

WE STILL NEED TO TALK ABOUT BOARDS

Introduction

In the summer of 2015 we published our paper *We need to talk about boards*, in the context of the *Five year forward view* and the debate that ensued about legal and organisational forms. Much has changed since then, with publication of the NHS long term plan and the drive towards system working, with its emphasis on collaboration rather than competition.

However, even in the context set out above, individual organisations remain important. They are the only bodies corporate within systems with the legal powers to make decisions and are legally accountable for the outcomes of that decision making. Their directors are answerable to the board even when making decisions under delegated powers and all board members are liable for the ensuing outcomes. For providers, this means the board, which embodies the organisation, remains the legitimate unit of decision making. So while system working is likely to impact on the way in which boards work, it has made board oversight more important than ever.

The policy emphasis on collaboration over competition makes legislation to revise NHS structures and ways of working more likely at some point in the future. When this is brought forward, whatever the shape of the resulting organisations, it is vital that board leadership should be at its heart. This revised version of our 2015 paper sets out our rationale for board leadership now and in the future.

The evolution of board-led organisations

It is worth reminding ourselves of the history of boards. Why do we have board-led organisations and what are they there to do? The duties of directors in England are set out in legislation based on common law duties, but it is important to note that the role of boards of directors has also changed incrementally, both in the UK and internationally.

The 1992 Cadbury report¹ set out the classic definition of corporate governance that is still quoted in the UK corporate governance code today:

"Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place."

¹ Report of the committee on the financial aspects of corporate governance 1 December 1992
<http://www.ecgi.org/codes/documents/cadbury.pdf>

The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting."

Subsequent reports built upon the Cadbury report, setting out matters including:

- remuneration of directors
- the requirement for companies to be led by boards of directors
- the need to *apply* the principles of corporate governance rather than *comply* with the systems of risk management and internal control.

One of the most significant steps was provided by the Higgs report² in 2003, written in the wake of the collapse of Enron and WorldCom. Both these cases provided overwhelming evidence that, left to their own devices and without proper supervision, executive directors do not always work in the best interests of a company's owners, or indeed its customers. It would be tempting to think of the examples of Enron and WorldCom collapses as extreme cases of company's led by rogue directors. However, the near collapse of the banking sector five years later dispensed with any notion that corporate failures could be solely attributed to the actions of a few individuals and further exemplified the need for strong non-executive input into the oversight of the work of executive directors.

The Financial Reporting Council (FRC) took forward the good practice described in the Higgs report in its *Guidance on board effectiveness*. There, it recognised: "Flawed decisions can be made with the best of intentions, with competent individuals believing passionately that they are making a sound judgment, when they are not". The need for boards to challenge the executive and for key risks to be considered and dealt with as part of the decision-making process could not be clearer.

Higgs acknowledged that there will never be a perfect system, a lesson that the NHS would do well to take into account. Higgs said: "Enterprise creates prosperity but involves risk. No system of governance can or should fully protect companies and investors from their own mistakes. We can, however, reasonably hope that boardroom sins of commission or omission – whether strategy, performance or oversight – are minimised".

The insightful Walker Review of corporate governance of UK banking industry³ looked in some detail at whether the unitary board comprised of executive and non-executive directors (NEDs) remained the best model for the banking sector. The review considered whether the European model of a supervisory board overseeing the executive board might not work better in an industry where non-executive oversight had been found to be seriously lacking. Walker concluded that the unitary board, which encourages proximity and interaction between executive and NEDs remained the best model.

2 Review of the role and effectiveness of non-executive directors, January 2003
<http://www.ecgi.org/codes/documents/higgsreport.pdf>

3 A review of corporate governance in UK banks and other financial industry entities, November 2009
http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf

He identified the crucial importance of behaviour and the interaction between directors and stakeholders in achieving sound corporate leadership and direction:

"Improvement in corporate governance will require behavioural change in an array of closely related areas in which prescribed standards and processes play a necessary but insufficient part. Board conformity with laid down procedures such as those for enhanced risk oversight will not alone provide better corporate governance overall if the chairman is weak, if the composition and dynamic of the board is inadequate and if there is unsatisfactory or no engagement with major owners. The behavioural changes that may be needed are unlikely to be fostered by regulatory fiat, which in any event risks provoking unintended consequences. Behavioural improvement is more likely to be achieved through clearer identification of best practice and more effective but, in most areas, non-statutory routes to implementation so that boards and their major owners feel 'ownership' of good corporate governance."

