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Foundation trust constitutions

A REFERENCE GUIDE

MAY 2024



FOUNDATION TRUST CONSTITUTIONS

A reference guide

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INTRODUCTION

This guide is intended to provide governors with information about their role in approving the foundation trust's constitution. We also hope it will be useful for trust secretaries to refer to. It outlines the need to be able to understand the content and gives some examples of issues for consideration. It also contains a glossary of common terms.

References to the relevant legislation and key documents issued by NHS England and the preceding regulators are included for information and further reading.

BACKGROUND

The constitution is one of the most important documents within any foundation trust and all foundation trusts are required to have one.¹ It is a useful point of reference for governors, and you should be given access to the document as part of your induction and whenever it is amended. Many questions can be answered by reviewing the constitution. It should be treated like a textbook – available for reference whenever needed but it is not necessary for you to memorise every word.

A foundation trust's constitution is distinct from the overarching NHS Constitution [A], and the two documents cover different subjects. The NHS Constitution summarises the rights to which patients, public and staff are entitled, includes pledges which the NHS is committed to achieve and outlines the responsibilities that the public, patients and staff owe to one another to ensure that the NHS operates fairly and effectively. It operates across England (as Scotland, Wales and Northern Ireland are responsible for developing their own health policies) and the NHS Constitution is not affected by a foundation trust's constitution.

By contrast, a foundation trust's constitution contains detailed information about how that foundation trust will operate. It sets out, for example, the foundation trust's membership area, gives information on the various membership constituencies and determines the size and composition of the board of directors and the council of governors. It also prescribes the rules by which any election to the council of governors is to be conducted.

The standing orders (or procedure) for the operation of the council of governors will be an annex within the constitution. These provide governors with important information on how the business of the council should be conducted. In addition, foundation trusts will usually have in place a document that describes a code of conduct and responsibilities for governors which will set out additional duties and responsibilities in relation to things like declarations of interest, maintaining confidentiality, effective communications, and the duties of public life. Having clear rules about how the organisation operates gives governors a set of clear expectations and provides reassurance to patients and service users that the governance of the foundation trust is sound.

All constitutions must comply with statutory requirements (those set out in schedule 7 of the National Health Service Act 2006 [B] as amended by the Health and Social Care Act 2012 [C] and the Health and Care Act 2022 [D]). Legislation also specifies a number of items that must appear within all foundation trust constitutions.

It is for an individual foundation trust to approve the content of its constitution. Any amendments to the constitution require the approval of both the board of directors and the council of governors so it is vital that governors² are satisfied that they understand

¹ sch.7, para.1(1) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

² s.37 National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

BACKGROUND

what it is that they are being asked to approve. Any changes that a foundation trust makes to its constitution take effect as soon as the approval process has been completed,³ but an amendment which goes against anything set out in legislation will not have effect.⁴

Foundation trusts are required, both in law and as part of their provider licence, to inform NHS England of the changes but it has no role in determining whether the constitution is legally compliant.^{5,6}

3 s.37(2) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

4 s.37(3) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

5 s.37(4) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

6 Condition NHS1(2)(a) of NHS England's Provider Licence ([PRN00191-nhs-provider-licence-v4.pdf \(england.nhs.uk\)](#))

GLOSSARY

FOUNDATION TRUST
 CONSTITUTIONS
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<p>Constitution of a foundation trust</p>	<p>The constitution is the foundation trust's governing document. It is a set of fundamental principles and processes that define the operating principles for the NHS foundation trust. It defines the structure, principles, powers and duties of the trust. It must comply with the requirements of schedule 7 of the NHS Act 2006 (as amended).</p>
<p>Code of governance for NHS provider trusts [E]</p>	<p>A document, based largely on the UK Corporate Governance Code, which is published by NHS England and gives guidance to both foundation trusts and NHS trusts on effective corporate governance.</p>
<p>Comply or explain</p>	<p>The same approach as for listed companies, the code of governance for NHS provider trusts (the code) operates on a 'comply or explain' basis. A foundation trust is required to comply with each of the provisions within the code, or otherwise explain (usually in their annual reports) how it has put alternative arrangements in place that meet or exceed the requirements of the main principles of the code.</p>
<p>Monitor and NHS Improvement (preceding regulators)</p>	<p>Monitor was the name of the regulator for NHS foundation trusts until April 2016 when it merged with the NHS Trust Development Authority to become NHS Improvement.</p> <p>The Health and Care Act 2022 was enacted in April 2023, and all regulatory duties are now held by NHS England.</p> <p>After the changes in regulators some references to Monitor and NHS Improvement will still be seen, such as within legislation and also when referring to guidance documents produced by Monitor or NHS Improvement until they are updated.</p>
<p>NHS England</p>	<p>The body established to regulate the provision of healthcare in England in accordance with part 1 para 1H of the NHS Act 2006 (as amended).</p>
<p>The NHS Oversight Framework [F]</p>	<p>The NHS Oversight Framework describes NHS England's approach to NHS oversight. It aligns to the priorities set out by NHS England and the operational planning guidance and the legislative changes made by the Health and Care Act 2022, including the formal establishment of integrated care boards and the merging of NHS Improvement (comprising Monitor and the NHS Trust Development Authority) into NHS England.</p>
<p>Operational planning guidance</p>	<p>Directions on national objectives and priorities for service delivery, issued by NHS England usually on an annual basis.</p>
<p>Provider licence [G]</p>	<p>A licence, issued by NHS England, which every organisation providing NHS health care services is required to hold (unless they are exempt). It contains standard licence conditions which apply to all providers, and the regulator may also impose additional licence conditions as part of its enforcement activities, such as where a foundation trust is found to be in breach of its licence conditions.</p>

