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Council of Governors and Board of Directors Policy of Engagement for Serious Concerns

Document Information

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Author:	Corporate Governance Manager		
Director Responsible	Director of Corporate Governance and Trust Secretary		
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Council of Governors		February 2023 (V1)	
Board of Directors		February 2023 (V1)	
Links or overlaps with other policies:			
<ul style="list-style-type: none"> NHS England Code of Governance for NHS Provider Trusts Governor Code of Conduct NHS England Your Statutory Duties – A Reference Guide for NHS Foundation Trust Governors – updated in 2022 for system working and collaboration NHS England "Director-governor interaction in NHS foundation trusts – A best practice guide for boards of directors" (joint publication by PA Consulting and Monitor 2012) 			
<p>We are committed to preventing discrimination, valuing diversity and achieving equality of opportunity. No person (staff, patient or public) will receive less favourable treatment on the grounds of the nine protected characteristics (as governed by the Equality Act 2010): Sexual Orientation; Gender; Age; Gender Reassignment; Pregnancy and Maternity; Disability; Religion or Belief; Race; Marriage and Civil Partnership. In addition to these nine, the Trust will not discriminate on the grounds of domestic circumstances, social-economic status, political affiliation or trade union membership.</p> <p>We are committed to ensuring all services, policies, projects and strategies undergo equality analysis. For more information about equality analysis and Equality Impact Assessments please refer to the Equality and Diversity Policy.</p>			

Amendment History

Issue	Status	Date	Reason for Change	Authorised
1.0	New Document	Feb 23	New Document	CoG and Board of Directors
2.0	Revisions	Feb 2024	Revisions to align with Constitution/SO's & Trust policy broadly	CoG and Board of Directors

1. Introduction

- 1.1. The relationship between the Council of Governors and the Board of Directors is key to the successful delivery of the Trust's functions. The Council of Governors and Board of Directors are each committed to building and maintaining an open and constructive working relationship.
- 1.2. The Chair is the prime connection between the Council of Governors and Board of Directors. In addition, the Trust has well established channels for business-as-usual communications and engagement between the two bodies. Informal and frequent communication are an essential feature of a positive and constructive relationship and benefits the Trust and the services it provides.
- 1.3. In the limited and rare circumstances described below, where Governors have very serious concerns about the functioning of the Trust, they may wish to invoke the formal process set out in this policy.

2. Purpose

- 2.1. The purpose of this policy is to describe the method by which Governors can engage with the Board of Directors in circumstances when they have serious concerns about:
 - 2.1.1. the performance of the Board of Directors,
 - 2.1.2. compliance with the Trust's NHS Provider Licence; or
 - 2.1.3. other matters related to the overall wellbeing of the Trust and its collaboration with system partners.
- 2.2. NHS England's Code of Governance for Provider Trusts (updated in 2022) ("**Provider Code of Governance**") recommends that the Council of Governors establishes a policy of engagement to govern such situations. This policy is intended to provide clear guidance for both the Board of Directors and Council of Governors and has been approved by each respectively.
- 2.3. The policy is not intended to interfere with the usual methods of interaction between the Board of Directors and Council of Governors or the operation of the Trust's Freedom to Speak up: Raising Concerns (Whistleblowing) Policy¹.

3. Definitions and Interpretation

- 3.1. The capitalised terms and expressions defined in the Constitution apply to this policy.
- 3.2. The phrase "overall wellbeing of the Trust" is not defined in the Provider Code of Governance. The Trust interprets the phrase to mean the Trust's ability to deliver services in a way that fulfils its purpose, aligns with its values, creating a just and fair culture and crucially ensures compliance with the Trust's NHS Provider Licence.
- 3.3. The policy should be read in conjunction with the Constitution and other documents relevant to the governance of the Trust, including the Trust's NHS Provider Licence, as well as the Provider Code of Governance.
- 3.4. If there is any discrepancy between this policy and the National Health Service Act 2006, the Constitution or the Trust's Provider Licence, then those documents shall prevail over this policy. All Governors and Directors have access to these documents and should familiarise themselves with the contents of them.

¹ <https://www.torbayandsouthdevon.nhs.uk/uploads/raising-concerns-policy-h30.pdf>

- 3.5. A reference to the Chair shall be read as a reference to the Senior Independent Director where the Chair is unavailable or where it would be inappropriate to engage the Chair due to reasons of conflict.

