



**COUNCIL OF GOVERNORS  
30 APRIL 2013**

**TRUST CONSTITUTION REVIEW - BRIEFING PAPER**

**1. Introduction**

This briefing paper will provide the Council with a background to the recent review of the Trust's Constitution, describe the review process and arrangements for oversight and summarise the key changes to the Constitution, attached. It will also signpost future work on the Constitution and supporting governance documents.

**2. Background**

In simple terms a constitution is a set of written rules or an agreement on how an organisation is governed including the aims of the organisation, how it will be run and how different parts of the organisation will work together.

Under the National Health Service Acts of 2003 and 2006, Monitor was given power to grant authorisation as a foundation trust only if it is satisfied that certain criteria are met, including the requirement of that the constitution will be in accordance with the Acts and will otherwise "be appropriate".

STHFT was authorised by Monitor as a Foundation Trust in 2004 and its Constitution incorporated as a condition of the terms of authorisation. As such, the Constitution is the legal framework under which the Trust, as a Public Benefit Corporation, operates.

Prior to this review, there had only been 3 minor amendments to the Trust's Constitution.

**3. Review process**

**3.1 Why?**

The passage of the Health and Social Care Act in April 2012 necessitated a number of changes to the Constitution of all foundation trusts. In addition to making preparations in readiness for the Commencement Orders, it was considered timely to undertake a thorough review of the Trust's Constitution at the same time as there were a number of constitutional issues that needed addressing:

- Size and composition of the Council of Governors (then known as Governors' Council) to ensure fair and effective representation. Specifically via the Public Constituency for the population covered by tertiary services that are regional or sub-regional such as North Trent and via the Staff Constituency for the newly integrated Primary and Community Services staff. There were also concerns about the relevance and effective engagement of the Appointed Governors – especially looking to the future.
- Clarification of Governor roles and responsibilities. Specifically how to build and maintain an effective relationship between the Council of Governors and the Board of Directors; the appropriateness of Governors' Terms of Office and induction and ongoing training/development for Governors.
- To review and revise the existing procedures to resolve any dispute between the Council of Governors and the Board of Directors.

- The size and composition of the Board of Directors, the appointment of the Vice Chair and the Terms of Office for Non-Executive Directors.
- To ensure a fit with Monitor's Model Core Constitution and the Code of Governance.

### 3.2 How?

In July 2012, the Trust Executive Group and the Board approved proposals to undertake a review and a timetabled programme of phased re-drafts of the Constitution to ensure ongoing compliance with provisions of the 2012 Act and to update the Constitution and key supporting documents to ensure the Trust's governance arrangements followed best practice and were internally coherent. The proposals were subsequently supported by Council of Governors in November 2012.

### 3.3 Oversight

A joint task-and-finish committee of the Board and the Council of Governors, the Trust Constitution Review Steering Group (TCRSG), was established to provide oversight of the review process and to approve all re-drafts of the Constitution and relevant complementary documents prior to approval by the Board, the Council and Monitor.

TCRSG membership included 2 NEDs (including the Vice Chairman and Senior Independent Director) and 3 Governors (1 Public, 1 Patient and 1 Appointed Governor). The group was chaired by the Trust Secretary and serviced by the Membership Manager and the Assurance Manager. The Terms of Reference of the TCRSG were agreed at their inaugural meeting in September 2012. Staff Governors chose not to participate as members of the group but to receive briefing updates from the Trust Secretary.

### 3.4 **Phase 1**

The first phase of the review process was to review and redraft the original Constitution to ensure compliance with provisions of the Health and Social Care Act that came into force from 1 October 2012 under Commencement Order 2.

The main changes approved in Version 2 were to:

- redefine the *Principal Purpose* (Para 3, p5) using recommended wording prescribed by Monitor i.e. to fulfil its principal purpose the Trust must ensure that in each financial year, its total income from NHS-funded goods and services is greater than its total non-NHS income (in effect the Trust can raise up to 49.9% of its total income from non-NHS income).
- rename the *Governors, Council* to the *Council of Governors* (Throughout). NB The 2006 Act had called the governor body the Board of Governors which may have caused problems when differentiating Boards. This was not an issue for the Trust.
- update the *Accounts* section (Para 40, p15) and *Annual report, forward plans and non-NHS work* (Para 41, p16) using recommended wording prescribed by Monitor i.e.
  - Annual Reports (from 2012/13) must address the impact of non-NHS income on fulfilling the Trust's principal purpose.
  - Forward Plans (from 2013/14) must include details on the Trust's proposals to generate non-NHS income including the amount it is expecting to raise.
  - Governors must be satisfied that non-NHS income generation will not significantly interfere with the Trust's principal purpose and must notify the Board of Directors of their decision.
  - Any proposal to increase non-NHS income by 5% or more of its total income must be approved by 50% of the Governors voting at a meeting.

On the recommendation of the TCRSG, the Trust's solicitors (DAC Beachcroft) were asked to independently review Version 2 as assurance for the Council of Governors and the Board of Directors. It was approved by the Trust (i.e. TEG, the Board and the Council) in November and

submitted for final approval by Monitor. Monitor gave final approval to Version 2 of the Constitution in February 2013 following a number of non material amendments.

### 3.5 Phase 2

The second phase of the review was to redraft Version 2 using Monitor's Model Core Constitution.

Originally published in 2008, the *Model Core Constitution* was prepared by Monitor to reflect the requirements of Schedule 7 of the 2006 Act, (and subsequently updated in 2012 to reflect the requirements of the 2012 Health and Social Care Act) and what Monitor considers matters "otherwise appropriate" as set out in Monitor's publication, *Applying for NHS Foundation Trust Status: Guide for Applicants*. Monitor requires all applicant Trusts to prepare their Constitutions on the basis of this model core constitution and that any departure from the model be in accordance with the relevant provisions of the acts or be accompanied by an explanation for the intended departure from the model.

