

Health Service Governance

Sample paper

Suggested answers

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 are longer than the answers expected from candidates in the examination.

- 1. Four Wheels Ambulance NHS Foundation Trust ('Wheels') has been an FT for almost three years. When it was authorised it had a well established board with six non-executive directors (including a chairman) and five executive directors (including the CEO). All of the board members, except the chairman, had been with the trust for a minimum of four years at the date of authorisation. The current chairman was appointed a year ago. Two of the non-executive directors retired six months ago.**

As a new FT, the board appointed both the senior independent director and the lead governor. Since authorisation, the board has only met in private session with the lead governor sitting in as an observer.

The council of governors elected upon authorisation consisted of 18 governors: 3 appointed governors (PCT, University and City Council), 5 elected staff governors and 10 elected public governors. The governors were appointed for a three-year term of office and only six of the elected governors have offered themselves for re-election. The nomination paper for one of these governors declares that he has since become a governor of the local mental health FT. All council of governors meetings are held in public, with all council material being delivered as a presentation on the day.

Required

As the company secretary of Wheels, write a paper for the board that covers the health service governance challenges that Wheels faces at this particular stage of its development, including the statutory roles that the governors will be required to fulfil in the next year or so.

(25 marks)

Suggested answer

To: The board of directors
From: Company secretary
Date: June 2012

Subject: Health service governance issues for Wheels

Executive summary

This report sets out the key governance issues to be considered by the board, which are as follows:

- Succession planning for the board.
- Appointment of lead governor.
- Board meetings in public.
- Availability of council papers before meetings for consideration of reports.
- Disqualification criteria for governor appointments.

These issues are underpinned by the Monitor NHS Foundation Trust Code of Governance (FT Code) and the Model Core Constitution for foundation trusts.

Key challenges for the board to consider

(i) Succession planning for the board

Succession planning for a board of directors is planning for the eventual replacement of board members, and it is particularly important that there should be long-term succession planning for the most important board positions, particularly the positions of chairman, CEO and finance director. Succession planning is necessary to ensure that the board remains effective.

With regard to non-executive directors (NEDs), the trust is carrying two vacancies which means that it does not have a majority of NEDs on its board, even if the chairman has a casting vote, and it should seek to fill these positions as soon as possible.

There is 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 noted in the UK Corporate Governance Code, the King III Code and the FT Code. The FT Code states that if a NED has served on the board for more than six years since the date of his first appointment then he is no longer deemed to be independent. Given that all of the NEDs, except the chairman, have now served a minimum of seven years, the trust is no longer compliant with the FT Code and, under the 'comply or explain' regime, would need to make a statement in its annual report as to why Wheels was not complying with the FT Code.

However, there will be circumstances where NEDs having served their full terms may exceptionally remain on the board. The FT Code is pragmatic in its approach to the six-year rule stating that any term beyond six years (for example, two three-year terms) for a NED should be subject to particularly rigorous review, and should take into account the need for progressive refreshing of the board.

NEDs may in exceptional circumstances serve longer than six years but would be subject to annual re-appointment. Serving more than six years could be relevant to the determination of a NED's independence.

As a result, the trust's nomination committee should begin a process of considering the succession plans for the board which consider which of the remaining NEDs might stand down and which might be reappointed for a further year. The rigorous review required for a further

appointment of one year might in some circumstances still require the appointment to be subject to open competition (for example, where the term of office is well in excess of six years). This would enable the board to build a succession plan which offered greater continuity and stability rather than all of the NEDs standing down at the same time.

The nomination committee should also consider succession planning for other positions on the board such as CEO, director of finance and so on, and serious consideration should be given to the executive directors who are board members as they too have also been in post for a minimum of seven years. It would be reasonable to assume that some of them may be looking for other opportunities to further their own career development at this stage and might be considering leaving the trust. This will require open and honest conversation between the CEO and the executive team as well as between the chairman and CEO. The CEO should discuss succession planning within the executive team with the chairman before bringing a paper to the nomination committee for consideration.

If the CEO is likely to move on within the next year then the nomination committee should also consider the risk that if any internal candidates apply for the position of CEO and are not successful, they often leave the company shortly afterwards. The company may therefore lose one or more executive directors, as well as the CEO. The nomination committee needs to plan for this possibility and have a workable succession plan in place.

Any appointment or reappointment of a NED would be the responsibility of the council of governors as it is a key statutory duty for the governors to appoint or remove NEDs. The council of governors may have delegated the search and selection process to be overseen by its nomination committee or an ad hoc appointment committee designated for that purpose. But the decision to appoint remains that of the full council of governors.

If the appointment of a new executive director became necessary, it would be the responsibility of the board's Appointment Committee.

Wheels' nomination committee appears to have failed in this task so far, and it should give urgent attention to the composition of NEDs on the board and the need for a programme of continual change and refreshment. There has been no change in board membership for seven years (excepting the chairman), so the NEDs have already served for longer than six years. The committee should consider recommending that some of these individuals are not offered a renewal to their contract when their existing term of office ends and others should be reappointed for a further one-year term. The length of term for any new appointment could also be considered to improve the continual refreshing of the board membership.

Whether executive or non-executive, a search for replacements, in compliance with the requirements of the FT Code, should begin. A firm of head-hunters may be used, or the positions advertised, and the relevant appointment committees should recommend candidates that have been vetted for appointment by the board or council as appropriate.

It should not be a one-off exercise for the nomination committee to review the composition of the board. The nomination committee needs to plan continually for the future, and the committee chairman should report on its work, including its policies and plans, each year in the governance section of the annual report.

(ii) Appointment of lead governor

Whilst the Wheels board may have appointed the lead governor in the first instance, this is not good practice and the appointment should be reconsidered by the council and either a new appointment made or the existing appointment ratified. This would then be in accordance with Monitor's recommendation that the council of governors appoint a lead governor.

The lead governor would have a role in certain circumstances where it would not be appropriate for the chair to contact Monitor, or Monitor to contact the chair (for example, in relation to

appointment of the chair). Communication would instead take place between the lead governor and Monitor in such circumstances. Routine communication from Monitor to governors is disseminated through the FT secretary.

Monitor also suggests that the lead governor might also lead the council of governors where it is not considered appropriate for the chair or another one of the NEDs to do so. These occasions are likely to be infrequent but one example may be a meeting discussing the appointment of the chair.

