

Suggested answers and examiner's comments

Health Service Governance

June 2017

Important notice

When reading these answers, please note that they are not intended to be viewed as a definitive 'model' answer, as in many instances there are several possible answers/approaches to a question. These answers indicate a range of appropriate content that could have been provided in answer to the questions. They may be a different length or format to the answers expected from candidates in the examination.

Examiner's general comments

The overall standard of performance for the June 2017 session was low. However, there were a few stand out papers scoring very highly. These candidates clearly demonstrated that they understood the governance dilemmas posed within the questions and gave detailed and well-structured answers to the questions posed. They used the right layout when requested and were clear about the differences between a CCG governing body, NHS trust board and foundation trust board. They showed a good grasp of the breadth of source evidence set out in the Health Service Governance Handbook.

The scripts which achieved pass level demonstrated a good understanding of the issues as discussed in the Handbook and quoted sufficient evidence from both corporate and health service governance guidance. They also used some practical examples to illustrate responses to any of the scenarios set out in the paper.

Most answers were legible and demonstrated that in general candidates had considered previous comments from the examiner in both their legibility and structure of answers.

Of the scripts which did not achieve a pass level, candidates either did not answer all four questions or the answers given were very basic (less than one page in many cases) and did not demonstrate much

understanding of the issues and topics explored in the Handbook. The answers in these scripts tended to not be set out in the way required by the questions. Candidates need to consider how they would lay out responses in a professional manner if, for example, their briefing was going to be given to the Chair to read, or if they were writing a letter to follow the normal convention of address, date, greeting and heading. Some candidates also gave incorrect answers, for example, stating that the Director of Finance is a member of the audit committee. Candidates are not penalised for this, but marks for accuracy regarding membership of the committee are not awarded.

As in previous sessions, some candidates did not consider the number of marks available for each question part by writing, for example, 8 lines for an answer scoring a possible 14 marks and then a whole page for an answer scoring a possible 6 marks.

- 1 You are the Company Secretary at Robson CCG ('Robson') and it became clear during the last governing body meeting that the lay members are confused about the CCG's duty to involve and duty to consult during significant service reconfigurations. Robson is looking to work more closely with its two local authorities to integrate health and social care in respect of care for the elderly. This will result in significant changes in the way that care is delivered within the community.

There have also been discussions about the CCG's duties in this regard at the local Health and Wellbeing board.

Required

Write a report for the next meeting of the governing body, addressing the following issues:

- (a) The role of the Health and Wellbeing board and its responsibilities in respect of involvement and participation. [Note: you should not refer to Robson in this part of the question.]

(8 marks)

Suggested answer

To: Robson CCG
From: Company Secretary
Date: June 2017

Local authorities are no longer required to have a Health Overview and Scrutiny Committee as the means by which they discharge their scrutiny function, although in practice most have retained them. However, under Regulation 23 of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, NHS England, CCGs, public and independent sector providers of NHS services must consult with the local authority about any proposals for a substantial development or variation of the health service in the authority's area. Whilst "substantial" is not defined, it would be advisable if an NHS body is proposing to consult that it should tell the local authority. If the local authority ultimately disagrees with the decision of the NHS body, it is entitled to refer the matter up to the Secretary of State for a final decision.

The role of the Health and Wellbeing board (HWB) is to encourage work to improve local health and wellbeing outcomes, including (where appropriate) more joined-up working across the NHS, public health, social care and other services. The core membership of a HWB includes commissioners from across the local authority, such as the director of public health, the director of adult social services, the director of children's services and representatives of all CCGs in the HWB's area. The local Healthwatch organisation also has a seat on the HWB, as well as at least one elected local authority member. Local boards are free to expand their membership to include a wide range of perspectives and expertise, such as representatives from the charity or voluntary sectors.

HWB's assess the current and future health and social care needs of the local community through Joint Service Needs Assessments (JSNAs). JSNAs are based on a principle of analysing the available evidence on the local community's health and social care needs. This includes engaging and working with a wide range of local stakeholders such as patient groups, voluntary organisations and the public. Using the JSNA, health and wellbeing boards jointly agree strategic priorities for local health and social care services in Joint Health and Wellbeing Strategies (JHWSs). Taken together, JSNAs and JHWSs are intended to form the basis of commissioning plans across local health and care services (including public health and children's services) for CCGs, NHS England and local authorities. HWB's are also under a statutory duty to involve local people in the preparation of JSNA and the development of JHWSs.

The HWBs that work best have built good relationships between the local authority and CCGs. Where relationships are most advanced, clinical commissioners are not only at the heart of discussions to develop JSNAs and JHWSs but are reflecting these in their own commissioning plans. They have also ensured that they have the right membership to lead in shaping transformational change across the whole system. HWBs in their entirety are accountable to

communities, service users and overview and scrutiny committees and must look outwards to engage with service users, patients, the public, and local communities, not inwards to its members and their organisations alone.

- (b) Good practice in the involvement of patients and the public. [Note: you should not refer to Robson in this part of the question.]

(8 marks)

Suggested answer

The guidance *Transforming Participation in Health and Care* includes a number of specific tools designed to aid commissioners in their consultation, including the “Ladder of Engagement and Participation”. This sets out different levels of participation, which may be appropriate when involving the public in decisions about healthcare. There is also an “Engagement Cycle”, setting out key points in the commissioning cycle for public participation. The guidance then sets out a number of suggested features of public participation:

- the information provided should be of good quality, and in a number of different formats to ensure that it reaches the intended target;
- there should be a range of opportunities for participation, which could include online surveys and dedicated local events, as well as work through voluntary and community sector organisations. Patients and the public should be involved from the initial planning stages of service redesign; and
- special efforts should be made to reach out to diverse communities.

Transforming Participation does not expressly replace the 2008 Department of Health document, *Real involvement: working with people to improve services*, but clearly commissioners should focus on it as the most recent guidance and the document that they have a statutory responsibility to take into account. However, the 2008 guidance does still contain some useful principles on good involvement which:

- happens early and continues throughout the process;
- is inclusive and informed;
- is fit for purpose and transparent;
- is influential – it makes a difference;
- is reciprocal – includes feedback; and
- is proportionate to the issue.

New guidance on engaging peoples’ communities in the development of the Sustainability and Transformation Plans was issued in June 2016 by the People and Communities Board. The guidance outlined six key principles that map the key elements of person-centred, community-focussed approaches to health, wellbeing and care. The six principles are:

- Care and support is person-centred; personalised, coordinated and empowering.
- Services are created in partnership with citizens and communities.
- Focus is on equality and narrowing inequality.
- Carers are identified, supported and involved.
- Voluntary community and social enterprise, and housing sectors are involved as key partners and enablers.
- Volunteering and social action are key enablers.

The guidance suggests that evidence clearly demonstrates that better engagement, such as involvement and co-production, is not a ‘nice-to-have’, it is core business and there is a growing body of knowledge and practice that shows that engagement is doable and has real impact.

- (c) Robson's duty to involve and duty to consult, which stakeholders it might be relevant to consult and the possible consequences of failing to comply.

(9 marks)

Suggested answer

Recent discussions at our governing body meeting have highlighted the requirement for a clearer understanding of the CCG's duty to involve and duty to consult, as set out by the Health and Social Care Act 2012, which introduced significant amendments to the NHS Act 2006 (section 14Z2). The legislation highlighted how NHS commissioners must function and included two complementary duties for the CCG with respect to patient and public participation. In addition to the legal consequences, the governing body must also consider the possible impact on the organisation's reputation.

