

Implications of the Health and Social Care bill for the Board of Governors

The Health and Social care Bill proposes fundamental changes to the way NHS foundation trusts are governed and managed. The changes mark a move away from collective responsibility of a board to individual responsibility for each director. At the same time, the duties and responsibilities of governors are significantly increased.

These changes in responsibility are introduced at the same time as the financial safety net for foundation trusts and Monitor's Compliance Framework is removed. In the future, there will be no soft landings or loans on favourable terms. This will mean a radical shift in management dynamics and responsibility as board members and governors take real responsibility for the direction and transactions of their NHS foundation trust.

Governors – their new role

In future, Monitor's compliance framework will be removed (except for a two year transitional period for some foundation trusts). To balance this change, governors are given significant duties and real approval powers.

The most important change is that the council of governors is given express statutory duties to hold the non-executive directors individually and collectively to account for the performance of the board and to represent the interests of the foundation trust's members and the public as whole. Under the current Act, governors appoint the chair and non-executive directors of a foundation trust. The new express duty to "hold non-executives to account" will encourage governors to use their existing powers so as to performance manage non-executives.

There are no express provisions about how non-executives are to be held to account. So, constitutions may need to be changed to allow for ongoing monitoring to allow governors to discharge their new duties.

Governors will be able to require directors to attend a meeting to obtain information about their organisation's performance and that of its directors. They may (like shareholders in a company) vote on motions at such meetings. If, for example, governors pass a motion of "no-confidence" in directors, then they would (using their existing powers) be entitled to remove the non-executives.

Any vote about the performance of the directors will need to be published in the annual report.

This extended role for governors raises interesting questions around fiduciary duties, liability and insurance. Many governors are likely to require significant training in order to understand and be able to discharge their duties. Indeed, the impact assessments published in relation to the bill suggest significant initial and ongoing training and advice needs – and this is no surprise in the context of Monitor's devolved duties.

Monitor will be one source of guidance, establishing an independent panel to give advice to governors. The proposals envisage this as "an authoritative source of advice" in response to governors' concerns about constitutional and governance issues. More than half the governors' council would need to approve a referral to this panel, so referrals would likely occur only in relation to material areas of concern. This might mean that the foundation trust

will need to provide much more by way of ongoing support and advice to its council of governors.

Constitution and members

Monitor will neither check whether a constitution complies with statutory requirements nor need to approve changes. This means that a foundation trust (like any private sector provider) will need to make sure that its constitution is and remains legally compliant. Again to balance the loss of this oversight role, governors and members gain approval rights in relation to constitutional changes. For example, the governors and the board of directors must approve any proposed changes to a constitution (the approval of more than half of each forum being required to implement a change). In addition, if a change to a constitution affects the powers and duties of governors, more than half of the members of a foundation trust must approve the change at the next meeting. If they don't approve the change, the change will be ineffective and must be reversed.

All foundation trusts will be required to hold an annual public meeting for their members. This marks a significant change from current practice. At that meeting, the board of directors must present the accounts, auditor's report and annual report. This move of power back to governors and members might mean that NHS foundation trusts 'look and feel' much more like the mutual or co-operative form on which they were initially modelled.

Transactions

In the new world, Monitor will no longer review significant or material transactions. NHS foundation trusts may choose to state that some types of transaction are "significant" in their constitution. If a foundation trust chooses to do this, then it will need the consent of more than half of the council of governors to proceed with the transaction. Bearing in mind the hurdle this consent will impose upon complicated transactions, it will be interesting to see how many foundation trusts decide to include this right for governors.

However, the consent of more than half of the governors will always be required for any merger, acquisition or separation of the NHS foundation trust. Unlike "significant transactions", this is not an optional requirement. This means that, in practice, responsibility for signing off any merger or acquisition moves to the directors and governors.

Directors

At the same time, directors will have individual responsibility to promote the success of the foundation trust so as to maximise the benefits for the members as a whole, and the public. This duty echoes statutory duties of directors of companies. This is a move away from collective responsibility of boards and will mean that each board member will have individual duties. More importantly, board members may also face personal liability (with claims for financial losses) under insolvency legislation where a non-designated provider continues to trade when likely to become insolvent. The awareness of this will make directors stop and think even more than before when entering into transactions.

There are also express duties for each director to avoid conflicts of interest but, importantly, there is a carve-out from the duty if the issue in question has been authorised in accordance

with the constitution. It will be important to make sure that constitutions are written so as to take advantage of this provision.

A new but familiar landscape?

The emphasis on internal governance and governors is interesting. Compare it to the regulation of listed companies or charities of similar size to foundation trusts. In contrast to the proposals for foundation trusts, both listed companies and charities are subject to significant ongoing external compliance requirements. This only throws into sharp focus the importance of the role of governors, and their training and resourcing, from here on.

Despite these changes in governance, NHS foundation trusts move firmly back within the Department of Health's 'line of sight' in relation to their forward plans and accounts. These must be sent to the Secretary of State and fall outside Monitor's new remit. In addition, the Secretary of State may make orders about the content of annual reports of foundation trusts. This new reporting requirement is coupled with the right of the Secretary of State to make changes (by statutory order) to the voting rights of directors, members and governors. This means the Department of Health retains the power to change all of these new governance arrangements at any time.

Conclusion

These monumental changes mean that the central checks and balances for transactions – historically provided by Monitor – will be removed. This, at the same time as the financial safety net for foundation trusts that run into financial difficulties becomes unavailable. What remains unclear is whether Monitor (or even the Secretary of State) will impose additional requirements or special approvals as part of its licensing regime or by order.