

Consultation on draft Addendum to your statutory duties – reference guide for NHS foundation trust governors

Introduction

The draft *Addendum to Your statutory duties – reference guide for NHS foundation trust governors* was issued by NHS England (NHSE) on 27 May 2022 and is **out for consultation** until 8 July. This briefing summarises the content of the proposed addendum, and NHS Providers' view. We have been working closely with NHSE colleagues in the preparation of this draft and we are grateful to them for responding positively to our comments. We will continue to work with them during the consultation period and would welcome your feedback. Please contact john.coutts@nhsproviders.org.

Overview of contents

The addendum adds to existing guidance for governors. It is a welcome addition to the information available to foundation trusts although because it is not statutory guidance, trusts do have discretion over whether and how they choose to follow it. It is important to stress that the addendum applies solely and exclusively to the council's role within the foundation trust itself.

The document sets out the significant changes that have taken place in the NHS since 'Your statutory duties' was produced, from the long term plan through to the establishment of Integrated Care Systems (ICS) underpinned by legislation in the Health and Care Act 2022.

The addendum seeks to place the legal duties of councils of governors into the context of system working. It addresses holding the non-executive directors (NEDs) to account for the performance of the board, representing the interests of trust members and the public, and approving or not, significant transactions, mergers, acquisitions, separations or dissolutions. This addendum only applies to a council of governors' role within its own foundation trust's governance.

The addendum has two main sections in addition to the introduction: *Updated considerations for the statutory duties of councils of governors* and *Working with the board*. Each section of the addendum

includes a highlighted section on updated considerations in view of system-working and also includes illustrative scenarios.

Section 1 Addendum introduction

The introduction addresses the rationale for updating the addendum. It explains what ICSs and Integrated Care Boards (ICBs) are and stresses that the success of trusts and foundation trusts will be heavily influenced by their contribution to system working. It emphasises how governors can support their foundation trust's contribution to a system by forming a rounded view in representing the interests of the public. It proposes that to support collaboration and system working councils of governors will need to form a view of the interests of the public within a broader area than their immediate catchment area.

Section 2 Updated considerations for the statutory duties of councils of governors

This section seeks to add clarity on the three statutory duties most affected by the move to system working:

- holding the non-executive directors individually and collectively to account for the performance of the board of directors
- representing the interests of the members of the NHS foundation trust and the public
- approving 'significant transactions', mergers, acquisitions, and separations or dissolutions.

Holding the non-executive directors to account

The guidance sets out the statutory basis for the council of governors to hold the non-executive directors to account for the **performance of the board**.

It stresses that 'holding to account' does not mean that governors need feel they must question every decision or plan. The addendum makes it clear that the role of governors in 'holding to account' is one of assurances of the performance of the board and that therefore councils should assess key areas of enquiry and provide appropriate challenge on the following:

- whether due process is being followed
- whether the interests of the members and of the public are being considered in an appropriate manner
- whether there is evidence that the trust is at significant risk of breaching the conditions of its licence.

The addendum acknowledges that while the board needs to give due consideration to the views of the council, it does not have to adhere to the council's preferences. It makes it clear that overall responsibility for running the foundation trust lies with the board of directors and that holding to account is not about performance managing the board or individual directors.

It sets out a clear role for the council of governors to consider the board's account of its performance against criteria agreed with the council in the context of the provider licence; to feed back on the evidence presented and to ask for more evidence if necessary and reasonable. It mentions the duties of the council to inform NHSE if it forms a reasonable, evidence-based belief that the trust is in danger of breaching the terms of its licence.

This section also includes helpful considerations to help councils to fulfil their (unchanged) statutory role within a system context with regard to representing the interests of members of the broader public and in looking at the board's account of its contribution to a wider health and care system. It also explains the triple aim and its relevance to councils of governors.

Finally, this section includes an illustrative scenario that suggests an approach to how governors might consider their board's contribution to the system. The scenario is helpful and useful, but it is an example of an approach that trusts may wish to adapt, as appropriate, to their local circumstances.

Representing the interests of trust members and the public

This section on representing the interests of members and the public references the existing statutory duties. It builds on existing advice on engagement with members and stresses the need for governors to respect confidentiality. It also draws attention for the need to co-operate with other bodies that have a concern in the interests of patients such as Healthwatch. The most significant sections are the updated considerations and the illustrative scenario.

The updated considerations section explains the duties of ICBs in relation to public engagement and stresses the continued duty of foundation trusts (and their councils) in respect of public engagement in a system context. The considerations re-emphasise the need for councils to take a broader view of the public interest than just their constituencies or views of the public in their immediate area. It stresses the need for councils to make use of, and adhere to, the trust's communications and media policies.

The illustrative scenario contains some interesting approaches to engagement that trusts may wish to adapt to their local circumstances.

