

Governance Reviews  
Monitor  
133 – 155 Waterloo Road  
London  
SE1 8UG

6 March 2014

by email

Dear Sir/Madam,

### **Governance Reviews Consultation**

On behalf of the Institute of Chartered Secretaries and Administrators (ICSA), I am pleased to provide our formal comments on the above consultation document regarding governance reviews of NHS foundation trusts.

ICSA is the professional body qualifying and supporting corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, HR, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, acting as advisers to government and regulators on company law and corporate governance; able to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. A number of our members undertake governance reviews, in public, private and not-for-profit organisations, and ICSA operates its own board evaluation service. This wealth of expertise and experience has informed our response to the consultation on governance reviews.

ICSA appreciates the opportunity to comment on Monitor's thinking in developing this guidance. The document's promotion of the importance of good governance is welcomed and ICSA will continue to support good governance in the sector. Having read, and reflected on, the consultation document, ICSA would like to register the following comments for further consideration.

### **General comments on the consultation**

Two-tier governance structure

As NHS foundation trusts operate a two-tier governance structure; with a board of directors and a council of governors, we believe that it would be beneficial for both aspects of the governance arrangements to be reviewed. While the board of directors has a more prominent role in the governance and leadership of the organisation, the council has an important role in holding the

board to account. We therefore suggest that, without an insight into the ethos, practices and effectiveness of the council of governors, any governance review is going to lack a comprehensive picture and have an adverse impact on the accuracy of the findings and recommendations reported to the foundation trust.

Comply or explain approach

It is widely accepted that the 'comply or explain' approach to codes of governance in various sectors have been successful in raising governance standards. The arena of governance reviews and board evaluations is relatively young, and there are many novel and innovative approaches being introduced in response to the evolution of board governance; such as diversity and behavioural governance. To propose a governance review framework that appears to favour one approach over others, at this time, could be detrimental to the ongoing development and increased sophistication of governance reviews.

We appreciate the benefit of a limited range of methods being utilised in the health sector, as it will make it easier for findings to be compared across foundation trusts. This information can then be better communicated to patients, the public and other interested parties, thereby reinforcing transparency and accountability. We suggest, however, that Monitor expressly encourage foundation trusts to appoint reviewers utilising a range of approaches for a specific period (for example, three years) and critically review the impact of each method before requiring a 'comply or explain' approach that provides little room for deviation.

### **Specific responses to consultation questions**

#### **1. Is the governance review framework clear and comprehensive? Please share the reasons for your answer.**

The four domains detailed in the consultation: strategy and planning; capability and culture; process and structure; and measurement are clear and provide a thorough outline for organisations and individuals undertaking the review. The domains include the major aspects of governance that would ordinarily come under a governance review or board evaluation. The final version could be improved by including specific references to boardroom behaviours, the analysis and management of patient complaints and involvement of the council of governors. The reference to governors in the consultation document includes them in the list of board relationships. Given the legal duties of governors, however, it would be wise to include them within the governance review.

One concern regarding the proposed framework is that such a template could be interpreted as a 'box ticking' exercise, thereby undermining the overall benefit of undertaking a governance review or board evaluation assessment. Flexibility and variation in the governance review process should not be viewed negatively, as the board of a foundation trust may have identified the need to address a specific area of governance that does not fit neatly into the proposed framework. In such cases, Monitor should welcome the considered and reasoned statements for the variation in method adopted. We have often heard in the corporate sector the view that explanation provided it is a good and reasoned explanation is usually preferable to unthinking compliance.

#### **2. Do you think that the review framework and process will provide assurance that a board is doing its job well? If not, please tell us your reason for this.**

A governance review and/or board evaluation provides a snapshot of the governance arrangements in place and their effectiveness, at a specific moment in time. As such, the ability of such a review to give complete assurance as to whether the board is doing their job well is limited. A thorough review will provide significant insight as to the effectiveness of

various aspects of an organisation's governance and may enable the reviewer to provide a qualified assurance on its ongoing success, but it is one tool among many.

Good governance arrangements enable an organisation to navigate unplanned or unforeseen circumstances more adeptly, thereby maximising the efficiency and effectiveness of resources. An appropriate governance review should therefore be viewed as part of a board's continuous development programme, providing critical feedback and recommendations for ongoing performance. An appropriate governance review will contain a mix of off-site activities; such as desk top research and online questionnaires, along with personal interviews with directors and other key individuals, board observations and site visits.