<p>Quorum</p>	<p>A quorum is the minimum number of members of a group that must be present in order to conduct business. Only full members of the group count towards the quorum; observers and those in attendance are not included. Information on the quorum for each group should be available within the group's standing orders, terms of reference or within the constitution.</p>
<p>Quorate</p>	<p>A meeting is quorate once a quorum is present. If the quorum is expressed as a percentage of the total membership and this results in anything other than a whole number, the result should always be rounded up to the next whole number for the purposes of calculating a quorum.</p>
<p>Senior independent director</p>	<p>A role specified within the code of governance for NHS provider trusts [H], it is held by one of the independent non-executive directors. Amongst other things, their role is to act as a sounding board for the chair and act as an intermediary for the other directors when necessary.</p>
<p>Trust secretary (may also be known as company secretary, corporate governance director or other variations in title)</p>	<p>A role specified within the code of governance for NHS provider trusts [I]. The trust secretary has a significant role in a foundation trust's corporate governance. As part of this role, they are responsible for ensuring good information flows and advising the council of governors (often via the chair). In some trusts the duties of the trust secretary are included in a role such as director of corporate governance.</p>

THE CODE OF GOVERNANCE FOR NHS PROVIDER TRUSTS

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The content of a foundation trust's constitution is not only prescribed by legislation. The code of governance for NHS provider trusts ("the code"), published by NHS England, also contains guidance on how foundation trusts should operate. Whilst a full discussion on the code is outside the scope of this guidance note, it is important to note that it operates on a 'comply or explain' basis which means that whilst foundation trusts are not required to comply strictly with each provision of the code, they are nonetheless required to explain how they achieve the overarching governance principles contained within it.

The provider licence issued by NHS England requires foundation trusts to 'apply those principles, systems and standards of good corporate governance which reasonably would be regarded as appropriate for a supplier of healthcare services to the NHS'⁷ and "to have regard to such guidance on good corporate governance as may be issued by NHS England from time to time"⁸. The code of governance for NHS provider trusts therefore forms part of the guidance on good corporate governance that foundation trusts are required to have regard to.

Some examples of how the code influences the content of a foundation trust's constitution include:

- While foundation trusts are free to determine the overall size of the board of directors provided relevant legal requirements are met, the code states that it 'should not be so large as to be unwieldy' (principle C1.2) and that at least half of the board, excluding the chair, should comprise non-executive directors determined by the board to be independent (provision B2.7).
- Similarly, while foundation trusts can determine the overall size of the council of governors once the relevant legal requirements are met, it too should not be 'unwieldy' (Appendix B provision 2.2).
- The process for appointing the senior independent director should provide for it to be undertaken by the board of directors, following consultation with the council of governors (provision B 2.11).
- The code, and the foundation trust's provider licence, requires the directors and governors of the foundation trust to be 'fit and proper persons' in addition to the exclusion criteria contained within legislation⁹ (provision B 4.1). Governors should note that the Fit and Proper Persons Test Framework does not apply to governors but only to members of the board of directors. The 'fit and proper persons' requirements for governors are much reduced compared to those for directors, covering for example bankruptcy and recent convictions requiring imprisonment.

7 Condition NHS2 (2) of NHS England's Provider Licence ([PRN00191-nhs-provider-licence-v4.pdf \(england.nhs.uk\)](#))

8 Condition NHS2 (3)(a) of NHS England's Provider Licence ([PRN00191-nhs-provider-licence-v4.pdf \(england.nhs.uk\)](#))

9 sch.7, para.8(1) and sch.7, para.16(3) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

Applying the code to your constitution

Provision C 2.13 and C 4.3 of the code states:

Non-executive directors (NEDs), including the chair, should be appointed by the council of governors for the specified terms subject to re-appointment thereafter at intervals of no more than three years and subject to the 2006 Act provisions relating to removal of a director.

Chairs or NEDs should not remain in post beyond nine years from the date of their first appointment to the board of directors and any decision to extend a term beyond six years should be subject to rigorous review.

