Trust through governance

Suggested answers and examiner's comments

Health Service Governance

June 2015

Important notice

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

Examiner's general comments

This was a good cohort of scripts, with a number of candidates providing very good answers. The best performing candidates demonstrated a good understanding of the issues and gave detailed and well-structured answers to the questions posed. They used good practical examples of the points being made and showed a practical application of governance principles in their answers.

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

The scripts which did not perform well largely did so as a result of not answering all four questions required or answering them with insufficient detail. They also lacked structure and knowledge of the detail contained within the study material for the course.

1 A number of CCGs have created a network forum for governance practitioners. As an experienced company secretary, you have been asked to give a presentation on the role of the company secretary or governing body secretary for CCGs. Two of the CCGs within the region utilise the services of their appointed law firms to provide this function and you have also been asked to address this approach.

Required

Set out your presentation notes on the role of the 'company secretary' or 'governing body secretary', making sure to include:

(a) How the role has developed within the NHS, the key governance responsibilities and appointment and remuneration issues, including any issues around lines of accountability.

(20 marks)

Suggested answer

This presentation sets out how the company secretary role has developed within the NHS, the key governance responsibilities of the role, the appointment and remuneration issues (including any issues around lines of accountability) and the potential conflicts raised by this role being fulfilled by law firms.

The company secretary is in a unique position to fulfill an important role in governance. In general, the chief purpose is to know what is going on at governing body level in the organisation and to offer advice and assistance, not only to the chairman but also to the governing body as a whole, its committees and individual directors. A key aspect of the role is communication and the vital exchange of information; the company secretary is able to help ensure that this happens.

Development of the role

The Integrated Governance Handbook (2006) attempted to establish this new role within the NHS and the authors had discussions with a number of FTSE 100 companies to look at the role of the company secretary, exploring, more importantly, whether these companies could exist without such an adviser. The evidence clearly pointed to the need for such integrated corporate support. FTs are already appointing such individuals and guidance is included in the FT Code of Governance. The significance of the role is to ensure that the governing body can confidently assure itself that at the end of the 12-month cycle it has full evidence and is fully appraised before signing off the annual governance statement.

The specific responsibilities of a company secretary for governance matters should be decided by the organisation and set out in a clear job description. The 'ICSA Guidance Note' provides helpful advice on the main responsibilities relating to corporate governance for an FT company secretary which could be of some assistance in drawing up a job description for a similar role in a CCG. Similar guidance can be found in the UK Corporate Governance Code, which applies to the private sector.

Key governance responsibilities

The company secretary is "responsible for advising the board through the chairman on all governance matters" and all "directors should have access to the advice and services of the company secretary" (UK Corporate Governance Code).

Aspects of the role which are set out by the FT Code of Governance, could be applied to a CCG as follows:

- ensure good information flows within the governing body and its committees and between senior management, non-executive directors and key stakeholders;
- ensure that board procedures of the governing body are complied with;
- advise the governing body on all governance matters; and

- be available to give advice and support to individual directors, particularly in relation to the induction of new directors and assistance with professional development.

Key functions of the role which are set out by the ICSA Guidance Note could be applied as follows:

- managing governing body composition and procedures;
- matters reserved for the governing body;
- constitution and membership of committees of the governing body to comply with good health service governance;
- scheduling meetings of the governing body and its committees, and help to set agendas;
- ensuring that appropriate directors' and officers' liability insurance is available for the directors;
- providing assistance with succession planning by the governing body and overseeing the rotation of members to ensure independence and regular refreshing of the governing body;
- contributing to the flow of information between the governing body and its committees, and between the governing body and executive management;
- development of governing body members and assisting with performance evaluations of the governing body, its committees and members;
- ensuring that the remuneration committee is familiar with the guidelines on remuneration;
- ensuring that the audit committee is familiar with guidelines on internal control in line with the Healthcare Financial Management Association (HFMA) Audit Committee Handbook and advise the governing body and its audit committee on their application;
- ensuring that the trust's whistleblowing procedures are implemented, and monitor their effectiveness.
- ensuring compliance with all the statutory and regulatory requirements relating to governance; and
- ensuring proper disclosures of information, for example, disclosures to NHS England.

For CCGs, the company secretary will also play a crucial role in maintaining the Register of Interests, providing support to governing body members on managing the competing interests that can arise for such members and advising the chair and managing director accordingly.

Appointment and remuneration issues

The role of the company secretary in governance is such that it is essential to ensure his or her independence from undue influence and pressure from a senior board member. An ICSA guidance note, 'Reporting Lines for the Company Secretary' comments:

> "Boards of directors have a right to expect the company secretary to give impartial advice and to act in the best interests of the company. However, it is incumbent on boards of directors to ensure that company secretaries are in a position to do so, for example by ensuring that they are not subject to undue influence of one or more of the board of directors. If the board fails to protect the integrity of the company secretary's position, one of the most effective in-built internal controls available to the company is likely to be seriously undermined. The establishment of appropriate reporting lines for the company secretary will normally be a crucial factor in establishing that protection."