**3. Are there any areas of board governance that you think are missing from the framework and why?**

As mentioned above the framework should include behavioural governance matters, an analysis and overview of the complaints procedure, and a review of the role and effectiveness of the council of governors in fulfilling their legal duties in a manner that supports the overall aims of the foundation trust.

Behavioural governance has been widely recognised as an important factor contributing to the banking failures of the last decade and diversity has been lauded as a significant factor in avoiding 'group think'. A board that provides a variety of experiences, thinking and values enables better decision-making as proposals and arguments are more thoroughly examined. Independence of mind within the non-executive body is also helpful in ensuring that an overpowering member of the board does not unduly influence decisions and actions.

Incorporating an analysis and understanding of the complaints process, complaints received and corrective action taken in the previous 12 -18 months will enable the reviewer to gain a better understanding of the board's commitment to quality and how it feeds into the long term strategy of the foundation trust.

The dual nature of governance within NHS foundation trusts; namely the board of directors and the council of governors underline the need to factor in an assessment of the effectiveness of both in any governance review. Governors have specific legal duties and as such, their contribution to the foundation trust should be included as a discrete unit within the framework and should not be included in the heading of 'other stakeholders'.

**4. Do the evidence/outcome sets in Annex 1 representing good practice cover an appropriate range of areas for the purposes of gathering evidence to assess governance? Are the examples too detailed or not detailed enough? Please share the reasons for your answer.**

The evidence sets detailed in Annex 1 cover a wide range of governance matters that should assist a reviewer. Caution however, should be exercised as for some the lists may be overly detailed and unduly lead the reviewer down a 'box ticking' approach. While the list will be of use to those new to governance arrangements in foundation trusts, or new to carrying out a governance review, a more experienced reviewer may adopt an approach that does not match the framework proposed. Monitor should be seen to welcome such diversity in approaches, and not fall into the trap of allowing a perception to develop amongst foundation trust's that divergence from the framework is frowned upon.

**5. Do you have any other comments on the proposed framework?**

There are no other comments we would like to make on the proposed framework that have not been covered above.

**6. Do you agree that the proposed approach to the review is suitable for all types of NHS foundation trust or are there exceptions that should be considered? Please share the reasons for your answer.**

Provided there is some flexibility in the way that foundation trusts undertake a governance review, it should be possible for all foundation trusts to accommodate the proposed approach. There may be some situations however, for instance with the recent merger of a foundation trust, where it will be difficult to undertake the governance review to the satisfaction of the regulator as systems, procedures and cultures may not have been successfully integrated.

For those foundation trusts that have a national membership base, it may be appropriate for reviewers to be given additional time to complete focus groups with a geographically spread range of stakeholders.

**7. Do you have any comments on the proposed rating method for the reviews and what information is provided to Monitor? Please share the reasons for your answer.**

The 'RAG' approach is well-established within the foundation trust sector thus incorporating it into the governance review process makes sense. There should however, be some mechanism for an independent reviewer to challenge the 'RAG' rating where they believe the evidence supports it.

The board's self-assessment will help provide background to the independent and highlight particular areas that may require extra attention. An experienced reviewer will use their own expertise and professional judgment to assess the effectiveness of the board and the structures supporting them. It is therefore worth noting that the self-assessment is just another piece of the jigsaw and not the picture on the box.

Greater consideration should be given to what information should be supplied to Monitor and when. In general, governance reviews should not be viewed as a tool for 'passing' or 'failing' a foundation trust. A sophisticated review or board assessment will be sensitive to the benefits of framing process as one of continuous development and improvement – by the board collectively and as individual directors. The board should therefore feel free to answer questions and participate fully in the exercise, without fear of what is sent to Monitor and the subsequent reaction of the regulator and without fear that the report from the review will be placed into the public domain. One of the most complex issues with which we have to deal is the balance between preserving the confidentiality of the input from directors – without which they will be disincentivised from being free and open in their responses – and reporting the outcomes of the review in a fair and balanced way.

Obviously, where there are examples and practices that pose a significant risk, a professional reviewer will be required to inform appropriate bodies.

Further consideration should also be given as to what information arising out of the review is made publicly available.