What does your constitution say about the terms of office of non-executive directors? If the constitution allows terms of office for longer than nine years, what 'rigorous' review do you undertake? How does your council consider the progressive refreshing of the board?

The code includes a similar provision for governors, because the principle of maintaining independence is as relevant to governors as it is to non-executive directors. Provision B 4.4 of the code states:

Elected foundation trust governors must be subject to re-election by the members of their constituency at regular intervals not exceeding three years. The governor names submitted for election or re-election should be accompanied by sufficient biographical details and any other relevant information to enable members to make an informed decision on their election. This should include prior performance information. Best practice is that governors do not serve more than three consecutive terms to ensure that they retain the objectivity and independence required to fulfil their roles.

What does your constitution say about the terms of office of governors? If the constitution allows terms of office for longer than nine years, how does your council consider the progressive refreshing of the council?

SIGNIFICANT TRANSACTIONS

A foundation trust's constitution is required to include provision about significant transactions.¹⁰ The word "transactions" most commonly refers to mergers between NHS organisations, or the acquisition of one NHS organisation by another. A significant transaction requires the approval of the council of governors before the foundation trust can enter into it, and it is up to each foundation trust how it wishes to define "significant", or indeed whether it wishes to specify any description at all. The only requirement is that the foundation trust's definition of a significant transaction is included in the constitution,¹¹ otherwise the constitution must state that it contains no such description.¹²

If a constitution does not specify a definition of a significant transaction, this does not remove the requirement for the foundation trust to seek the approval of the council of governors.¹³ The foundation trust would need to determine on a case-by-case basis whether a proposed transaction is significant.

This requirement came into force on 1 April 2013,¹⁴ and so constitutions were amended in advance of this date to ensure compliance. The issue of significant transactions is an important one, and thus should be reviewed on a regular basis. If your foundation trust has already taken the opportunity to define significant transactions, it is good practice to periodically consider whether this definition remains appropriate. If your foundation trust has previously not defined significant transactions, it may be prudent to consider whether this remains appropriate.

Generally speaking, significant transactions usually involve large scale changes. A random sample of foundation trust constitutions has shown that many foundation trusts that have defined significant transactions within their constitutions have elected to use financial thresholds as the basis for their definition.

Many of the definitions in trust constitutions are based on the transaction guidance that was available at the time the legislation was introduced in 2013; albeit with higher thresholds. For example, a number of foundation trusts have defined a significant transaction as 'equal to or greater than 25% of the trust's assets, income or capital'. In addition to financial thresholds, some foundation trusts have included more qualitative criteria, such as transactions that would involve a diversification from the range of care services currently provided.

Alternatively, some foundation trusts have elected not to provide a definition within their constitution. NHS England guidance on statutory transactions was published in October 2022 [J] and provides helpful guidance in determining what would be a significant transaction.

10 s.51A National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

11 s.51A(2) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

12 s.51A(3) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

13 s.51A(1) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](#))

14 Art.2(2), The Health and Social Care Act 2012 (Commencement No.4, Transitional, Savings and Transitory Provisions) Order 2013 (The Health and Social Care Act 2012 ([Commencement No.4, Transitional, Savings and Transitory Provisions\) Order 2013 \(legislation.gov.uk\)](#))

Many significant transactions impact on the wider system in which the foundation trust operates. It is important that the council of governors understand the duty of the foundation trust to collaborate. When considering significant transactions, the council of governors should act in accordance with the requirements of the 'Addendum to your statutory duties – reference guide for NHS foundation trust governors' that was published by NHS England in October 2022 [K].

Do you know what your foundation trust's definition of a significant transaction is? If it is expressed as a percentage or ratio, have you calculated what this means in financial terms? When did the council of governors last review the definition?

AMENDING YOUR CONSTITUTION

It is good practice to regularly review the foundation trust's constitution. Changes in legislation, regulation and the local healthcare environment should all be considered to ensure the constitution remains current and effective. There are a number of reasons why your foundation trust may be considering making changes to its constitution. For example, it may wish to review its constituencies, make changes to the makeup of the board of directors or the council of governors or to terms of office, or it may simply want to undertake a routine review to take account of changes in legislation and guidance. Some constitutions contain a specific requirement for a review to be undertaken at stated intervals. Whatever the driver, it is a good idea to involve relevant people at an early stage if you are thinking of amending your constitution. Constitutions are long and often complicated documents and therefore the amendments may take some time for people to digest fully.

An effective way to facilitate a review is to establish a working group comprising governors, directors and the trust secretary. It is often a good idea to ask the trust secretary to chair the meetings, as they are independent of both the board and council and have a detailed understanding of the constitution. They are also likely to have lead responsibility for any updates. It is important to ensure that there are a sufficient number of people involved to provide a range of views and to offer constructive challenge where necessary, but not such a large number as to render the meetings ineffective.