Taking decisions on significant transactions, mergers, acquisitions, separations and dissolutions

This section sets out the legal considerations and reassesses the council's role in terms of transactions, given the fact all of the powers and duties of the trust must be exercisable by the board. The emphasis in this section is for councils to ensure that the board has followed due process, carried out due diligence and has engaged appropriately with the public, service users and system partners. As long as this has happened, the guidance proposes that councils should not unreasonably withhold their consent for a proposal to go ahead. It also makes it clear that councils need to consider the key risks the transaction is intended to address and the impact of those risks if consent is withheld. We see this as a helpful clarification of existing legislation and guidance.

The updated considerations set the duty in a system context and makes the point that councils may need to consent to transactions that are of benefit to the broader public and may not have an immediate benefit in their own locale. The illustrative scenario gives an example of how this may work in practice.

Section 3 Working with the board

Building relationships and understanding roles

This section addresses key relationships and roles and in essence emphasises key relationships within trusts such as with the chair, trust secretary etc. It gives some practical tips on information that governors should receive on induction and for use as part of their role:

- trust's constitution
- code of conduct
- confidentiality and data protection policies
- conflict of interest policies
- communications policy
- Nolan Principles.

This section also covers engagement and the meetings that governors can expect to attend which will include council of governors' meetings and annual members meetings, public trust board meetings, informal meetings and briefings as well as engagement sessions on plans for transactions.

Supporting governors to understand their duties in the context of ICSs and system working

This section suggests that the key relationships for governors with regard to system working, are with the chair and the chief executive of their trust. It suggests that the chair should facilitate lines of communication and engagement between the ICB, the Integrated Care Partnership (ICP) and the council of governors. The rest of the advice in the section centres around the trust providing the council with information and briefings on system plans, decisions and delivery.

The section suggests engagement on the part of the council and other tips by which the council might engage and understand work within the system. It makes it clear that engagement between governors and the ICS or ICB should be facilitated by the trust. It also sets out the responsibility of the board to keep governors informed on developments within their system, and the trust's contribution to system working. It makes it clear that there is no agreed way in which a trust should do this and acknowledges that there will be a variety of practice at a local level. It gives a number of helpful suggestions as to how boards can keep governors informed of work within their system and includes some practical tips for governors about issues that they need to understand.

NHS Providers view

We welcome the focus and time NHSE has put into updating the addendum to the guide for governors, and we agree that the previous document needed updating in the light of the new Act and the development of collaborative working within local health and care systems.

We have welcomed the opportunity to engage with NHSE at different points in the drafting process and appreciate their responsiveness in taking on board our feedback. We do still have some concerns about some of the detail within the draft addendum, which we will continue to work closely with colleagues to resolve during the consultation period. Below we summarise the key points of feedback we will make on the draft:

Following the logic of the legislative basis for the governor role¹

In law the council of governors is part of the foundation trust (and governors have no standing in law as individuals and only as a council). There is also a firm legislative context for the duties of the

¹ Paragraph 7.1 of Schedule 7 of the National Health Service Act 2006 as amended by the Health and Social Care Act 2012 and soon the Health and Care Act 2022 (the Act as amended) states: "A public benefit corporation has a council of governors".

council of governors. Paragraph 10A of Schedule 7 of the Act as amended states: “The general duties of the council of governors are (a) to hold the non-executive directors individually and collectively to account for the performance of the board of directors, and (b) to represent the interests of the members of the corporation as a whole and the interests of the public.” Therefore, the duty to hold to account relates specifically to the performance of the board. In carrying out the duty of representing the interests of members and the public it is implicit that the council represents those interests to the board. We welcome the fact that the addendum makes this clear.

Representing the interests of the public

When considering system working the duties of the council need to be seen through the lens as set out in Paragraph 18A of the Act as amended: “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.” This duty had previously been interpreted as maximising the benefits for the public in the trust’s catchment area, but with the advent of collaboration over the last few years a wider interpretation maximising the benefits of the broader public wherever they may live has been accepted and has been unchallenged. The fact that most foundation trusts have a rest of England constituency emphasises this interpretation because their public is quite literally everyone who lives in England. The duty to collaborate as set out in the Health and Care Act 2022 has removed any doubt and it is clear that the duty of foundation trust boards of directors is to maximise the benefits for the public as a whole. We are therefore comfortable with the broader interpretation of the governor role with regard to representing the interests of the public set out in the updated draft addendum.

Holding the NEDs to account for the performance of the board

The NHS is currently under a great deal of pressure. In this context it is crucial that governors work in partnership with their boards to hold them to account by looking at assurance in the round. Interaction with other groups representing patient interests may be helpful in this regard. We welcome the proposal that governor engagement and interaction with members and the public needs to be consistent with the communications and media policies of their trust and the restatement of the need for governors to respect confidentiality.

In summary, we welcome the publication of the draft addendum and will be closely engaged with members and with NHSE during the **consultation** period. We believe it makes a significant contribution to clarifying the governor role and bringing it up to date in the context of legislation and changed ways of working. We welcome your feedback on this briefing and the draft addendum, to john.coutts@nhsproviders.org.