The main circumstances where Monitor will contact a lead governor are where Monitor has concerns as to the quality of the board leadership at an FT, which may lead to Monitor's use of its formal powers to remove the chairman or NEDs. As the council of governors appoints the chairman and NEDs, Monitor would want to consult with the governors as to the capacity and capability of these individuals to lead the trust, to rectify successfully any issues, and also for the governors to understand Monitor's concerns.

Monitor suggests that: "The lead governor should take steps to understand Monitor's role, the available guidance and the basis on which Monitor may take regulatory action. The lead governor will then be able to communicate more widely with other governors."

The other situation where Monitor may wish to contact the lead governor is where it has concerns that the process for the appointment of the chairman or other members of the board, or elections for governors, may not have complied with the NHS foundation trust's constitution, or alternatively may be inappropriate.

The existence of a lead governor does not, in itself, prevent any governor from contacting Monitor directly if they feel it is necessary. The term lead governor is used to prevent confusion with the deputy. The lead governor should be chosen by the council of governors and should not deputise for the deputy chair of the board of directors.

(iii) Board meetings in public

The Health and Social Care Act 2012 ('the HSC Act') provides that before holding a meeting, the board of directors must send a copy of the agenda of the meeting to the council of governors and, as soon as practicable after holding a meeting, the board of directors must send a copy of the minutes of the meeting to the council of governors.

The HSC Act also requires that the constitution must provide for meetings of the board of directors to be open to members of the public and that members of the public may be excluded from a meeting for special reasons.

The FT Code B1.8 also requires that the council of governors should have appropriate and effective interaction and relationship with the board of directors, in particular, by agreeing the availability and timely communication of relevant information, discussion and the setting in advance of meeting agendas and use, where possible, of clear, unambiguous language.

Meeting in private with a governor observer does not fulfill the requirements of the HSC Act and there is no evidence of any of the special reasons usually given for the exclusion of the public, for example, publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted.

(iv) Availability of council papers before meetings for consideration of reports

It is a well known principle of effective boards to provide board members with relevant information in advance of the meeting. The UK Corporate Governance Code states that:

"The board should be supplied in a timely manner with information in a form and of a quality sufficient to enable it to discharge its duties."

The Intelligent Board Report states that “every member of the board needs sufficient information at a high enough level to be confident that the organisation is well run, but not so much information that it becomes difficult to tell what is important” and that “good governance is underpinned by intelligent information”.

These principles also apply to council meetings. To enable the council to contribute effectively to council discussions, governors must be provided with relevant information. They should receive relevant documents in advance of a council meeting, so that they have time to read them and think about the issues they deal with.

The chairman of the FT is responsible for leadership of both the board of directors and for the council of governors. The FT Code sets out that it is the chair’s responsibility to ensure that the two boards work together effectively, but that the governors also have a responsibility to make these arrangements work and should take the lead in inviting the chief executive or other board members to their meetings, where they may raise questions about the affairs of the trust with the chair or other board members. The chairman has the responsibility for ensuring that governors receive the information that they need in sufficient time.

(v) Disqualification criteria for governor appointments

It is noted that only six governors had offered themselves for re-election and there may be a variety of reasons for this. Feedback from the retiring governors would be useful in evaluating the profile of the role of the governors and the support they had received during their term of office.

The FT Code states that:

“Elected governors must be subject to re-election by the members of their constituency at regular intervals not exceeding three years. The names of governors submitted for election or re-election should be accompanied by sufficient biographical details and any other relevant information to enable members to take an informed decision on their election. This should include prior performance information such as attendance records at governor meetings and other relevant events organised by the NHS foundation trust for governors.”

Appointed governors may be re-appointed by their organisation for a further three-year period. The maximum term for all members of the council of governors is six years under the FT Code.

The trust’s constitution will set out the criteria for disqualification of governors and it may explicitly prohibit governors of other FTs from standing as governors to prevent conflicts of interest and to protect confidentiality.

Recommendations

- The nomination committee should consider succession planning as soon as possible and a timetable for NED appointments should be established outlining the work of the Governors Appointments Committee.
- The council of governors should consider and appoint a lead governor.
- Trust board meetings should regularly be held in public.
- Council agendas and papers should be circulated in advance of council meetings in accordance with statutory orders.
- The disqualification criteria for governor appointments should be clarified in the trust’s constitution.

2. **Caroline is the company secretary of an FT which was authorised 18 months ago. The last year has been very difficult for the trust, with a significant deterioration in 18 week Referral to Treatment Times. The Care Quality Commission has also recently raised a moderate concern in relation to the management of medicines. Monitor has found the trust to be in significant breach of two of its terms of authorisation: its duty of governance, and its duty of healthcare targets and other standards. The chairman, the CEO and two of the executive directors have been appointed in the last three months.**

The chairman, who was previously the chair of a large multinational plc, has approached lawyers from his previous organisation for advice, as further evidence has emerged regarding the negligent actions of the previous CEO and medical director which led to Monitor's intervention. The chairman has been informed that there are strong grounds for taking legal action against the executive directors who left the trust for negligence and a serious lack of care in the performance of their duties. They have suggested that the board should take action against these board members to recover some of the severance payments that were made at the time of their departure.

The chairman has told Caroline that he is inclined to follow the lawyers' advice and seek to recover some of the severance payments.

Caroline has just received a Freedom of Information request from a national newspaper asking for the details of all severance payments that have been made since the trust became an FT.

Required

(a) Draft a report for the chairman which:

- (i) Sets out the personal liabilities of individual directors and any potential problems which may occur if the trust pursues legal action.**
- (ii) Outlines the processes that are required to agree a severance payment in the NHS.**

(20 marks)

(b) Explain what information Caroline should disclose in respect of the Freedom of Information request.

(5 marks)

(Total: 25 marks)

Suggested answer

(a) Report to the chairman

Background to personal liability

The starting point for considering the liabilities of individual directors is understanding the role of the board and the corporate nature of the FT. The trust is a corporate entity in its own right and takes decisions as such. 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 in s. 265 of the Public Health Act 1875.

There is a degree of protection for directors. Non-executive directors may 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 which 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 which 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.

However, there are circumstances where personal liability can arise which are set out below. From the currently available evidence it would appear that the lawyers are advocating legal action in respect of a director's duty of care and skill to the trust which is covered under 'Claims by the trust'.

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 health and safety legislation, 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. Current proposals introduce an approach that would address the difficulty of convicting the corporation, but would not affect the test for manslaughter.

Civil liability to third parties

Civil liability, which generally relates to the payment of compensation, can arise in either contract or tort. 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.

