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# Report to the Meeting of the

# Oxford Health NHS Foundation Trust

**BOD 84/2022**

(Agenda item: 17)

# Board of Directors

**30th November 2022**

**Corporate Affairs Update Report**

**For: Awareness and Assurance**

**Executive Summary**

The Reading Room contains the detail of this regular report to inform the Board of Directors on recent legislation, regulation and compliance/policy guidance issued by bodies such as NHS England the Care Quality Commission, and other relevant bodies where their action/publications have a consequential impact on the Trust or an awareness of the change/impending change is relevant to the Board of Directors and its committees’ business. This report covers the period since the last report to Board and includes any noteworthy contributions covered by health think tanks and a section in the Addendum to this report on learning / ‘True for Us’ considerations.

With regard to the concept of ‘True for Us’ and the section in the report; the effects of corporate failure and the last financial crash cast a long shadow forward. Trust in leaders and in business is damaged and the public believe that the way business works is not good for society. In consequence each failure of a business becomes magnified in terms of the analysis of its impact and the mood to blame. The responsibility to avoid corporate failure lies with the directors who may or may not be able to take evasive action. It is intended the Corporate Affairs directorate will develop further the concept of ‘True for Us’ reviews in connection with corporate governance because failures contribute significantly to the collapse of our reputation but importantly enhance the effectiveness of risk management. The process will support identification of warning signals to support the ongoing learning and development of successful mitigating actions.

**Risk Management**

The Code of Governance for the NHS replicates Provision 28, UK Corporate Governance Code (July 2018) and states that “*the board should carry out a robust assessment of the company’s emerging and principal risks. The board should confirm in the annual report that it has completed this assessment, including a description of its principal risks, what procedures are in place to identify emerging risks, and an explanation of how these are being managed or mitigated*.”

Included in the Reading Room is the latest iteration of the Board Assurance Framework to ensure Board members continue to have a universal view of the Trust’s strategic risk profile. This is the November edition of the BAF and follows oversight and discussions at the latest suite of Board Committee meetings since the last meeting of the Board.

The Trust’s extreme/red-rated risks relate to demand and capacity, workforce, recruitment, financial sustainability and major capital projects; these themes are consistent with current and emerging health sector risks as benchmarked by the Trust’s Internal Auditors, PwC.  Although demand and capacity has been red-rated for a while from Community Services, Oxfordshire, the corresponding  risk at BAF 1.5 from Mental Health & Learning Disability services has also recently been escalated from high/orange to an extreme/red-rating, as also approved by the Quality Committee.

The Trust’s risks at a strategic level on the Board Assurance Framework (**BAF**), and at an operational level on the Trust Risk Register (**TRR**), are considered in more detail through the work of Board Committees in particular the Finance & Investment Committee, the People, Leadership & Culture Committee and the Quality Committee which have monitoring oversight of specific risks; further oversight is provided through the work of the Audit Committee which is not to become involved in the population of the risks or the operational development of risk management processes, which are the responsibility of the Board and management, but which should review content, processes and format of the BAF and TRR to seek assurance as regards risk management processes. At the last Audit Committee, its review of workforce and recruitment red risks focussed predominantly on the framing of those risks.

**Impact Reporting – Corporate Affairs**

**Communications, Involvement and Engagement**

This month’s report again includes in the Reading Room examples of the impact of specific team functions beyond the compliance and regulation aspects of the remit of the Director of Corporate Affairs/Company Secretary in order to alert the Board to activity across the Corporate Affairs portfolio. Ongoing iterations of the update report will include these updates as considered pertinent/useful in the prevailing circumstances.

**Compliance matters and prospective analysis**

The Legal Regulatory and Policy Update Report is designed to reflect changes in legislation, guidance, the structure of the NHS, and government policy and direction on health and social care. A summation of the change is provided for each item and where relevant, a sense of the Trust’s position with regard to the change. **The Board of Directors is invited to consider and note the content of the report and where relevant, members should each be satisfied of their individual and collective assurances that the internal controls in place to deliver compliance against any Trust’s obligations are effective. The Appendix should, on a risk basis, prompt consideration of the need to commission any deep dive (or ‘true for us’ reviews) in order to enhance the level of assurance or to improve the control environment, and/or decisions about the focus of any relevant Board Committee.**

The Executive team meeting’ focus will where relevant ensure Executive Directors are aware of the changes related to their portfolios and will take forward any key actions arising from the Legal, Regulatory and Policy Updates. Progress updates on any relevant actions will be reported to the Board of Directors, as pertinent and appropriate either through the report itself or via the relevant routine Board reports of individual Executives.

