COMMENTARY FOR NHS PROVIDERS[i]

CONFLICTS OF INTERESTS FOR FOUNDATION TRUST AND NHS TRUST DIRECTORS ON INTEGRATED CARE BOARDS

Introduction

1. The new NHS landscape introduced by the Health and Care Act 2022 (the **Act**) means that directors of NHS Foundation Trusts (**FT**) and NHS Trusts (**Trust**) may have multiple roles. For example, a director of an FT or Trust may also be a partner member of an Integrated Care Board (**ICB**). In such an instance, the director will owe duties as director to the relevant FT or Trust and, at the same time, to the ICB. In most cases, the duties owed by the director to the FT or Trust will be aligned with the duties owed to the ICB. In theory, however, it is possible, for these duties to conflict.

2. The Act also includes various provisions to enable more integrated and collaborative ways of working and to allow FTs, Trusts and ICBs to consider the wider effect of their decisions. This is an important change from prior law, where organisational duties were often narrowly viewed.

3. An important change introduced by the Act, is that all FTs, NHS Trusts and ICBs are now all subject to a statutory duty to have regard to the wider effect of their decisions (the **Triple Aim Duty**).

4. This Triple Aim Duty means that providers and ICBs must, when making decisions, have regard to the effect that decision will have upon:

    4.1. the health and well-being of people of England;

    4.2. the quality of National Health Service (NHS) services provided to individuals by NHS England, ICBs, FTs and Trusts (each a relevant body) to patients in England; and

    4.3. efficiency and sustainability in relation to the use of resources by relevant bodies for the NHS in England.

5. This Triple Aim Duty means that decisions of FTs and Trusts are not narrowly confined to the impact of their decision upon their own organisation or patient population.

6. Under the NHS Act 2006, NHS bodies are also under a duty to co-operate with each other in exercising their functions. The Act allows the Secretary of State to publish guidance on the discharge of the existing statutory duty of NHS bodies to co-operate under section 72 of the NHS

Act 2006 (**Co-operation Guidance**). Co-operation Guidance has not yet been published, but once published providers must have regard to this guidance when making decisions.

7. The legislation (and the Triple Aim Duty) provides statutory underpinning for providers to work with other organisations, and to take into account the impact upon the patients of other providers. This is important context when considering how directors of FTs and Trusts must discharge their statutory duties and how to address any conflict of interest. This shift in approach is also emphasised in the NHS England 2022 Code of Governance for NHS Providers Trusts[1] (the **NHSE Code of Governance**).

Provider Director Duties

Foundation Trusts

8. The board of an FT is a unitary board, which means that the directors make decisions as a single group and share the same responsibility and liability.

9. The NHS Act 2006 (as amended) also imposes duties upon each director 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.

10. FT directors each have a duty to avoid a situation in which that director has (or can have) a direct or indirect interest that conflicts (or possibly may conflict) with the interests of the FT and must not to accept a benefit from a third party by reason of being a director[2]. Furthermore, the FT's Constitution must make provision for dealing with conflicts of interests of directors[3] and FTs must maintain a register of interests of the directors. Each FT director who has in any way a direct or indirect interest in a proposed transaction or arrangement with the FT must declare the nature and extent of that interest to the other directors before the transaction is entered into[4].

11. Importantly, the director duties with respect to conflicts are scoped by reference to the personal position of that director in relation to the FT (and is typically construed to mean a financial or similar interest of the director personally with respect to a decision being made by the FT). In other words, the conflict of interest arises because the interest of the individual director conflicts with the interests of the FT.

12. Whilst the FT director duties may appear to be narrowly scoped to relate to that organisation and its members, any decision made by the board of the FT must be made in the context of the FT's statutory functions and duties, which include the Triple Aim Duty. It will not be sufficient for the board to act solely with a view to promoting the success of the FT if the FT does not (in reaching its decision) also have regard to the impact on the quality of care provided to patients outside of its

[1] https://www.england.nhs.uk/wp-content/uploads/2022/10/B2076-code-of-governance-for-nhs-provider-trusts-october-22-1.pdf

[2] Schedule 7, Para 18B of the NHS Act 2006 (as amended)

[3] Schedule 7, Para 21 of the NHS Act 2006 (as amended)

[4] Schedule 7, Para 18C of the NHS Act 2006 (as amended)

areas or to the financial effect upon other relevant bodies. In all cases, this will be a balancing exercise.

NHS Trusts

13. NHS legislation does not contain express statutory duties upon NHS Trust directors in the same way that it does for FTs.