Essentially CCGs must promote the involvement of patients and carers in decisions, which relate to their care or treatment. The duty requires Robson to ensure that it commissions services, which promote involvement of patients across the full spectrum of prevention or diagnosis, care planning, treatment and care management. The current discussions about commissioning integrated health and social care will mean significant changes to the delivery of services for our elderly population, consequently, there is a clear duty upon Robson to ensure that patients and carers are involved in the discussions and decisions as these commissioning plans are considered.

The second duty placed a requirement on Robson to ensure public involvement and consultation in commissioning processes and decisions. A description of these arrangements have been included in Robson's Constitution which requires the involvement of the public, patients and carers in:

- the planning of commissioning arrangements, which might include consideration of allocation of resources, needs assessment and service specification;
- in the development and consideration of proposals by Robson for changes in the commissioning arrangements; and
- any decisions to be made by Robson affecting the operation of those services

In summary, any significant commissioning decision or reconfiguration of provision will be caught by these statutory requirements. Whilst the statute does not insist on "consultation", it seeks to make sure that service users are "involved". The most recent such guidance on consultations for the NHS was published in September 2013, and is called *Transforming Participation in Health and Care*.

Therefore, once the proposals as to how the services could be reconfigured has been established, there is a clear duty on Robson to ensure that there is public involvement as well. This will take the form of a public consultation in line with the statutory requirements.

If Robson (or any other public body for that matter) fails to involve patients and the public, they leave themselves open to a challenge by way of Judicial Review which is heard by the Administrative Court. Robson would then be unable to lawfully take such decisions and thus implement the changes until consultation has occurred. Such a review could also leave Robson paying the legal costs if this is what the court awards. The duty to involve arises whether the changes in health service provision are required in response to financial pressures, clinical requirements or other reasons, or a combination of two or more factors.

Changes made to comply with Department of Health (DH) policy decisions are also subject to the duty to consult. The legal duty to consult both patients and the wider public falls both on the commissioner of health services and on to those providing services. The courts have ruled that even where a commissioner was simply implementing DH policy, the provision of services was still the commissioner's responsibility and therefore it had an obligation to consult.

In addition to the public, patients and carers, Robson specifically needs to consider involving its local authorities and relevant Health and Wellbeing boards as key external stakeholders. It may also consider involving NHS providers locally and regionally as well as its staff and its member GP practices as key stakeholders who will be involved in communicating and embedding any decision taken by the governing body.

Examiner's comments

This question was answered quite well overall but few answers demonstrated a full knowledge of the background legislation for the requirement to involve or duty to consult. This is an important area given the increasing amount of engagement necessary to successfully deliver the level of collaboration and service changes required by the Five Year Forward View. For most of the answers which did not achieve a pass level, the answers were colloquial and not based on the clear guidance and strategies set out in the Health Service Governance Handbook. The sample answer above sets out clearly the source legislation and best practice guidance from which the answers should have been structured.

- 2 Describe the full range of a board director's duties and liabilities, and explain how non-executive directors can deliver scrutiny and challenge as part of the work of an NHS board.

(25 marks)

Suggested answer

The full range of a board director's duties and liabilities

Whilst board directors may be either executive directors or non-executive directors (NEDs) it is important to note that there is no distinction between these two roles in terms of their duties and liabilities.

The concept of duty is not easy to understand, and it is helpful to make a comparison with the duties owed by other individuals or groups. Examples of individuals owing a duty to something inanimate are not common, although personnel in the armed forces have a duty to their country. It is more usual to show loyalty to something inanimate than to have a duty. For example, individuals might be expected to show loyalty to their country, and they might voluntarily show loyalty to their sports team or group of friends or work colleagues. Arguably, solicitors have a duty to their profession to act ethically, although the solicitors' practice rules in the UK specify that solicitors owe a duty of care to their clients. Similarly, doctors have a duty to act ethically, but their duty is to their patients. Duty is normally owed to individuals or a group of people. It might therefore be supposed that directors should owe a duty to their stakeholders and possibly to the organisation's employees, but this is not the case.

- Accountability and responsibility should not be confused with duty.
- Directors have a responsibility to use their powers in ways that seem best for the organisation and its shareholders or major stakeholders.
- They should be accountable to the owners of the organisation, for the ways in which they have exercised their powers and/or the performance of the organisation.
- They have duties to the organisation.

If a person is guilty of a breach of duty, there should be a process for calling them to account. There might be an established disciplinary procedure, for example, in a court or before a judicial panel, with a recognised set of punishments for misbehaviour.

The development of these duties started in common law, that is, as a result of court cases and judgements, which developed into a form of precedent. Over time common law established directors' duties as a fiduciary duty and duty of skill and care to the organisation.

Fiduciary duty of directors – 'Fiduciary' means given in trust, and the concept of a trustee (as established in US and UK law) is applicable. The directors hold a position of trust because they make contracts on behalf of the organisation and also control the organisation's property. Since this is similar to being a trustee of the organisation, a director has a fiduciary duty to the organisation (not its shareholders).

If a director were to act in breach of their fiduciary duty, legal action could be brought against them by the organisation. In such a situation, 'the organisation' might be represented by a majority of the board of directors, or a majority of the shareholders, or a single controlling shareholder.

Duty of skill and care – Directors are also subject to a duty of skill and care to the organisation under common law (although this also became a statutory duty under the Companies Act 2006). A director should not act negligently in carrying out their duties, and could be personally liable for losses suffered by the organisation as a consequence of such negligence.

A director is expected to show the technical skills that would reasonably be expected from someone of their experience and expertise. If the finance director of a scientific research organisation is a

qualified accountant, they would not be expected to possess the technical skills of a scientist, but would be expected to possess some technical skill as an accountant.

However, the duty of skill and care does not extend to spending time in the organisation. A director should attend board meetings if possible, but at other times is not required to be concerned with the affairs of the organisation. This requirement is perhaps best understood when looking at the role of the NED, who might visit the organisation only for board or committee meetings.

The duties of a director are intermittent in nature and arise from time to time only, such as when the board meets. If a director holds an executive position in the organisation, a different situation arises, because they are an employee of the organisation with a contract of service. This contract might call for full-time attendance at the organisation or on its business. However, this requirement arises out of their job as a manager, not out of their position as a director.

It is also not a part of the duty of skill and care to watch closely over the activities of the organisation's management. Unless there are particular grounds for suspecting dishonesty or incompetence, a director is entitled to leave the routine conduct of the organisation's affairs to the management. If the management appears honest, the directors may rely on the information they provide. It is not part of their duty of skill and care to question whether the information is reliable, or whether important information is being withheld.

Statutory duties of directors – Although NHS organisations are not registered companies but organisations created by statutory instrument, they are not bound by the Companies Act 2006 (sections 171–177). Good practice, however, would require an understanding of the general principles of the Act, as set out below:

These consist of a duty to:

- act within powers;
- promote the success of the organisation;
- exercise independent judgement;
- exercise reasonable care, skill and diligence;
- avoid conflicts of interest;
- not to accept benefits from third parties; and
- declare any interest in a proposed transaction or arrangement.

NHS directors also need to be aware of the statutory duty to break even which is currently under much discussion due to the financial context and the pressures on public sector funding.