The principal Committee meetings of the Board are aligned to the cadence of the Board calendar, with the Chair of each Committee providing the Board with their latest updates and recommendations for approval. Following the interim findings of the Good Governance Institute as part of the external review against the Well Led framework into quality governance, the Chair of each Committee will from November adopt a ‘Three A’s’ approach to upward reporting to Board (Advice, Alert, Assurance). In addition to the matters in this report, the Board will need to use the Committee Chair’s updates to also influence its identification and assessment of new/emerging risk.

Early consideration supports a prospective understanding of risk and opportunity. Chairs of Board Committees should consider whether more detailed assurances relevant to their committees, are necessary, utilising this report as a constructive stimulant to inform the composition of meeting agendas and reporting focus as necessary or appropriate.

**In this month’s Legal and Regulatory Update**, a number of publications have significance for the Trust.

The importance of system and partnership working is again a theme through this month’s paper, and as reported in July and in September, system working and collaboration is set to become a licence condition under our **Provider Licence** such that we will be increasingly judged on our contribution to the objectives of the integrated care system. This month’s report includes an alert to the launch of the consultation on the changes to the Licence and also NHS England’s new Operating Framework against which our performance will be overseen.

The provider licence forms part of the oversight arrangements for NHS providers. The NHS Oversight Framework (SOF) details the overall principles, responsibilities and key metrics for oversight, while the provider licence serves as the legal mechanism for any formal regulatory intervention and underpins mandated support for the most challenged providers. The need to change the licence has arisen from changes to the statutory and operating environment, including a shift of emphasis from economic regulation and competition to system working and collaboration. The proposed changes will bring the licence up to date, reflecting the new legislation and supporting providers to work effectively as part of integrated care systems

Regarding the publication of the new **NHSE** **Operating Framework**, it is clear that we will retain our statutory responsibilities for the delivery of safe, effective, efficient, high-quality services and will be required to continue to comply with the provider licence which we assert to annually. We will be required as a provider to comply with Care Quality Commission (CQC) standards and NHS planning guidance requirements, and to contribute to effective system working via ICS strategies and plans. We remain accountable to people, communities, services users, Council of Governors and ICS partners. We are accountable to ICBs for ‘business as usual’ delivery of services and performance and are accountable to NHSE as regulator by escalation/ exception or agreement with ICB. An interesting change is that the role of foundation trust governors in appointing a chair under the new framework says the appointment process should “consistently seek the views and input of relevant partners, such as ICB leaders and so the Director of Corporate Affairs and Company Secretary, whilst this is not a requirement under the law, will ensure a reasonable approach is adopted to comply with the guidance in due course.

The CEO and Executive Team attended its first Tripartite (ICB and NHSE) Assurance meeting in respect the SOF on 24th November, 2022. Whilst previously flagged that the potential for duplication of function, contradictory messaging, blurred boundaries of accountability, and increased bureaucracy in support, oversight and performance management were risks, the Operating Framework gives emphasis to NHSE doing what it is best placed to do, while supporting and empowering the rest of the system. The specific references to proportionality, devolution and a ‘no surprises’ relationship is a welcome, positive signal – as is the acknowledgement of the “wisdom of frontline services”.

The guidance has now been published and as the consultation proposed, now formally sets expectations of providers in terms of collaboration in respect of three key areas – engaging consistently in shared planning and decision-making; consistently take collective responsibility with partners for delivery of high quality and sustainable services across various footprints including system and place; and consistently taking responsibility for delivery of agreed system improvements and decisions. Five characteristics of governance arrangements that providers must have in place to support effective collaboration are detailed.