The ICSA guidelines recommend that:

- In matters relating to their duties as an officer of the organisation, the company secretary should, through the chairman, be accountable to the board as a whole.
- If the company secretary has additional executive responsibilities to their core role, they should report to the CEO or appropriate executive director on such matters.
- The company secretary's remuneration should be set (or at least noted) by the board as a whole, or by the remuneration committee of the board on the recommendation of the chairman or CEO (this is in accordance with the FRC Guidance on Board Effectiveness).

The UK Corporate Governance Code clarifies this further by recommending that the appointment and removal of the company secretary would be a matter for the board as a whole. This is re-

interpreted by the FT Code of Governance in its recommendation that the role is a joint appointment by the chief executive and chairman.

The Integrated Governance Handbook is also concerned to establish the independence of the company secretary and, in addition to the above, also recommended that:

- The company secretary will be actively involved in or be a member of the executive team to ensure a full understanding of the organisation's business.
- The company secretary will not undertake executive activity in respect of having a specific role, but will be the neutral observer and adviser to the board or executive team.
- An NHS-based company secretary should have sufficient knowledge of the NHS to gain the respect of the doctors in the organisation but need not necessarily be a clinician.
- The company secretary should be appropriately qualified to carry out his or her role and should ideally be accredited by a professional body such as the ICSA.

Maintaining the distinction in reporting lines for governance responsibilities and any additional executive management responsibilities does not provide the company secretary with security of tenure or exempt them from performance management, but it does ensure that on key governance matters they are not accountable only to the executive directors. In CCGs, consideration to this requirement of independence should be taken into account. The chair of the CCG and the managing director need to be clear about how the role will report to them both and the lay member for governance could be involved for additional rigour to ensure that their independence is not jeapordised. The CCG's remuneration committee could consider the appointment and remuneration aspects as well.

(b) The potential conflicts raised by this role being fulfilled by law firms.

(5 marks)

Suggested answer

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 is clear that a CCG's legal advisers could perform many of the tasks set out above and add further value from their understanding of managing risk and the complexities of the law. However, what they will be lacking is the insight of the workings of the specific CCG, which are gained by the company secretary being part of the executive management. A conflict may arise where the law firm is instructed to act on a particular governance issue by the managing director and they would end up having to 'take sides' to represent the particular interest raised by the managing director. This would be inconsistent with the requirement to be independent when advising on governance issues. One way to address this would be to ensure that advice on all governance issues is instructed by and given to the chair.

Examiner's comments

This was the most popular question, which a majority of candidates provided very good answers for. These answers demonstrated a good understanding of the role in the corporate sector and accurately explained how the role had developed within health service governance. They also gave clear explanations of the breadth of responsibilities and the key requirements in respect of the appointment and remuneration of company secretaries. This was not a question about the role of the appointment or remuneration committee. Nor was it a question that related to an FT and some candidates set out their answer on the basis of a FT.

2 Harrington NHS Trust ('Harrington') has been discussing the risks faced by the trust as a small district general hospital. It is planning a board development session next month, which will look at this in further detail.

Required

The chair has asked you as the trust secretary to draft a briefing note, in which you:

(a) Describe each of the following risks in the health sector, giving examples of each:

- business risk;
- internal control risk;
- operational risk;
- clinical risk; and
- non-clinical risk.

(16 marks)

Suggested answer

Briefing note to the board of Harrington

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

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

Business risk can therefore be categorised or identified by considering the following sources of risk:

- Reputation risks.
- Competition risks.
- Business environment risks.
- Financial risks.
- Liquidity risks.
- Strategic risks.

Internal control risks are risks that arise because of weaknesses in the trusts' systems, procedures, management or personnel that are in place within the trust. These are risks that the trust has within its control and needs to have a comprehensive system in place to manage. Unless there are controls to deal with them, internal control risks can lead to losses because of operational failures, errors or fraud. The controls for these risks are 'internal controls' and internal controls are applied within an internal control system.

Operational risk is all about the day to day running of the trust and the risk that operational failures will impact detrimentally on the trust's ability to deliver its business strategy. Such risks might include:

- Lack of innovation.
- Lack of investment in research and development.
- Failing capital equipment or plant.
- Failing to set and manage cost budgets.
- Employee relations difficulties.
- Low senior management capability.
- High sickness absence levels and poor staff retention.
- Lack of ongoing professional development and staff training.
- Failure to work collaboratively with the local health economy.

Healthcare itself is inherently risky and although it would be impossible to eradicate all harm, there are many activities and actions that can be introduced that will minimise opportunities for errors. Clinical risk, therefore, considers patient safety and risk at both the organisational and the practitioner level. A clinical risk is the chance of an adverse outcome resulting from clinical investigation, treatment or patient care. Clinical risk management is specifically concerned with improving the quality and safety of healthcare services by identifying the circumstances and opportunities that put patients at risk of harm and then acting to prevent or control those risks. Inherent clinical risk is the permanent or currently unavoidable clinical risk that is associated with a particular clinical investigation or treatment. It is the risk from undergoing a particular procedure in ideal conditions and performed by the best staff using the most up-to-date research, equipment and techniques. The inherent clinical risk can be considered permanent or currently unavoidable when used for the purpose of risk assessment. The risk that should be targeted by clinical risk assessment is the risk that is added to the inherent risk and results from, for example, a poor safety culture, poor communication and teamwork, inadequate supervision of inexperienced staff, unreliable equipment or an unsuitable environment.

