

# Report to the Meeting of the

**CoG 09/2017**

(Agenda item: 13)

# Oxford Health NHS Foundation Trust

# Council of Governors

**8th March, 2017**

**CONSTITUTION REVIEW**

**For: Discussion; Final approval at the March CoG meeting**

**Executive Summary**

The Governance working group made up of Governors including the Lead and Deputy governor and the Director of Corporate Affairs & Company Secretary has been considering necessary and desirable amendments to the Trust’s Constitution as instigated by the Director of Corporate Affairs & Company Secretary who had clarified that it was both timely and appropriate to review the content and format of the extant Constitution.

It is necessary to amend the Trust’s Constitution to support accordance with the provisions of the Health and Social Care Act 2012 and to update it with regard to changes at the Trust. The impact of those changes to the Constitution will make it also relevant and timely to review the Governor Standing Orders, Code of Conduct and other associated governing documents which will follow in due course with the support of the Governance Working Group.

**The Constitution**

This Constitution represents the Constitution of Oxford Health NHS Foundation Trust as adopted in accordance with the 2006 Act as amended by the 2012 Act. It sets out the powers and functions of the Trust.

Work has continued to be carried out on the amendments to the Trust’s Constitution that safeguard compliance with statute, bring the Trust’s governing documents up to date with best practice and include matters of concern to the Governors as a result of their deeper understanding of their powers. This work has continued to encompass both necessary and desirable amendments. The Board of Directors and the Council of Governors are required to approve the amendments (more than half of the members voting) to the Constitution at their meetings in March 2017. Additional amendments to the Constitution will be considered later in the year with regard to the size and composition of the Council in particular taking account of the possibility of delivering learning disability services and how that should reflect on the Council; and additionally with regard to the determination of definitions for ‘significant transactions’.

**The Code of Conduct for Governors**

Proposed amendments to the Code are being considered by working group members and will be reviewed at the next meeting of the Governance Working Group. Any supported changes will be presented for adoption to a future Council general meeting and in particular will document the procedure for the termination of tenure by the Council of Governors of an individual governor in specific circumstances.

**Engagement Policy**

In accordance with NHSI’s NHS Foundation Trust Code of Governance the Council of Governors needs to develop an engagement policy for the Council of Governors’ interactions with the Board of Directors and this is presented for adoption to the March Council meeting following circulation at the February meeting and subsequent feedback.

**Standing Orders of the Council of Governors**

These will ultimately require amendment to take account of the changes to the Constitution and to include matters of conformance with prevailing best practice. The Governance Working Group will support recommendations for change accordingly which will be presented for adoption to a future Council general meeting.

**Next Steps**

Following recent discussions at both the Board of Directors and Council of Governor meetings and resulting comments and support, the final draft of the Constitution and Engagement policy is presented for approval. This will also be presented for approval to the Board of Directors at its March meeting. Over half of members voting at both the Council and Board meetings are required in order to adopt the revised Constitution. Following formal approvals and adoption, it is required that NHS Improvement receive (but are not required to approve) the amended Constitution. **The lead governor is required to present changes to the powers of the governors to the September AGM in accordance with prevailing statute.**

**Governance Route/Approval Process**

The Governance Working Group has supported the Director of Corporate Affairs & Company Secretary with the review of the Trust’s Constitution. In particular the Group has considered in detail the composition of the Council of Governors; the wording to support a locally accepted definition of ‘Significant Transaction’, and the tenures of the Governors.

**ACTIONS REQUIRED BY COUNCIL OF GOVERNORS**

The Council of Governors is invited to:

* approve subject to any minor changes agreed at the meeting the revised Constitution.
* Note amendments to the annexes will be presented to the June CoG and Board of Directors meetings for approval and adoption prior to the entire suite of governing documents being presented to NHS Improvement (as all collectively form the entire Constitution of the Trust).

**Author and Title:** Kerry Rogers, Director of Corporate Affairs/Company Secretary

**Lead Executive:** Kerry Rogers, Director of Corporate Affairs/Company Secretary

**BACKGROUND**

**Revisions to Constitution and associated governing documents**

1. **Constitution amendments**

Work has continued on the amendments to the Trust’s Constitution in preparation for formal approvals at the March meetings of both the Council and the Board. This work has encompassed both necessary and desirable amendments.

