



WE NEED TO TALK  
ABOUT BOARDS  
BOARDS, LEADERSHIP  
AND THE NHS

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# WE NEED TO TALK ABOUT BOARDS

## BOARDS, LEADERSHIP AND THE NHS

### INTRODUCTION

We need to talk about boards of directors. Debate about the future shape of the NHS shows that we need more discussion and understanding of the role and powers of the boards of directors of NHS provider organisations, and in particular how well functioning boards directly support their staff and improve services for patients.

Our starting point is that NHS provider organisations already have significant potential to adapt and transform and that board-led organisations are more likely to be better led through times of change than other organisations. The purpose of this report is to help create a shared understanding of the role and potential of boards in the NHS.

### KEY ISSUES

- The current legal model, the public benefit corporation, is uniquely adaptable and can provide a vehicle for substantial organisational change when combined with good governance. There is a need to sustain the benefits of the unique legal form of foundation trusts, the public benefit corporation, including provider board autonomy and local accountability.
- No legal or organisational model is, or can be, immune from failure. However, good corporate governance is essential to the delivery of high quality healthcare and good corporate governance is best delivered by unitary boards.
- Evidence from the private and public sectors suggest that unitary boards provide the best vehicle for good corporate governance because they combine an independent perspective with detailed knowledge of the organisation in setting strategy and culture, in oversight of the work of the executive and in being accountable to stakeholders.
- Compliance and performance management regimes result in compliance at best, but can divert resources away from the key business of leading and directing organisations.
- Autonomy is necessary to make the cultural changes necessary to deliver medium term sustainability. It would be unhelpful if the provider sector were diverted from this task by a quest for the perfect organisational form.

## BOARDS OF DIRECTORS

Unitary boards, accountable for the delivery of quality services are the cornerstone of foundation trust status and need to be the cornerstone of the provider model for the future.

The NHS is unique in the public and private sectors, in terms of its focus on what is the best organisational vehicle or model for success. However it is the case that there is no organisational or legal form that can guarantee success, because all organisations ultimately depend on the actions of individuals. Our focus should be on making what we have work more effectively and evidence from the private and public sectors<sup>1</sup> shows that the unitary board is a robust vehicle for achieving that end. The feedback is that the process of pursuing and being authorised as a foundation trust is in itself a useful and robust test of performance and potential.

It is however worth noting the context in which NHS boards have needed to operate over the last few years and in which they are likely to continue to operate for the foreseeable future. The biggest issue for health sector boards has been to try to deliver what no other part of the public sector has been asked to deliver – to balance the books without reducing services. Councils have faced substantial cuts. As a consequence they have had to reduce service provision or change how services are delivered, charge for some services or even stop providing certain services altogether. Only in the NHS has there been a requirement to do more with less and no option of reducing services. The fact that so much has been achieved in this most challenging of contexts speaks highly of board leadership.

## FOUNDATIONS TRUSTS: A LEGAL FORM, NOT AN ORGANISATIONAL FORM

We need to move away from the notion that a foundation trust is an organisational form. It is not. In fact foundation trusts are to be found in a variety of vastly different forms already and have the capability of almost infinite diversity. It is useful to look at what the legislation says about foundation trusts. The 2006 Act as amended establishes foundation trusts as a legal form, 'a public benefit corporation'. Schedule 7 of the 2006 Act as amended deals with the constitution of foundation trusts and is a detailed description of what must be included in a foundation trust's constitution. Fundamentally a foundation trust is a body with a unitary board of directors, charged with delivering healthcare and accountable for the success of the organisation, a council of governors to hold the board to account and members to elect governors. All of the other characteristics that are attributed to foundation trusts are separate from the legal form. The point here is that legal forms are useful and enabling, however they are not omnipotent. Criticising the legal form that is a foundation trust, because some organisations do not deliver to the required standard is akin to castigating the company limited by guarantee model because not all limited companies deliver.

It has been this requirement for a unitary board, accountable for the delivery of quality healthcare, rather than beholden to another tier of management that has done more than anything to raise the calibre of boards in both NHS foundation trusts and NHS trusts.