The more usual risks are for the individual to have a claim in tort made against them, most commonly in relation to either negligence or defamation. Negligence arises where an individual acts without due care towards a person to whom they owe a duty of care, and causes foreseeable loss. 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 relevant functions for directors similar to that available in the commercial market by way of directors' and officers' liability insurance.

Defamation is a potential risk, and while some degree of protection is afforded where public officers are acting honestly and in the course of their business, there are risks if they step outside the strict parameters of the role.

A potential threat is misfeasance in public office, but in practice this is very rare, and requires the establishment of deliberate malice, targeting the individual or a limited class of people who has/have suffered loss.

Claims by the trust

A final area of risk is that of claims by the trust which is the position currently under consideration. 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 and non-executive directors. 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.

Although there are some high profile cases, such as Equitable Life, in practice, claims against the directors for negligently carrying out their duties are rare. However, it does underline the need for directors to use care and skills in carrying out their role. Where a matter is outside their competence, they may want to consider whether they need independent advice.

A further area of claim by the trust would be for breach of fiduciary duty or for repayment of benefits improperly received. This can arise in two main ways. The first is where a director abuses his or her position to make private gain. This could occur where a director arranged for a contract with a company in which he or she had an interest, without declaring the relevant interest. In such circumstances the trust can call for an account of the proceeds.

Secondly, and perhaps more commonly, situations arise where the auditors call into question officers' remuneration or retirement packages. Irrespective of the propriety of the individual's conduct, if the award of an enhanced pension was outside the powers of the trust, or decided upon improperly, it can be clawed back.

Considerations in pursuing legal action

The probability of success in the legal action should be considered. The chairman has been informed that there are strong grounds for legal action, and has been advised by his lawyers to initiate an action. However, the legal advice and opinion is not a 'guarantee' of success and as can be seen above has not factored in all of the provisions within the NHS. Nevertheless, if the board decides to initiate legal action, it must recognise that the trust will incur costs without any certainty of a successful outcome. It may be appropriate to ask for a further legal opinion, from a lawyer who specialises in the relevant aspect of the law.

Even if the legal action was for damages as opposed to the clawback of severance payments, it is doubtful whether the trust would benefit financially. Unless the former directors are very wealthy it is doubtful whether they would have the money or assets to afford any payments to the trust that the court may award. The costs of the legal action may therefore exceed the potential benefits.

The board should also consider the potential effect on the trust's reputation of a legal action against the former directors. Any such legal action would probably be widely publicised in the national media. There may be adverse publicity arising from the past failures and the severance payments made, and the details of the failures and mistakes would emerge in court, and would be reported in the press. On the other hand, failure to take action against the former directors may damage the reputation of the current board, as a body that cannot take 'tough' decisions.

The attitudes of major stakeholders may also be relevant. The board may be more inclined to initiate legal action if stakeholders are demanding it.

Having reached its decision about whether or not to initiate legal action, the board should announce the decision, and the reasons for it. This is a matter in which openness and transparency is advisable, so that the board is seen to have taken a considered and rational decision in the perceived best interests of the trust.

Severance payments

In the NHS, the NHS Finance Controllers Office (in the Department of Health) has produced and published detailed guidance on the process for making severance payments. This guidance states that employers should consider why a severance case represents value for money, before a business case for the payment is produced. Guidance has also been issued by NHS Employers to assist those handling severance payments to senior managers who are generally covered by the Very Senior Managers Pay Framework. It also states that it is good practice to apply this guidance to other employees. The NHS Employers guidance sets out five initial considerations which include whether it is appropriate to terminate the senior manager's employment as severance payments are not to be used as an option to avoid management action, disciplinary processes, unwelcome publicity or reputational damage. The guidance requires any performance or misconduct issues to be resolved by way of capability or disciplinary procedures as appropriate. The overriding factor has to be whether the arrangement is in the public interest and whether the severance payment represents value for money and the best use of public funds. The trust would also have had to consult the strategic health authority or its successor body under the Health and Social Care Act 2012.

If these steps have been taken and the severance payment is in the best interests of the employer and represents value for money, then the guidance requires a proposal be made to the remuneration committee containing the business case for the severance payment. Written advice from the trust's auditors and legal advisors on the proposed business case and severance payment must be made available to the remuneration committee.

All business cases for severance payments must be submitted to the NHS Finance Controllers Office in the Department of Health. The NHS Finance Controllers Office then seeks HM Treasury approval for the business case. FTs must also seek HM Treasury approval, through Monitor, for all severance payments. Consequently, all severance payments made by NHS employers must be approved by HM Treasury. As part of this approval process, HM Treasury applies its own criteria to assess whether severance payments achieve value for money.

(b) Freedom of Information

The Freedom of Information Act 2000 ('the FOI Act') is an Act of Parliament that creates a public 'right of access' to information held by public authorities. The full provisions of the FOI Act came into force on 1 January 2005.

The FOI Act means that public authorities must disclose official information when people ask for it (unless there is a good legal reason not to), and they must reply within 20 working days.

Information in relation to severance payments is accessible to the applicant by other means, therefore the exemption (at section 21) of the FOI Act applies. The information requested can be found in the annual reports which can be accessed from the trust's website.

Information in relation to any pending severance payments is intended for future publication, therefore the exemption (at section 22) of the FOI Act applies. The next annual report is due to be published in September 2013. The information requested will also be available via the annual reports.

Due to issues with data protection for staff in the lower management rungs, they will be identified by department and management tier/level rather than by name.

Information in relation to the name / title / designation / department of individual employees in relation to the receipt of severance pay would, because of the small numbers of individuals concerned, make individuals personally identifiable and is therefore exempt (at Section 40(2)) of the FOI Act, which provides an exemption from disclosing information about identifiable individuals where it would breach the Data Protection Act 1998.

3. Lorna and Jim run a private company in the UK, 'Green Garden Care Homes', that specialises in the provision of residential nursing care for dementia. The company was established about 15 years ago as a property investment company specialising in larger houses, but has moved into the nursing home market because of the motivation of Lorna and Jim to demonstrate that better care for the elderly dementia patient is possible within a constrained budget. They have been married for 30 years and have a son and a daughter. Their daughter, Sarah, is a GP and is a non-executive director on the board of the regional clinical commissioning group. Their son, James, is legally trained and the company secretary of a listed company.

The company's profits have been falling during the last three years, partly because of economic conditions but also because Lorna and Jim have decided to increase the rate of pay for their staff in order to attract the best care staff available.