Non-clinical risks include:

- Health and Safety.
- Breaches of legislation, for example, the Data Protection Act and Human Rights Act.
- Fire.
- Security.
- Manual handling.
- Slips, trips and falls.
- Stress.
- Lone working.
- Major incidents.

Non-clinical risks are closely linked with operational risks, however, it must be remembered that both operational risks and non-clinical risks can still have an impact of the safety and quality of patient care.

Whilst delineation in this way can be helpful, it should be remembered that many of these risks are interlinked in practice. For example, a failure to carry out routine theatre maintenance (operational risk) which was not picked up by the estate team's maintenance checklist (internal control risk) led to the closure of three operating theatres, thus impacting on patient appointments (clinical risk), thus impacting on national performance targets, thus damaging the reputation of the trust (business risk).

(b) Explain the board's responsibilities for risk management and, in particular, explain the impact of the *Financial Reporting Council (FRC) Guidance on Risk Management, Internal Control and Related Financial and Business Reporting (2014)* on evaluating the effectiveness of the Harrington risk management and internal control systems.

(9 marks)

Suggested answer

Effective development and delivery of Harrington's strategic objectives as a small district general hospital, its ability to seize new opportunities and its ability to ensure its longer term survival depend upon its identification, understanding of, and response to, the risks it faces. The board has ultimate responsibility for risk management and internal control, including for the determination of the nature and extent of the principal risks it is willing to take to achieve its strategic objectives and for ensuring that an appropriate culture has been embedded throughout the trust.

The assessment of risks as part of the normal business planning process should support better decision-taking, ensure that the board and management respond promptly to risks when they arise, and ensure that the NHS Trust Development Authority (TDA), local health economy partners, patients, staff and the public are well informed about the principal risks and prospects of the trust. Under the 2014 FRC guidance, a principal risk is defined as a risk or combination of risks that can seriously affect the performance, future prospects or reputation of the entity. These should include those risks that would threaten its business model, future performance, solvency or liquidity. It should be noted that whilst it is hoped that the FRC guidance will be utilised by other entities, it is primarily directed to companies subject to the UK Corporate Governance Code. It applies to such companies for accounting periods beginning on or after 1 October 2014. At present, therefore, it is only suggestive of best practice for the NHS.

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

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

The board should also establish the tone for risk management and internal control and put in place appropriate systems to enable it to meet its responsibilities effectively. The FRC guidance recommends that the board should consider the following in deciding what arrangements are appropriate:

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

In terms of evaluating the effectiveness of Harrington's risk management and internal control system, Harrington could choose to make that assessment based on the FRC guidance which recommends considering the following:

- willingness to take on risk (its "risk appetite"), the desired culture within the organisation and whether this culture has been embedded;
- operation of the risk management and internal control systems, including the identification of risks and determination of those which are principal to the organisation;
- integration of risk management and internal controls with considerations of strategy and business model, and with business planning processes;
- changes in principal risks, and ability to respond to changes in its business and the external environment;
- communication of the results of management's monitoring to the board which enables it to build up an assessment of control in the organisation and the effectiveness of risk management or mitigation;
- the incidence of significant control failings or weaknesses that have been identified and the extent to which they have, or could have, resulted in unforeseen impact; and
- the effectiveness of the organisation's public reporting processes.

Examiner's comments

Question 2 was very well answered and there were some very high-scoring answers. There were good definitions and health service examples of each of the risks and an excellent understanding of the role of the board in risk management was shown.

3 You are an independent governance consultant advising Rackmore Clinical Commissioning Group ('Rackmore') as part of a governance review after its first two years in operation. Rackmore's level of involvement with patients and the public has been identified as a key area of weakness. As Rackmore will need to consider significant reconfiguration of services in order to achieve financial viability, the governing body has asked for a formal report setting out its responsibilities with regard to patient and public involvement.

Required

Write a report addressing the following issues:

(a) A CCG's 'duty to involve' and the range of internal and external stakeholders that Rackmore might need to consider.

(12 marks)

Suggested answer

To: Rackmore Clinical Commissioning Group
From: Independent Governance Consultant
Date: 4 June 2015

Duty to involve
The Health and Social Care Act 2012 introduced significant amendments to the NHS Act 2006 (section 14Z2), especially with regard to how NHS commissioners will function. These amendments included two complementary duties for CCGs with respect to patient and public participation.