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1 The Healthy NHS Board, NHS Leadership Academy

## ABOUT BOARDS

Why do we have board-led organisations and what are they there to do? While the duties of directors in England are set out in legislation based on common law duties, in the UK and internationally, the role of boards of directors has changed incrementally. In the UK, the framework for corporate governance began in earnest with the Cadbury Committee<sup>2</sup> report in 1992.

The Cadbury report 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. 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.’

The Cadbury report was built upon by the Greenbury<sup>3</sup> report dealing with remuneration, Hampel<sup>4</sup> and Turnbull<sup>5</sup> reports; Hampel reinforcing the requirement for companies to be led by boards of directors and the need to apply the principles of corporate governance rather than comply with them and Turnbull dealing with advice on systems of risk management and internal control that in revised form is still in operation.

One of the most significant steps was provided by the Higgs Report<sup>6</sup> 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, 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 companies led by rogue directors. But the near collapse of the banking sector five years later dispensed with any notion that corporate failures could be 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’s *Guidance on board effectiveness*, which built on and replaced the *Suggestions for good practice from the Higgs report* recognised that: ‘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 account of today. 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 much neglected, but insightful Walker Review of corporate governance of UK banking industry<sup>7</sup> looked in some detail at whether the unitary board comprised of executive and non-executive directors remained the best model for the banking sector.

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2 Report of the Committee on the Financial Aspects of Corporate Governance, 1 December 1992  
<http://www.ecgi.org/codes/documents/cadbury.pdf>

3 Directors’ Remuneration, Report of a Study Group chaired by Sir Richard Greenbury, 17 July 1995  
<http://www.ecgi.org/codes/documents/greenbury.pdf>

4 Hampel Committee, Final Report, January 1998  
[http://www.ecgi.org/codes/documents/hampel\\_index.htm](http://www.ecgi.org/codes/documents/hampel_index.htm)

5 Internal Control: Guidance for Directors on the Combined Code, 1999 <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Guidance-on-Risk-Management,-Internal-Control-and.pdf>

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

7 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](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf)

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 non-executive directors remained the best model. 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, with procedures and processes being necessary, but insufficient and regulatory injunction most likely not producing the required outcomes from organisations.

The latest iteration of the UK Corporate Governance Code<sup>8</sup> took account of the findings of the Walker report as well as a call for evidence in 2010 and consultations in 2012 and 2014. The essence of the code: that organisations need effective well-led unitary boards to succeed remains unchanged. However, in common with the private sector, we must accept that board governance is not infallible.

The delivery of high quality healthcare involves uncertainty of outcome – risk. 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 non-executive directors 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.

## BOARDS AND NHS PROVIDER ORGANISATIONS

The relevant code for NHS provider organisations is Monitor's *NHS foundation trust code of governance*.<sup>9</sup> The code was based on the UK Corporate Governance Code and is typically revised each time the UK Code is revised. In common with the UK Code 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'.<sup>10</sup> There is a read across from paragraph one of Section 172 of the Companies Act 2006. 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.

8 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>

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

10 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>

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. Lessons from research covering the public, private and third sectors in 14 countries conducted by Professor Andrew Kakabadse of Henley Business School stresses the 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.'***<sup>11</sup>

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.

The role of boards in setting and nurturing a positive organisational culture is something that was seldom discussed even three or four years ago, but is now rightly recognised as being of central importance. Culture, 'how we do things here', is not something that can be imposed from the centre or be the subject of regulatory enforcement. Woods et al<sup>12</sup> identified the biggest predictor of mortality in acute trusts was: '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'.'***<sup>13</sup>

Boards are able to do what 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 its best produces compliance. When the question is asked 'are NHS trusts outperforming foundation trusts?' the question is really one about the narrow area of compliance, but compliance can be a blunt instrument and isn't necessarily about delivering good services. It can skew priorities away from what is necessary to deliver for patients and towards what is necessary to keep the regulator on-side. 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), to seek and obtain assurance: confidence backed by sufficient evidence. They 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.