The Trust's Constitution predated the Monitor model and was significantly different. Whilst not a requirement for existing FTs to adopt the model, TCRSG concluded that adoption was a simple way of ensuring a fit with best practice, that it would expedite future amendments and would smooth the approval process whilst Monitor still had that responsibility.

Moving Version 2 on to Monitor's Model Core Constitution entailed further significant review and amendment of some provisions of the Trust's Constitution as well as a number of key supporting documents to ensure internal coherence of the Trust's governance arrangements.

The main changes in Version 3 were to:

- re-draft the Constitution using the framework and format of Monitor's Model Core Constitution (All)
- increase the maximum number of consecutive terms of office for Governors from 2 to 3 and introduce a 3 year rest rule before being able to seek re-election (Para 15, p8)
- introduce a "Public outside Sheffield" constituency for Public Constituencies and update existing boundary definitions to fit with Boundary Commission definitions of Sheffield City Council wards. (Annex 1, p19)
- introduce an additional Staff Constituency – Primary and Community Care Services, provisionally as an interim for 3 years. (Annex 2, p20)
- reduce the number of Appointed Governors from 13 to 8 and update details of remaining appointing organisations, specifically – 1 x PCT, 1 x South Yorkshire Police, 1 x Sheffield Health and Social Care, 1 x SHA, and 1 x Sheffield First. (Annex 5, p24)
- revise and update the Council of Governors' Standing Orders. (Annex 7, p52)
- codify provision for removal of members and Governors. (Annex 8, p63)
- revise the Board of Directors' Standing Orders (including NED Terms of Reference) and incorporate into the Constitution. (Annex 9, p65)
- codify provisions for disqualification and expulsion of Trust members. (Annex 10, p83)

TCRSG originally planned Phase 2 of the programme would be completed by early 2013. However, the scale and complexity of the work was greater than had been envisaged and in December 2012 it approved slippage in the timetable.

In the absence of prior confirmation that the remaining relevant provisions of the Health and Social Care Act would be in force by the 1st April 2013, the work on Version 3 and the supporting documents was completed and approved by the TEG and the Board of Directors in February 2013, awaiting final approval by the Council of Governors at an extra-ordinary meeting to be held in March 2013.

However, before the extra-ordinary meeting of Council of Governors was held, the fourth Commencement Order for the Health and Social Care Act was released confirming that all

relevant outstanding provisions would be in force on 1st April 2013, including the requirement to notify Monitor rather than seek its approval of any amendments to FT Constitutions. In response, the Board of Directors agreed to cancel the extra-ordinary meeting of Council of Governors pending a further redraft of Version 3 for approval at the scheduled Council of Governors meeting in April 2013.

In addition to the changes to the Constitution, Phase 2 also included the development or review and update of a number of supporting governance documents, namely:

- Terms of Reference of the Council of Governors (including Lead Governor Role)
- Terms of Reference of the Council of Governors' Nominations and Remuneration Committee
- Terms of Reference of the Board of Directors' Nominations and Remuneration Committee
- Senior Independent Director Role Description
- Governor Role Description
- Board of Directors' Code of Conduct
- Council of Governors' Code of Conduct

### **3.6 Phase 3**

The third and final phase of the review process was to make amendments to Version 3 to ensure compliance with the remaining constitution-related provisions of the Health and Social Care Act that came into force from 1<sup>st</sup> April 2013 under Commencement Order 4.

The main changes in Version 3.1 are to:

- hold an Annual Members Meeting. (Para 12, p8 and Annex 4, p22)
- alter the duty of Governors to hold the NEDs individually and collectively to account for the performance of the Board of Directors and to represent the interests of members and of the public. (Para 17, p9)
- hold the Trust responsible for ensuring appropriate training for Governors to undertake their new duties. (Para 17, p9)
- the Council of Governors can require a Director to attend a Council of Governors meeting rather than request attendance (Para 18.3, p 9)
- include provision for Governors to refer matters of non-compliance with the Trust's Constitution to a Panel appointed by Monitor. (Para 20, p10).
- include a description of the general duty of the Board of Directors. (Para 25, p11)
- require that Board meetings are held in public and that agendas and minutes are made available to the Council of Governors. ((Para 31, p 12)
- make available to the public certain documents, in the event of a special administration of the Trust. (Para 37, p 14)
- shift responsibility for approving future amendments from Monitor to the Council of Governors with a proviso that any change in relation to Council must be presented to members for ratification at the Annual Members Meeting and that Monitor must be notified of any amendment. (Para 45, p17)
- introduce new provisions relating to the approval for mergers etc and for significant transactions, as defined. (Para 46, p17)
- update the Dispute Resolution Procedure between the Council of Governors and the Board of Directors. (Para 44, p17 and Annex 11, p86)

## **4. Future**

Following approval by the Board of Directors on 17 April 2012 and pending approval at the meeting of the Council of Governors on 30 April 2013, the revised Constitution will take immediate effect and will be notified to Monitor thereafter, subject to ratification at the Annual Members Meeting to be held sometime in September.

In future the Constitution and all supporting governance documents will be subject to regular review.

There are still some outstanding tasks to complete such as updating supporting governance documents in line with Version 3.1, developing a Job Description for the Governors' Forum Convenor and undertaking a boundary review for the Sheffield Public Constituencies. However the TCRSG has successfully discharged its duties under its terms of reference and the dissolution of the steering group was agreed at their meeting of 25 March 2013.

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