

Code of Governance Update  
Monitor  
133 – 155 Waterloo Road  
London  
SE1 8UG

28 November 2013

(via email)

Dear Sir/Madam

### **Revised Code of Governance for NHS Foundation Trusts**

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

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

ICSA has an extensive pedigree in the governance arena, acting as advisers to government and regulators on company law and corporate governance; able to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. The expertise and experience of our network of Members and advisers has informed our response to the revised code of governance for foundation trusts.

#### **General comments**

ICSA appreciates the opportunity to comment on Monitor's thinking in revising the code of governance. ICSA would like to draw attention to the following general observations on the significance of good governance being central to the process of formulating strategy and delivering quality healthcare within a locally engaged stakeholder community. In order to deliver continuously improving healthcare that meets the needs of commissioners and users, it is essential that NHS foundation trusts are encouraged to make improvements both in the disclosure process and in governance performance itself.

The Institute's experience of governance frameworks and their disclosure in other sectors informs our thinking on the application of governance codes and accompanying reporting requirements of NHS foundation trusts.

The pursuit of good practice governance can be seen as offering competitive advantage and assurance, because it strengthens the process and quality of decision-making and, hence, the overall efficiency and effectiveness of the board and, ultimately, the NHS foundation trust.

Considered, and appropriate, disclosure is the mechanism by which governance performance is communicated to target audiences to explain how their expectations have been met.

The Institute of Chartered Secretaries and Administrators

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Proposals to improve governance arrangements and their reporting should, in our view, aim to add value by providing evidence of innovative and creative forms of disclosure. This will not be 'boilerplate' reporting that merely repeats standard statements or imitates the language of the code of governance, statutory guidance or declarations made by other foundation trusts. Over reliance on such formulaic statements and reports can indicate a situation where good governance and the importance of assurance and disclosure are not seen as central to the effective running of the foundation trust, but a by-product of 'box-ticking' compliance reporting.

ICSA therefore welcomes the change in tone from Monitor regarding the flexibility in the application of the code. We endorse the approach that values flexibility; so that boards can decide what governance arrangements are most appropriate for their foundation trust at a given period in time. Whether foundation trusts, stakeholders and regulators embrace this flexibility will remain to be seen, but it is to be hoped that all relevant parties recognise and accept the spirit of flexibility when monitoring and reviewing governance arrangements.

ICSA has a long pedigree of informing and leading on governance developments across the sectors of the UK economy. For your interest, I enclose a copy of our recent post-event report from the Institute's Transparency in Governance Awards which aims to improve disclosure reporting within the listed company sector, along with a copy of the newly launched code of governance for CCGs developed by ICSA and DAC Beachcroft LLP.

#### **Question-specific comments**

##### **Q1. New and/or revised principles and provisions: Do you have any feedback on the specific changes we have made to the principles and provisions of the code?**

In general, ICSA welcomes the revised amendments to the code of governance for NHS foundation trusts, but there are number of aspects that we urge Monitor to reconsider.

#### **Leadership:**

The adoption of boardroom behaviours is appropriate given the experience of the corporate sector in identifying scrutiny and challenge as an essential aspect of effective governance. The revised code however, could be enhanced further in this area by stressing that all directors – both non-executive and executive – have a duty to question, challenge and probe recommended actions and decisions of the board. It could be unintentionally understood that this duty only applies to non-executive directors (Section A, para. 10). Any undue emphasis on one type of director could be seen to confuse the collective nature of a unitary board.

A.1.2 could be clarified as governors are already able to request the information relating to board and committee attendance, on a rolling basis in many foundation trusts, and they receive this information as part of the annual report as a matter of course.

Provision A.1.6 provides detail as to the role of the chief executive as the 'accountable officer'. In its current form the provision is confusing and would benefit from greater clarification in relation to "recording and submitting objections to decisions considered or taken by the board of directors in matters of propriety or regularity...". An explanation as to these specific duties would benefit the reader, without having to refer in detail to the NHS Foundation Trust Accounting Officer Memorandum.

Provision A.4.1, in addition to the chairman, chief executive and finance director, the company secretary should be referred to as a normal channel for governors to register concerns. We would expect the company secretary to be the natural conduit for such communications rather than the chief executive or finance director.

A.4.2 refers to the senior independent director leading the appraisal of the chairman, in liaison with fellow non-executive directors. Given that the council of governors are responsible for the appointment and re-appointment of non-executive directors, any matters

relating to performance appraisal should include a mechanism for including their comments on the performance of the chairman and fellow non-executive directors. This section needs to dovetail more closely with the relevant provisions contained within Section B.

A.5.2 recommends that the council of governors should not be unwieldy in order that meetings are effective with each governor given the opportunity to contribute accordingly. It should be borne in mind that the council must reflect the constituencies of the foundation trust, and that will impact on the size of the entire council.

We suggest that further detail is provided to support A.5.6 as to what reasonable information the council of governors should expect in order to fulfil their duties. For some foundation trusts, there may be a desire to keep the information provided to governors to a minimum, while some councils may demand the same level of detail as the board of directors. Further guidance would support foundation trusts in ensuring that boards of directors and councils of governors are concentrating on fulfilling their legal duties rather than replicating each others' work.

