Consultation on the new draft Code of governance for NHS provider trusts

Introduction

A draft *Code of governance for NHS providers* was issued by NHS England (NHSE) on 27 May 2022 and is out for consultation until 8 July 2022. The new code will replace the *NHS Foundation trust code of governance* which was last updated in 2014. For the first time, the code will apply to all trusts. This briefing provides an overview of the code and its requirements, with a focus on what's new or different, and includes brief summaries of its general provisions. Following the terminology in the code, 'trusts' here will apply to trusts and foundation trusts unless otherwise stated.

NHS Providers has welcomed being involved in shaping the code and commenting on early drafts, and we will be responding to the consultation. Please send any questions or feedback to: izzy.allen@nhsproviders.org so that we can reflect a wide range of views in our response and ensure the code is as helpful as possible.

Summary

The code has been updated to reflect:

- its application to NHS trusts, following the extension of the *NHS Provider licence* to them
- changes to the *UK Corporate Governance Code* in 2018
- the legal establishment of integrated care systems (ICSs) under the Health and Care Act 2022
- the evolving *NHS System Oversight Framework*, under which trusts will be treated similarly regardless of their constitution as a trust or foundation trust.

Code-based governance has been adopted across the UK in the corporate sphere and was translated to the NHS when foundation trusts were introduced. The NHS foundation trust code provided guiding principles with the flexibility for foundation trusts to adopt alternative practices where it was right for them: so long as they were able to explain how they were meeting the core principles of good governance. The revised code helpfully takes the same approach but although the code is issued as guidance, it does contain some statutory requirements because they are enshrined in legislation elsewhere – these are indicated in the new code.

Disclosures to NHSE in relation to the 'governance condition' (Condition 4) of the *Provider licence* and to the code itself will be used by them to make determinations about adherence to the provider licence in terms of having safe, effective, outcomes-focused governance arrangements.

What's new?

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

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

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

The code

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

principles and provisions related to councils of governors (for foundation trusts only), and how the code relates to other regulatory requirements.

Section A: Board leadership and purpose

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

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

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

Section B: Division of responsibilities

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

appointment and removal of the company secretary becomes a matter for the board as a whole, rather than the chair and chief executive jointly.

Section C: Composition, succession and evaluation

The principles here cover the need for formal, rigorous and transparent procedures for making board appointments. The board should be constituted, in terms of size, diversity of skills etc. to undertake its duties, and an annual evaluation of its effectiveness undertaken.

There is a new requirement for the board to have published plans "for how the board and senior managers will in percentage terms at least match the overall black and minority composition of its overall workforce, or its local community, whichever is the higher" and consideration of diversity is now included within the annual board evaluation.

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

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

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

Section D: Audit, risk and internal control

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

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

Section E: Remuneration

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

Schedule A: Disclosure of corporate governance arrangements

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

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

Appendices

A: The role of the trust secretary

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

B: Council of governors and the role of the nominated lead governor

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

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

C: The code and other regulatory requirements

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

NHS Providers view

The draft code is out for consultation until 8 July and we would encourage provider trusts to respond during the consultation period and to share feedback with us to inform our response.

We argued for the code to be updated, and on balance we welcome this refreshed version which reflects best governance practice as described in the UK corporate code. The application of the code to NHS trusts is also welcome in providing a firm, transparent and consistent basis for good corporate governance across the sector and with regard to NHSE assessments about trusts' performance and leadership. NHS trusts new to the code should keep firmly in mind that most provisions are guidance, and they may demonstrate how they are applying the core principles of good governance in different ways.

We are pleased to see the new focus on diversity and inclusion, alignment with the *Workforce Race Equality Standard* and reference to disability and gender because we know what a positive difference diversity makes in the leadership of provider trusts, supporting better decision-making and outcomes for patients. We also welcome the inclusion of reference to the board's responsibilities regarding the wellbeing of our hard-working, hard-pressed NHS workforce.

Foundation trusts may need to adapt to the new expectations to involve NHSE in recruitment and selection, equally NHSE should not seek to impose a candidate upon a trust and be aware that the statute in respect of appointments remains unchanged.

We welcome the proposal that trust secretaries should be appointed and subject to removal by the board as a whole. It is crucial that trust secretaries can have robust and frank conversations about effective governance in their trust and feel protected in doing so.

References to system working in the code are also concise and not overly prescriptive which is helpful and welcome. We are however continuing to work with NHSE to ensure the read across to the addendum to the guide to governors with regard to system working remains sufficiently reflective of the legislative basis of the governor role.

Overall, we welcome this consultation on the updated code which seems to mark a helpful step forward in updating its provisions in light of the changing context for trusts, and to introduce a more consistent, transparent approach across the sector. We look forward to working with trusts and NHSE as the code is finalised and implemented.

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