

Draft Addendum to Your statutory duties: consultation

NHS Providers response

About us

NHS Providers is the membership organisation for the NHS acute, mental health, community and ambulance services that treat patients and service users in the NHS. We help NHS trusts and foundation 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 all trusts in England in voluntary membership, collectively accounting for £104bn of annual expenditure and employing 1.2 million staff.

About this consultation

On 27 May 2022 NHS England (NHSE) published its [Draft Addendum to your statutory duties for consultation](#). In our response below we have addressed the online survey questions by topic area, rather than responding individually to each consultation question. This response provides our organisational view and reflects the feedback we have received from our members, including chairs, chief executives, company secretaries and members of NHS Providers Governor Advisory Committee.

Aims of the addendum

We welcome the focus and time NHSE has put into creating the addendum to the guide for governors, and we agree that the previous document needed updating in the light of the Health and Care Act 2022 (the 2022 Act) and the development of collaborative working within local health and care systems.

We are pleased that the addendum has acknowledged and been based upon the legislative foundations of the governor role as this ensures welcome clarity of expectation for foundation trust boards and councils of governors. NHSE has acknowledged that councils of governors remain part of

the foundation trust and that legal standing lies with the council of governors as opposed to individual governors. There is also a recognition in the addendum that while councils of governors are among the groups that Integrated Care Boards (ICBs) may well consult on various issues, the legislation in relation to the powers and duties of councils of governors remains unchanged.

Holding the NEDs to account for the performance of the board

The duty to hold to account relates specifically to the performance of the board not the performance of individual NEDs. We welcome the fact that the addendum makes this clear. The 2022 Act places a duty to collaborate on trust boards of directors and there is therefore an onus on boards to provide their council of governors with information on the trust's performance of this duty. This will include relevant information on the trust's contribution to the development of system strategy, the contribution of the trust to collaborative working and place-based collaboratives, working with the ICB in the same way of boards keep their councils informed of other aspects of their work. While the complexity of the board's interactions with other organisations might change as well as the information needs of councils of governors the task of governors remains the same: to understand the performance of the board and to feedback on any issues that governors determine to be of importance.

However councils are not in a position to hold collaboratives or other parts of the system to account, nor are they resourced or expected to do so. Not all of the players within a collaborative will be foundation trusts and indeed not all will be from the NHS, so it is imperative that councils look at their own board's contribution to collective endeavours to add real value. We also agree that boards will need to consider how they ensure councils of governors have accessible and regularly updated information on the expectations of their trust within the ICS, and the trust's contribution to system working.

In looking at the performance of the board it is important to emphasise that councils should continue to avoid seeking to performance manage NEDs or the board itself or allowing themselves to stray into operational matters. We believe the addendum could be strengthened by placing greater emphasis on these points which remain unchanged in law, for the benefit of councils of governors and foundation trusts.

The addendum therefore helpfully makes clear that the relationship of councils of governors remains with their own foundation trust board and not directly with an ICB or any other part of the system in which their board and trust operate. Some foundation trust boards may wish to facilitate interaction

between governors at system level to exchange information and experience. We are pleased that the addendum allows flexibility for different approaches without placing any onus on foundation trusts to take up a particular approach as the appetite for, and feasibility of, different approaches will vary. As the legal framework underpinning the role of councils of governors has not changed, it remains the case that if governors are acting outside the context of a council meeting they do so as individuals with no standing in law. The Addendum could make this clearer given some regional and system level networks and learning for a for governors may well emerge. For councils, the norm should be business as usual, albeit in a changed context.

Representing the interests of the public

In carrying out the duty of representing the interests of members and the public it is implicit that the council represents those interests to their board, although councils may be consultees on issues raised by ICBs. Where councils are consultees it would be good practice for them to discuss any response with their board.

The requirement to collaborate has changed the onus of the existing duty of the board of directors to act to maximise healthcare benefits for the public to include the broader public including those outside the trust's catchment area. This in turn means that in representing the interests of the public councils will also need to consider the interests of the broader public. 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.

That said, we do accept that this represents a significant step change in approach and interpretation for many councils of governors, and one which our own Governor Advisory Committee has flagged. We will consider how best to support this within NHS Providers governor support offer. Some trusts will wish to facilitate their councils carrying out this duty by supporting a range of engagement activities, but others will wish to rely on the knowledge that their governors gain in their everyday interactions and rely on the ability of their councils to act in a way that is representative of the broader public. 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.

Councils of governors and transactions

It is likely that system working will require a larger number of significant transactions, including consolidation of trusts, than has previously been the case. Often these transactions will be absolutely

essential to the effective functioning of the broader system to deliver added benefits to patients and service users. The addendum proposes that councils of governors should not unreasonably stand in the way of transactions but should ensure that due diligence is carried out and due process followed. We believe that this approach is necessary if the needs of patients and service users across systems are to be maintained and improved. This amendment similarly hangs on a broader interpretation of 'interests of the public' than some councils may previously have been used to. As we mention above, we will consider how best to support governors with this evolving interpretation in our support work.

Working with 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 trust board. We believe that is essential that the addendum makes this clear.

Conclusion

In summary, we welcome the publication of the draft addendum. It could perhaps be improved by closer alignment and greater reference to the Code of Governance, and we would hope that NHS England gives this serious consideration before finalising the document.

We believe that the addendum, with some relatively minor amendments, will make a significant contribution to clarifying the governor role and bringing it up to date in the context of legislation and changed ways of working.