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11 Delivery and diversity, Andrew Kakabadse, <https://icsa.org.uk/products-and-services/governance-and-compliance/comment/guest-comment/may-2015-andrew-kakabadse>

12 NHS Staff Management and Health Service Quality, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/215454/dh\\_129658.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/215454/dh_129658.pdf)

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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>

Boards do this by knowing their organisation and how it operates, tailoring risk management processes to local circumstances, by overseeing the work of the executive and by 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. They test this through triangulation – comparing what they have heard with what they see within the organisation and what they hear when they speak to staff and those who use services. They seek 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. That board assurance requires boards of directors is axiomatic.

The nature of foundation trust and NHS trust non-executives has changed radically over the last six years. A place on the local trust board is no longer a token of thanks for a lifetime of public service. 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 non-executive directors 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 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.

Some commentators have levelled criticism at foundation trust boards that they have become too strong and too focused on the institution. There is much in the NHS as a system that forces boards to focus on compliance and to look upwards for permission. There has also been a protracted period of political uncertainty, which has militated against decisive action for the foundation trust model. That is not the same thing as being inwardly focused, while the charge that boards are too strong is not valid when the alternative to a strong board is an executive whose work is not properly supervised and not properly held to account. The NHS remains a high performing system of organisations,

but learning from where it has gone tragically wrong, including at Mid Staffordshire from 2005 to 2009 and Morecambe Bay in 2010, it has predominately been because 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 organisations into serious difficulties. It is perhaps instructive that the Myners report for the Co-op group<sup>14</sup> recommends the group moving to a unitary board model precisely because of the weakness of the existing Co-op board model, the failure of which led to significant financial problems for the group.

The period of political inertia alluded to above is now over. Devolution and moves to new care models based on those envisaged in the *Five year forward view* will move forward apace. Organisations led by strong unitary boards of directors are well placed to respond to the challenges presented by these changes. In this context, another observation, much more relevant than whether boards are inwardly focused, is that they need to spend more time on strategy and particularly on engaging with potential partners and their key stakeholders in developing their strategies. That having been said, time is a finite resource and it would be fairer to say that boards need to spend more time on strategy development instead of chasing down arbitrary performance targets particularly those not based on clinical evidence. They need to spend more time engaging with key stakeholders, including, but not exclusively, with the regulators on the future shape of services and less time worrying about compliance.

That is not to say that every foundation trust and every NHS trust is well placed to move forward. In some cases transactions will be required to consolidate. Some health economies will need to be pump primed to promote dialogue and resolve disputes. There is a real need for a dialogue about how best we can work together to create sustainable services for the future. But a move away from a model based on strong boards with the authority to affect real change will not resolve the problems we face, but will take up valuable time and resource.

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14 The Co-operative Group, Report of the Independent Governance Review, Paul Myners, 7 May 2014  
[http://www.co-operative.coop/PageFiles/989348879/Report\\_of\\_the\\_Independent\\_Governance\\_Review.pdf](http://www.co-operative.coop/PageFiles/989348879/Report_of_the_Independent_Governance_Review.pdf)

## 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? 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. But so too do 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.

Healthcare providers need to be answerable to the people who use and receive their services or may have recourse to do so because they too are the 'owners' of the service. They also need to be answerable to the public for the stewardship of the service – that they use their resources prudently and that 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. The council of governor model remains a work in progress. However, it has the potential to provide real local accountability for the performance of boards, something that cannot be done by commissioners as purchasers or local authorities as commissioners and stakeholders.

## CONCLUSIONS

There is no legal form, structure or system that can completely inoculate NHS provider organisations against failure because organisations are led by people not systems or methodologies, and as in any industry, success is contingent on the cumulative behaviour of individuals. But good corporate governance provides a vehicle for the provision of sound leadership, clear direction and dynamic accountability. All the 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 defence in the successful management of risk.

So strong board leadership with sound local accountability needs to be a key component of the new and more integrated care models and new service delivery mechanisms which will deliver most benefit to patients.

For further information

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**NHS Providers** is the membership organisation and trade association for the NHS acute, ambulance, community and mental health services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high quality, patient focused, care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

NHS Providers has more than 90 per cent of all NHS foundation trusts and aspirant trusts in membership, collectively accounting for £65 billion of annual expenditure and employ more than 928,000 staff.



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