Liability of directors – The starting point here is developing an understanding of the role of the board and the corporate nature of the trust. Any such trust will be a corporate entity in its own right and will take decisions as such, that is, as a unitary board. This has implications for the role of directors, who are collectively responsible for all decisions. However, the corporate nature of the organisation will mean that, in most instances, even if a decision is open to criticism, individual directors will not be legally liable. There is specific statutory protection where they are acting in good faith (s.265 of the Public Health Act 1875). However, personal liability can arise in the following circumstances:

Criminal liability – An individual who, in the course of his or her activities as a director, commits a criminal offence will of course carry personal responsibility and liability. Perhaps more significantly a director can, in some circumstances, be held to have committed a criminal offence where the offence arises under statute that includes explicit provision to hold a director liable. Examples are the Health & Safety at Work Act, the Environmental Protection Act and the Data Protection Act.

With regard to corporate manslaughter, the law remains that it is necessary to show that a 'controlling mind' within the organisation (usually a director) is also guilty of manslaughter, that is to say, has been guilty of gross negligence that directly caused the fatality. In practice it has proved very difficult to convict either large corporations or their directors on this basis.

Civil liability to third parties – This generally relates to the payment of compensation. Liability in contract will only occur if the contract is entered into in the personal name of the director rather than that of the trust, or where a contract entered into by the trust is found to be **ultra vires** and the director has given a personal warranty or representation that the trust has appropriate powers. Directors therefore need to be careful about what assurances they give about the powers of the organisation. Usually, as with clinical negligence claims, the claim is pursued against the trust, not the individual, and the NHS Litigation Authority will provide cover. Indeed, the Liabilities to Third Parties Scheme includes cover for directors similar to that available in the commercial market by way of directors' and officers' liability insurance.

Claims by the trust – A further possibility faced by a director is of a claim by the trust. All directors owe a duty of care and skill to the trust, and breaches could give rise to claims. In this area there is a material difference between the position of executive directors and NEDs. The latter are protected by the terms of the standard Treasury indemnity unless they have been reckless. However, executives could in theory be the subject of claims even if they have only been negligent.

Indemnity

Whilst this list of liabilities may seem extensive there is a degree of protection for directors. NEDs will typically have the benefit of the Treasury approved wording (HSG 1999/104):

'A chairman or non-executive member or director who has acted honestly and in good faith will not have to meet out of his or her own personal resources any personal civil liability that is incurred in the execution or purported execution of his or her board function. Save where the person has acted recklessly.'

This indemnity may be extended to members of those committees that have delegated powers to make decisions or take actions on behalf of NHS boards. This covers the director for acts carried out in good faith in the execution or purported execution of the functions of the trust, short of recklessness. It does not cover criminal liability, and no indemnity could do so. There is some doubt about the position where the director is in fact acting outside the powers of the trust, particularly where to enforce the indemnity would be to allow a collateral enforcement of an ultra vires obligation against the trust. Executive directors will generally be indemnified in relation to claims against them arising from third parties, but difficult issues can arise when staff make allegations of harassment, and trusts will need to tread carefully in such cases

NED scrutiny and challenge

In order to deliver scrutiny and challenge the NEDs need to be independent. A NED is deemed not to be independent if their opinions are likely to be influenced, in particular by the senior executive management of the organisation or by a major stakeholder. The UK Corporate Governance Code states that each board of directors should identify in the annual report each NED it considers to be independent. The board is responsible for determining whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement. There is also a general view that the independence of a NED is likely to diminish over time, as the NED becomes more familiar with the organisation and executive colleagues. The risk is that the NED will take more of the views of executive colleagues on trust and will be less rigorous in his questioning. This is also noted in the FT Code and the King III Code. Boards will therefore need to consider the independence of each NED and reflect on their length of service to ascertain whether this is impacting on their ability to scrutinise and challenge.

The ability to scrutinise and challenge also depends largely on the quality of information available to the NED. The Intelligent Board guidance is clear that the board as a whole needs to be supplied with information that is in a timely and understandable format and should be clearly and simply presented. However, the senior executives in the trust control the information systems, and so control the flow of information to the board. It is quite conceivable, for example, that the CEO and other executive directors might have access to management information that is withheld from the

board as a whole, or that is presented to the board in a distorted manner. Lacking the 'insider knowledge' of executive managers about the business operations, and having to rely on the integrity of the information supplied to them by management and executive directors, can restrict the scope for NEDs to make a meaningful contribution to board decisions.

The ability of NEDs to offer scrutiny and challenge can also be impacted by their availability and often have executive positions in other companies and organisations, where most of their working time is spent. As a general rule, NEDs do not have an office at the trust headquarters and may spend at most two or three days a month on the trust's business. It could be argued, for example, that an individual cannot be an effective NED of a trust if he is also the CEO of another public organisation and holds four or five other NED positions in other companies. All NEDs should be able to allocate sufficient time to the trust to discharge their responsibilities effectively.

The Higgs Report of 2003 is helpful in identifying the behaviours and attitudes that will make for an effective NED:

'Non-executive directors should constantly seek to establish and maintain confidence in the conduct of the company. They should be independent in judgement and have an enquiring mind. To be effective, non-executive directors need to build a recognition by executives of their contribution in order to promote openness and trust. To be effective, non-executive directors need to be well-informed about the company and the external environment in which it operates, with a strong command of issues relevant to the business. A non-executive director should insist on a comprehensive, formal and tailored induction. An effective induction need not be restricted to the boardroom, so consideration should be given to visiting sites and meeting senior and middle management. Once in post, an effective non-executive director should seek continually to develop and refresh their knowledge and skills to ensure that their contribution to the board remains informed and relevant.'

A final consideration for NEDs is that there should be a majority of NEDs on a board since it is well known that if a difference of opinion arises during a meeting of the board, the opinions of the executive directors are likely to carry greater weight, because they know more about the organisation. As a result, NEDs may be put under pressure to accept the views of their executive director colleagues and being in the majority is a key governance principle.

Examiner's comments

This question was a popular choice but was not answered well overall. The question was focussed on fiduciary, common law and statutory duties which are clearly set out in the Handbook and yet many answers focussed on reading papers and attending meetings, chairing committees, and so on. With regard to NED scrutiny and challenge, there was a general acknowledgement as to how their independence could be ascertained and the importance of being in the majority but again, on the whole, a general lack of understanding was shown about the check and balance provided by NEDs. A pass mark answer would also be expected to include some concept of the indemnity available for NEDs alongside the potential claims that might arise.

- 3 The Walker Report 2009 argued that the character of board members and the board culture are both important for an effective board and that the main weaknesses in the boards of UK banks had been caused by behavioural factors and a failure to challenge. The report stated:

“The sequence in board discussion on major issues should be: presentation by the executive, a disciplined process of challenge, decision on the policy or strategy to be adopted and then full empowerment of the executive to implement. The essential “challenge” step in the sequence appears to have been missed in many board situations and needs to be ... clearly recognised and embedded for the future.”

Required

Using examples from either a CCG, FT or NHS Trust, discuss how behavioural factors can affect the board’s ability to provide sufficient and robust challenge.

(25 marks)

Suggested answer

Numerous reports have over the years made mention of the impact of behaviours and culture on the effectiveness of boards of directors. The quote cited in the question is a prime example which highlighted weak chairmanship, inadequate composition and board dynamics, and unsatisfactory engagement with key stakeholders as key factors in ineffective boards. Whilst the 2009 Walker Report was commissioned to consider the failings in UK bank corporate governance, and the contribution of the banks to the scale of the financial crisis in 2007–2009, its findings are not directly applicable to the NHS but still offers interesting insights for the NHS to learn from.

In considering the Walker Report, it would be beneficial to consider the strength and skills of the Chair, the composition of the NHS board/governing body and the level of engagement with key stakeholders. By contrast, many NHS organisation focus on structured agendas and board templates for reports and give insufficient attention to these issues within the NHS.