Using the tracked changes facility on a document can be useful, although pages of crossed out and underlined text can make a document hard to read so consider the approach carefully. A useful addition to an amended document is a schedule of changes, this allows for the rationale for each change to be explained within the schedule. Given the nature of the meeting, circulation of papers well in advance is essential.

As a governor on the working group, ensure that you understand the rationale behind any proposed changes. Also, take the time to consider whether you feel any other areas of the constitution should be discussed, even if they have not been identified for review. If there are any areas of the constitution that you do not fully understand, use this process as an opportunity to explore the meaning.

APPROVING AN AMENDED CONSTITUTION

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Once a final draft of the revised document is available, it must be submitted to both the board of directors and the council of governors for approval. There is no requirement for this to be done in any particular order – the only requirement is that both groups approve the document by majority vote. This means that, provided the meetings are quorate, more than half of those present at each meeting must vote to approve the changes. It is not possible for the board or council to delegate responsibility for approval to a working group or committee; any changes must be approved by the board and council.

Governors should expect a covering report detailing the changes that are proposed, and explaining why they are needed. This will ordinarily be produced by the trust secretary or another lead executive. It is also helpful to provide the council with a summary of the process that has been used to review the document, alongside a copy of the full document, with the changes shown.

If the constitution has been reviewed in-house, it may be prudent to ask for assurance that the revisions comply with all legal requirements and with the code of governance for NHS provider trusts. In some circumstances, a solicitor’s letter confirming this may be useful for both the board and the council.

Once the board and council have approved the changes, they take immediate effect. The revised constitution should then be circulated to all directors and governors for information, and a copy must be sent to NHS England within 28 days of approval (this is the later of the two dates on which the board and council approved the changes). Copies on the foundation trust’s website should also be updated within the same timescales.

If either the board or the council (or both) do not approve the changes, they do not take effect and the existing constitution remains in force.

If the board and council have approved any changes to the constitution in relation to the powers or duties of the council of governors, or in respect of the role that the council has as part of the foundation trust, they take immediate effect as described above but at least one member of the council of governors must attend the next members’ meeting and formally present the amendment to the meeting.¹⁵ The members present at the meeting are then given an opportunity to vote on whether to approve the change.

¹⁵ sch.7, para.27A(4) National Health Service Act 2006 ([National Health Service Act 2006 \(legislation.gov.uk\)](https://www.legislation.gov.uk))

If more than half of the members present at the meeting vote to approve the amendment, the amendment continues to have effect. Otherwise, it ceases to have effect from the point of the vote, and the foundation trust will need to take such steps as are necessary as a result.¹⁶

In summary, the council of governors has a key role in considering and approving the foundation trust's constitution. Advice and guidance are readily available from your trust secretary, who is responsible for corporate governance in your organisation and who will be able to provide advice and support throughout the process of amending the constitution.

It also provides a useful point of reference for governors, and it is therefore useful to ensure that you know how to access it if necessary.

REFERENCES

- A **The NHS Constitution**
<https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england>
- B **National Health Service Act 2006, sch 7**
<https://www.legislation.gov.uk/ukpga/2006/41/schedule/7>
- C **Health and Social Care Act 2012**
<https://www.legislation.gov.uk/ukpga/2012/7/contents>
- D **Health and Care Act 2022**
<https://www.legislation.gov.uk/ukpga/2022/31/section/12/enacted>
- E **The Code of governance for NHS provider trusts**
<https://www.england.nhs.uk/long-read/code-of-governance-for-nhs-provider-trusts>
- F **NHS Oversight Framework**
<https://www.england.nhs.uk/nhs-oversight-framework>
- G **NHS provider licence**
<https://www.england.nhs.uk/wp-content/uploads/2023/03/PRN00191-nhs-provider-licence-v4.pdf>
- H **The code of governance for NHS provider trusts, section B 2.11**
<https://www.england.nhs.uk/long-read/code-of-governance-for-nhs-provider-trusts>
- I **The code of governance for NHS provider trusts, appendix A**
<https://www.england.nhs.uk/long-read/code-of-governance-for-nhs-provider-trusts>
- J **Statutory transactions, including mergers and acquisitions**
https://www.england.nhs.uk/wp-content/uploads/2022/10/B1464_ii_Statutory-transactions-including-mergers-and-acquisitions.pdf
- K **Addendum to your statutory duties – reference guide for NHS foundation trust governors**
<https://www.england.nhs.uk/long-read/addendum-to-your-statutory-duties-reference-guide-for-nhs-foundation-trust-governors>

DISCLAIMER

This guidance note is based on the published documents as of May 2024. The reader is reminded that the publications on which this guidance is based are regularly updated and should be checked with your trust secretary or a reliable source before taking any action.

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For more information

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