Lorna and Jim have been talking with James and Sarah about their aspirations for the future and have said that they would be delighted to bring both James and Sarah into their company. They would want James to combine the roles of company lawyer and company secretary on a part-time basis and for Sarah to take on the role of executive chairman, allowing for the day-to-day running of the business to be carried out by a business manager.

Required

- (a) Explain to the family how their future plans would raise conflicts of interest for Sarah as a GP. Advise Sarah on the codes of health service governance that will apply and how she should handle the resulting conflict. (15 marks)
- (b) Outline the possible consequences of the roles of company secretary and company lawyer being combined and the governance issues arising from the appointment of an executive chairman. (10 marks)
- (Total: 25 marks)

Suggested answer

(a) Conflicts of interest

Sarah, as a GP, has several obligations to consider here. Firstly, she as a GP has to declare any conflicts of interest to the GP practice. Secondly, as a board member of the clinical commissioning group (CCG), she would also have to report any conflicts to the CCG as well. If she were to take on a directorship at Green Garden Care Homes then this would be an appointment that she would need to declare to both of her current appointments.

Sarah has a clear duty to avoid conflicts of interest, not to accept benefits from third parties and to declare any interest in a proposed transaction or arrangement. These requirements are very clearly set out in the Business Code of Conduct for NHS organisations. Given the scale and magnitude of the procurement of contracts and services within the NHS, there is clearly a significant need to regulate the behaviour of both the board and NHS staff in regard to managing conflicts of interests.

The NHS Appointment Commission's Code of Conduct and Code of Accountability are quite clear in that NHS boards should act in a way that protects the interest of the NHS in the way they undertake their business. These codes follow the Nolan principles of public life and require the following:

- **Accountability:** Everything done by those who work in the NHS must be able to stand the test of parliamentary scrutiny, public judgements on propriety and professional codes of conduct.
- **Probity:** There should be an absolute standard of honesty in dealing with the assets of the NHS: integrity should be the hallmark of all personal conduct in decisions affecting patients, staff, and suppliers, and in the use of information acquired in the course of NHS duties.
- **Openness:** There should be sufficient transparency about NHS activities to promote confidence between the NHS organisation and its staff, patients and the public.

Sarah's role as a GP and as a board member to the CCG means that she will be subject to all of these values and requirements. It is essential that she conducts herself and the business of the GP practice and the CCG in an open and transparent way that commands public confidence.

Probity would require that both organisations should maintain an up-to-date register of board members' interests. Their agendas should include an opportunity for board members to declare conflicts of interests that may relate to specific agenda items so that they can be managed appropriately.

Interestingly, these duties (as in common law) apply to non-executive as well as to executive directors. The fiduciary duty and the statutory duties of directors are referred to in the UK Corporate Governance Code, which includes a supporting principle that: "All directors are fiduciaries who must act objectively in the best interests of the organisation and in accordance with their statutory duties."

Conflicts arise when the interests of directors, or 'connected persons', are incompatible or in competition with the interests of the trust. Such situations present a risk that directors may make decisions based on these external influences, rather than the best interests of the organisation.

A 'connected person' to a director is defined in s.252 (2) of the Companies Act 2006 as members of the directors' family. Section 253 defines these as:

- (i) A spouse or civil partner; any other person with whom the director lives as a partner in an enduring family relationship, and that partners' children or step-children under 18 years of age.
- (ii) A body corporate with which the director is connected.
- (iii) A person acting in his capacity as a trustee of a trust: the beneficiaries of which include the director or a person who by virtue of (i) or (ii) is connected with him, or the terms of which confer a power on the trustees that may be exercised for the benefit of the director or any such person, other than a trust for the purposes of an employees' share scheme or pension scheme.
- (iv) A person acting in his capacity as a partner: of the director, or of a person who by virtue of (i) to (iii) is connected with that director.
- (v) A firm that is a legal person under the law by which it is governed and in which: the director is a partner; a partner is a person who by virtue of (i) to (iii) is connected with the director, or a partner is a firm in which the director is a partner or in which there is a partner who by virtue of (i), (ii) or (iii) is connected with the director.

The most common types of conflicts of interest include:

- Direct financial interest.
- Indirect financial interest.

- Non-financial or personal interests.
- Conflicts of loyalty.

Sarah would have a financial interest if nursing care home provision had been agreed as being part of the remit of the CCG and she could influence decisions as to which providers should be commissioned by the CCG. Any referrals to nursing homes run by Green Garden Care Homes would result in a financial benefit.

If she was to accept the appointment as executive chairman of Green Garden Care Homes then there may also be a further concern that she may not have enough time to devote to the role because of the large and significant commitments that she has as a GP and to the CCG.

The CCG might also want to consider her independence as a board member. Her appointment to the board of the CCG would not be independent as her opinions are likely to be influenced by a major stakeholder of the CCG. The UK Corporate Governance Code does not suggest that all directors should be independent. Non-independent directors are permissible, although the majority of the total board should consist of independent directors.

(b) Consequences of the roles of company secretary and company lawyer being combined

Lorna and Jim should note that it may be inappropriate to appoint James as both company secretary and company lawyer. Whilst many of the governance duties of a company secretary have a legal aspect or involve compliance with regulations or a voluntary code of governance practice, it could be argued that many of these tasks could be performed better by an in-house lawyer working for the organisation, since corporate lawyers are specialists in company law and regulations.

However, independence is a critical aspect of the governance role of the company secretary. To perform the task effectively, the company secretary needs to be as independent as it is possible for a full-time employee to be.

In their legal work, an in-house lawyer must at times consider the specific interests of the organisation and individual directors, and may be required to advise them on the most appropriate way of dealing with legal issues that arise. In performing this role, the lawyer will often have to 'take sides' to represent a particular interest. This would be inconsistent with the requirement to be independent when advising on governance issues.

It would therefore be inappropriate for James as the company's lawyer to take on the governance that is usually given to the company secretary. An individual who has trained and qualified as a professional lawyer could be a suitable candidate to act as company secretary or take on governance responsibilities within the organisation, but only if two key conditions are applied:

- the qualified lawyer does no legal work for the organisation; and
- the independence of the individual can be protected in the same way as for a company secretary, with the board as a whole responsible for appointing and dismissing them and deciding their remuneration.

As a result, the two roles are different and should not be combined. The company secretary, amongst his other duties, is required to act as the conscience of the company and to advise the company on ethical and governance requirements. A company lawyer is responsible for protecting the legal interests of the company, which could require a different approach to dealing with problems that may arise. These potential conflicts need to be managed, for example, by appointing external legal advisers in certain situations.