What is true of the banking sector is equally true of the NHS. It is the calibre of boards and the behaviour of board members that are the determinants of effective leadership. Procedures and processes are necessary but insufficient in this respect, with regulatory injunction most likely not producing the required outcomes from organisations. The 2018 iteration of the UK corporate governance code⁴ came into force at the beginning of 2019.⁵ The code draws on several reviews and consultations, including an inquiry by the business, energy and industrial strategy select committee which had once again stressed the role of non-executive directors: *"We are in no doubt about the vital role that NEDs have in company governance and are concerned about the impact of what we heard were ever increasing burdens on their ability to perform their role effectively, particularly if they serve on several boards"*.⁶

The essence of the latest code is to reaffirm that organisations need effective well-led unitary boards to succeed, but it also stresses the need to engage with stakeholders (including staff) in a meaningful way and emphasises the need for boards to work to promote a positive organisational culture and to look to maintain the long-term success of the organisation.

Boards and NHS provider organisations

The delivery of high-quality healthcare involves uncertainty of outcome – that is, risk. Though we must accept that board governance is not infallible, unitary boards are well placed to deal with risk because they can ensure that risk is properly controlled as part of the decision-making process, they bring together NEDs and executives in a way that maximises the potential for constructive but rigorous challenge, and they facilitate the application of good practice rather than promoting unthinking compliance.

4 UK Corporate Governance Code, Financial Reporting Council, April 2014
<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf>

5 The new code took account of the findings of the Walker Review, as well as a call for evidence in 2010 and consultations in 2012 and 2014. The latest version of the code resulted from work conducted by the FRC on corporate culture, a government green paper and a report from the BEIS Select Committee Inquiry.

6 BEIS Select Committee Inquiry, April 2017
<https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70202.htm>

The relevant code for NHS provider organisations is Monitor's NHS foundation trust code of governance.⁷ In common with the UK code,⁸ it recognises the singular role of boards of directors in providing coherent leadership and direction and sets out the same role for boards of NHS organisations as that of their private sector counterparts. They stand for the best interests of the 'owners' of the organisation: the public.

One of the less controversial aspects of the Health and Social Care Act 2012 was to codify for the first time the role of foundation trust boards of directors: "The general duty of the board of directors, and of each director individually, is to act with a view to promoting the success of the corporation so as to maximise the benefits for the members of the corporation as a whole and for the public"⁹ There is a read across from Paragraph 1 of Section 172 of the Companies Act 2006.¹⁰ The way in which NHS provider boards exercise this duty, once again like their private sector counterparts, is through corporate governance – a methodology put into action, not a set of rules, procedures or committee structures.

It is worth reiterating that corporate governance is what boards of directors do: setting the strategy of their organisation, supervising the work of the executive, setting and exemplifying corporate culture and being accountable to stakeholders. Research by Professor Andrew Kakabadse of Henley Business School – covering the public, private and third sectors in 14 countries – stresses need for boards to be driven by evidence rather than attempting to duplicate what they have done previously when they engage with their key stakeholders: "Good leaders create value and deliver success through evidence-led stakeholder engagement. They build the commitment and passion which delivers value through real evidence rather than neat consultant-generated strategies, or distant dreams. In these successful organisations, evidence is not an aberration, but the result of hard work, persistence and structure."¹¹ Implicit in this is the need to understand local conditions and build solid evidence based on knowing the organisation and those it serves – something that cannot be done remotely.

Constructive challenge

The role of the NHS board in fostering a positive organisational culture

The role of boards in setting and nurturing a positive organisational culture is now rightly recognised as being of central importance. Culture, or 'how we do things here',

7 The NHS foundation trust Code of Governance
<https://www.gov.uk/government/publications/nhs-foundation-trusts-code-of-governance>

8 The current FT Code was based on an earlier iteration of the UK Corporate Governance Code and is in the process of being revised in line the 2018 iteration of the UK Code, but taking account of system working and the need for the code to cover NHS trusts as well as foundation trusts.

9 Section 18A, National Health Service Act 2006 as amended by the Health and Social Care Act 2012
<http://www.legislation.gov.uk/ukpga/2012/7/section/152/enacted>

10 <https://www.legislation.gov.uk/ukpga/2006/46/section/172>

11 NHS Staff Management and Health Service Quality,
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/215454/dh_129658.pdf

is not something that can be imposed remotely from the centre or be the subject of regulatory diktat. West et al¹² identified the strongest predictor of mortality rates in acute trusts is “the percentage of staff working in well structured teams that have clear objectives, that meet regularly to review their performance and how it could be improved, and whose members work closely and effectively together”. Fostering a culture where teamwork, appraisal and problem-sharing and solving are part and parcel of the way of working can only happen in a climate in which trust and candour are the norm. This is only possible where there is close interaction between an organisation’s leaders and those they lead.