CCGs must promote the involvement of patients and carers in decisions, which relate to their care or treatment. The duty requires CCGs to ensure that they commission services, which promote involvement of patients across the full spectrum of prevention or diagnosis, care planning, treatment and care management. The second duty placed a requirement on CCGs to ensure public involvement and consultation in commissioning processes and decisions. A description of these arrangements must be included in a CCG's Constitution. It requires the involvement of the public, patients and carers in:

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

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

Internal and external stakeholders
The board should consider who it would determine as being its key stakeholders, both internal and external to the trust. It needs to consider those organisations which will provide opportunities for engagement with patients, staff, the local community and the wider public.

External stakeholders that Rackmore might like to consider in respect of its engagement and involvement activity include the following:

- NHS providers locally and regionally.
- Local authorities or councils.
- Other CCGs.
- Regional representatives of NHS England.

- Health and Well-being Board and/or Health Overview and Scrutiny Committee.
- Local HealthWatch groups.
- Local community groups.
- Voluntary health agencies.
- Care Quality Commission.

Rackmore should also consider involving its staff and its member GP practices as key internal stakeholders who will be involved in communicating and embedding any decision taken by the board.

(b) Principles of good practice in involvement of patients and the public and the possible consequences of failing to involve them.

(13 marks)

Suggested answer

Principles of good practice in involvement

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

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

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

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

Consequences of failing to involve patients and the public

A public body that fails to involve leaves itself open to a challenge by way of Judicial Review and may not lawfully be able to take decisions and thus implement the changes until consultation has occurred. The courts may also award legal costs against the NHS body. The duty to involve arises whether the changes in health service provision are required in response to financial pressures, clinical requirements or other reasons, or a combination of two or more factors. Changes made to comply with Department of Health (DH) policy decisions are also subject to the duty to consult. The legal duty to consult both patients and the wider public falls both on the commissioner of health services and on to those providing services. The courts have ruled that even where a commissioner was simply implementing DH policy, the provision of services was still the commissioner's responsibility and therefore it had an obligation to consult.

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

Examiner's comments

Question 3 was not answered well. It was clear that candidates had sought to answer the question based on a general understanding of transparency, openness and candour. For CCGs, there are specific governance frameworks which needed to be cited and explained in order to score well on this question. Candidates should refer to the relevant section in the study material. Quoting the Nolan Principles or the NHS Constitution were insufficient to answer this question well.

4 Health service governance is underpinned by a framework of legislation, voluntary codes and guidance in order to be effective in a wide range of organisations.

Required

(a) Give three examples of non-NHS-specific legislation which are still relevant to the NHS and outline whose interests they protect.

(6 marks)

Suggested answer

There are areas of an organisation's business where laws are essential to protect the interests of stakeholders, such as employees. For example:

- Employment laws are needed to give protection to employees against unfair treatment by employers.
- Company legislation requires organisations to prepare annual financial statements and have them audited, and set out the duties of directors. These are areas that should be subject to the law, in order to protect stakeholders.
- Health and safety legislation protects both employees and other third parties.
- Corporate manslaughter legislation sets out clear responsibilities for directors who control the actions or inaction of their organisation.
- Anti-competition legislation protects customers by offering choice and limiting price fixing.
- Bribery legislation protects staff and shareholders so that there are fair procurement and/or employment practices.

(b) Explain why statutory regulation works best alongside voluntary regulation.

(5 marks)

Suggested answer

There may be different views about the extent of statutory regulation that is required; however, the need for some regulation seems unquestionable. If governance was left on an entirely voluntary basis then there would be the opportunity for organisations to abuse their positions of power and control. This could result in serious harm to employees, customers, suppliers, and so on. Consequently, voluntary regulation has to be underpinned by statutory regulation where breaches of that regulation can be enforced through the courts and sanctions applied.

In addition, some behaviors/decisions within an organisation would be seen as unethical and in some instances, laws are needed to prevent or punish activities that are considered so unethical that they should be illegal. Bribery is an example of behaviour that has been tolerated in the past but which is now accepted as illegal by most countries. Further, it may be that statutory regulation may be needed to address public concerns and maintain public confidence in the governance system.

In practice, however, good governance is a combination of statutory regulation and voluntary best practice. In some countries there is more emphasis on regulation and in others there is greater reliance on voluntary codes of practice for large organisations. However, unless law regulates governance, it is probable that standards of governance will vary substantially between organisations. It should be noted, however, that some principles and recommendations have become legislation (for example, Bribery Act 2010) and the practices required by the legislation then become mandatory.

As described above it is difficult to devise a set of laws that should apply to all organisations in all circumstances. Rules that are appropriate for one organisation might not be appropriate for another whose circumstances are very different. This is where a voluntary system of governance (such as the corporate governance system in the UK) is very useful. The voluntary code places an

expectation on organisations to comply with the guidelines, but it also allows them to breach the guidelines if it seems appropriate and sensible to do so. A voluntary code of best practice in governance can be targeted at the largest organisations and smaller organisations are able to choose whether they want to model their own governance systems on parts of the code for the larger organisations. Governance practices can therefore be adapted to the circumstances of the organisation.

(c) Describe the 'comply or explain' approach to governance, the risks of such an approach and how the 'apply or explain' approach tries to address this.

