Agenda Item No.17

NHS
The Queen Elizabeth Hospital King's Lynn
NHS Foundation Trust

REPORT TO THE BOARD OF DIRECTORS AND THE GOVERNORS' COUNCIL (PUBLIC)

RESPONSIBLE DIRECTOR:	REPORT FOR:		IMPACT ON BUSINESS:		
Steve Barnett, Trust Chairman	Decision	✓	High	Med	Low
	Discussion			✓	
	Information				
LEAD MANAGER:	**REPORT TYPE:**		**BAF REFERENCES & RAG:**		
Gill Rejzl, Trust Secretary	Strategic				
	Operational				
	Governance	✓	**RELATED WORK: (PREVIOUS PAPERS TO COMMITTEE)**		
PEER ASSIST:	**PEER REVIEW:**				
	N/A		Constitution Working Group - 10 July 2019 Board and Governors' Council Meetings - 30/31 July 2019 Extraordinary Governors' Council meeting – 15 August 2019		
CQC Domain: (safe, caring, effective, responsive, well-led)	Well-led				

Meeting Date: **27 August 2019**
Report Title: **Proposed Constitutional Changes**

PURPOSE:

To seek the Board's reconsideration of proposed changes to the Trust's Constitution.

SUMMARY:

On 10 July 2019, the Trust's Constitution Working Group met to discuss potential changes to the Trust's Constitution, relating to:

- Governor terms of office
- FT membership for volunteers
- The Lead Governor role

The work of the group was informed by a review of the legislation (Schedule 7 to the NHS Act 2006 (as amended up to 2012, by the Health and Social Care Act 2012) and the NHS Foundation Trust, Code of Governance (Monitor) (the Code).

Proposed changes were recommended to the Board in July 2019 and the Board's preferred options discussed by the Governors at an extraordinary Governors' Council meeting on 15 August. At their meeting, the governors proposed alternative constitutional changes. These are presented here for the Board's consideration.

RISK ASSESSMENT (CROSS-REFERENCE WITH RISK REGISTER WHERE APPROPRIATE):

Strategic / External	Operational/ Organisational	Financial	Clinical	Legal/ Regulatory	Reputational / Patient Experience
✓	✓			✓	

RECOMMENDATION/S:

The Board is invited to consider and agree the preferred constitutional change proposals of the Governors' Council:
 	
• Governor Terms of Office - Restriction on the number of terms a governor may serve to be removed from the constitution
• Volunteers - No constitutional change to make volunteers automatic members (subject to opt out). The Trust should however, put processes and communications in place to encourage volunteers to become members of the Public Constituency
• Lead Governor:
  o Lead Governor to be elected for the duration of his/her term (3-years)
  o Constitutional provision to be made for the election of a Deputy Lead Governor

1. Context

In July 2019, the Trust's Constitution Working Group met to discuss potential changes to the Trust's Constitution, relating to:

- Governor terms of office
- FT membership for Volunteers
- The Lead Governor role

The work of the group was informed by a review of the legislation (Schedule 7 to the NHS Act 2006 (as amended up to 2012, by the Health and Social Car Act 2012) and the NHS Foundation Trust, Code of Governance (Monitor) (the Code).

Proposed changes were recommended to the Board in July 2019. The Board's preferred options are (**MARKED)**. The constitutional change options and the Board's preferred options were discussed by the governors at an extraordinary Governors' Council meeting on 15 August. At their meeting, the Governors proposed alternative constitutional changes. These are presented here (**MARKED**), together with the Council's rationale for the preference, for the Board's consideration.

This report sets out the key elements for discussion and options for appraisal considered at the meetings of the Board of Directors and Governors' Council in July/August.

Legal and Code of Governance provisions are highlighted in *shaded italics*.

2. Options and preferred options

Governor Terms of Office

The Code of Governance provides that *'Elected governors must be subject to re-election by the members of their constituency at regular intervals not exceeding three years.' (Code provision B.7.2).* It does not advise concerning a maximum number of terms for governors.