Trust and candour are essential if people are to speak up about problems as they arise so that they can be dealt with rather than hidden or ignored. Good boards depend on this to help them identify problems and address them. Mary Dixon-Woods, professor of medical sociology at Leicester University, describes this as ‘problem-sensing behaviour’. She expresses concern that the demands of regulators and central organisations, rather than facilitating positive behaviour, might actually inhibit the delivery of quality healthcare: “If the provider system remains too focused on servicing external accountability demands and protecting providers’ own reputations, they may be disincentivised to find bad news. This can easily divert providers from problem-sensing behaviour – looking for bad news (including fugitive knowledge) and instead incentivising ‘comfort-seeking’”¹³

Boards are able to do what the centre and regulators cannot conceivably do from an outside perspective because they can harness high-quality information from multiple sources, triangulate and obtain assurance based on sufficient evidence. The regulatory frameworks, by way of contrast, often look to performance management as a proxy for governance. Performance management at best produces compliance, however, prioritising compliance can skew priorities away from what is necessary to deliver for patients and towards what is necessary to keep the regulator onside. It also makes whatever is measured important, rather than measuring what is important.

So, if performance is prioritised, where does that leave those aspects of quality that are best described using softer information?

A key role for boards of directors in delivering quality services is to put in place processes to control risk (or uncertainty of outcome), and to seek and obtain assurance (that is, confidence backed by sufficient evidence). Boards look for solid evidence that the outcomes they seek are being achieved and, perhaps most importantly, they look to identify gaps in controls and take action to ensure those gaps are treated effectively. They do this by:

- knowing their organisation and how it operates, tailoring risk management processes to local circumstances, overseeing the work of and challenging the executive to ensure that what is presented as evidence is not taken at face value and that the full range of explanations for outcomes is explored

12 NHS Staff Management and Health Service Quality
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/215454/dh_129658.pdf

13 Regulatory complexity – a challenge for the provider system
<http://www.nhsproviders.org/blogs/mary-dixon-woods-blog/regulatory-complexity-a-challenge-for-the-provider-system/#sthash.RxuK8QON.dpuf>

- testing this through triangulation – testing what they have heard against what they see within the organisation and what they hear when they speak to staff and those who use services
- seeking to verify what they believe they know about their organisation through deep dives, audit, peer review and external reviews, among other methodologies, so that they can improve the quality of assurance they receive.

It is this, the quality of assurance, not performance data, periodic inspection or proxies for governance that is likely to speak most loudly on the quality of services. It is axiomatic that board assurance requires local boards of directors.

The nature of NHS trust and foundation trust non-executives has changed radically over the last decade. The foundation trust and NHS trust board is now a place for non-executives who bring significant business and other skills to the table. It is a place for a real independent perspective made on behalf of the public and populated by people who can inject real challenge into board debate so that executive directors are really held to account. It is therefore no coincidence that there has been a real change in the way NEDs are regarded, in what is asked of them, and in the support and development opportunities available to them. A good board is the first line of accountability and regulation, and the one most likely to be effective in dealing with problems before they become a real issue, rather than insisting things are put right after the event.

NHS provider boards and system working

There have been suggestions that NHS provider boards need to rely more on delegations and committees in common so that decisions can be made at a system level. There are clear advantages to system working and the appropriate use of delegation in order to reach system-wide decisions with the minimum of bureaucracy. However, clinical commissioning group (CCG) governing bodies and provider boards remain the legal units of decision making within the NHS at local levels, partnered closely by local authorities. This means trust boards remain the unit of decision making within the NHS provider sector, accountable for quality outcomes for patients and it is a key duty of the board to properly supervise the work of the executive.

Learning from where service delivery has gone tragically wrong, including at Mid Staffordshire from 2005 to 2009 and Morecambe Bay in 2010, it's clear that one of the key determinants of failure was that executive directors were not properly challenged, supervised and held to account by their board. Strong boards are rarely a problem. Conversely, weak boards can lead to disaster.