(14 marks)

Suggested answer

There is no statutory (legal) requirement for organisations to apply the principles or provisions of a voluntary code. However, a well-established code should attract the support of the significant organisations in that sector, and this develops an expectation that others should adopt the code unless their circumstances are such that non-compliance with some of the code's provisions is a more sensible option.

The purpose of a voluntary code is to raise standards of governance. It is principles-based, because there is a recognition that the same set of rules is not necessarily appropriate in every way for all organisations, and that there will be situations where:

- Non-compliance with provisions in the code is desirable, given the circumstances that the organisation faces.
- Implementing a principle of best practice is not always best achieved by following the detailed provisions or recommendations in the code, and some flexibility should be allowed.

Voluntary governance standards are recommendations on principles and practices rather than strict rules that organisations are advised to act accordingly to. Thus organisations are allowed to use their own discretion on whether to comply with the recommended principles and practices, however, it is expected of each organisation to explain why it chose not to comply, for example, in their annual report. In order for this approach to be effective, organisations must have regular reports and for its stakeholders to critically scrutinise these reports for relevance and accuracy.

The UK Corporate Governance Code 2014 explains:

> "The 'comply or explain' approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of its flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally. The Code is not a rigid set of rules. It consists of principles (main and supporting) and provisions."

The UK Corporate Governance Code recognises that an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means. A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. In providing an explanation, the company should aim to illustrate how its actual practices are consistent with the principle to which the particular provision relates, contribute to good governance and promote delivery of business objectives. It should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.

However, there is a view that the word ‘comply’ will encourage organisations to follow the provisions of a code in all its details, without considering the principles that underpin the code. This may encourage a box-ticking approach, and a view that the detailed provisions must be followed without considering whether the provisions might be appropriate or finding a suitable way of applying the governance principles in the actual circumstances.

For this reason, some countries have adopted what they call an ‘apply or explain’ rule (or approach) such as, the King Code III, the governance code for South Africa. The intention of this approach is to “show an appreciation for the fact that it is often not a case of whether to comply or not, but rather to consider how the principles and recommendations can be applied. Explaining how the principles and recommendations were applied, or if not applied, results in compliance.” (Introduction to King Code III). In an apply or explain approach, following the principles over-rides following specific recommended practices.

Under King III, entities (whether they be public, private or non-profit sectors) are required to make a statement as to whether or not they apply the principles and then explain their practices. The implication of this is that South African entities will have to consider the recommended principles set out in King III, state what their principles are, and explain if and why they differ from the King III recommendations. This is a softer and more flexible approach to governance disclosure, but may lead to abuse if entities fail to justify their deviations from the King III Report’s recommended principles.

This allows for the explanation to set out how the principle is being followed rather than demonstrating compliance with a recommended practice, which may not be in the best interests of the organisation. The King III Code makes it clear that under ‘apply or explain’ it is the board’s duty, if it believes it to be in the best interests of the company, to override a recommended practice, it must then explain why the chosen practice was applied and give the reasons for not applying the recommended practice.

A ‘comply or explain’ approach has been taken with some voluntary codes in the NHS. Monitor requires FTs to comply with the NHS Foundation Trust Code of Governance or to explain any non-compliance. Interestingly, NHS England has set the Good Governance Standard as the guidance for CCGs which does not have a comply or explain basis.

Examiner’s comments

Question 4 was either answered very well or not well at all. Those who answered it well clearly articulated the non-NHS legislation which was relevant, for example, Health and Safety Act or Bribery Act, as well as then giving a detailed explanation of ‘comply or explain’ compared to ‘apply or explain’. Overall, this was one of the least popular questions.

5 Bardington NHS Trust ('Bardington') was formed three years ago by merging two hospitals. At the time of the merger, these hospitals had a combined deficit of £26m. Following the merger, Bardington has run up debts of more than £95m, to become one of the most financially challenged trusts in the NHS. As well as inheriting the financial difficulties of its two predecessor hospitals, four Private Finance Initiative (PFI) schemes operate across the two main sites, adding to its deficit. In addition, the trust has recently had a Care Quality Commission inspection which is likely to lead to a rating of 'inadequate'. Board discussions centre around the special measures provisions and the possible appointment of a trust special administrator if Bardington was to be judged as 'not financially viable in its current form'.

Required

The chair has asked you as company secretary to advise the board on:

(a) What the special measures provisions are, what action may be taken if Bardington is put into special measures and the possible outcomes.

(15 marks)

Suggested answer

Following the publication in February 2013 of Robert Francis's report into care at Mid Staffordshire NHS Foundation Trust, Sir Bruce Keogh led a review of 14 trusts (nine NHS FTs and five NHS trusts) that had high mortality rates. The Keogh Review identified significant problems relating to quality and safety and/or leadership in all 14 trusts. In July 2013, 11 of the 14 trusts were put into 'special measures'. This regime was new to the NHS and is set out in the Guide to Special Measures published jointly by the Care Quality Commission (CQC), Monitor and the NHS Trust Development Authority (TDA).