In 2018, the Trust's constitution was amended to provide that governors may serve three, three-year terms (from two previously) and may nominate themselves for election to the Governors' Council, after a period of at least one year. The current constitution annex provides as follows:

ANNEX 5 – ADDITIONAL PROVISIONS – GOVERNORS' COUNCIL

3.3 *An elected governor may not hold office for more than nine consecutive years, and shall not be eligible for election if he has held office for three terms.*

3.4 *An appointed governor may hold office for three years.*

3.5 *An appointed governor shall be eligible for reappointment at the end of his three-year term.*

3.6 *An appointed governor may not hold office for more than nine consecutive years and shall not be eligible for reappointment if he has held office for three terms.*

3.7 *An elected governor who has held office for three consecutive terms may nominate him/herself for election after one year (from the day after the date of the end of the third term).*

3.8 *An appointed governor who has held office for nine consecutive years may be appointed after one year (from the day after the end date of the ninth year).*

The Constitution working group considered the following questions and issues:

- Should governors serve a maximum of three terms (subject to re-election) with the option to stand again for election after a period of at least one year? (current provision)
- Should governors be able to serve more than three terms (subject to re-election) – and if so, for how long should a governor be able to serve on the Council?
- Should any restriction on the number of terms a governor may serve be lifted altogether?

A range of views were expressed by members of the Constitution Working Group:

Support for the status-quo:

- Governors serving more than three terms may lose independence and objectivity and become 'too close' to operational issues and colleagues
- Governors may feel pressure to serve more terms than they would ideally wish too
- The ability to 'refresh' the Governors' Council membership and skill-set is desirable

Support for a constitutional change:

- Rather than there being any constitutional restriction on the number of terms a governor may serve, the FT Members should be able to decide how long a governor may serve, through the election process
- The Trust has at times, found it challenging to attract nominations for election to the Governors' Council from some constituencies / classes. Restricting the terms of governors willing to continue to serve, may result in more vacant or uncontested seats on the Governors' Council
- A restriction on the number of terms a governor may serve and the resulting loss of long-serving governors, may result in the loss of a significant body of governor experience
- There may be times when the Board of Directors is undergoing a period of rapid change at both executive and non-executive director-level. The loss of experienced governors at these times may further de-stabilise the Trust's governance arrangements

Options:

1. No change from 2018 – Governors continue to serve a maximum of three terms (subject to re-election) with the option to stand again for election after a period of at least one year
2. The number of terms a governor may serve will be amended / extended (by how long – to be determined)
3. Restriction to the number of terms a governor may serve be removed from the constitution altogether **(GOVERNORS' COUNCIL PREFERRED OPTION. Rationale – in recent years, it has been increasingly challenging to attract members to nominate themselves for election to the Governors' Council. Losing governors willing to continue to serve, could result in more vacant or uncontested seats on the Governors' Council. Additionally, governors felt that it should be up to the members to decide how long public governors should serve, at the ballot.)** It is suggested that the re-appointment of partner governors for would be at the discretion of the partner organisations.
4. Constitutional provision is made for governors' terms to be extended (subject to re-election) for a period of up to three years (a further full-term) at the discretion of the Trust Chairman, taking into account the views of the Governors' Council and the Board of Directors. This would provide

for a 'temporary' extension to governors' terms at times of instability or for other extenuating reasons.

The Chairman would use his/her discretion to take this decision before the beginning of each election period and the extension would apply to all governors coming to the end of their third term of office, who wish to nominate themselves for election to a further period in office. **(BOARD'S PREFERRED OPTION at 30 July)**

Volunteers

The Trust's volunteers are highly valued. Not all volunteers are currently FT Members and those who have become members are currently members of the Public Constituency.

It was originally suggested by the Governors that all volunteers become automatic FT Members (unless they choose to opt out), as a mark of the Trust's recognition of the value and importance of its volunteers.

Schedule 7 of the NHS Act 206 provides that only members of the Staff and Patient Constituencies can become members, automatically. The Trust does not have a Patient Constituency.

The legislation provides that trusts can include in the Staff Constituency, *'individuals employed by the corporation under a contract of employment and, if the constitution so provides, individuals who exercise functions for the purposes of the corporation otherwise than under a contract of employment with the corporation' (Schedule 7 to the NHS Act 2006 - 3.1b).*

To seek to include the volunteers in the Staff Constituency, a separate class could be introduced, resulting in the Staff Constituency being divided into the following classes: Clinical Staff, Non-Clinical Staff and Volunteers.