A dominant Chair or CEO can damage/limit the ability of a board to effectively challenge board decisions and discussions. This impacts on the board’s ability to make effective decisions in the best interests of the organisation and its stakeholders. One such example, particularly relevant to FTs, is where the council of governors is prevented from properly holding the NEDs to account for the performance of the board by the behaviour of the Chair, lack of appropriate information and/or non-attendance of NEDS at council meetings.

Boardroom effectiveness can be improved by ensuring that there is:

- a clear understanding of the role of the board;
- the appropriate deployment of knowledge, skills, experience and judgement;
- independent thinking;
- the questioning of assumptions and established orthodoxy;
- challenge which is constructive, confident, principled and proportionate;
- rigorous debate;
- a supportive decision-making environment;
- a common vision; and
- the achievement of closure on individual items of board business.

ICSA report: Boardroom Behaviours (2009)

These kind of issues and behaviours lead to a lack of challenge and rigour such as is required in the boardroom.

A number of reports (Mapping the Gap, NHS Healthy Board, Effective Boards in the NHS) have highlighted that lack of challenge was a key issue for NHS boards. Observations of many

boardrooms will highlight behaviours such as using electronic devices, conversing with colleagues, interrupting colleagues, reading non-board papers, reading papers at the meeting, poor preparation, arriving late/leaving early, fidgeting, and not participating in the debate. Too much trust and/or “group think” can also be types of behaviour that damage board member’s ability to challenge and scrutinise. These kinds of behaviours have a direct impact on the level of challenge and scrutiny provided and therefore damages the effectiveness of the board in its governance role.

These kinds of behaviours were clearly identified by the ICSA research project Mapping the Gap and even more interestingly, the project further identified that, on average, respondents saw board trust and collective behaviours as a minimal contributory factor in an effective board. Nevertheless, these kinds of behaviour are still regularly seen within NHS board/governing body meetings. In particular, there can be an issue with lateness of papers thus not allowing board members to properly read and prepare before meetings or the use of electronic devices thus distracting board members from the discussions in hand, with executive board members being called out of board meetings to attend to operational issues. Boards will sometimes try to present a united front in public meetings in order to protect the reputation of the organisation but again this demonstrates a lack of understanding of the work of the board in providing a place for robust but respectful challenge.

Other ways of working that obstruct effective board practice can be summarised as follows:

- Board members behaving in a way that suggests a ‘master-servant’ relationship between non-executive and executive directors.
- Executive directors only contributing in their functional leadership area rather than actively participating across the breadth of the board agenda.
- Demonstrating an unwillingness to consider points of view that are different from individual directors’ starting positions.
- Challenge primarily coming from non-executive directors, rather than all directors feeling empowered to challenge one another in board meetings.
- Challenging in a way that is unnecessarily antagonistic and not appropriately balanced with appreciation, encouragement and support.
- Working in ways that do not demonstrate overall confidence in the executive and that feed individual anxiety and insecurity about capability.

Healthy NHS Board (2013)

Outside of the NHS, the UK Corporate Governance Code (UK Code) identified constructive challenge as essential to the effective functioning of any board. Such challenge requires “dialogue which is both constructive and challenging. The problems arising from “groupthink” have been exposed in particular as a result of the financial crisis.” The UK Code suggests that one of the ways in which constructive debate can be encouraged is through having sufficient diversity on the board. This includes, but is not limited to, gender and race. Diverse board composition in these respects is not on its own a guarantee. Diversity is as much about differences of approach and experience, and it is very important in ensuring effective engagement with key stakeholders and in order to deliver the business strategy.

The relationship between the CEO and the Chair is also crucial as the CEO is the most senior executive director on the board with responsibility for proposing strategy to the board, and for delivering the strategy as agreed. The role of the Company Secretary is facilitating this relationship is important. Within NHS organisations, the role of the Company Secretary can often be diluted or misunderstood and this can hinder the support of the important relationship between the Chair/CEO. The UK Code (or FT Code of Governance) states that the differing responsibilities of the Chair and the CEO should be set out in writing and agreed by the board. Particular attention should be paid to areas of potential overlap.

Managing conflicts of interest can be an example of behaviour and culture, for example, in the governing body for a CCG. Individual behaviour is a major factor in the effectiveness of the governing body, and also has an influence on the reputation of the organisation; the confidence and trust members of the public have in it and the working relationships and morale within it. Conflicts,

real or perceived, can arise between the organisation's interests and those of individual governing body members; public trust can then be damaged unless the organisation implements clear procedures to deal with these conflicts.

Looking more positively, there are some behaviours which positively impact on a board's effectiveness, and these include:

- focussing on strategic decision-making;
- board members who trust each other and act cohesively/behave corporately;
- clear understanding of the different roles of executive and non-executive directors whilst still remaining a unitary board;
- building a crystal clear understanding of the roles of the board and individual board members;
- actively working to develop and protect a climate of trust and candour;
- building cohesion by taking steps to know and understand each other's backgrounds, skills and perspectives;
- encouraging all board members to offer constructive challenges of each other;
- sharing corporate responsibility and collective decision-making;
- effective chairs who ensure meetings have clear and effective processes; and
- ensuring that neither Chair nor Chief Executive power and dominance act to stifle appropriate participation in board debate.

Effective Boards in the NHS (2004)
Healthy NHS Board (2013)

A positive culture that enables board business to be conducted in a sharp and focused manner is required at board level, making clear what decisions are required of the board and what action will follow as a result of the decisions.

For each type of NHS organisation there is a clear responsibility to consider behaviour and culture as part of the work of the board, for example, for a CCG, promoting values for the whole organisation and demonstrating good governance through behaviour (Good Governance Standard for Public Services 2004); for FTs and NHS Trusts, the Well-Led framework considers the effectiveness of the board in regard to capability and culture.

Conclusion

There is a general consensus among recently published reports and reviews in both corporate and health service sectors that the quality of governance depends ultimately on the culture and behaviour of individuals, and consequently the ability to offer appropriate levels of challenge and holding to account. In support of this conclusion it is interesting to note that the new FRC risk management guidance (2014) that has resulted from the economic recession and high-profile failures of risk management in the corporate sector has also included behavioural and organisation risks into its definition of principal risks suggesting therefore a much higher profile than previously seen. The FRC's rationale behind this has been the recognition that the root causes of most crises lie in human behaviour and in the way that organisations are led, structured and managed. It is also good to see that the recent Well-Led Framework for FTs and non FTs recognises that the board takes the lead in setting culture.

Examiner's comments

This question was not answered well. The question asked about the behavioural factors that can affect the board's ability to provide sufficient and robust challenge. These are comprehensively covered in the Handbook and encourage candidates to think beyond process and procedures and to think about the behaviours, attributes and character required for good governance. The answers focused on processes and procedures and therefore did not address the question set.

- 4 In the face of a possible flu pandemic, the board of directors of Aurora Hospitals NHS Foundation Trust ('Aurora') has asked to be assured on the effectiveness of Aurora's risk management policies, systems and procedures and for an outline of how the FT plans for emergency preparedness.

The last time the board considered the Principal Risk Register was over nine months ago and the Major Incident Plan was last reviewed two years ago, when the Senior Independent Director was nominated as the lead director under the Plan.

The audit committee has been tasked with testing the assurance provided to date.

Required

Prepare a report for the Chair of the audit committee, setting out:

- (a) The types of principal risks that an FT may face. [Note: you should not refer to Aurora or the flu pandemic in this part of the question.]