With regard to the **NHS enforcement guidance** consultation, under the Health and Care Act 2022, NHS England has statutory accountability for oversight of both integrated care boards and NHS providers. NHS Improvement (comprising Monitor and the NHS Trust Development Authority) has been abolished and NHS England has assumed responsibility for carrying out NHS Improvement’s statutory functions, including the regulation of NHS providers, the exercise of provider enforcement powers, enforcement powers over ICBs in relation to compliance with patient choice provisions, and publishing and revising the guidance on the use of those powers.

The basic processes that NHS England would follow when taking provider enforcement action have not changed in the revised enforcement guidance. The revised guidance, however, sets out that NHS England will exercise its enforcement powers in line with the principles set out in the NHS Oversight Framework, working with and through ICBs wherever possible and with an emphasis on systems working together to resolve problems. Providers may be subject to:

• discretionary requirements

• undertakings

• additional governance licence conditions (foundation trusts only)

• monetary penalties

• revocation of licence

As set out in the 2012 Act, breach or suspected breach of provider licence conditions may provide the basis for formal regulatory intervention. In particular, NHSE may accept an undertaking from a provider to remedy suspected non-compliance where it has reasonable grounds to suspect a breach. NHSE may impose requirements on a provider, designed to remedy non-compliance, where it is satisfied there is a breach (discretionary requirements). The licence and related enforcement action underpins mandated support at some of the most challenged providers as set out in the NHS Oversight Framework.

The new **Code of Governance**, as with the UK Corporate Governance Code, has each section built around a set of principles emphasising the value of good corporate governance to long-term sustainable success. Each section also incorporates a set of more detailed provisions to implement these, which can help trusts demonstrate the effectiveness of governance practices and their contribution to the long-term success of the organisation and its wider system.

Corporate governance is the means by which boards lead and direct their organisations so that decision-making is effective, risk is managed and the right outcomes are delivered. In the Code, for the NHS this means delivering high quality services in a caring and compassionate environment, while collaborating within ICSs to integrate care and complying with the triple aim duty of better health and wellbeing for everyone, better quality of health services for all individuals and sustainable use of NHS resources. Robust governance structures that support collaborative leadership and relationships with system partners and other stakeholders, and strong local accountability is referenced as helping trusts maintain the trust and confidence of the people and communities they service. Good corporate governance is dynamic. The Board should be committed to improving governance on a continuing basis through evaluation and review.

The guidance magnifies how robust corporate and quality governance arrangements complement and reinforce one another. It reminds the reader that quality governance is the combination of structures and processes at and below board level to lead on trust-wide quality performance, including (i) ensuring required standards are achieved and (ii) investigating and acting on sub-standard performance.

The Code highlights that clinicians are at the frontline of ensuring patients receive quality care. However, the board of directors takes final and definitive responsibility for improvements, successful delivery and, equally, failures in the quality of care. Effective governance therefore requires boards to pay as much attention to quality of care and quality governance as they do to the financial health of their organisation. Boards also set the tone of their organisation by demonstrating shared values and behaviours, and recognising their organisation’s role in an ICS and the wider NHS, and the risks and opportunities this may present for quality of care. Our Well Led Review will provide a perspective and developmental insight.

Statutory guidance has now been published outlining options for how Trusts, NHSE and ICB can exercise some statuory functions via **delegation or joint working arrangements** under the HSCA 2022. There are risks associated with moves to delegate or jointly exercise statutory functions: for example, around how best to embed high-quality governance.The Board’s considerations of its strategic developments will need to pay due attention to such delegations and joint working especially given the Licence conditions highlighted in this report. The Board will need to be fully engaged in discussions and ensure robust oversight of any delegated or jointly exercised functions on an ongoing basis.

The publication of new **Transaction Guidance** is of significance given our Warneford developments. The updated transactions guidance is a significant improvement on the previous iteration: it is simpler and clearly reflects the changing NHS landscape and new ways of working within systems. It represents an important development in how NHSE considers the risks and benefits of transactions trusts undertake, and puts patient and population benefits at the core.

For transactions classified as significant, NHSE’s review will comprise of two gateway processes: *1. Strategic case* – setting out the rationale for the transaction, including why this is the preferred option. This will be assessed through discussion with trust, integrated care board (ICB) and integrated care partnership (ICP) leaders and review of documentation. NHSE will expect key partners within the ICS to be engaged in discussing and developing proposals from the very beginning. ICB support for a transaction will be a critical factor in NHSE’s consideration of whether a Strategic Case should be allowed to progress to the next stage.