The legislation provides as follows: '*At least three members of the board* (Governors' Council) *must be elected by the staff constituency or, where there are classes within it, at least one member of the board* (Governors' Council) *must be elected by each class and at least three members must be elected altogether.' (Schedule 7 to the NHS Act 2006 - 9.2)*. The volunteers would therefore be able to elect one or more of their number to the Governors' Council, in the same way as the clinical and non-clinical members currently do.

The legislation also provides that members of the Staff Constituency, may not continue as members of any other constituency. This would mean that were our volunteers to become automatic members of the staff constituency, they would no longer be able to be members of the Public Constituency.

Options:

1. No constitutional change – the Trust may, however, wish to put processes and communications in place to encourage volunteers to become members of the Public Constituency. **(GOVERNORS' COUNCIL PREFERRED OPTION. Rationale – Governors have withdrawn their suggestion that volunteers should become automatic members [subject to opt out] of the Staff Constituency. Following their consideration of the legal position, Governors reconsidered the options and took account of the fact that such a change might result in the loss of volunteers and/or members and governors. Members eligible for membership of the Staff Constituency (which would lawfully need to include volunteers) are not eligible for membership of any other constituency.)**
2. A 'Volunteer Class' be added to the Staff Constituency. Volunteers would become automatic members, unless they choose to opt out. Volunteers would be able to elect one or more governors to the Governors' Council. **(BOARD'S PREFERRED OPTION at 30 July)**

Lead Governor

The Trust's Constitution currently provides that 'The Governors' Council shall elect one of their number to be the Trust's Lead Governor, having the role described in Monitor's NHS Foundation Trust Code of Governance.' It does not currently state how frequently the Governors' Council should be invited to

elect / re-elect the Lead Governor. Custom and practice at the Trust since authorisation has been that the Lead Governor has been elected by the Council for the duration of his/her current term of office.

The Constitution currently makes no provision for the election of a Deputy Lead Governor. The Constitution Working Group felt that this should be considered, as there were identified benefits in having a Deputy, in terms of workload-sharing, cover for periods of non-availability e.g. sickness/holidays and potentially, succession planning.

Options:

1. Clarify the Constitution concerning the frequency of elections to the role of Lead Governor (1 year / 2 years / 3 years?)
2. Add a constitutional provision for the election of a Deputy Lead Governor

THE BOARD AND THE GOVERNORS' COUNCIL WERE IN AGREEMENT ON THEIR VIEW THAT THE LEAD GOVERNOR SHOULD BE ELECTED FOR THE DURATION OF HIS/HER TERM OF OFFICE (3 YEARS) AND THAT THE GOVERNORS' COUNCIL SHOULD BE INVITED TO ELECT A DEPUTY LEAD GOVERNOR. Rationale – opportunity to share the workload of the Lead Governor and the potential for succession planning.

3. Recommendations

The Board is invited to consider and agree the preferred constitutional change proposals of the Governors' Council:

- Governor Terms of Office - Restriction on the number of terms a governor may serve to be removed from the constitution
- Volunteers - No constitutional change to make volunteers automatic members (subject to opt out). The Trust should however, put processes and communications in place to encourage volunteers to become members of the Public Constituency
- Lead Governor:
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4. Next Steps

Since, the proposed changes relate to the power and duties of governors, any constitutional changes agreed will be presented to the Annual Members' Meeting (AMM) for approval on 12 September. In line with the provisions of the Trust's constitution, if the members do not approve constitutional amendments relating to governors, then the amendments will cease to have effect.

The Trust Secretary will assimilate any agreed amendments into the drafting of the Trust's Constitution, for recommendation to the Annual Members' Meeting.

Access to information:

Schedule 7 of the NHS Act 2006:

https://www.legislation.gov.uk/ukpga/2006/41/schedule/7

The NHS Foundation Trust Code of Governance:

https://www.gov.uk/government/publications/nhs-foundation-trusts-code-of-governance