(5 marks)

Suggested answer

To: Chair of audit committee
Report for the Audit Committee
Date: June 2017

NHS organisations must take risks in order to deliver healthcare but have to assess how much risk should they be prepared to tolerate, and if they would be able to withstand 'shocks' in the business environment if an unexpected event or development were to occur.

For clarity, a distinction can be made between business risk and internal control risk (sometimes called governance risk). Business risks are risks that occur and arise in the business environment in which an organisation operates, whilst internal control risks are risks that arise because of weaknesses in the internal systems, procedures, management or personnel that are in place within the organisation.

An FT's business strategy will influence and define the business risks associated with that strategy. Not all of the FT's business risks, however, are under its control, such as the impact of government policy and regulatory changes, advances in technology and changing expectations of the patients and the public. An FT's business strategy should attempt to define and quantify the impact of these business risks and then plan how the FT will react and adapt to them. The objectives of the FT need to factor in these risks and to what extent the trust can mitigate their impact.

To support the board in its consideration of its business risk, it is helpful to categorise or identify business risk by considering the following sources of risk.

- (i) Financial risk
- (ii) Operational risk
- (iii) Reputational risk
- (iv) Competition risk
- (v) Behavioural risk
- (vi) Third-party risk
- (vii) External risks

Internal control risks are risks that the trust has within its own control and it needs to have a comprehensive system in place to manage them. Unless there are controls to deal with these risks, internal control risks can lead to losses because of operational failures, errors or fraud. The controls for these risks are 'internal controls' and relate to either financial risks, operational risks or compliance risks.

These principal risks should be recorded in the Principal Risk register and regularly reviewed by the board.

(b) The key aspects of an emergency preparedness scheme. [Note: you should not refer to Aurora or the flu pandemic in this part of the question.]

(7 marks)

Suggested answer

Emergency preparedness is a plan of what to do if a disaster, that is either unconnected with the individual FT's business and/or outside the control of management, occurs. By way of explanation, disaster recovery planning goes beyond procedures that should be taken in an emergency, such as a fire or explosion in a building. Emergency preparedness is intended to establish what should be done if an extreme disaster threatens the ability of the organisation to maintain its operations. Examples of disasters are natural disasters, such as major fires or flooding or storm damage to key installations or offices, major terrorist attacks and pandemics. What is unique for NHS organisations in these scenarios is that such disasters often place an extreme demand on the organisations as they respond to the injured or sick.

Emergency preparedness plans are vital for all NHS organisations, as lengthy or widespread overwhelming demand (as would be the case in a pandemic) or shutdown of operations (if significant numbers of staff are affected) could be catastrophic. While the training of appropriate NHS staff regarding such arrangements in the UK is the responsibility of those NHS organisations, the Department of Health funds an extensive training programme delivered by the Health Protection Agency to support the NHS in England in planning and preparing for such major incidents.

Guidance is given in *The NHS Emergency Planning Guidance 2005*, which sets out general principles to guide all NHS organisations in developing their ability to respond to a major incident (or incidents) and to manage recovery, whether the incident or incidents has effects locally, regionally, or nationally, within the context of the requirements of the Civil Contingencies Act 2004 (the CCA). The guidance contains strategic national guidance for all NHS organisations in England and equivalent guidance is provided by Health Departments in devolved administrations. The CCA defines an emergency as:

'An event or a situation which threatens serious damage to human welfare in a place in the UK, the environment of a place in the UK, or war or terrorism which threatens serious damage to the security of the UK.'

The definition is concerned with consequences rather than the cause or source. For the NHS, major incident is the term in general use and is defined as:

'Any occurrence that presents serious threat to the health of the community, disruption to the service or causes (or is likely to cause) such numbers or types of casualties as to require special arrangements to be implemented by hospitals, ambulance trusts or primary care organisations.'

There are three levels of incident for which NHS organisations are required to develop emergency preparedness arrangements, namely major, mass and catastrophic. The definitions are as follows.

- Major: individual ambulance trusts and acute trusts are well versed in handling incidents such as multi-vehicle motorway crashes within the long-established major incident plans. More patients will be dealt with, probably faster and with fewer resources, than usual but it is possible to maintain the usual levels of service.
- Mass: much larger-scale events affecting potentially hundreds rather than tens of people, possibly also involving the closure or evacuation of a major facility (for example, because of fire

or contamination) or persistent disruption over many days. These will require a collective response by several or many neighbouring trusts.

- Catastrophic: events of potentially catastrophic proportions that severely disrupt health and social care and other functions (for example, mass casualties, power, water, and so on) and that exceed even collective local capability within the NHS.

The guidance recognises that there may be events occurring on a national scale, such as fuel strikes, pandemics or multiple events that require the collective capability of the NHS nationally. In each NHS organisation, the CEO is responsible for ensuring that their organisation has a Major Incident Plan (MIP) in place that will be built on the principles of risk assessment, cooperation with partners, emergency planning, communicating with the public and information sharing.

The MIP links into the board's arrangements for ensuring business continuity as required by the CCA. The CEO must ensure that the board has previously received regular reports, at least annually, regarding emergency preparedness, including reports on exercises, training and testing undertaken by the organisation, and that adequate resources have been made available to allow discharge of these responsibilities. As a minimum requirement, the board is required to undertake a live exercise every three years; a tabletop exercise every year and a test of communications cascades every six months. These must all be carried out and a review of emergency preparedness plans must be part of the annual review of the effectiveness of internal control by the board or audit committee.

In accordance with the guidance an executive board director must be designated to take responsibility for emergency preparedness on behalf of the board in respect of the emergency situation and a NED must also be nominated to support the executive director lead in this role. The board must also ensure that there is a designated and adequately resourced officer, usually referred to as the emergency planning liaison officer (EPLO), to support the executive in the discharge of their duties for emergency preparedness which is in line with good practice for NHS organisations.

- (c) The Aurora board's responsibility for risk management and how it receives assurances on the risk management systems and the Major Incident Plan.

(13 marks)

Suggested answer

Effective development and delivery of Aurora's strategic objectives as an FT, its ability to seize new opportunities and to ensure its longer-term survival depend upon its identification, understanding of, and response to, the risks it faces. The Aurora board has ultimate responsibility for risk management and internal control, including the determination of the nature and extent of the principal risks it is willing to take to achieve its strategic objectives and for ensuring that an appropriate culture has been embedded throughout the trust. In the face of the current possible threat of a flu pandemic the board has a responsibility to ensure that these principal risks have been considered in the light of this external threat to the delivery of its strategic objectives. As the Strategic Risk Register has not been reviewed for nine months this would suggest that it has had insufficient board attention and scrutiny. It should be considered urgently by the appropriate board committee and by the Aurora board.

The assessment of risks as part of the normal business planning process should support better decision-taking, ensure that the board and management respond promptly to risks when they arise, and ensure that the CQC, NHS Improvement, local health economy partners, patients, staff and the public are well informed about the principal risks and prospects of Aurora.

Under the 2014 FRC guidance, a principal risk is defined as a risk or combination of risks that can seriously affect the performance, future prospects or reputation of the entity. These should include those risks that would threaten its business model, future performance, solvency or liquidity. It

should be noted that whilst it is hoped that the FRC guidance will be utilised by other entities, it is primarily directed to companies subject to the UK Code. It applies to such companies for accounting periods beginning on or after 1 October 2014. At present therefore it is only suggestive of best practice for the NHS.