1. **Necessary amendments**

The last review of necessary amendments to the Constitution was brought about by changes to legislation namely the implementation of the Health and Social Care Act 2012: For example the change in the statutory duties of the Council of Governors.

The 2017 review includes amendments needed to ensure consistency across key documents i.e.: codes of conduct, standing orders and implementation of an engagement policy in addition to removal of repetitive clauses (so as to avoid potential inconsistencies). Furthermore, changes approved at the September 2015 meeting have been formally adopted in the latest version.

1. **Desirable amendments**

The desirable amendments have been put forward for inclusion and adoption based on a number of factors:

* changes in best practice and guidance (including NHSI’s NHS Foundation Trust Code of Governance where appropriate);
* changes to address requirements included in the current Constitution which the working group considered it advisable to address for future clarity and process.

A clean copy of the Constitution (excluding Annexes as separate files) is presented to the March meeting and a comparison copy of the existing Constitution was issued to the February meeting but can be accessed at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422563/Constitution__Nov14.pdf> There have been various ordering and desirable housekeeping changes in the revised draft with **the following matters of significance being approved at the February meeting for inclusion in the Constitution or worthy of highlighting to the Council as part of the approval process.**

* **TERMS OF OFFICE**
  + **Governors**

The working group supported a recommendation to the Council of Governors to increase the consecutive terms for which a Governor can be elected, to be effective from formal adoption of the revised Constitution in March. The following amendments are presented below in suggested changes for paragraphs 7.10.1.3 and 7.10.2.3:

* 1. Terms of Office

Elected Governors:

7.10.1.1 shall be elected for a period of 3 years;

7.10.1.2 are, subject to paragraphs 7.10.1.3 and 7.10.1.4 eligible for re-election at the end of the period referred to in paragraph 7.10.1.1;

7.10.1.3 may hold office for a maximum of 9 years but in exceptional circumstances (as determined by the Council of Governors) may serve longer than 9 years, but any extension beyond 9 years will be subject to annual re-election and, in any event, he shall not serve for a total term longer than 12 years; and

7.10.1.5 shall cease to hold office if they cease to be a member of the Constituency (or relevant class within a Constituency) by which they were elected or in any other situation specified in this Constitution.

Appointed Governors:

7.10.2.1 shall be appointed for a period of 3 years.

7.10.2.2 are, subject to paragraphs 7.10.2.3 and 7.10.2.4 eligible for reappointment at the end of the period referred to in paragraph 7.10.2.1;

7.10.2.3 may hold office for a maximum of 9 years but in exceptional circumstances (as determined by the Council of Governors) may serve longer than 9 years, but any extension beyond 9 years will be subject to annual re-appointment and, in any event, he shall not serve for a total term longer than 12 years; and

7.10.2.4 shall cease to hold office if their appointing organisation withdraws its appointment of them or in any other situation specified in this Constitution.

* + **Non-Executive Directors**

Greater flexibility with regard to the decision of the Council on re-appointment of non-executives has been incorporated into the Constitution at section 8.7 with the amendments highlighted below in green. This does not affect the requirement under the provisions of the Code of Governance to ‘comply or explain’ any periods of non-executive tenures exceeding 6 years.

8.7 Terms of Office

8.7.3 Non-Executive Directors:

* + - 1. shall be appointed for a period of up to 3 years;

8.7.3.2 are, subject to paragraphs 8.6.3.3 and 8.6.3.4 eligible for re-election at the end of the period referred to in paragraph 8.6.3.1;

8.7.3.3 shall not, except in exceptional circumstances, hold office for a period in excess of 6 years; and

8.7.3.4 where appointed for more than 6 years shall, at the discretion of the Council of Governors, be so appointed either on the basis of:

* + - * + re-appointment for up to 3 years;
        + annual re-appointment through broader review taking into account the needs of the Board and the Trust; or
        + a competitive process

up to a maximum 9 years.