Appointment of an executive chairman

There are also difficulties with appointing Sarah as executive chairman. As leader of the executive team and leader of the board of directors, the CEO and chairman are the most powerful positions on a board of directors.

When the same person holds the position of both chairman and CEO, there is a possibility that she could become a dominant influence in decision-making in the organisation. As leader of the executive management team, a chairman-cum-CEO may be reluctant to encourage challenges from non-executive directors about the organisation's performance or to question management proposals about future business strategy.

The UK Corporate Governance Code therefore states that the roles of chairman and CEO should not be performed by the same individual. In addition, the division of responsibilities between the chairman and CEO should be set out clearly in writing, to prevent one of them from encroaching on the area of responsibility of the other.

When an individual holds the positions of chairman and CEO, she could exercise dominant power on the board, unless there are strong individuals on the board, such as a deputy chairman or a senior independent director, to act as a counterweight. If the individual also has a domineering or bullying personality, the situation will be even worse, because a chairman-cum-CEO who acts in a bullying manner will not listen to advice from any board colleagues, and the board would not function as an effective body.

There is even a risk that she could run the organisation for her own personal benefit rather than in the interests of the shareholders and other stakeholders. The only way to prevent a chairman-cum-CEO from dominating an organisation is to have an influential group of directors capable of making their opinions heard. However, it is important to distinguish between:

- the position of 'unfettered power' that is created when the roles of chairman and CEO are combined and given to one individual; and
- acting in a dominant or tyrannical way, possibly out of self-interest.

Combining the two roles increases the risk that the organisation and its board will be dominated by a tyrannical individual, but this does not happen every time.

4. Haven Community Services NHS Trust ('Haven') was created from the merger of the community provider arm of the previous local Primary Care Trust (PCT) and a smaller mental health provider that had previously delivered mental health services for the area of Haven and the outlying villages. The new trust now covers a much larger geographical area which includes three borough councils, five clinical commissioning groups (awaiting authorisation from the National Commissioning Board) and a university which provides degree level qualifications in health and social care. The trust is an aspirant trust in the FT pipeline and is regulated by the Care Quality Commission.

Required

- (a) Highlight the relevance of the enlightened shareholder and stakeholder theories of governance for the NHS. (15 marks)
- (b) Outline a possible governance structure for the council of governors that would offer fair representation. (5 marks)
- (c) Explain the possible consequences of poor health service governance for Haven. (5 marks)

(Total: 25 marks)

Suggested answer

(a) Enlightened shareholder and stakeholder theories of governance

A stakeholder in an organisation is someone who has an interest or 'stake' in it, and is affected by what the organisation does. A stakeholder, in turn, has an influence on what the organisation does. Each stakeholder or stakeholder group may expect the organisation to behave or act in a particular way with regard to the stakeholders' interests. A stakeholder can also expect to have some say in some of the decisions an organisation makes and some of the actions it takes. The balance of power between different stakeholder groups, and the way in which that power is exercised, are key issues in governance.

One of the major distinctions between health service governance and corporate governance is that a public company has a number of different stakeholder groups, which can be divided into financial stakeholders, and other stakeholders. In public companies, the main focus of their attention will be on meeting the expectations of their financial stakeholders. While an NHS organisation has a wide number of stakeholders, only a small minority will have a purely financial interest. This minority is likely to be banks or lenders who have supplied funding for capital projects such as Private Finance Initiative schemes.

Traditionally, it has been assumed that the objective of public companies is the maximisation of shareholder wealth and that governance is concerned with the principal-agent relationship between the board of directors and shareholders. Corporate governance is restricted by company law which underpins the primary role of shareholders as key stakeholders.

By recognising the variety and complexity of stakeholders within the NHS, it is clear that the traditional shareholder approach to governance is inappropriate for NHS organisations. Good health service governance requires an understanding of an enlightened shareholder approach or a stakeholder approach to governance.

Stakeholder theory

Stakeholder theory takes the view that the purpose of governance should be to satisfy, as far as possible, the objectives of all key stakeholders – employees, investors, major suppliers and

creditors, customers, the government, local communities and the general public. The board of directors should therefore consider the interests of all the major stakeholders. However, some stakeholders are more important than others, so management should give priority to their interests above the interests of other stakeholder groups.

Stakeholder theory states that the organisation's managers should make decisions that take into consideration the interests of all the stakeholders. This means trying to achieve a range of different objectives, not just the aim of maximising the value of the organisation for its shareholders. This is because different stakeholders each have their own (different) expectations of the organisation, which the organisation's management should attempt to satisfy.

Stakeholder theory also considers the role of organisations in society, and the responsibility that they should have towards society as a whole. It could be argued that some organisations are so large, and their influence on society so strong, that they should be accountable to the public for what they do.

From a 'stakeholder view', governance is concerned with achieving a balance between economic and social goals and between individual and communal goals. Sound governance should recognise the economic imperatives organisations face in competitive markets and should encourage the efficient use of resources through sound investment. It should also require accountability from the board of directors to the shareholders for the stewardship of those resources. Within this framework, the aim should be to recognise the interests of other individuals, companies and society at large in the decisions and activities of the organisation.

This approach is also limited in its application to health service governance as the concept of competitive markets is limited within the NHS and, whilst there is an increasing emphasis on a market economy with healthcare, this is still limited in reality. The concept of individual goals for stakeholders is also tempered by the overriding objective of the NHS to provide health care at the point of need for all.

A further distinction for health service governance is that the rights of other stakeholders such as employees, suppliers and the general public, although not well protected by company law, are protected by health law (for example, the Freedom of Information Act and NHS Constitution) as well as other aspects of law such as employment law, health and safety legislation, and environmental law.

Enlightened shareholder approach

The enlightened shareholder approach to corporate governance is that the directors of an organisation should pursue the interests of their shareholders, but in an enlightened and inclusive way. It is a form of compromise between the agency view and the stakeholder view. The directors should look to the long term, not just the short term, and they should also have regard to the interests of other stakeholders in the organisation, not just the shareholders. Managers should be aware of the need to create and maintain productive relationships with a range of stakeholders having an interest in their organisation.

A criticism of the enlightened shareholder view is that most shareholders do not fit the image of enlightened investors. Most shares in public companies are owned by institutional investors, who themselves may be relatively unaccountable to their beneficiaries. When companies become a target for a takeover bid, speculative investors such as hedge funds may acquire large but short-term shareholdings, with a view to making a quick profit from their investment.