According to the FRC guidance, the board has responsibility for an organisation's overall approach to risk management and internal control. The board's responsibilities are:

- ensuring the design and implementation of appropriate risk management and internal control systems that identify the risks facing the organisation and enable the board to make a robust assessment of the principal risks;
- determining the nature and extent of the principal risks faced and those risks which the organisation is willing to take in achieving its strategic objectives (determining its "risk appetite");
- ensuring that appropriate culture and reward systems have been embedded throughout the organisation;
- agreeing how the principal risks should be managed or mitigated to reduce the likelihood of their incidence or their impact;
- monitoring and reviewing the risk management and internal control systems, and the management's process of monitoring and reviewing, and satisfying itself that they are functioning effectively and that corrective action is being taken where necessary; and
- ensuring sound internal and external information and communication processes and taking responsibility for external communication on risk management and internal control.

The Aurora board must make sure that it establishes the tone for risk management and internal control and puts in place appropriate systems to enable it to meet its responsibilities effectively. The lack of regular attention needs to be rectified and more board engagement needs to be demonstrated in order to help the board fulfil its responsibilities.

The FRC guidance recommends that the board should consider the following in deciding what arrangements are appropriate:

- (i) The culture it wishes to embed in the company, and whether this has been achieved.
- (ii) How to ensure there is adequate discussion at the board.
- (iii) The skills, knowledge and experience of the board and management.
- (iv) The flow of information to and from the board, and the quality of that information.
- (v) The use, if any, made of delegation.
- (vi) What assurance the board requires, and how this is to be obtained.

In terms of the assurances that the Aurora board receives, the board must be able to demonstrate through the work of its board committees, internal and external auditors, independent reviews from Care Quality Commission and other health/clinical colleges or professional bodies that it has actively considered the effectiveness of its risk management system and processes. In particular, with the imminent threat of the flu pandemic, independent advice should have been taken and collaborative work with other health agencies and public bodies should have been actioned to provide a country-wide response. This work should be considered both at board and board committee meetings to assess the risk posed to the organisation. The Board Assurance Framework should also be updated to include all of the assurance received and this will highlight any gaps in assurances or controls to manage the risk.

A flu pandemic would be considered as a mass incident and/or, according to its severity, catastrophic and would therefore be a significant external risk for Aurora. It could also pose a financial risk to the FT, as well as having an impact on its reputational, operational and behavioural risks. All of these interconnections will need to be reflected in the Principal Risk Register and the Board Assurance Framework as mentioned above.

Aurora's MIP in respect of the flu pandemic must be considered at board level and be included on the risk register and the board assurance framework. An executive lead must also be nominated to take on this role and to be supported by the Senior Independent Director.

As the situation develops the board will continue to review its risk management processes and will work other agencies to ensure that it delivers its responsibilities effectively in managing the impact of the flu pandemic.

Examiner's comments

This question focused on risk management processes and emergency preparedness. Pass-level answers demonstrated an understanding of business risks and did not confuse them with internal control risks. They also addressed the role of the board in risk management, the concept of principle risks and set out clear source guidance from the FRC in the responses. In general, the understanding demonstrated was more risk management focussed than emergency preparedness, with the knowledge demonstrated in this latter area somewhat brief. Higher-scoring answers handled both with ease and demonstrated the clear linkages between risk management and emergency preparedness planning.

- 5 You are the newly appointed Company Secretary at Western Counties Ambulance Service NHS Trust ('Western'), which, as a consequence of being in special measures, has had a number of non-executive board members resign or retire. Currently, there is an Acting Chair and one other non-executive director remaining. Consequently, quoracy at a number of board committees is problematic, particularly for the audit committee.

The Acting Chair of Western has asked you to advise her on appointing an executive director and the external auditor as members of the audit committee, to address the quoracy issues. She is also thinking of becoming an audit committee member herself.

Required

Advise the board of Western on:

- (a) The composition and role of the audit committee.

(18 marks)

Suggested answer

Background

The audit committee has a unique role amongst board committees. Three standing committees are recommended by the UK Corporate Governance Code, namely audit, nomination and remuneration. The FRC Guidance on Audit Committees states that the 'audit committee has a particular role, acting independently from the executive, to ensure that the interests of shareholders are properly protected in relation to financial reporting and internal control'. The guidance adds that the good relationships between the audit committee Chair, the board Chair, the Finance Director, and the CEO are vital as the Committee may have to take a robust stand at times.

Guidance for the NHS can be found in the Department of Health (DH) publication *The Intelligent Board*, which recommended that all NHS trusts should have an audit committee, a nomination committee and a remuneration (and terms of service) committee as part of their governance arrangements. All three committees were required to report to the board of directors. This has been encapsulated in the model standing orders for NHS Trusts, which requires an audit committee as well as a remuneration and terms of service committee.

The composition of the audit committee

Again starting with the corporate position: the Eighth Company Law Directive 2008 requires 'public interest entities' (including listed companies) to have an audit committee consisting solely of independent non-executive directors (NEDs). In addition the FRC Guidance on Audit Committees suggests that appointments to the committee should be made by the board on the recommendation of the nomination committee, in consultation with the audit committee chair. Appointments should be made for a period of up to three years, extendable by no more than two additional three-year periods and so long as the director remains independent. The FRC Guidance also makes it clear that the Chair of the board may only be a member of the committee in smaller companies, and even then may not chair the committee. This is to protect the independence of the committee as a key part of the corporate governance arrangements.

The NHS Audit Committee Handbook issued by the Healthcare Financial Management Association (HFMA) in 2014 states:

'the distinctive characteristic of the audit committee is that it comprises only non-executive directors. This condition of membership provides the basis for the committee to operate independently of any executive management processes and to apply an objective approach in the conduct of its business.'

It also states that the audit committees should comprise not less than three NEDs, with a quorum of two.

The HFMA handbook stipulates that the Chair of the board should not chair the audit committee or be a member of the committee. In fact, the Chair of the organisation does not normally attend at all. It also specifies that there at least one member of the committee should have 'recent and relevant financial experience' (in line with the UK Corporate Governance Code and FRC guidance mentioned above). The CEO and other executive directors only attend when requested.

As a consequence, the suggestion that an executive director and the external auditor be appointed would not be permissible under the current NHS guidance. Only NEDs can be members of the audit committee. As Chairs cannot be a member of the committee either, other steps need to be taken to solve the quoracy issue.

In the short term, audit committee meetings can be held even if inquorate, with decisions being ratified by the board, and when new NEDs are appointed it would be worth making sure that the terms of reference allow for meetings by telephone or Skype so that those NEDs are able to attend the planned meetings without having to attend physically, thus fulfilling the quoracy rule of two NEDs. Discussion with NHS Improvement must be had to see if immediate action can be taken to begin a NED appointment process or if they have NEDs who could be seconded in the short term.

In terms of the appointment of new NEDs, it would be helpful to ensure that the successful candidates are not new to non-executive directorships and/or have a background of operating on equivalent committees in other organisations and specifically that at least one of the appointments has recent relevant financial experience even if they do not actually chair the audit committee.

Overview of role and duties

Boards can, and should, look to the audit committee to review and report on the relevance and rigour of the governance structures in place and the assurances the board receives.

The UK Corporate Governance Code lists the role and responsibilities of an audit committee as follows:

- to monitor the integrity of the organisation's financial statements and any formal announcements relating to the organisation's financial performance. In doing so, it should review 'significant financial judgements' that these statements and announcements contain;
- to make recommendations to the board in relation to the appointment, reappointment or removal of the organisation's external auditors, and for putting these recommendations to the stakeholders for approval at a general meeting of the organisation;
- to approve the remuneration and terms of engagement of the external auditors (after they have been negotiated with the auditors by management);
- to review and monitor the independence and objectivity of the external auditors, and also the effectiveness of the audit process, taking into account relevant UK professional and regulatory requirements;
- to develop and implement the organisation's policy on using the external auditors to provide non-audit services. This should take into account any relevant external ethical guidance on the subject. The committee should report to the board, identifying actions or improvements that are needed and recommending the steps to be taken;
- to provide advice on whether the annual report and accounts, taken as a whole, is fair, balanced and understandable and provides the information necessary for shareholders to assess the company's position and performance, business model and strategy;
- to review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action; and
- to report to the board on how it has discharged its responsibilities.