**8. Does the expected time commitment for reviews reflect your experience of similar governance reviews? Please share the reasons for your answer.**

Our experience and that of our members' members undertaking governance reviews and board performance assessments is that 30-35 days over six to eight weeks to complete a review is unrealistic, especially when the approach includes the report being presented to a board meeting and a response provided. We suggest that nine to twelve weeks is a more appropriate timescale to complete such a review.

**9. How long do you think the self-assessment step in the review should take? What information is your response based on?**

The timeframe for the self-assessment should take as long as is required and should be completed before the independent reviewer starts their research. As the board are likely to want to discuss the results of the self-assessment and use the information to frame the tender for external review, it would be unwise to engage an external assessor without that detailed discussion taking place. It is important to understand the importance of getting this 'done right rather than done quickly'.

**10. What other information would be helpful to support you in choosing an external reviewer? Please share the reasons for your answer.**

The current list appears to be overly bureaucratic and we are concerned that it might lead foundation trusts to engage larger organisations for the review rather than smaller teams. While due diligence should be undertaken as part of any tender process, foundation trusts should be free to make such decisions in the most appropriate form for them, subject to complying with legal requirements. While it is important to ensure transparency in the selection process, it is not necessary to require each piece of information listed in the consultation document. Documentation only goes so far in enabling a board to select the right team to undertake a governance review – personal interaction will be more important to assess whether the candidates inspire trust and confidence and have the skills to engage each group involved in the process.

**11. How would you find out about potential reviewers in the market?**

Bona fides that can be checked via formal routes will provide some assurance to boards; however word of mouth and personal recommendation are likely to play a more important role in sourcing and selecting independent reviewers. Formal and informal networks are likely to be the most common way in which boards learn about potential reviewers.

**12. Would it be helpful if Monitor published a list of reviewers who had carried out governance reviews for particular NHS foundation trusts? Please share the reasons for your answer.**

We think probably not. The board evaluation and governance review sector is growing and new methods and approaches are being introduced. It would be detrimental to the range and quality of options available to foundation trusts if an 'approved list' of independent reviewers was established at this stage. The perception may arise that any reviewer on the list is endorsed by the regulator and those not on it may be viewed as unqualified or otherwise unsuitable. Furthermore, how would a reviewer not on the list be able to get on the list or challenge its removal from any established list? What quality assurance and appeals processes would Monitor adopt to ensure a fair playing field?

Governance is not a 'one-size-fits-all' matter, and as such the instruments available to foundation trusts should be suitably varied to ensure that the review is applicable and effective to each organisation.

**13. Peer review teams, i.e., from other NHS foundation trusts, could be used to undertake the governance reviews. If this was the case, would you use a peer review team for the full review, for parts of the review or not at all? Please share the reasons for your answer.**

We would not. Peer reviews have an important role to play in the continuous development and improvement of foundation trust governance, but they are not independent as the review teams will be conflicted by mere fact of their employment at a fellow foundation trust. We would support the use of peer reviews in between a formal independent review to develop an ongoing commitment to improving governance arrangements. An independent review every three years however, should be exactly that, and be facilitated by an external third party.

We have championed the importance of governance reviews and board performance evaluations for a number of years and welcome measures to spread good governance practice across sectors, so long as such practices are adopted appropriately and proportionately. The governance review framework has many positive aspects that will be of benefit to NHS foundation trusts; however there are some areas for concern. The detailed list of evidence sets, combined with a comply or explain approach could lead nervous or unsure boards to adopt a 'box ticking' mentality. This may result in the governance review being performed, but not actually delivering what the foundation trust requires.

Furthermore, a prescriptive approach to researching and appointing independent reviewers could unduly deter trust boards from appointing the right reviewer, instead opting for one that is perceived to have been 'approved' by the regulator. Governance reviews and board evaluation exercises should be seen as part of the board's development activities to ensure continued improvement. Adopting an approach that embraces the review as one way of improving the work of the trust for its patients, staff, the public and other stakeholders is the one likely to have the biggest positive impact.

We hope that the above comments are useful to Monitor in developing thinking on governance reviews for NHS foundation trusts. Should further information or clarification be required, please do not hesitate to contact me.

Yours faithfully,



Louise Thomson  
Head of Policy, Not for Profit  
ICSA

Tel: 020 7612 7040  
Email: [lthomson@icsa.org.uk](mailto:lthomson@icsa.org.uk)