MANAGING CONFLICTS OF INTERESTS IN CONTEXT OF SYSTEM WORKING

FOUNDATION TRUSTS, NHS TRUST & INTEGRATED CARE BOARDS
CONTEXT: INTEGRATION & CO-OPERATION
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• Long Term Plan 2019

• Health and Care Act 2022 (HCA)
  – Theme of Integration, Co-operation and Collaboration
  – Facilitates greater integration and collaborative ways of working between NHS, independent sector and third sector organisations, including between NHS Foundation Trusts (FTs), NHS Trusts and Integrated Care Boards (ICBs)
  – All FTs, NHS Trusts and ICBs now subject to a statutory duty to have regard to the wider effect of their decisions: the Triple Aim Duty
CONTEXT: INTEGRATION AND COOPERATION – SHIFT IN APPROACH

• The **Triple Aim Duty** means that FTs, NHS Trusts and ICBs must, when making decisions, have regard to the effect that decision will have upon:
  
  – the health and well-being of people of England;
  
  – the quality of NHS services provided to individuals by NHS England, ICBs, FTs and Trusts (as relevant bodies) to patients in England; and
  
  – efficiency and sustainability in relation to the use of resources by relevant bodies for the NHS in England

• **NHS Act 2006**: NHS bodies are under a duty to **co-operate** with each other in exercising their functions

• **NHS Guidance**: reflects shift to integrated care landscape
BOARD & DIRECTOR/PARTNER MEMBER ROLES & RESPONSIBILITIES
DIRECTORS/PARTNER MEMBERS IN SYSTEM WORKING

• New regime: Directors of FTs and NHS Trusts may have multiple roles

• For example, may also be a “Partner Member” of an ICB

• Duties generally likely be aligned but may be conflicting
TRUST BOARD RESPONSIBILITIES & DIRECTOR DUTIES

• Foundation Trusts
  – Public Benefit Corporations with local accountability through members and council of governors
  – Unitary board: directors make decisions as a single group and share the same responsibility and liability
  – NHS Act 2006 (as amended)
    ▪ Duty on each director to act with a view to promoting the success of the corporation - to maximise the benefits for the members of the corporation as a whole and for the public
    ▪ Duty to avoid a situation in which a director has (or can have) a direct or indirect interest that conflicts (or possibly may conflict) with the interests of the FT
    ▪ A director must not accept a benefit from a third party by reason of being a director (Para 18B, Schedule 7)
    ▪ The FT's Constitution: provision for dealing with conflicts of interests of directors (Para 21, Schedule 7)
    ▪ FTs must maintain a register of interests of its directors (Para 20, Schedule 7)
    ▪ Director must declare direct or indirect interest in proposed transaction or arrangement (Para 18C, Schedule 7)

• NHS Trusts
  – NHS legislation does not contain express statutory duties upon NHS Trust directors
  – Unitary board: like FTs – directors make decisions as a single group and share the same responsibility and liability
  – Duties of NHS Trust directors considered to be similar to those of FT directors + an implied duty to act in the best interests of the NHS Trust
  – Certain individuals are disqualified from being directors on the basis of conflicting interests
TRUST BOARD RESPONSIBILITIES & DIRECTOR DUTIES

• Any decision of the board of an FT or NHS Trust must be made in the context of that Trust’s statutory duties

• These statutory duties include the general duty for functions to be exercised, effectively, efficiently and economically and the Triple Aim Duty

• FTs/NHS Trusts to take into account:
  – the NHS England Code of Governance (October 2022)
  – other guidance such as the Co-operation Guidance or equivalent (as and when published)

• In practice, this will mean a balancing exercise of various considerations required to be taken into account by FTs and NHS Trusts in discharging multiple duties
  – a view to promoting the success of the Trust
  – the impact on the quality of care provided to patients outside of its areas
  – the financial effect upon other relevant bodies
ICBS: BOARD RESPONSIBILITIES & PARTNER MEMBER DUTIES

• FTs and NHS Trusts may nominate Partner Members (also known as Ordinary Members) to the ICB board

• The Partner Members work alongside the Chair, non-executives, executive directors and other Partner Members as equal members of a unitary board

• While Partner Members will bring knowledge and experience from their sector and will contribute the perspective of their sector to the decisions of the board, they are not to act as delegates of those sectors (Model Constitution)

• ICBs are subject to:
  – the Triple Aim Duty
  – General Statutory Duties
  – Co-operation Guidance (or equivalent when published)
  – their respective Constitutions (model constitution published May 2022)

• ICBs obliged to make arrangements for managing conflicts and potential conflicts in order that they do not, nor appear to affect the integrity of the board’s decision-making process (HCA 2022, Section 14Z30)

• ICBs requirement to maintain and publish conflict registers and make arrangements for the declaration of conflicts (HCA 2022, Section 14Z30)