*2. Full business case* – a detailed case will need to be developed, demonstrating how the transaction will be executed, what the benefits will be and how they will be delivered. The overarching purpose of an FBC review is to determine whether the deliverable benefits of the transaction to patients and the wider public materially outweigh the costs and risks in the medium to long term. Trusts will need to develop detailed plans for the delivery of patient benefits as part of their business cases, as standard. NHSE expects that trusts and ICSs will be ambitious for their patients and populations, but also realistic. Deliverability will be assessed as part of NHSE’s assurance approach. NHSE will consider whether the transaction forms part of an ICB strategy that delivers ICS sustainability in the medium term. Where this test applies, the trusts will not be solely accountable for addressing a wider system issue. The FBC rating will determine whether the transaction can proceed and the support requirements.

The True for Us and learning section of the Appendix highlights the outcome of the **Kirkup review into Maternity Services in East Kent**. It amplifies how every board member must examine the culture within their organisation and how they listen and respond to staff. It asks that Trusts take steps to assure themselves, and the communities we serve, that the leadership and culture across our organisation(s) positively supports the care and experience we provide

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Board members need to reflect on how effective assurance mechanisms are at ‘reading the signals’. The report outlines four areas for action:

* To get better at identifying poorly performing units
* Giving care with compassion and kindness
* Teamworking with a common purpose
* Responding to challenge with honesty.

The **Healthcare Regulators Whistleblowing** report amplifies the most common themes of the disclosures for the 21/22 year related to patient safety and care; leadership and management; health and safety; and behaviour.

At the last meeting the Emergency Preparedness, Resilience and Response Framework was highlighted and this month, the Trust’s EPRR assurance report is presented for Board approval.

Finally, with the theme of learning and the encouraged ‘True for Us’ curiosity, Board and Committee members are invited to consider the Addendum to the Report in the Reading Room. Notable is the ongoing theme of the importance of culture and safe environments for speaking up and a number of CQC inspections included in the report will assist with our own development focus.

**Governance Route/Approval Process**

This is a routine report with direct relevance to the Board and its committees and serves to provide early insight into the changing legal, regulatory and policy environment thereby allowing a risk based approach to stimulating further enquiry where relevant. The governance framework (Board, committees, legal duties and management functions) facilitate responsive and effective decision making, ensuring the Board and its Committees and the Executive Management Committee and senior management are able to collaborate, consider issues and respond.

Good governance is at the core of successful operation, ensuring considered and efficient decision making in furtherance of our overarching strategy and long-term sustainability. In discharging its duties the Board is supported by its various Board Committees.

The principal Committee meetings of the Board are aligned to the cadence of the Board calendar, with the Chair of each Committee providing the Board with their latest updates and recommendations for approval. Following the interim findings of the Good Governance Institute as part of the external review against the Well Led framework into quality governance, the Chair of each Committee will from November adopt a ‘Three A’s’ approach to upward reporting to Board (Advice, Alert, Assurance). In addition to the matters in this report, and other Board reporting, the Board will need to use the Committee Chair’s updates to also influence its identification and assessment of new/emerging risk to performance or objectives.

**Recommendation**

The Board of Directors is invited to consider and be aware of the content of the report and where relevant, members should each be satisfied of their individual and collective assurances and reassurance that the internal plans and controls in place to deliver compliance against relevant Trust obligations are appropriate and effective. Chairs of Board Committees should consider whether more detailed assurances relevant to their committees, are necessary, utilising this report as a constructive stimulant to inform the composition of meeting agendas and reporting focus as necessary or appropriate and in the context of the Trust’s strategic risk profile and the effectiveness of mitigations/controls.

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**Lead Exec: Kerry Rogers, Director of Corporate Affairs & Company Secretary**

1. *A risk assessment has been undertaken around the legal issues that this report presents and there are no issues that need to be referred to the Trust Solicitors*
2. ***Strategic Objectives/Priorities*** *– this report relates to or provides assurance and evidence against all aspects of each of the Strategic Objectives/Priorities of the Trust*