This approach is of greater application to health service governance as it does address the need to balance the competing needs of the different stakeholders. However, its limitation is in its lack of clarity on how to balance the diverse and/or differing stakeholder interests. This is still largely a shareholder driven approach to governance and is limited in its application to health service governance.

Alternatively, trusts may have a stakeholder approach to health service governance. With a stakeholder approach, the board of directors recognises the interests and expectations of a number of different stakeholder groups, and pursues policies that attempt as far as possible to satisfy these differing (and often conflicting) expectations.

(b) Governance structure for the council of governors

The basic governance structure of all NHS FTs includes:

- the membership;
- the council of governors; and
- the board of directors.

FTs are allowed some local flexibility over the size and composition of their council of governors. However, every board must have:

- Public Governors: A majority of governors elected by members in the public constituency.
- Staff Governors: At least three governors representing staff.
- Appointed Governors: At least one governor representing local NHS primary care trusts or their successor body (for example, CCGs), plus at least one governor representing local authorities in the area, plus at least one governor appointed from the local university (if the trust's hospitals include a medical or dental school).
- A chair.

Note: These criteria reflect the content of the National Health Service Act 2006 applicable at the time of writing.

The council of governors is made up of elected governors and appointed governors. Elected governors are those members elected by the membership to represent the staff, patient (where chosen) and public constituencies that make up the membership of an FT. The appointed governors are the representatives from certain key stakeholders, such as CCGs that commission services from the NHS FT, and a local authority – they are appointed to the council of governors to represent those stakeholder groups.

A possible governance structure could be:

- Public Governors: 16
- Staff Governors: 5
- Appointed Governors: 3 MBC, 5 CCG, 1 University, 1 Voluntary sector

This would allow all the major stakeholders to be represented at the council of governors and would allow for the elected public governors to be in the majority as required by the Model Constitution.

(c) Consequences of poor health service governance for Haven

NHS organisations are encouraged to go through a process each year in relation to governance and whilst they can satisfactorily complete this process, it does not necessarily mean the organisation will be good at governance or that it will prevent problems from occurring.

As a result, the importance of good governance is often only highlighted in circumstances where an organisation has failed or is in crisis. It tends to be seen in organisations where the separation between stakeholder interests and management is wider. This is a significant risk for NHS organisations. For example, government spending on health care for 2011/12 is approximately £106 billion and yet the recipients of the healthcare provided are often very distant from the holders of the healthcare budget. Health service governance in NHS organisations therefore must be resilient enough to hold NHS organisations to account for the

responsibility of managing this expenditure. The separation between NHS stakeholders and Parliament is vast and it is only through the health service governance regimes of the individual parts of the NHS that NHS stakeholders can exercise the relatively limited powers they have to hold the boards of directors to account.

Whilst poor governance within the NHS may not lead to its complete disappearance, it will lead to the continual pressure to move towards greater centralisation of control by the government. Political opinions will differ as to whether this is in the best interests of the recipients of a publicly funded healthcare system. Similarly, lessons in good practice have generally resulted from misconduct and poor decision making and it is the reputation of the NHS that suffers as a consequence.

Briefly, however, aspects of poor governance include:

- A board of directors that fails to perform its duties properly, perhaps because it is dominated by one or more individuals, or because it fails to carry out the tasks that it is supposed to.
- A poor relationship between the board and the main stakeholders.
- Failure to deliver the appropriate returns or services required by either statute or by regulators.
- Ineffective systems of risk management, and exposure to errors and fraud due to inadequate internal control systems.
- Inappropriate remuneration and reward systems for directors and senior executives.
- Unethical business practices.

5. Fred suffers from mental health issues and has been admitted as an inpatient in a mental health hospital five times between 2001 and 2011. In some of these instances he was detained for treatment against his will. These are some of his experiences:

“The ward I was on was in a converted nurses’ home and totally unsuitable for its purpose, offering very little space for activities and few places to meet visitors or socialise with other patients.”

“The very worst was the total reliance on medicine and the expectation of unquestioning compliance with this, regardless of the unpleasant side-effects – accompanied by a complete lack of curiosity as to why I might be consistently refusing most of my medicine and whether there might be things going on in my life that were triggering my repeated relapses. This was particularly surprising as I had been well for 21 years prior to this period.”

“The ward housed 18 older people with hugely diverse problems; some were bed-ridden and some doubly incontinent, while the ward only had two bathrooms and one shower, and the washbasins were virtually useless for hygiene purposes as the plugs had all been removed and the water never ran hot.”

“Tribunals were also difficult. On one occasion, the social work report was prepared by someone who had only met and interviewed me the day before. His report was full of inaccuracies and I was very distressed that I was not allowed to challenge it when it was read out, as I had had no chance to discuss it with my solicitor.”

Required

- (a) Outline the nature and scope of the NHS Constitution. (10 marks)
- (b) Explain what breaches of Fred’s constitutional rights have taken place. (10 marks)
- (c) What avenues of redress would Fred have under the NHS Constitution? (5 marks)
- (Total: 25 marks)*

Suggested answer

(a) The nature and scope of the NHS Constitution

The NHS Constitution for England is a formal constitution which, in one document, lays down the objectives of the NHS, the rights and responsibilities of the various parties involved in health care in England (patients, staff, trust boards), and the guiding principles which govern the service.

The NHS Constitution was first published on 21 January 2009 and was one of a number of recommendations in Lord Darzi’s report ‘High Quality Care for All’ which provided a ten-year plan to provide the highest quality of care and service for patients in England.

Previously, these rights and responsibilities had evolved in common law or through UK or EU law, or were policy pledges by the NHS and government. They have now been written into the NHS Constitution and from 19 January 2010, following the successful passage of the Health Act 2009 through Parliament, all providers and commissioners of NHS care are under a new legal obligation to have regard to the NHS Constitution in all their decisions and actions.

The NHS Constitution is a concise document that is written in an accessible form and is simple

to understand. Alongside the NHS Constitution is a handbook which gives more information to patients and staff about the NHS Constitution and a statement of NHS accountability which gives a clear account of the NHS system of accountability and responsibility.

The NHS Constitution grants patients 'rights' which are intended to be legally enforceable and also makes other non-binding 'pledges'. These are in the areas of access; quality of care and environment; access to treatments, medicines and screening programmes; respect, consent and confidentiality; informed choice; patient involvement in healthcare and public involvement in the NHS; and complaints and redress.