• ICB Governance Handbook
NHS GUIDANCE
KEY NHS GUIDANCE (1)

• Managing Conflicts of Interest in the NHS: Guidance for staff and organisations (2017)
  – Introduces consistent principles and rules for managing conflicts of interest
  – Defines a conflict of interest as: “A set of circumstances by which a reasonable person would consider that an individual’s ability to apply judgement or act, in the context of delivering, commissioning, or assuring taxpayer funded health and care services is, or could be, impaired or influenced by another interest they hold.”
  – In context of Conflicts of Interest, promotes:
    ▪ use of common sense and judgement of staff
    ▪ well communicated conflict of interest processes
    ▪ regular policy reviews
    ▪ training and support on managing conflicts
    ▪ maintenance of register(s) of interest
    ▪ audit policy, process and procedures and review at least every three years
  – “Don’t interpret and deploy this guidance in a way which stifles the collaboration and innovation that the NHS needs.”
KEY NHS GUIDANCE (2)

- The NHS England Code of Governance for Provider Trusts (published October 2022)
  - Effective 1 April 2023
  - Applies to FTs and NHS Trusts
  - Boards to deliver “entrepreneurial and effective leadership”
  - “Good corporate governance is dynamic”
  - Board to identify and manage conflicts of interest and ensure that influence of third parties does not compromise or override independent judgement
  - Trust to enter conflicts of interest into a register available in line with “Managing Conflicts of Interest in the NHS” Guidance
  - Approach to collaboration for Trusts as System Partners:
    - “The board of directors should develop, embody and articulate a clear vision and values for the trust, with reference to the ICP's (Integrated Care Partnership's) integrated care strategy and the trust's role within system and place-based partnerships, and provider collaboratives. This should be a formally agreed statement of the organisation's purpose and intended outcomes, and the behaviours used to achieve them. It can be used as a basis for the organisation's overall strategy, planning, collaboration with system partners and other decisions.”
KEY NHS GUIDANCE (3)

• NHS England Guidance to CCGs on the preparation of ICB Constitutions (2021)
  – Commitment to the Triple Aim and Interest of the ICB and the Public

  “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.”

  – Following declaration of Conflict of Interest
    ▪ ICB to undertake risk assessment and to act proportionately

  – Mitigating Conflicts
    ▪ Determine whether to include or remove partner in board discussions and/or in decision-making
    ▪ Maintain audit trail and culture of transparency

• NHS England: NHS Oversight Framework
FUTURE NHS GUIDANCE

- New NHS England statutory guidance awaited:
  - Guidance on the Provider Selection Regime
  - Guidance on Joint Working and Delegation Arrangements
MANAGING CONFLICTS: PRACTICALITIES
MANAGING CONFLICTS (1)

- A director of an ICB **and** an FT or an NHS Trust may have conflict or potential conflict of interest in respect of their duties to each organisation
- Individual director’s capacity to be involved in any board discussions will be assessed by each organisation independently
- NHS bodies to comply with statutory duties and guidance and register director interests in accordance with governance regime
- Individual directors should:
  - be fully conversant with the conflict of interest policies and related processes;
  - declare any interest that might be the subject of a conflict or potential conflict of interest as soon as they become aware of them;
  - engage fully with any process at the relevant organisation;
  - where applicable, establish the basis upon and the extent to which a relevant organization allows them to be involved in board discussions in circumstance where they are otherwise excluded from taking part in the decision-making exercise; and
  - where they consider it appropriate, withdraw from any board decision-making process and/or board discussions
MANAGING CONFLICTS (2)

• Conflicts arising out of same subject matter at different organisations – no hierarchy or mechanism to determine whether a director can take part in one process but not the other; need to follow the respective processes at each organisation

• FTs, NHS Trusts and ICBs and their respective boards should review and update existing conflict of interest policies and practices

• 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
  – are comfortable in discharging their respective statutory (and corporate) duties and responsibilities to their respective bodies lawfully

• Directors should make every effort to familiarise themselves with and comply with statutory and implied duties, their organisations' constitutions and policies, and to follow guidance
MANAGING CONFLICTS (3)

- Statutory direction of travel and ethos: integration and collaboration
- HCA policy focus: no desire to impede partnership working by public bodies
- In this context, HCA recognises potential for conflict of interest issues: e.g., requirements on ICBs for conflicts policy and register
- Guidance reminds Trusts to practice “Dynamic Governance”
  - encourage transparency
  - FTs, NHS Trusts and ICBs to manage and record conflicts carefully
  - ensure regular review of governance policies
- Await further guidance, particularly: Conflict of Interest Rules for new Provider Selection Regime
- Comfort for directors that it is very rare for actions to be taken against directors for misconduct in public office