of patients from multiple ICSs, governors should work with their board to consider how to represent patients in ICSs that the trust is not a partner of. The addendum now suggests governors – with support from their board – should be aware of how the trust's services are used and accessed, and be assured that the trust's board has considered the impact of any changes or decisions on the public using its services, irrespective of what system they are from.

20. As part of further work, we will consider how best to support councils of governors to represent the interests of patients across different systems, and also look to share best practice in director/governor relationships. This will serve to clarify the governor role and also help governors adapt to their organisation's role in ICSs.

4. Good governance and collaboration guidance

Summary of proposals

21. To help providers collaborate and work effectively in systems to deliver system objectives, we developed and consulted on guidance practically setting out what collaborative behaviour looks like in practice, framed around three areas of behaviour:

    - Engaging consistently in shared planning and decision-making.
    - Taking collective responsibility with partners for delivery of services across various footprints including system and place.
    - Taking responsibility for delivery of improvements and decisions agreed through system and place-based partnerships, provider collaboratives or any other relevant forums.

22. With five supporting characteristics:

    - 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.

23. To help providers understand how internal processes may need to change to facilitate better collaboration, we developed a series of key lines of enquiry (KLOEs), articulating expectations more clearly and providing organisations with a means to assess their behaviours. This guidance links these expectations regarding collaboration between trusts and their partners in systems with FT4, the governance condition in NHS foundation trusts' licence. If foundation trusts are not co-operating, this can ultimately lead to regulatory action by NHS England.

Consultation response

24. We received 21 responses. The overall response to the guidance was highly positive, with 90% of respondents agreeing with its aims. 60% agreed that it would meet these aims, 25% were neutral and 10% disagreed. In more detail:

- Regarding the approach to focusing on three areas:
  - shared planning and decision-making: 90% agreed or strongly agreed
  - collective responsibility: 80% agreed or strongly agreed
  - taking responsibility for delivery of improvements: 80% agreed or strongly agreed.
- For each of the supporting characteristics above, 80–90% either agreed or strongly agreed.
- At least 80% agreed or strongly agreed with the KLOEs associated with each characteristic.
- 95% saw no adverse impacts on equality of care (and some respondents said collaboration should reduce it).

Other feedback

25. We received a number of comments alongside the agree/neutral/disagree questions in the consultation, including:

- The provider licence should be updated to enable, encourage and support collaboration more broadly outside this specific guidance.
- NHS England's approach to overseeing and regulating collaboration should be mindful of the complexity of the new environment trusts will be operating in, and so should consider all factors and be supportive before considering regulatory action.
- While the guidance was very welcome, there should be a reciprocal set of formal expectations on ICBs and other system partners (eg local authorities) to support collaboration with providers.

Our response

26. Given the high level of support from respondents for the guidance we have not made substantial changes in the final guidance. However, we have made some changes to:

- More explicitly link governance and collaboration to oversight of care quality and cross-reference other publications in this regard.
- Align the content with the powers in the Health and Care Act 2022, which were not finalised at the time of developing the draft guidance, eg with reference to financial obligations.

27. In addition to issuing the final guidance, we have also published our consultation on proposed changes to the provider licence, which includes incorporating the system working expectations in the guidance directly into the provider licence itself. Issuing the final guidance now will support transition while we consult and finalise the new provider licence for 2023.

5. Next steps

28. Final versions of the documents can be found on the NHS England website:

- *Code of governance for NHS provider trusts*
- *System working and collaboration: An addendum to your statutory duties – A reference guide for NHS foundation trust governors*
- *Guidance on good governance and collaboration*

29. We also took the opportunity through this consultation to seek broader views on how the roles of trust boards and NHS foundation trust councils of governors should continue to evolve as ICSs develop further, any issues respondents think need to be resolved and what further support may be required. Responses covered several themes, including:

- The need for reciprocal expectations on other system partners to work openly and collaboratively with trusts.
- The extent to which it was still felt that different oversight approaches to organisations across the health and care system had yet to align incentives uniformly around systems objectives.
- The need for NHS England to continue to align its regulatory and oversight priorities around system working to make ICSs a success.
- A number of enduring behavioural/cultural challenges were also identified associated with the legacy of competition and the purchaser/provider split as well as short-term planning horizons.

30. We anticipate that over the coming months there will be a period of 'bedding in' and adjustment to the new approaches to working that the reforms have introduced, which was also acknowledged by respondents. Based on the feedback above, we will continue to work with trust and system leaders and other stakeholders to clarify key

issues, identify any barriers and support trusts and governors to fulfil their roles and contribute to the objectives of ICSs. As part of this we will also continue to review national policy frameworks to ensure clarity around collaboration and the alignment of incentives to help achieve it.

NHS England
Wellington House
133-155 Waterloo Road
London
SE1 8UG

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