Special measures apply to NHS trusts and FTs that have serious failures in quality of care and where there are concerns that existing management cannot make the necessary improvements without support. Special measures consist of a set of specific interventions designed to improve the quality of care within a reasonable time.

The CQC, through the Chief Inspector of Hospitals ('Chief Inspector'), will normally recommend that a trust is placed in special measures when an NHS trust or FT is rated 'inadequate' in the well-led domain (that is, there are concerns that the organisation's leadership is unable to make sufficient improvements in a reasonable timeframe without extra support) and 'inadequate' in one or more of the other domains (safe, caring, responsive and effective). The well-led domain covers five areas which the CQC will inspect to ensure that boards focus on ensuring their organisations are well-led, namely, inspiring vision; governance; leadership, culture and values; staff and patient engagement; and learning and innovation.

When the NHS TDA receives a recommendation from the Chief Inspector to place an NHS trust in special measures, it will consider the evidence that the CQC provides to it alongside other relevant evidence. On the basis of the full range of information, the NHS TDA will make a decision whether the trust will be placed in special measures.

The NHS TDA may also place a trust into special measures without receiving a recommendation from the Chief Inspector, based on its own evidence. In these circumstances, the NHS TDA will always seek advice from the CQC. An NHS trust will not enter special measures until the NHS TDA formally makes that decision.

The NHS TDA will communicate its decision to the trust and then make a formal public announcement through a press release. The period of special measures begins when the NHS TDA formally and publicly announces that a trust is in special measures. It is intended that the usual period of time a trust remains in special measures will be a maximum of 12 months, although this may be extended in some circumstances.

In this approach, the CQC will focus on identifying failures in the quality of care and judging whether improvements have been made. The NHS TDA will use its respective powers to support improvement in the quality of care provided.

Typically, providers will be subject to the following interventions, although their detailed application will vary according to the specific circumstances of the organisation:

- The NHS TDA will appoint an improvement director who will act on its behalf to provide assurance of the trust's approach to improving performance.

- In most cases, the NHS TDA will also appoint one or more appropriate partner organisations to provide support in improvement. Partner organisations are selected for their strength in the areas of weakness at the trust in special measures. The nature and amount of support from the partner will be tailored to the trust's requirements but will focus on addressing quality issues identified in the trust's action plan. Arrangements for this appointment will be set out in a memorandum of understanding between the NHS TDA and the partner ('buddy') organisation. Partner organisations will be reimbursed by the NHS TDA for reasonable expenses and may receive an incentive payment.

- The NHS TDA will review the capability of the trust's leadership. If needed, this may lead to changes to the management of the organisation to make sure that the board and executive team can make the required improvements.

- The NHS TDA will require trusts in special measures to publish their progress against action plans every month on the NHS Choices website and their own websites, and to participate as required in national and local press conferences.

The CQC re-assessed all 14 trusts in the early part of 2014, using its new approach to comprehensive inspections. The Chief Inspector concluded that significant progress had been made at 10 of the 11 trusts. Two had made exceptional progress and were rated 'good' overall. A further three had made good progress and although they still required further improvements, they exited special measures with ongoing support. For five further trusts, the Chief Inspector recommended a further period in special measures, with a further inspection after six months to ensure that they were continuing to make progress. One trust failed to make significant overall progress and Monitor and the CQC agreed to take further urgent action to ensure the quality of care provided to the local population improved as rapidly as possible.

A trust will only come out of special measures if it has made the required improvements and this is usually expected to be within one year. At the end of the year the relevant CQC Chief Inspector will inspect the trust and judge whether improvements have been made and if it is delivering good enough care to exit special measures. The NHS TDA will only take a trust out of special measures after a trust has been re-inspected, is no longer rated as 'inadequate' in the well-led domain and has made progress across the other four CQC domains. The NHS TDA must also be confident that improvements will be sustained.

An inspection and recommendation from the CQC Chief Inspector may result in a range of outcomes for a trust in special measures that includes:

- Exit from special measures.
- Exit after an extension period.
- Continuing in special measures where the NHS TDA has concerns that the trust may not be able to sustain improvements without special measures in place (in this instance, special measures may run in parallel to processes which will consider longer-term solutions, for example, a transaction such an acquisition or merger).

In some circumstances, a transaction may be the best means of securing longer term improvements in the quality of care. In these circumstances, the resulting organisation (whether an acquiring parent

organisation, new entity formed by merger, and so on) itself would not automatically be placed into special measures at the point of transaction. The resulting organisation would be assessed on its own merits and regulated accordingly by the CQC, NHS TDA and Monitor, which would take full account of the nature of the quality problems being taken on within the resulting organisation and how it, as a whole, was seeking to address them.

(b) The regulations governing the insolvency provisions for a non-foundation trust.