14. However, the duties of NHS Trust directors are generally considered to be similar to that of FT directors and there is an implied duty to act in the best interests of that NHS Trust. Any decision of the board of the NHS Trust must (as with FTs) be made in the context of the NHS Trust's statutory duties, including the general duty for functions to be exercised, effectively, efficiently and economically and other statutory duties, which include the Triple Aim Duty.

15. In addition, FTs and NHS Trusts will also be obliged to take into account any Co-operation Guidance when it is published and should also consider the NHSE Code of Governance as part of their governance arrangements. The Co-operation Guidance will not override the duties of the FT, the NHS Trust or their boards. However, a failure to take into account the Triple Aim Duty or the Co-operation Guidance may mean that the FT or NHS Trust has not acted lawfully.

16. In practice, this will mean that a balancing exercise of various considerations must be taken into account by FTs and NHS Trusts in discharging multiple duties. FTs, NHS Trusts and their boards have a wide discretion in the factors that may be taken into account when discharging these duties.

ICB Conflict of Interest Provisions

1. ICBs are also subject to the Triple Aim Duty and general statutory duties, and will be subject to the Co-operation Guidance when it is published. Further, ICBs must act in accordance with their constitutions.

2. Each ICB is obliged to make arrangements for managing conflicts and potential conflicts in such a way as to ensure that they do not, and do not appear to, affect the integrity of the board's decision-making process[5].

3. An ICB must also maintain conflict registers, publish these registers and make arrangements for the declaration of conflicts[6].

4. NHS England has issued guidance and model documents for integrated care board constitutions (**Constitutional Guidance**)[7].

[5] HCA 2022, Section 14Z30

[6] HCA 2022, Section 14Z30

[7] The full text can be found at https://www.england.nhs.uk/wp-content/uploads/2021/06/B1551--Guidance-to-Clinical-Commissioning-Groups-on-the-preparation-of-Integrated-Care-Board-constitutions.pdf .

5. The Constitutional Guidance also refers to the role of nominee directors and the potential for actual or perceived conflicts. This Constitutional Guidance recommends that a series of principles to be taken into account by ICBs in their decision-making as follows:

(a) Commitment to the Triple Aim and Interest of the ICB and the Public

5.1. ICBs must discharge the Triple Aim Duty and any individual involved in making decisions that relate to ICB functions must be acting clearly in the interests of the ICB and of the public, rather than furthering direct or indirect financial, personal, professional or organisational interests.

5.2. The Constitutional Guidance reminds us that:

"ICBs have been created to give trust/foundation trust, local authority, and primary medical services (general practice) provider nominees a role in decision-making. These individuals will be expected to act in accordance with the first principle, and while it should not be assumed that they are personally or professionally conflicted just by virtue of being an employee, director, partner or otherwise holding a position with one of these organisations, the possibility of actual and perceived conflicts of interests arising will remain. For all decisions, ICBs will need to carefully consider whether an individual's role in another organisation could result in actual or perceived conflicts of interest and whether or not these outweigh the value of the knowledge they bring to the process."

(b) Declarations

5.3. ICBs must ensure that the personal and professional interests of ICB directors involved in decision-taking are declared, recorded and managed appropriately. A related statutory requirement also requires ICBs to make arrangements for each ICB director to declare conflicts or potential conflicts of interest when they are taking part in the exercise of the ICB's health services commissioning functions[8]. Such declarations must be made as soon as practicable after the ICB director becomes aware of the conflict or potential conflict and, in any event, within 28 days of that individual becoming aware. Such declaration should be clear and specific about the nature of any interest, and about the nature of any conflict that may arise regarding a particular ICB decision.

(c) Considerations following a Declaration

5.4. Where an ICB director declares an interest, then the ICB must following its conflict of interest policy and, as applicable, engage its governance team to determine if the interest amounts to a conflict of interest.

5.5. Where, in the course of an ICB decision-making exercise, the ICB determines that there is no risk of a conflict arising, then no further action needs to be taken, although the declared interest still needs to be recorded.

[8] NHS Act 2006, section 14Z30. These arrangements must also extend to individual members of committees and sub-committees of the ICB as well as to its employees.

5.6. If a material interest is declared, the ICB will need to consider to what extent this affects the balance of the ICB's discussion and decision-making process, and in doing so the ICB should ensure that conflicts and potential conflicts of interest do not, and do not appear to, affect the integrity of the ICB's decision-making processes.

5.7. In taking any actions to mitigate conflicts or potential of conflicts of interest, the ICB should act **proportionately** and should seek to preserve the spirit of collective decision-making, whilst balancing the benefits of having a particular individual involved. In looking at mitigations, ICBs may need to take account of a range of factors in order to determine what the risks are of including an individual with an actual or perceived conflict in the decision-making process and how that may be perceived or challenged.