For example, the audit committee should consider significant accounting policies used to prepare the financial statements, any changes to them, and any significant estimates or judgements on which the statements have been based. Management should inform the committee about the methods they have used to account for significant or unusual transactions, particularly where the accounting treatment is open to different approaches. Taking the external auditors' views into consideration, the committee should consider whether the organisation has adopted appropriate accounting policies and made appropriate estimates and judgements.

No audit committee can now afford to limit itself to the long-established focus on internal financial control matters. The importance of that financial scrutiny has never diminished, but the need for similarly rigorous control over all activities has led to a much wider focus by the audit committee in the public sector, and in particular the NHS, where boards have to meet a broad range of stakeholder requirements.

By way of contrast, the NHS Audit Committee Handbook (HFMA) describes the role of the audit committee as "critically reviewing the governance and assurance processes on which the board places reliance".

This wider role still encompasses the traditional financial assurance role of the audit committee, for example, with regard to public disclosure statements, the audit committee has an essential role in reviewing these prior to approval by the board. It should be satisfied with the strength of the processes and the quality of data that has been relied upon to produce the statements. However, in addition to monitoring the integrity of the organisation's financial statements, the two key areas that the audit committee should provide assurance to the board on are the Assurance Framework and documents that are to be publicly disclosed (that is, the annual governance statement (AGS), registration evidence for the CQC, the annual report and accounts and the quality accounts).

In practice, the role of the audit committee is to also review the adequacy of the organisation's internal control system and, in the absence of a separate risk committee, to review the organisation's capacity to manage its risk management systems.

In NHS organisations there is usually an overlap between the work of the audit committee and the quality committee. Clarity on how these areas will be addressed by the two committees is vital to ensure that duplication of work is avoided and no gaps of assurance arise. The audit committee should challenge and test the effectiveness of the internal audit function and should promote its role within the organisation ensuring that it has adequate resources.

The audit committee therefore supports the board by critically reviewing governance and assurance processes on which the board places reliance. At the corporate level these will include a risk management system and a performance management system underpinned by an Assurance Framework. The Assurance Framework is the 'lens' through which the board examines the assurance it requires to discharge its duties. The key question board members need to ask is 'How do we know what we know?' The Assurance Framework should provide the answer.

- (b) The independence of external auditors and identifying the threats to external auditor independence.

(7 marks)

Suggested answer

In addition to the requirement to have only NEDs as members of the audit committee, it would also not be appropriate to have the external auditor as a member of the committee as this would seriously jeopardise the independence of their role.

The FRC Guidance requires audit committees to include in their role having 'procedures to ensure the independence and objectivity of the external auditor annually, taking into consideration relevant UK professional and regulatory requirements'.

The Local Audit (Health Service Bodies Auditor Panel and Independence) Regulations 2015 and resulting National Audit Office Code of Practice gives auditor panels the responsibility for monitoring and ensuring the independence of the external auditors.

External auditors are required to check the financial statements and the way in which they have been prepared, and provide an independent professional opinion to the stakeholders about whether the financial statements give a true and fair view. Stakeholder confidence in veracity of the financial statements, including the statement by the board about the going concern status of the trust, and quality report, is therefore dependent on the independent opinion of the auditors. Auditors are also required to provide an opinion on Value for Money and that there are adequate arrangements to secure economy, efficiency and effectiveness and on the content of the quality report.

Unless suitable health service governance measures are in place, a firm of auditors may reach audit opinions and judgments that are heavily influenced by their wish to maintain good relations with the management of a client organisation. If this happens, the auditors are no longer independent and the stakeholders cannot rely on their opinion.

Five types of threats to auditor independence can be identified:

- (i) Self interest threats, which arise in situations where it is in the auditor's own interests to accept the views and opinions of the client's management and not to challenge them vigorously. The auditors in the scenario carry out a lot of non-audit work for the company, and this may create a self-interest threat. This is because the audit firm may be reluctant to lose the non-audit work and fee income, and so may be less rigorous than it should be in the conduct of the external audit.
- (ii) Self-review threats, which arise when the auditors are required to check the validity of work that has previously been carried out by employees of the audit firm. Auditors might be reluctant to report failures in the work of their own staff.
- (iii) Familiarity threats, which can develop as members of the audit team become more familiar with a client company and its management, and so become more willing to accept the accuracy and validity of their opinions and what they do.
- (iv) Advocacy threats, which arise when the audit firm actively promotes the interests of a client company, for example, in a legal dispute between the company and another party.
- (iv) Intimidation threats, which arise when the auditors accept the views of a client's management because of threats or domineering personalities.

Threats to auditor independence must be identified, and measures should be taken to limit the threat to an acceptable level of risk.

Examiner's comments

This was a question of two halves, with half of candidates answering the question well. Those that passed made a clear separation in their answers to address the role/composition of the audit committee and the final section focusing on auditor independence. It was clear from the answers that did not pass that many candidates had not read around the issue of auditor independence thoroughly enough, with brief and colloquial answers being provided, as opposed to the detailed and specific answers required. There was also an imbalance in the depth of answer in relation to the marks awarded. There was scope with 18 marks to give a detailed response on the role/composition and yet often the answers given were split more 50/50 between parts (a) and (b).

- 6 You are the Company Secretary of White Valley Hospitals NHS Foundation Trust ('White Valley') and the current Chair is due to step down in 12 months' time, after six years of service. You are working alongside the Senior Independent Director (SID) in planning the appointment process for a new Chair.

Required

Prepare a report on behalf of the SID for the next council of governors, explaining:

- (a) The role of the nomination committee and the appointment process for a new FT Chair.

(9 marks)

Suggested answer

Council of governors report: Appointment process for new Chair and associated governance issues
Lead: Senior Independent Director
Author: Company Secretary
Date: June 2017

Background

Our current Chair is due to step down from office in June 2018 following six years of office. For the purpose of good governance and to ensure an effective handover and continuity it is important that the appointment process for a new Chair is considered in good time. This report sets out the key steps that need to be taken along with the governance issues that need to be considered. Please note that a separate section of the annual report should describe the work of the nomination committee(s), including the process it has used in relation to board appointments. The main role and responsibilities of the nomination committee should also be set out in publicly available, written terms of reference.

The role of the nomination committee and the appointment process for a new FT Chair

The FT Code of Governance sets out that:

'The governors are responsible at a general meeting for the appointment, re-appointment and removal of the chair and the other NEDs. They should agree with the nominations committee a clear process for the nomination of a new chair and NEDs. Once suitable candidates have been identified the nominations committee should make recommendations to the council of governors.'

There may be one or two nomination committees in an FT. If there are two committees, one will be responsible for considering nominations for executive directors and the other for non-executive directors (NEDs), including the Chair. Where an FT has two nomination committees, the nomination committee responsible for the appointment of NEDs, including the Chair, should consist of a majority of governors. If only one nomination committee exists, when nominations for NEDs (including the appointment of a Chair) are being discussed, there should be a majority of governors on the committee and also a majority governor representation on the interview panel.