The NHS Constitution will be renewed every 10 years, with the involvement of the public, patients and staff. The Handbook to the NHS Constitution will be renewed at least every three years, setting out current guidance on the rights, pledges, duties and responsibilities established by the NHS Constitution. An updated version of the NHS Constitution was issued in March 2012. These requirements for renewal are legally binding and guarantee that the principles and values which underpin the NHS are subject to regular review and recommitment; and that any government which seeks to alter the principles or values of the NHS, or the rights, pledges, duties and responsibilities set out in the NHS Constitution, has to engage in a full and transparent debate with the public, patients and staff.

The NHS Constitution provides an overriding strategy that is then underpinned at a local level by each NHS organisation as it actively considers its own specific local strategy.

(b) Constitutional rights

As noted above, the NHS Constitution grants patients 'rights' which are intended to be legally enforceable and also makes other non-binding 'pledges'. These are set out in five key areas. The areas that would have been breached in Fred's care and treatment are as follows:

Quality of care and environment

The quality and environment offered on the ward would not have been at the standard expected by this part of the NHS Constitution. The lack of meeting space and social activities would not have been at the required levels of safety and quality. The age of the property and the lack of proper sanitation raises questions on the level of cleanliness and safety that was provided. Fred was entitled to receive treatment with a professional standard of care, by appropriately qualified and experienced staff, in an organisation that meets required levels of safety and quality. He can expect NHS organisations to monitor, and make efforts to improve, the quality of healthcare they commission or provide.

Respect, consent and confidentiality

The NHS Constitution sets out that Fred should have expected to be treated with dignity and respect and that he should have been able to accept or refuse treatment that is offered, and not to be given any examination or treatment without valid consent. He had good reason for refusing to take his medication and it seems that little effort was made to explore his reasons why. Fred was also entitled to be given information about his proposed treatment in advance, including any significant risks and any alternative treatments which may be available, and the risks involved in doing nothing.

Informed choice

There is no evidence that Fred was offered any information about other healthcare services available locally and nationally, that might have been of help to him. Whilst this is not a right under the NHS Constitution, it is one of the pledges that are included. There is a further pledge that Fred should have been offered easily accessible, reliable and relevant information to enable him to participate fully in his own healthcare decisions and to support him in making choices. This includes information on the quality of clinical services where there is robust and accurate

information available.

Involvement in one's own health care and in the NHS

Under the NHS Constitution, Fred is entitled to be involved in discussions and decisions about his own health care, and to be given information to enable him to do this. He should be involved, directly or through representatives, in the planning of health care services, the development and consideration of proposals for changes in the way those services are provided, and in decisions to be made affecting the operation of those services.

(c) Rights of redress

Under the NHS Constitution, when complaining or seeking redress, Fred is given the right to:

- Have any complaint made about NHS services dealt with efficiently and to have it properly investigated.
- Know the outcome of any investigation into a complaint.
- Take a complaint to the independent Health Service Ombudsman if he is not satisfied with the way his complaint was dealt with by the NHS.
- Make a claim for judicial review if he thinks he has been directly affected by an unlawful act or decision of an NHS body.
- Compensation where he has been harmed by negligent treatment.

The NHS also makes pledges:

- To ensure patients are treated with courtesy and receive appropriate support throughout the handling of a complaint, and the fact that they have made a complaint will not adversely affect their future treatment.
- That when mistakes happen, the NHS promises to acknowledge them, apologise, explain what went wrong and put things right quickly and effectively.
- That the organisation will learn lessons from complaints and will use them to improve NHS services.

6. You are a self-employed health service governance consultant. You have been asked by the chairman of Three Chairs Community Healthcare NHS Trust ('the trust') to advise him on the processes that are available to evaluate the individual performance of trust board members. The trust has a chair, five other non-executive directors (NEDs), a CEO and four other executive directors. The chairman is particularly concerned about the performance of the finance director, as the trust has not managed to control its bank and agency spend over the last nine months. The board previously took a decision to cap the level of such expenditure as a result of advice given by the finance director.

The chairman wants to evaluate the performance of both executive directors and NEDs, manage any performance improvements that might be required and publicise the outcomes of his evaluation in the interests of openness and transparency within the NHS.

Required

Write a briefing note for the chairman, addressing the following issues:

- (a) The role of the unitary board in light of the chairman's concerns about the finance director. (7 marks)
- (b) The role of the chairman and the CEO in performance evaluation. (5 marks)
- (c) How the performance of board members can be evaluated and published. (13 marks)
- (Total: 25 marks)*

Suggested answer

Briefing note – Unitary board and performance evaluation

(a) The unitary board

As a starting point, it is important to recognise the difference between the governance of any organisation and its management. Powers to manage the affairs of an NHS Trust are given to the board of directors, but most of these powers are delegated to the CEO and are delegated further to executive directors and executive managers. The board of directors retains some powers and responsibilities, and certain matters have been reserved for board decision-making rather than delegated to the management team.

The board of directors is responsible for monitoring the performance of the management team. However, the board of directors itself is not responsible for day-to-day management of the trust. It is instead responsible for governing the organisation. Responsibilities for governance go beyond management, and governance should not be confused with management. When a senior executive manager is 'promoted' to the board, he or she may consider the position of an executive director to be a recognition of their senior executive position, however, their promotion to the board creates new responsibilities for governance that are not related to management. The executive director needs to think as a member of the board, rather than as a senior executive, in performing his duties as a director.

This concept is known as the unitary board, where there is an effective single board which is collectively responsible for controlling the organisation or company, with no one individual having unfettered powers of decision making. When an executive director becomes a board member, they are part of that collective responsibility for ensuring the achievement of corporate aims and objectives and must not solely contribute to discussions and decisions considering their particular executive function.

The board of directors is given authority to act on behalf of the trust, and it should accept full responsibility for the powers that it is given and the authority that it exercises. A board of directors should understand what its responsibilities are, and should carry them out to the best of its abilities.

Accountability goes hand in hand with responsibility and the board of directors is accountable to the trust's stakeholders for the way in which it has carried out its responsibilities. Similarly, executive management should be responsible for the exercise of powers delegated to them by the board of directors, and should be made accountable to the board for their achievements and performance.

According to the Department of Health, an NHS trust board has six key functions, for which it is held accountable by the Department on behalf of the Secretary of State. These are:

- (i) To ensure effective financial stewardship through value for money, financial control and financial planning and strategy.
- (ii) To ensure that high standards of corporate governance and personal behaviour are maintained in the conduct of the business of the whole organisation.
- (iii) To appoint, appraise and remunerate senior executives.
- (iv) To ratify the strategic direction of the organisation within the overall policies and priorities of the Government and NHS, define its annual and longer term objectives and agree plans to achieve them.
- (v) To oversee the delivery of planned results by monitoring performance against objectives and ensuring corrective action is taken where necessary.
- (vi) To ensure effective dialogue between the organisation and local community on its plans and performance, and that these are responsive to the communities' needs.