#### Effectiveness:

While provisions relating to the inclusion of clinical experience and diversity on the board of directors are warmly received, it should be noted that the responsibility for appointing and re-appointing non-executive directors rests with the council of governors, or a committee of governors.

Furthermore, explaining that diversity extends beyond gender, ethnicity, physical and mental ability and sexuality to include experience and independence of thought would further strengthen the benefits to a board of directors, or council of governors. Every effort should be made to ensure that diversity is not seen as a list of characteristics that need to be 'ticked off', but as a spectrum of skills, experience, competences and perspectives, a combination of which will add to the decision-making ability of the board or council.

That said, it should be noted that, as governors are elected, it can be more difficult to ensure that the council is as diverse as it could possibly be, or to the degree the foundation trust may require. The democratic nature of the selection of many governors will present challenges to achieving the desired level of diversity.

B.2 refers to the importance of succession planning and the role of the board of directors. It should be clarified that it is the role of the council of governors to appoint and re-appoint non-executive directors and as such the principle should be extended to both the board and the council for consideration.

Given the code's commitment to promoting flexibility, it is suggested that the nomination committee dealing with non-executive director appointments should have the freedom to appoint a governor as chairman of the committee, rather than limiting the option to appointing a non-executive director.

B.6.5 asserts that the council of governors should be evaluated on the performance of the duties relating to commenting and contributing to the forward plan, and representing/engaging with members and the public. We believe that the duty of holding the board and individual non-executive directors to account is equally, if not more, important, and as such should be included in the annual appraisal of the council and its committees.

#### Stakeholder engagement:

The code could be read to assume that the primary function of the annual meeting of members as being to promote stakeholder engagement. While this is potentially an important outcome of any open meeting, the primary purpose of the annual meeting of members is for the council of governors to receive the annual report and accounts.

E.1.2 should be clarified to ensure that it is clear to the reader that all board of director meetings should be held in public, unless there are items that should reasonably be dealt with in closed session – such as matters of confidentiality relating to personnel or patients, or commercially sensitive information.

#### Appendix A:

Given the statutory duties of the council of governors, the company secretary should be available to provide appropriate governance advice and support to both the board of directors and the council of governors. This should include the induction of new governors and any ongoing training and development needs of the council.

It is good practice within other sectors for the appointment and dismissal of the company secretary to be a matter of the whole board, not just the chief executive and chairman. This reflects the important role the secretary plays in supporting the entire board and council of governors.

#### **Q2. Disclosure requirements: Are the disclosure requirements sufficiently clear?**

Within the proposed amended code there is a lack of clarity about what is and is not a legal requirement, until Section E and Schedule A. To improve understanding, we would recommend that you replicate the approach taken by other regulators who use ‘must’ and ‘should’ in publications to signal when something is a legal requirement and when a good practice suggestion.

The current draft makes it explicit within Section E that certain provisions are legal requirements. As this does not appear elsewhere in the code, it makes the code feel unnecessarily disjointed. A unified and consistent approach would therefore benefit the final version of the updated code.

#### **Q3. Tone and structure of the code: Do you have any feedback on the changes we have made to the tone and structure of the code?**

Articulating that the purpose of compliance reporting is primarily for members and patients is applauded, and ICSA hopes that regulators will observe the primacy of such reporting in the future and respond maturely to those reports that deviate from accepted norms but provide detailed information as to why governance arrangements are appropriate and effective for their foundation trust. However, it appears that there is an inconsistency in tone within section 1.4 Application of the Code, with the sentence “...it is recognised that departure from the provisions of the Code may be justified in particular circumstances” (p6). This gives the impression that compliance is preferred over explanation and could potentially influence boards to adopt governance mechanisms that are sub-optimal for their foundation trust, thereby undermining the overall aim of this code and good corporate governance as detailed in 1.2.

#### **Q4. Audit committee requirements: Do you have any feedback on our proposal to retain existing requirements for audit committees?**

The proposal appears appropriate in the current circumstances. In the future it may become necessary to revise the code in favour of more independent directors sitting on the committee.

#### **Q5. The value of recruiting non-executive directors with clinical experience: Do you have any feedback on this change?**

As mentioned in response to question 1, there is a great deal of benefit of having a board with a range of backgrounds, skills, experience, competences, opinions and independence of thought.

#### **Q6. How the code fits alongside other governance reporting requirements: Do you have any feedback on these changes?**

The code of governance should accompany the governance requirements set out in the foundation trust's constitution. It may therefore be beneficial for the code to reference the model constitution for NHS foundation trusts in an appendix.

**Q7. Other changes: Do you have any other feedback or suggestions for changes?**

There are no other material comments ICSA would like to make at this time.

ICSA hopes that the comments above assist you in your consideration of the revised code. Should you have any questions regarding this submission, please do not hesitate to contact me directly.

Finally, we would like to register our concern at the short timeframe provided for people to read, consider and respond to the revised code. As a regulator that has committed to the better consultation standards, you will be aware that consultation periods should run for considerably longer than 3 weeks. Such a short timeframe may give rise to the impression that external comments are not really sought and that decisions regarding the final amended code have already been made, thereby undermining the consultation as a public engagement exercise.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Swabey', with a large, sweeping flourish extending to the right.

Peter Swabey FCIS  
Policy and Research Director