The Institute of Chartered Secretaries and Administrators (ICSA) is the professional body qualifying and supporting company secretaries and corporate administrators in all sectors of the UK economy. Members are educated in a range of topics including finance, HR, company law, administration and governance, which enable 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 and have access to a wealth of practical experience in order to provide pragmatic insights into effective practices across a range of organisations. We, therefore feel that we have a wealth of knowledge in this area to assist in the development of best practice in governance for NHS Foundation Trusts and the manner in which governors not only fulfil their statutory duties but demonstrate best practice.

In order to respond constructively to the above consultation we established a working group, constituted of both Members and non-members, undertaking the trust secretary role in foundation trusts. This enabled us to combine the strength of the ICSA’s knowledge of corporate governance issues with the practical understanding of how the document’s proposals are likely to impact on the day-to-day administration of a foundation trust and contributing to the effectiveness of governors.

General Comments
In addition to the specific responses to the questions raised in the consultation document, ICSA has a number of general observations it would like to share with regard to the draft guidance.

Firstly, while the guide clearly restates the statutory provisions pertaining to the roles and responsibilities of foundation trust governors, it appears to the Institute that the guide, overall, has missed an opportunity; in its current state it is overly prescriptive and unnecessarily narrow in its ambition. Many foundation trusts and aspirant trusts are eager to learn from each other and assimilate best practice in order to enhance the governance arrangements and accountability of their particular trust. In simply outlining the legal duties, the guide is denuded and lacks the power to move trusts away from what they ‘must’ do legally, to what they ‘should’ do as a matter of best practice.

By not addressing some of the more nuanced aspects of governors’ powers, such as what could happen where the governors veto the appointment of the chief executive, the guide is undermined by failing to provide examples of how such situations have been resolved in other trusts. While Monitor may currently have no mandate or desire to provide guidance to foundation trusts, we strongly encourage it to look again at its approach to regulating the sector and moving towards a more enabling and proportionate style.
INSTITUTE OF CHARTERED SECRETARIES & ADMINISTRATORS

RESPONSE TO MONITOR’S GUIDE FOR NHS FOUNDATION TRUST GOVERNORS

By its very nature as a regulator, Monitor has access to a wide range of practical examples as to how foundation trusts are making their governance arrangements work and their local accountability real. It is a shame that this information is not more readily available to all trusts as a way of encouraging them to make the most of their freedoms and to use public funds in a manner that is of benefit to the trust and its stakeholders.

Secondly, in trying to provide basic information as to how the legal responsibilities are to be fulfilled, there is no acknowledgement of the fact that each foundation trust may have slightly different requirements, as laid out in their constitution. The revised guide should, therefore, explicitly acknowledge that some differences may exist and that governors should be made aware of them as part of their induction and encouraged to become familiar with the constitution as a defining document of the foundation trust.

Thirdly, while the guidance identifies the governors taking the lead in certain situations, there needs to be a more realistic account of the support they will need from their executive and non-executive directors. Many of the situations that governors are expected to lead are likely to require detailed knowledge and information to assist in making the most appropriate decision for the foundation trust. It would, therefore, be appropriate for the final guidance to acknowledge the wide-ranging support governors are likely to require in each situation.

Finally, there appears to be some inconsistency between the provisions of the Code of Governance and the draft Guide for Governors. It would be helpful if the final version addressed them to provide a unified approach to the role of governors in the arrangements of a foundation trust’s governance framework. From the point of view of the governors, it would be advantageous if the final version combined key aspects of the code of governance as well as statutory requirements, rather than having two lengthy documents that appear to contradict each other in parts.

Specific Comments in Response to the Questions Raised in the Consultation

1. Does the chapter on governance structure explain in principle the key elements of a foundation trust? If not, what elements require further explanation?

The section, in general, is quite clear though there are a few areas that could benefit from greater explanation. For example, the guide mentions that the foundation trust may adopt one or two committees for the purpose of nominations for both executive directors and non-executive directors. It would be useful if the guidance was clearer as to what the benefits and drawbacks of each option are in order to facilitate foundation trusts in their pursuit of best practice.
It is currently unclear as to what role the nomination committee plays with regard to setting terms and conditions and the further role the remuneration committee performs. If it is the intention that the nomination committee concerns itself with the initial terms and conditions of a newly appointed non-executive director, and the remuneration committee is there to periodically review those terms, the final guide should make that differentiation more marked to avoid any confusion or misunderstanding.