The Healthy NHS Board states that "in unitary NHS boards, all directors are collectively and corporately accountable for organisational performance. A key strength of unitary boards is the opportunity provided for the exchange of views between executives and non-executives, drawing on and pooling their experiences and capabilities."

The dangers of not being a unitary board were reinforced by the Integrated Governance Handbook in 2006: "To date, NHS Boards have performed in a diverse manner by separating out the roles of the various directors, i.e. finance, medical, nursing etc, and the non-executive director/lay individual input. The result of this is that, if the Board takes a decision, it is often deemed to be the decision of, say, the finance director or HR director, rather than being a corporate decision. Board corporacy is paramount. Each decision or agreement entered into in the boardroom is a fully accepted corporate decision. If a decision around finance is taken and the information brought to the Board clarifies the debate, if there are implications say, one month after the decision, the responsibility is of the corporate whole, rather than just the finance director."

(b) The role of the chairman and CEO

In the context of the unitary board, it is therefore important to consider the different roles played by the chairman and the CEO. The chairman is the leader of the board and the CEO is the leader of the executive management team.

The chairman's responsibilities relate primarily to managing the board of directors, and ensuring that the board functions effectively. To do this, he needs to ensure that the board discusses relevant issues in sufficient depth, with all the information needed to reach a decision, and with all the directors contributing to the discussions and decision-making.

By way of contrast, the CEO leads the executive team, is responsible for the executive management of the organisation's operations and is the senior executive in charge of the management team and to whom all other executive managers report. Other executive managers

might also be directors of the organisation, but the CEO is answerable to the board for the way the business is run and its performance.

From this it can be seen that there are clear distinctions to be made for performance management. The chairman, who is responsible for the board, will review the performance of the board and its individual members. The board is responsible for the performance of the CEO. The CEO is responsible for the performance of the executive team.

(c) Performance evaluation and publication

The NHS Appointments Commission has an established evaluation system in place for NHS trusts, whereby it sets out the key principles and minimum standards for a performance and development review process (appraisal) for chairs and NEDs. It provides a framework for:

- Holding all chairs and NEDs to account for their performance.
- Setting appropriate objectives, consistent with the chair or NED role.
- Identifying learning and development needs.
- Supporting succession planning and the management of the NED talent pool.
- Ensuring the process is proportionate to the chair/NED role, i.e. appropriate to the nature of the role and the size/weight of responsibilities.

Key principles

There should be, as a minimum, an annual performance and development review meeting for the chair and each NED throughout the term of their appointment. This could be supplemented by interim review(s), where necessary and appropriate.

Individuals should be made aware, on appointment, that they will be appraised, the standards against which they will be appraised, and that they have an opportunity to contribute to and approve their reports.

The annual performance and development review meeting should be clearly recognised as such by the individual, i.e. it should not be an informal 'coffee shop' conversation or an 'add-on' to a different conversation.

Performance reviews should be evidence-based with relevant examples for conclusions drawn. Objectives for the chair/NED should reflect a link to the key objectives of the organisation, where possible.

For an independent NED, key questions for evaluation include the following:

- How many board meetings has the director attended, and how many times has he been absent?
- How well prepared has the individual been for meetings, for example, has he read the relevant papers in advance?
- What has been the quality of contributions of the individual to board meetings, for example, on strategic development and risk management?
- Has the individual shown independence of character, or has he tended to go along with the opinions of certain other board members?
- How many board committee meetings has the director attended and how many has he missed?
- What has the individual contributed to committee meetings?
- Has the time commitment of the director been sufficient? Has the time commitment been as much as expected, or as much as stated in the director terms of appointment?
- Does the NED continue to show interest in and enthusiasm for the organisation?
- Are there reasons why the director may no longer be considered independent?
- Does the director communicate well with the other directors and with senior executives of the organisation?

One approach is for the chairman to carry out the reviews personally, possibly with advice and assistance from the company secretary. Alternatively, the chairman may be responsible for deciding on the process that should be used for the performance review, and should act on the findings of the review, but may hand the responsibility for conducting the review to the senior independent director. Organisations may also use the services of specialist external consultants.

This is underpinned as good governance by the requirements of the UK Corporate Governance Code, which established in 2003 a requirement for company directors to undergo formal performance appraisals each year.

The UK Corporate Governance Code states as a main principle that the board should undertake a “formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.”

The performance of the board as a whole and the performance of individual directors are usually carried out separately but may be combined into an overall annual review.

Executive directors will normally undergo a formal annual appraisal by the CEO. This should take into account their performance as a member of the unitary board and the chairman may be asked for feedback in terms of their individual performance at board level. In the main, however, their appraisal will focus on their performance as members of the executive team. The outcome of the evaluation process would be considered by the board’s nominations committee via a report made by the CEO.

The chairman would be responsible for evaluating the performance of the CEO and should also make his report to the nomination committee (for the purposes of succession planning) and the remuneration committee for consideration.

Evaluation of individual board directors should aim to show whether each director:

- continues to contribute effectively; and
- continues to demonstrate commitment to the role (for example, in terms of time spent in carrying out the director’s duties, attendance at board and committee meetings, and on other duties).

The evaluation of performance is probably particularly important for NEDs. Executive directors commit all or most of their time to the organisation and should be fully familiar with the business and the organisation’s operations. In contrast, NEDs spend only a part of their time with the organisation, even though they make up the membership of key board committees – the audit and remuneration committees in particular. There is a possibility that NEDs will lose some of their enthusiasm for the organisation, and may get into a habit of missing meetings and not spending as much time with the organisation as expected.

Publication of evaluation

All performance reviews must be formally recorded. This is a requirement of the Office of the Commissioner of Public Appointments and is also vital in the event of any complaint requiring investigation. Evidence that a review has taken place and details of the performance assessment made must be recorded and sent to the Appointments Commission on completion of the review meeting.

The UK Corporate Governance Code requires that organisations should state in their annual report how the performance evaluation of the board, its committees and individual directors has been carried out.

There is no requirement on Haven to actually publish the findings of the board evaluation but best practice in governance would suggest that Haven should make a similar statement in line with the UK Corporate Governance Code in its annual report

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.