5.8. Such factors will include whether an individual's role in another organisation could result in actual or perceived conflicts of interest and whether or not these outweigh the value of the knowledge they bring to the ICB's decision-making process.

5.9. ICBs should consider the perspective the individual brings and the value they add to both discussions around particular decisions and in actually taking part in the decision, including the ability to shape the ICB's understanding of how best to meet patients' needs and deliver care for their populations. The way conflicts of interest are managed should reflect this distinction.

5.10. In such circumstances, ICBs should consider the composition of decision-making forums and clearly distinguish between those individuals who should be involved in formal decision-taking and those whose input informs decisions.

(d) Mitigating Conflicts

5.11. Where a material interest is declared or it is determined that there is risk of a conflict arising, an ICB should weigh up the considerations and risks. The options available to the ICB's general management to mitigate the conflict may be to:

5.11.1. include the conflicted person in the relevant discussions but not in the relevant decision-making exercise;

5.11.2. exclude the conflicted person from both the relevant discussions and the relevant decision-making exercise (this may or may not involve seeking input/expertise on the matter in question from an alternative and unconflicted source);

5.11.3. remove a conflicted person from an area of work or even their role (where the conflict is so significant); or

5.11.4. include a conflicted person in the relevant discussions and relevant decision-making exercise where there is a clear benefit to them being included in both (following an ICB risk assessment and the ICB being satisfied that appropriate mitigations are in place).

(e) Culture of Transparency

5.12. In each case and in any event, the ICB's rationale for inclusion or exclusion of an individual in either the discussions and/or the decision-making should be properly documented and, as applicable included in meeting minutes. An audit trail of the actions taken must be maintained by the ICB and the individuals concerned should maintain their own written record of the information considered and actions taken.

Future NHS Guidance

6. The approaches described above should be read in conjunction with other relevant NHS England statutory guidance that is due to be published. This includes guidance on the provider selection regime as well as guidance on joint working and delegation arrangements. In relation to the provider selection regime, as is already established practice in the NHS, where decisions are being taken as part of a formal competitive procurement of services, any individual who is associated with an organisation that has a vested interest in the procurement should recuse themselves from the process.

Potential Conflict of Director Duties

7. Unfortunately, it may be the case that where a director of an ICB and an FT or an NHS Trust has a conflict or potential conflict of interest, it may apply to in respect of their duties to each organisation (for example, in the case of service re-allocation being commissioned by an ICB that affects an FT or NHS Trust).

8. In such scenarios, conflicts or potential conflicts of interest will apply separately to each organisation and the individual director's capacity to be involved in any board discussions will be assessed by each organisation independently. This will require each organisation to have regard to the Triple Aim Duty, following their respective conflicts processes and, in each case, undertake a risk assessment accordingly.

9. In order to manage such scenarios, individual directors should:

9.1. be fully conversant with the conflict of interest policies and related process applicable at each of the respective organisations to whom they owe a duty of care;

9.2. declare any interest that might be the subject of a conflict or potential conflict of interest as soon as they become aware of them (as well as at the start of meetings, declarations should be made before appointment to a role and upon a change of role);

9.3. engage fully with any process at the relevant organisation (including with the governance team) that determines whether a declaration of interest amounts to any conflict of potential conflict of interest for that organisation;

9.4. where applicable, establish the basis upon and the extent to which a relevant organisation allows them to be involved in board discussions in circumstance where they are otherwise excluded from taking part in the decision-making exercise (for example, in circumstance where they can add value); and

9.5. where they consider it appropriate, withdraw from any board decision-making process and/or board discussions.

10. Where the conflict or potential conflict relates to the same subject matter, there is no hierarchy or mechanism to determine whether a director can take part in one process but not the other, and any individual director caught in this position will need to follow the respective processes at each organisation.

Conflict of Interest Policies

11. To ensure compliance with the above approach, FTs, NHS Trusts and ICBs and their respective boards should review and update existing conflict of interest policies and practices to make sure that board members with other NHS directorships are able transparently to declare any and all potential conflicts of interest to any particular organisation and that they are comfortable in discharging their respective statutory (and corporate) duties and responsibilities to their respective bodies lawfully.

Actions Against Directors

12. Directors should make every effort to familiarize themselves with and comply with statutory and implied duties, their organisations' constitutions and policies, and to follow guidance, (and as noted above, where boards exercise their duties in accordance with these, they are given broad discretion in the decisions that they make, their decisions will be lawful unless irrational).

13. Subject to the above, it will give directors some comfort that in practice, it is very rare for actions to be taken against directors **(https://www.cps.gov.uk/legal-guidance/misconduct-public-office).**

[i] Commissioned from MWE by NHS Providers 2023