(10 marks)

Suggested answer

A special administration process was introduced in Chapter 5A of the National Health Service Act 2006 (as amended by the Health Act 2009) which made provision for the appointment of a Trust Special Administrator (TSA) over an NHS trust, where the Secretary of State for Health considered it in the interests of the health service. The key objective of a TSA appointed to an NHS trust is to develop and consult locally on a draft report and make recommendations to the Secretary of State for Health in a final report about what should happen to the trust and the services it provides to ensure the continued provision of key services (location specific services). The legal framework sets out a maximum period of 120 working days for completion of the process (unless extended by order of the Secretary of State), by which time the Secretary of State must make a final decision on the future of the NHS trust following the TSA's recommendations.

With many hospitals facing significant financial difficulties as a result of a variety of complex factors, it is vital, both politically and socially, that NHS services are maintained. The Department of Health (DH) assesses NHS trusts according to their performance against a set of financial and quality indicators. If clinical or financial performance is below the required standard and does not improve then the Regime for Unsustainable Providers could be triggered under Chapter 5A of the National Health Service Act 2006 as the only way in which the DH can take decisive action to deal with NHS trusts that are either unsustainable in their current form or significantly failing to make progress towards attaining FT status.

The regime has been extended by the Health and Social Care Act 2012 to deal with FTs enabling Monitor to appoint a TSA where the FT is, or is likely to become, unable to pay its debts. The framework is different from an ordinary administration under general insolvency legislation in that its main objective is to protect patients and staff from failing services and secure the continued provision of patient services.

The Care Act 2014 has also introduced extensions to the special administration timetable to give greater time for the TSA to publish its draft report, the consultation period is extended and creates an obligation on the TSA to consult:

(i) other NHS trusts and NHS FTs affected by wider recommendations, their staff and their commissioners;
(ii) any local authority in whose area the trust in administration and other affected trusts are located; and
(iii) any Local Healthwatch organisation in the area of any local authority.

Examiner's comments

Question 5 was not attempted by many candidates and was the least popular question.

6 Jane Smith, a newly-appointed company secretary at a neighbouring FT, has approached you for some advice. She is concerned about the quality of the decision-making by the board at her FT and believes that some decisions by the board are often taken without due regard to the risks posed to quality and safety. She believes that the board would benefit from a review of its past decisions, particularly ones with poor outcomes, and is discussing this with the FT chair. She wants to support the chair in carrying out this review but is unsure about what needs to be done.

Required

Prepare an advice note to Jane in which you:

(a) Outline the guidance documents which set out best practice in board effectiveness and summarise their recommendations.

(8 marks)

Suggested answer

From: Company Secretary
Subject: Effective decision-making
Date: 4 June 2015
To: Jane Smith

The idea to review past decisions is in line with the FRC Guidance on Board Effectiveness (2011) which states that boards can benefit from reviewing past decisions, particularly ones with poor outcomes. The review should not focus just on the merits of the decision itself but also on the decision-making process. Your suggestion of a review of previous board decisions is therefore well founded. I will outline other considerations from FRC guidance later but firstly let me set out the NHS guidance as well which could also be factored into the review.

Boards can only make effective decisions if they have the right information. One key piece of NHS guidance on information is the Intelligent Board report. Whilst published in 2006, it still contains some key principles of interest for FTs to consider. It sets out a set of principles and a model framework for structuring information to support strategy development and oversight of business delivery and effectiveness. It also suggests practical ways in which boards might use the framework proposed.

The report outlined the growing pressure on boards to raise their game and the need to improve the information they receive and how they use it. It included some key principles that should govern information for the board, together with a proposed framework and minimum data set for reviewing trust performance, supporting decision-making and considering strategy. It also recommended improving the structure of agendas for the board; developing a 'dashboard' of routine performance indicators, which informed the annual cycle of board meetings.

The report also recommends that all information should:

- Cover locally defined priorities as well as national 'must do' requirements.
- Focus on outcomes, not systems and processes.
- Be available in a timely and understandable format.
- Be clearly and simply presented.
- Be forward-looking, presenting trends and anticipating future issues.
- Allow internal comparison between services and make use of external benchmarks.
- Provide interpretation and analysis as well as information.
- Provide a level of detail that is appropriate to the board's governance role.

A further piece of guidance is the Healthy NHS Board guidance (2013), which sets out that embedding board disciplines is the "bedrock of good board functioning" and enables effective decision-making. These disciplines include attention to agenda planning, annual programmes of

work, board papers, action logs, declarations of interest and maintaining transparency and openness within the board.

Returning to the FRC guidance on decision-making, it goes on to say that well-informed and high-quality decision making is a critical requirement for a board to be effective and does not happen by accident. Further, boards can minimise the risk of poor decisions by investing time in the design of their decision-making policies and processes, including the contribution of committees. The FRC guidance sets out clear recommendations, which could be used to formulate a review of previous decisions, namely:

- was there high quality board documentation;
- was expert opinion obtained when necessary;
- was time allowed for debate and challenge, especially for complex, contentious or business critical issues;
- did the board achieve timely closure; and
- was clarity provided on the actions required, and timescales and responsibilities?

(b) Describe the procedures a board should follow in order to make effective decisions.