The final guidance should also be cross-referenced with other relevant documentation that relates to the role and composition of both the nomination and remuneration committees and ensure consistency in the core messages delivered. For example, guidance as to the independence of non-executive directors and whether it is appropriate for the chairman to be part of the remuneration committee should be clear in order to avoid any possible confusion or misunderstanding.

There is an argument to suggest that the chair of the foundation trust should not chair the nomination committee, as this could result in one individual holding too much sway over fellow non-executive directors and governors. As this is a main principle of the code of governance (A.3), perhaps further consideration could be given to this aspect of the guidance to ensure that measures are in place to limit the power of one, or a group, of non-executive directors.

Clarification as to the respective roles of the chair and vice-chair would also be helpful, especially with regards to the management of any conflicts of interests of the chair. Furthermore, clearer differentiation of the roles and responsibilities of the vice-chair and the senior independent director would also be welcome.

The diagram on page 11 could be improved as it currently does not appear to provide for the foundation trust being accountable to the primary care trust. While there may not be a straightforward line of accountability, all foundation trusts will be held to account by PCTs via contracts for service provision. Some form of indirect accountability, therefore, exists and should be acknowledged.

2. Are there other useful committees/roles you feel should be covered in this section? Are terms used in the guide clear?

The guide would benefit from providing real examples of other committees that foundation trusts have put in place, for instance the membership development committee. As governors provide a key interface with members, information or examples as to their role with regards to such a committee would be advantageous. The use of sub-committees and joint-meetings also provides the foundation trust with the opportunity for collaboration with governors and for them to be involved in the strategy and planning of the foundation trust.
Furthermore, the information provided on the role of the membership secretary is quite narrow and prescriptive. A wider, more encompassing approach to the duties of this position would enable foundation trusts to put in place effective arrangements appropriate for their needs, rather than focussing on just meeting minimum requirements.

3. Are the statutory duties of the board of governors explained clearly? If not, how would you improve this?

While the statutory duties of the board of governors may be clearly explained there is a definite lack of information as to what boards could, and should, do when things go wrong. It would, therefore, be most helpful to foundation trusts if the revised guide included information and examples of how foundation trusts have resolved such issues effectively and in the interests of all, as previously mentioned in the general comments above.

As a matter of best practice, the board of governors should also be encouraged to undergo some form of performance evaluation, as individuals and, as a collective board.

4. Do you agree that governors should be involved in the performance appraisals for the chair and non-executive directors? If not, what information should governors have when considering issues such as re-appointment or removal?

As noted before, the final guidance should also be cross-referenced with other relevant documentation that relates to the appraisals of the non-executive directors, particularly the chairman and the senior independent director to ensure consistency in the core messages delivered (for example, the draft guidance claims that the chair should only be appraised by the governors in his role chairing the board of directors, this approach appears to be narrower than that contained within the governance code). This is also one situation in which the governors are going to require comprehensive support from the foundation trust.

If the governors are required to appoint or remove the chair and other non-executive directors, it is only appropriate and sensible that they perform some function with regards to the non-executive directors’ performance appraisal. The guidance, however, provided in this chapter should not be limited or prescriptive in its view, as many foundation trusts have adopted different approaches.

For example, thought needs to be given to the likely exposure governors will have in seeing the chair perform as chair of the board of directors, the performance of all non-executive directors in fulfilling their duties, including the additional role the senior independent director plays. Some foundation trusts have used their governors to lead appraisal discussions and feedback, while others have provided such insights into a formal committee of the governors to discuss and make
recommendations. By providing a restricted approach to such matters the guide could be seen as encouraging foundation trusts to play safe and not enable governors to play a more fulsome and leading role in the appraisal of non-executive directors, where appropriate.

5. **Was the process for appointing a chair sufficiently clear? If not, what additional elements or clarification would be helpful?**

As highlighted previously, this is an area that is going to require significant support from the foundation trust in order for governors to fulfil the role effectively. While the governors have ultimate responsibility for appointing the chair, they are not necessarily in the best position to be able to lead the process to the optimum conclusion, given the lack of interaction with the work of the board of directors and the skill-set possessed, and required, to ensure the board is fit for purpose. Again, the differences in the competencies of some governors in different trusts make it difficult to adopt a one size fits all approach. If the guide provided examples of practical experiences and strategies adopted by foundation trusts it would serve as a way of clearly outlining how legal requirements can be met, along with disseminating best practice that some foundation trusts could aspire to emulate.