Systems are not bodies corporate and do not have any legal standing. They cannot be board led and they cannot use the same method of corporate governance as is used by boards. System working strengthens the role of executives and, unless care is taken, likely diminishes the role of NEDs. Leaders in systems have attempted to tackle this issue in a number of ways. These have included the appointment of independent system chairs

and of scrutiny groups of NEDs, CCG lay members and councillors. These moves are welcome, not least because they can facilitate objective approaches to discussions on difficult issues. However, these groupings are of individuals with very different duties, accountabilities and legal standing, and the fact that they meet together does not confer on them any statutory powers to act as a counterbalance to executives.

If challenge and proper supervision of the executive is to take place at system level and risk is to be properly managed, we will need to have unitary boards at system level. That in turn will require primary legislation, which – in this respect at least – is unlikely to be forthcoming in the short term. In the absence of such bodies, we must rely on reference back to existing local boards of directors so that system risks are properly challenged, managed and assured.

Bringing together different parts of the NHS should present the opportunity to build on what is best about corporate governance in the NHS. That means opting for best practice rather than looking for a common denominator. When considering best practice, the Myners report¹⁴ for the Co-op group echoed the findings reviews from Cadbury onwards on the strengths of the unitary board. We believe that what is true of the private and co-operative sectors is also true of the NHS, that the retention of the unitary board is essential to best practice in corporate governance.

NHS provider boards and accountability

It is not possible to talk about boards without also addressing accountability. The UK corporate governance code addresses the accountability of boards to their shareholders, the owners of their businesses, rather than accountability to whatever their industry regulator might be. Who then is the ‘owner’ of a foundation trust or NHS trust?

Clearly the state has a stake. Healthcare services are funded centrally and the government has a legitimate claim to be part owner, an ‘institutional shareholder’ for the NHS. However, this is equally true of the people who use and receive NHS services and the local communities made up of people who at one time or another will have recourse to use their services. Trusts also need to be answerable to the general public for the stewardship of the service – that they use their resources prudently and what they pass on to the next generation of leaders and service users is fit for purpose.

This cannot be done as part of some monolithic bureaucracy. Good accountability needs a strong local dimension, not just because it the ‘right thing to do’, but also because the local perspective can differ greatly from the perspective of the regulators or that of central NHS organisations. Those who work in the sector are well aware of the fact that if patient and service user engagement is to be meaningful there is a need to move beyond the accumulation of data and to listen to the authentic voice of those who use services. The same argument applies to the voice of staff and to the public in a trust’s catchment area more generally.

14 https://assets.ctfassets.net/5ywmq66472jr/3DA9s4bHUAguMmY688cAQW/b04a23c45c971098d9735c0ba7fc4159/Report_of_the_Independent_Governance_Review.pdf

NHS foundation trusts are required by law to have councils of governors elected by their members – their staff, patients, service users and carers and the public. Councils of governors have a number of important statutory duties,¹⁵ not least of which is to hold the NEDs of the foundation trust to account for the performance of the board. System working makes the role of councils of governors more challenging as a legitimate route to public accountability. Not all trusts are foundation trusts with councils of governors. Councils have no standing outside their own trusts and can only work together on an informal basis. There is also a significant question as to how councils can be both party to an informal decision-making process at system level while holding their boards to account for these same decisions at local level.

The long term plan is silent on the future of groups representing the interests of patients and the public, such as councils of governors. This leaves scope for a sector-wide debate of how best to bring local accountability to systems.

Conclusion

There is no legal form, structure or system that can completely inoculate organisations against failure, whether at local or system level. This is because they are led by people and, as in any industry, success is contingent on the cumulative behaviour of individuals. However, good corporate governance provides a vehicle for the provision of sound leadership, clear direction and dynamic accountability.

All available evidence suggests long term success is unlikely in the extreme in organisations where good governance is lacking. The unitary board model provides a better prospect of good governance than any other model of leadership and direction. It provides a forum to set and model positive values and behaviours. The duty on non-executive and executive directors alike to challenge means that strategy is thoroughly tested and vetted. It provides a mechanism by which executive directors can be supervised effectively and be challenged on the results they deliver and it provides a key line of defence in the successful management of risk.

Strong board leadership with sound local accountability need to be key components of system working and the future evolution of systems. That either means leaving accountability in local organisations as it is now, or developing a more radical vision of how health and care can be delivered and placing system working itself on a firmer, board-led, footing.

15 <https://www.gov.uk/government/publications/nhs-foundation-trust-governors-your-legal-obligations>

For more information:
www.nhsproviders.org/we-still-need-to-talk-about-boards

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