* **TERMINATION OF MEMBERSHIP**

6.6.1.3 The Council of Governors may also terminate the membership of a Member by a resolution approved by not less than 2/3rds of the Governors present and voting at a General Meeting if in the reasonable opinion of the Council of Governors the Member:

* **TERMINATION OF TENURE (GOVERNOR)**

The following paragraphs have changed to allow provision for the Council to remove a Governor in certain circumstances and the Code of Conduct will be amended accordingly subject to CoG approval to include the relevant procedures.

7.11.2 A Governors tenure

7.11.2.2 shall be terminated immediately if the Council of Governors decide (by a majority of the other Governors) that a Governor has:

(a) failed to comply with paragraph 7.10.4; (except where the Council of Governors decide that termination of tenure would not be appropriate in the circumstances);

(b) conducted himself in an inappropriate manner which would adversely affect public confidence in the Trust or the Council of Governors; or

(c) conducted himself in such a manner as is likely to bring the Trust into disrepute including, but without prejudice to the generality of the foregoing, a failure to declare a material or pecuniary interest which would or would be likely to result in a conflict of interest.

7.11.3 The Council of Governors may request that the CoG’s Nominations and Remuneration Committee investigates any matter which would give rise to them exercising their powers in paragraphs 7.11.2 – 7.11.3 (inclusive) and to receive the representations of the relevant Governor and any representative appointed by him for that purpose except to the extent that the Code of Conduct for Governors provides a procedure for the same in which case such procedure must be followed.

7.11.4 Any engagement of the CoG’s Nominations and Remuneration Committee pursuant to paragraph 7.11.4 shall make such report and recommendations to the Council of Governors as it deems fit and shall, as far as practicable, submit any report and recommendations to the Council of Governors within 4 months of commencing their investigation.

7.12.3.6has within the preceding two years been dismissed from any paid employment with a Health Service Body otherwise than by reason of redundancy, sickness or dismissal that was found by an Employment Tribunal or competent court (or on appeal in either case) to be unfair, wrongful or discriminatory);

**7.12.3.12** has been identified and given notice in writing by the Chief Executive to the effect that he is a habitual or repetitive complainant [*replaces ‘vexatious’*]in respect of the Trust;

7.12.3.13is a member of a local authority’s Overview and Scrutiny Committee covering health matters;

7.12.14 An individual is disqualified from becoming or continuing to hold office as a Governor if NHS Improvement has exercised its powers to remove that person as a Governor or has suspended him from office or has disqualified him from holding office as Governor for a specified period or NHS Improvement has exercised any of those powers in relation to the person concerned at any other time whether in relation to the Trust or some other NHS foundation trust.

* **SIGNIFICANT TRANSACTIONS**

The current Constitution offers no definition of ‘Significant transaction’ which is permitted in statute in so much as the Constitution must itself identify no definition has been incorporated. In the spirit of transparency it is proposed that a definition is agreed which adopts the recognised description within NHSIs Risk Assessment Framework used by the regulator to assess Significant Transactions, along with further local clarifications. **Further consideration of this clause will take place before any changes are proposed to the Constitution in this regard.**

* **COMPOSITION OF THE COUNCIL OF GOVERNORS**

The working group has given due consideration to the composition of the Council of Governors. The size of the Council is considered to be large but not proving to be unwieldy, and at the February Council meeting members agreed **not to change the Constitution at this time pending a further review when delivery of learning disability services is clarified.**

1. **Engagement Policy**

In accordance with NHSI’s NHS Foundation Trust Code of Governance the working group has considered the proposed engagement policy for the Council of Governors’ interactions with the Board of Directors. The draft of the policy is attached for approval.

**The Council is invited to approve the Engagement Policy.**

1. **Recommendation**

The Council of Governors is invited to:

* approve subject to any minor changes agreed at the meeting the revised Constitution.
* approve the Engagement policy
* note amendments to the annexes will be presented to the June CoG and Board of Directors meetings for approval and adoption prior to the entire suite of governing documents being presented to NHS Improvement (as all collectively form the entire Constitution of the Trust).

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