In providing examples of best practice already in use, this section could compensate for what is currently an overly technical chapter. Furthermore, the information regarding temporary appointments is currently not as helpful as it could be as it takes no account of proportionality, and appears to be unduly rigid when more subtle ways of dealing with these incidents may be more appropriate and effective.

6. **Does the guide provide clarity over setting terms and conditions for all non-executive directors, including the chair? If not, what further guidance would aid the process?**

As previously mentioned there is some benefit in clarifying the difference between the nominations and remuneration committees with regards to the setting of pay and conditions for new and existing directors.

7. **Do you agree with the suggested process for removal?**

The process provided for the removal of the chairman does not provide for the input of the chief executive and the executive directors. While it is ultimately the responsibility of the governors to remove the chairman, it would be prudent for them to canvass the insights of others when considering whether the chairman has performed his/her duties as expected and required. If the guide included the suggestion that further guidance be sought internally before governors made their final decision it would strengthen their case for ensuring that all perspectives were canvassed ahead of such a serious decision being made.
8. Is the process for approving the appointment of the chief executive clear? If not, how would you improve this?

This section does not provide sufficient information as to what could, or should, be done in the situation where the governors decide to veto the appointment of the chief executive. While the information regarding the statutory requirements is clear, it is somewhat undermined by the subsequent lack of detail for those situations that aren’t as straightforward as the guidance anticipates.

9. Does the chapter on appointing and removing the auditor explain the key requirements of the board of governors? What additional information would be helpful?

The document might cover the legal requirements but there is some weight to the argument that the guidance might not be true to real experiences within foundation trusts. It is important that governors perform their legal functions in the appropriate manner, but the guidance does not necessarily countenance the role played by other individuals within the foundation trust in providing advice and support in appointing and removing auditors. It is far more realistic to expect that the executive and non-executive directors will be better informed and placed to provide critical information on the performance of the auditors and undertaking ‘beauty parades’ when necessary. The final version of the document might, therefore, gain from covering a wider range of ways in which the governors may fulfil their role, but acknowledging the differences in the capabilities of boards of governors and how foundation trusts can better support them to ensure the governors make the best decisions for the foundation trust.

10. Does this chapter provide useful guidance for governors? Is further explanation required?

The section on the requirement to present the annual report and accounts to the governors at general meetings serves to highlight the lack of real accountability the governors and members have within the legal framework. This is one area which would hugely profit from examples of best practice within the foundation trust movement that serves to promote and enhance real accountability and transparency. Indeed there is evidence within the foundation trust movement of some confusion as to whether the annual accounts and report are to be presented to a governors’ meeting or the annual members’ meeting. Greater clarification would, therefore, be welcome.

11. Is the board of governors’ role in preparing the forward plan clearly explained in the guidance?

As with other examples, this is another opportunity that has been underplayed and would assist foundation trusts if more strongly supported with clear guidance and
the inclusion of some examples of best practice. The process of using governors in developing forward plans is an area that some foundation trusts have grasped and made an inherent aspect of the governors’ relationship with the board of directors and members, while other foundation trusts would be interested in learning about different ways of working. For example, the use of joint board of directors and board of governors meetings is one approach in which governors can contribute in a material way and fully connect with the forward plans of the foundation trust. This involvement will in turn reap benefits by the ability of the governors to promote and endorse it to the wider membership base convincingly.

The section would also benefit from providing an oversight of the negative aspects of failure to engage governors fully in this process.

12. **Is the guide written in a concise and clear manner?**

As an overview of the legal requirements governors must fulfil, the document is generally clear. It is unfortunate, however, that the document has not more fully embraced the wider role governors can play and the value they add to the governance of a foundation trust. As previously mentioned, that lack of vision is an opportunity lost to the foundation trust movement, especially when the information has already been collected from ongoing regulatory activity.

13. **Are the statutory duties of the board of governors clearer to you after reading the guide?**

The statutory duties are likely to be clearer for those that have not previously read, or are familiar with, the appropriate sections of the legislation. While the document might mirror the legal requirements, it does not provide any further meaningful insight as to how governors can make a positive impact on the governance and accountability of a foundation trust beyond the legal minimum.

By including examples and case studies from a range of foundation trusts, readers would be able to develop a better understanding of the wider role they could perform in supporting the foundation trust.