Why boards?

The case for boards at a glance

There is no legal form, structure or system that can completely inoculate organisations against failure whether at local or system level. This is because they are led by people 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 available evidence suggests long term success is unlikely in the extreme in organisations where good governance is lacking. As we explore in this article, independent experts have concluded that the unitary board model provides a better prospect of good governance than other models 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 line of defence in the successful management of risk. So strong board leadership with sound local accountability need to be key components of system working and future evolution of systems.

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[1] 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 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.'*

[1] Report of the Committee on the Financial Aspects of Corporate Governance 1 December 1992
https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf

The Cadbury report was built upon by the Greenbury[2], Hampel[3] and Turnbull[4] reports; Greenbury dealing with remuneration, 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[5] 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 5 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 (2009) of corporate governance of the UK banking industry[6] looked in some detail at whether the unitary board comprised of executive and non-executive directors remained the best model for the banking sector. The review considered whether the European model of a

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[2] Directors' Remuneration, Report of a Study Group chaired by Sir Richard Greenbury, 17 July 1995 https://ecgi.global/download/file/fid/9446

[3] Hampel Committee, Final Report, January 1998 https://ecgi.global/code/hampel-report-final

[4] 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

[5] Review of the role and effectiveness of non-executive directors, January 2003 https://ecgi.global/sites/default/files//codes/documents/higgsreport.pdf

[6] 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

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 (sic) 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 2016 iteration of the UK Corporate Governance Code[7] 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 latest version of the code resulted from work conducted by the FRC on corporate culture, a government green paper and a report from the Business, Energy and Industrial Strategy (BEIS) Select Committee Inquiry. It came into force at the beginning of 2019.

The BEIS Select Committee Inquiry once again stressed the role of non-executive directors:

'We are in no doubt about the vital role that NEDs have in company governance and are concerned about the impact of what we heard were ever increasing burdens on their ability to perform their role effectively, particularly if they serve on several boards.[8]

The essence of the code: that organisations need effective well led unitary boards to succeed remains unchanged, but the updated code stresses the need to engage with stakeholders including staff in a

[7] 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

[8] BEIS Select Committee Inquiry, April 2017, https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70202.htm

meaningful way and emphasises the need for boards to work to promote a positive organisational culture and to look to maintain the long term success of the organisation.

Having said that 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 NHS England's NHS Code of Governance.[9] The code was based on the UK Corporate Governance Code and was revised in 2022 to take account of the updated UK Code of 2019, the provisions around collaboration of the Health and Care Act 2022 and extension to all provider trusts, having previously applied only to foundation trusts (FTs)s. 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. While the 2022 code does not specify the legal duties of directors, it remains the case that: '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' [10] 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.

It is worth reiterating that 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 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. Kakabadse writes:

'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.'

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[9] Code of Governance for NHS provider trusts 2022 B2076-code-of-governance-for-nhs-provider-trusts-october-22-1.pdf (england.nhs.uk)

[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

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 now rightly recognised as being of central importance. Culture, 'how we do things here', is not something that can be imposed remotely from the centre or be the subject of regulatory diktat. Woods et al[11] 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' (see our chapter on culture and problem-sensing). She expresses concern that the demands of regulators and central organisations might sometimes inhibit the delivery of quality healthcare rather than facilitate positive behaviour:

'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'.'[12]

Boards are able to do what the centre and 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. Performance management, at its best, produces compliance. It can skew priorities away from what is necessary to deliver for patients and towards what is necessary to keep the regulator onside. It also makes whatever is measured, the target, important rather than measuring what is important (the two may not coincide). 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

[11] NHS Staff Management and Health Service Quality, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/215454/dh_129658.pdf

[12] Regulatory complexity - a challenge for the provider system, https://nhsproviders.org/news-blogs/blogs/regulatory-complexity-a-challenge-for-the-provider-system

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. 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 – assessing what they have heard against 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 used to obtain an independent view 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. It is manifestly the case that board assurance requires local boards of directors.

The nature of FT and NHS trust non-executives has changed radically over the last decade. A place on the local trust board is no longer a small token of thanks for a lifetime of public service or community contribution. The FT and NHS trust board is now a place for non-executives who bring significant skills to the table with experience drawn from the commercial world, public service and the voluntary sector as well as lived experience of care or from disadvantaged groups. It is a place for independent perspectives to be shared 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.

Boards are only as effective as the people on them. We will cover the importance of board diversity in an upcoming chapter on effective boards doon, where we will discuss both the moral imperative to ensure representation at the most senior level, but also how having members with diverse perspectives and life experiences improves board decision-making.

Boards and system working

There have been suggestions from some quarters that boards need to rely more on delegations and committees in common so that decisions that were once the business of the local board can be made at system level. There are clear advantages to system working and the appropriate use of delegation in order to reach system-wide decisions with the minimum of bureaucracy. However boards remain the unit of decision making within the NHS provider sector, accountable for quality outcomes for patients, and it is a key duty of the board to properly supervise the work of the executive. We will have more on systems in an upcoming chapter, but here we will simply assert that as well as opportunities there are significant risks for boards working in systems and through involvement in structures where decision-making may take place outside the

boards of bodies corporate, and so non-executive challenge is lacking or weak and the power of executives is strengthened.

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 trust or FT? 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 this is equally true of 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 those 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 are they too are the 'owners' of the service. They also need to be answerable to the wider 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 more generally.