The Chair or an independent NED would normally chair the nomination committee(s), however, this is not appropriate where the appointment is in regard to their own position and so, for White Valley on this occasion, the committee will be chaired by the SID. If necessary and at the discretion of the committee, a governor can chair the committee in the case of appointments of NEDs or the Chair.

The process should be as follows:

The nomination committee should prepare a job and person specification defining the role and capabilities required for the role of Chair, including an assessment of the time commitment expected, recognising the need for availability in the event of emergencies. The commitment for an NHS

Chair is commonly advertised as 2-3 days per week. The council of governors should agree with the nomination committee a clear process for the nomination of a new Chair. Once suitable candidates have been identified, the nomination committee should make recommendations to the council of governors.

Since the Chair has to be independent upon appointment (for example, it would not be appropriate for the White Valley CEO to apply for the role), the nomination committee should initiate a search, which takes account of these job and person specifications. I would like to remind governors that a person may only be appointed as a NED (including the Chair) if they are a member of the public constituency (or patient constituency if there is one).

The search for candidates for the Chair should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board and the requirements of White Valley. As a general rule, the Chair should also be independent when first appointed. This is a provision of the UK Corporate Governance Code for listed companies and of the FT Code.

To carry out the search, the nomination committee may appoint a firm of head-hunters, whose task would be to identify a small number of potential candidates for consideration or it might advertise the position and might conduct its own private search. An independent external adviser should not be a member of or have a vote on the nomination committee(s). As part of the process, the nomination committee must also pay attention to the requirements of the Fit and Proper Persons Test (FPPT). The FPPT is part of the regulatory requirements of the Care Quality Commission (CQC), the independent regulator of health and adult social care in England. The FPPT for directors came into force on 27 November 2014 and it plays a major part in ensuring the accountability of directors of NHS bodies. The CQC intends to use these new powers to encourage a culture of openness and to enable providers and directors to be held to account. As White Valley is an FT, it is responsibility of the FT to ensure that all appointments of NEDs meet the requirements of these regulations.

In the NHS, the requirement to openly advertise all NED appointments has gone some way to addressing issues of ethnicity and gender. The Equality Act 2010 also imposes a duty on public bodies to achieve equal opportunities in the workplace and in wider society. The Act is supported by specific duties, which require public bodies to publish relevant, proportionate information demonstrating their compliance with the equality duty and to set themselves specific, measurable equality objectives. White Valley must set objectives that eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity and foster good relations.

Upon receiving a recommendation to appoint from the nomination committee, the council of governors should consider the qualifications, skills and experience required and the time commitment required. Bear in mind that the FT Code stipulates that 'no individual, simultaneously while being a chair of an NHS FT, should be the substantive chair of another NHS FT'.

In accordance with the FT's constitution, appointment is by a majority of the governors attending the relevant meeting.

- (b) The main duties and responsibilities for an FT Chair, and the skills and attributes required from an FT Chair.

(16 marks)

Suggested answer

The focus for the White Valley council of governors on understanding the role of the Chair must not distract from the underlying principle of the unitary board, with the Chair having the same duties and responsibilities of every other board director. However, the role of the Chair in creating the right team dynamic for a disparate group of board directors with varied and strongly held views to reach agreement on strategic direction and corporate objectives is absolutely crucial.

As the FRC Guidance on Board Effectiveness states: ‘good boards are created by good chairs’: therefore, the role warrants further examination here.

The Chair leads the board and ensures the effectiveness of the board and also chairs the council of governors. To do this, a Chair needs to ensure that the board and council discusses relevant issues in sufficient depth, with all the information needed to reach a decision, and with all the directors/governors contributing to the discussions and decision-making.

The UK Corporate Governance Code states that:

- ‘The chair is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role.’
- ‘The chair is responsible for setting the board’s agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues.’
- ‘The chair should also promote a culture of openness and debate by facilitating the contribution of non-executives in particular and ensuring constructive relations between executive and NEDs.’
- ‘The chair should ensure that communications with shareholders are “effective”.’

The FRC Guidance on Board Effectiveness states that: ‘the chair creates the conditions for overall board and individual director effectiveness.’ It emphasises that an effective Chair is a team-builder, developing a board whose members communicate effectively and enjoy good relationships with each other. They should develop a close relationship of trust with the CEO, giving support and advice while still respecting the CEO’s responsibilities for executive matters. They should also ensure the effective implementation of board decisions, provide coherent leadership for the organisation and understand the views of the stakeholders.

The NHS Healthy Board suggests the following as the key aspects of the role of the Chair:

- Ensures the board develops vision, strategies and clear objectives to deliver organisational purpose.
- Makes sure the board understands its own accountability for governing the organisation.
- Ensures board committees that support accountability are properly constituted.
- Holds the CEO to account for delivery of strategy.
- Leads the board in being accountable to governors and leads the council in holding the board to account.
- Provides visible leadership in developing a healthy culture for the organisation, and ensures that this is reflected and modelled in their own and in the board’s behaviour and decision-making.
- Leads and supports a constructive dynamic within the board, enabling grounded debate with contributions from all directors.
- Ensures all board members are well briefed on external context.
- Ensures requirements for accurate, timely and clear information to board/directors and governors are clear to executive directors.
- Plays key role as an ambassador, and in building strong partnerships with:
 - Patients and public
 - Members and governors
 - All staff
 - Key partners
 - Regulators
- Ensures that the board sees itself as a team, has the right balance and diversity of skills, knowledge and perspective, both NEDs and executive directors, and the confidence to challenge on clinical as well as other intelligence and service plans.
- Supports the governors’ nomination committee to undertake its role of appointing and appraising NEDs effectively.
- With NEDs, appoints and removes the CEO.

- Advises the Remuneration Committee on the appropriate remuneration for executive directors and on the appointment/removal of executive directors and in succession planning.
- Ensures that directors (and governors) have a full induction and continually update their skills, knowledge and familiarity with the organisation.
- Arranges the regular evaluation of the performance of the board and its committees and the governors, run externally at least every 2–3 years.
- Conducts regular performance reviews of the NEDs, the CEO and executive directors in relation to their board contribution. Acts on the results of these evaluations, including supporting personal development planning.

In terms of attributes the report *What makes a top chair?* published by Hunter Healthcare in 2015 describes this well:

‘Good chairs understand their role in helping their trusts embrace a large cultural shift [as required by the duty of candour]. They lead by example; they are a critical but supportive friend of the chief executive and make sure they do not get dragged into the detail. The new duty of candour places even more weight on the shoulders of NHS trust chairs. There is no hiding from mistakes and top chairs recognise this and use candour as a driver for improvement.

‘Above all, chairs need to understand that success is about relationships, whether this involves creating the right environment for an effective board meeting, or helping clinicians understand management processes. The best chairs understand this and will invest time in developing and nurturing their board members.’

The report goes on to cite the following as key characteristics: courage, strength and agility, curiosity, tenacity, approachability, emotional resilience and integrity. Good communication skills were also seen as key alongside an ability to listen effectively.

Summary

This report sets out the key tasks ahead for the nomination committee and the issues that need to be considered in the appointment process for a new Chair.

The council of governors is asked to accept this report and to receive further update reports from the nomination committee at each subsequent council meeting.

Examiner’s comments

Overall, this question was answered well. Pass-level answers described the role of the nomination committee, recognising for an FT that there could be two committees, and highlighting the difference in composition and role. In addition, these answers focused equally on the role of the Chair as well as their attributes in part (b). Source documentation and guidance was also evident in these answers.

The scenarios included here are entirely fictional. Any resemblance of the information in the scenarios to real persons or organisations, actual or perceived, is purely coincidental.