(10 marks)

Suggested answer

The review of previous decisions could consider the following areas with regard to effective decision making:

<u>High-quality, timely board documentation</u>
The board members should receive relevant documents in advance of a board meeting, so that they have time to read them and think about the issues they deal with. The UK Corporate Governance Code (UK 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 chairman has the responsibility for ensuring that directors receive the information that they need in sufficient time. The UK Code states that management has an obligation to provide the required information, but that the directors should ask for clarification or additional information if required.

Such information enables the board to:

- Understand the needs, views and experiences of members, patients and the public from all backgrounds and communities served.
- Make sure that patients are receiving a high-quality service.
- Anticipate the potential impact of key policy, technological and socioeconomic developments.
- Assure themselves that the organisation is complying with standards and other regulatory requirements.

The information flow should be both formal and informal. Information should be provided formally in documents or files, and supplemented by informal communication by e-mail, telephone or face-to-face conversation. The company secretary should ensure that there are good information flows between the board and its committees, between committees, and between executive managers and NEDs.

The review of previous decisions taken by the board could consider the following questions.

- Did the board reports direct the board's attention to significant risks, issues and exceptions and provide a level of detail appropriate to the board's role?

- Had the relevant sub-committees considered the board reports and did they have the relevant delegated authority to interrogate and scrutinise the information they received?
- Did it clearly set out alternative options to any investment?
- Were the benefits clearly established and tested for credibility?
- Was there clinical and nursing input into the proposal?
- Were the views of existing patients consulted (including staff, patients and carers)?
- Was a proper tender process followed?
- What gaps can be identified in the risk assessment process and the management of the project plan?
- Were requests for additional information made and, if so, how timely were the responses?

Obtaining expert opinions when necessary
As well as receiving relevant and timely information, directors should be given access to independent professional advice, at the organisation's expense, when they consider this necessary in order to fulfil their duties as director. For example, a director might ask to consult a lawyer for advice on a matter where the legal position is not clear. It would interesting to see what expert opinions had been sought in the past and which experts had been considered necessary from a quality perspective.

Achieving timely closure and providing clarity on the actions required, and timescales and responsibilities
- Was the board aware of the necessary deadlines and the imperative for decision making within the project plan?
- If requests were made for clarity or amendments, were responsibilities clear and action points followed through?
- Were the authority levels for the various stages of sign off clear to the board?
- As projects progress, are regular updates provided to the board along with revised risk assessments?

Support
And, finally, NEDs and possibly also executive directors may need administrative support or advice on routine matters, and the UK Code includes provisions that board committees should be provided with sufficient resources to carry out their duties, and that all directors should have access to the advice and assistance of the company secretary.

(c) Outline the steps which might be considered in order to improve the quality of decision-making by the board.

(7 marks)

Suggested answer

The steps to be taken to improve decision-making will depend upon the findings of the review but the questions above shed some light on the matter for the future. In addition, the FRC guidance also recognises that most complex decisions depend on judgment, however, that judgment, of even the most well-intentioned and experienced leaders, can, in certain circumstances, be distorted. Some factors known to distort judgment in decision-making are conflicts of interest, emotional attachments, and inappropriate reliance on previous experience and previous decisions. A consideration of the register of interest would therefore also be helpful.

Another key factor for improved decision-making is looking at the time allowed for debate and challenge. This is particularly important for complex, contentious or business critical issues and the FRC guidance recommends that careful attention should be paid to the agenda setting process and the amount of material to be considered. For example:
- Was there sufficient time allowed?
- Would presentations and site visits have been helpful, as well written reports and business cases?

- Was the timing of board meetings supportive of the decision making process or did it lead to rushed documentation and limited discussion at board meetings?

For significant decisions, the FRC guidance suggests extra steps that a board may wish to consider, for example:

- describing in board papers the process that has been used to arrive at, and challenging the proposal prior to presenting it to the board, thereby allowing directors not involved in the project to assess the appropriateness of the process as a precursor to assessing the merits of the project itself; or
- where appropriate, putting in place additional safeguards to reduce the risk of distorted judgements by, for example, commissioning an independent report, seeking advice from an expert, introducing a devil's advocate to provide challenge, establishing a sole purpose sub-committee, or convening additional meetings.

Some board chairs favour separate discussions for important decisions; for example, concept, proposal for discussion, proposal for decision. This gives executive directors more opportunity to put the case at the earlier stages, and all directors the opportunity to share concerns or challenge assumptions well in advance of the point of decision.

Summary
There are a number of areas outlined in this report, which would assist you in establishing a review. The findings from that review should help the board in improving its decision-making and should form the basis of an action plan for improvement based on the findings. If you would like me to take a look at the findings of that review I would be happy to help or to answer any other questions that might follow on from the contents of this note.

Examiner's comments

Question 6 was generally well attempted by a number of candidates. Those who scored highly on this question clearly articulated the principles behind board effectiveness and drew a close link between that and effective decision-making. A number of candidates did not make that distinction and therefore scored well in part (a) but less so in parts (b) and (c).

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.