4. Application of the Policy

- 4.1. The policy is not intended to cover minor or technical issues which can usually be resolved via the established channels of communication between Governors and the Secretary and Chair.
- 4.2. The policy seeks to address very serious concerns raised by Governors which cannot be resolved in the normal manner and may be invoked in relation to the following, but non-exhaustive list of situations, outlined below:
- 4.2.1. breakdown of communications between the Trust and its System stakeholders;
 - 4.2.2. extensive breaches of the Trust's Provider Licence whether alleged or actual;
 - 4.2.3. Board of Director's failure to respond adequately to findings from external regulatory bodies such as CQC or HSE of serious failings;
 - 4.2.4. absence of Board of Directors oversight over significant financial or clinical risks which subsequently materialise;
 - 4.2.5. breakdown of trust between the Trust and its workforce;
 - 4.2.6. major operational oversights leading to loss of continuity of service;
 - 4.2.7. loss of confidence of system leaders in the Board of Directors;
 - 4.2.8. failure to respond to a significant transformational opportunity.
- 4.3. The policy is not intended for use where Governors have concerns about the performance of the Chair or any single Non-Executive Director. In these situations, Governors are referred to NHS England guidance, including the Provider Code of Governance and the Statutory Guide for Governors² and, ultimately, paragraph 27 of the Constitution (appointment and removal of Chair and other Non-Executive Directors).
- 4.4. Concerns may be raised through the application of this Policy by Governors as a whole acting collectively, by a sub-set of Governors or by Governors individually.
- 4.5. Where the Council of Governors as a whole is in dispute with the Board of Directors, the procedure in Annex 4 of the Constitution applies.
- 4.6. For the avoidance of doubt, Directors may not invoke this policy in relation to Governors.

5. Process for Engagement

- 5.1. Governors should first consult the Trust Secretary who will seek to resolve the concern informally and advise on the appropriateness of raising the matter with the Chair; as outlined in provision 4.1.
- 5.2. The advice of the Trust Secretary is not binding and the Governors retain the right at all times to raise the matter with the Chair. Where it would be inappropriate to raise the concern with the Trust Secretary or the Chair, the Senior Independent Director should be approached instead.
- 5.3. Where the matter has not been resolved informally with the support of the Trust Secretary or where Governors have been advised to raise the concern with the Chair, the Governors may raise the concern with the Chair who will seek to resolve the matter informally. Failing that,

² [Governors guide August 2013 UPDATED NOV 13.pdf](#)

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Governors should make a request for the matter to be investigated within the terms of this policy.

5.4. The Trust shall, at its discretion, appoint one of the following to investigate the concerns ("**Investigator**"):

- 5.4.1. the Chair;
- 5.4.2. the Senior Independent Director;
- 5.4.3. a Nominated Officer;
- 5.4.4. the Trust's internal auditor; or
- 5.4.5. an external investigator such as a professional services firm whose costs will be paid by the Trust provided the matter is not vexatious within the meaning of the Trust's Complaints Policy³.

5.5. The Investigator is entitled to set the detailed terms of reference but will do so in line with the overall statutory roles of the Council of Governors to:

- 5.5.1. hold the Non-Executive Directors to account for the performance of the Board of Directors; and
- 5.5.2. represent the interests of the Trust's Members and the public.

The investigation will therefore focus on the Board of Director's, and particularly the Non-Executive Directors', visibility, oversight and response to the matter raised.

5.6. The Investigator may involve Directors and Officers at their discretion. Directors who are requested to participate in an investigation shall:

- 5.6.1. co-operate with requests of the Investigator;
- 5.6.2. attend meetings and produce documents;
- 5.6.3. answer questions raised by the Governors which form part of the investigation; and
- 5.6.4. confirm decisions taken by Directors or the Board of Directors (where appropriate).

5.7. Governors who have raised the concern will be invited to submit evidence to the Investigator.

5.8. The Governors and Directors agree to respect the confidentiality of the investigation.

5.9. Whilst the investigation is ongoing, the Council of Governors agrees to refrain from exercising its statutory power to require one or more of the Directors to attend a Council of Governor's meeting for the purpose of obtaining information about the Trust's performance of its functions or the Directors performance of their duties (and deciding whether or not to propose a vote on the Trust's or Director's performance) in relation to the matters under investigation.

5.10. The Investigator will review the evidence gathered and will, unless the Investigator is the Chair, report their findings to the Chair. As soon as practicable after the conclusion of the investigation, the Chair will meet with the Governors who raised the concerns to discuss the findings. The meeting has three possible outcomes:

5.10.1. the Governors are satisfied that their concerns were unjustified and withdraw them unreservedly. In this case no further action is required;

5.10.2. the Governors are satisfied that their concerns will be resolved by actions to be taken in light of the investigation or will be otherwise resolved. The Chair will write a report on the concerns and the actions taken, or to be taken, and present it to the Council of Governors in the closed section of the next Council of Governors meeting;

³ [Complaints Policy](#)

5.10.3. the matter is not resolved to the satisfaction of the Governors. The Chair will call a closed extraordinary meeting of the Council of Governors as soon as reasonably practicable to consider the matter further. That meeting may resolve to take no further action or, if two thirds of the Governors present agree the motion, the Trust shall refer the matter to NHS England or an independent arbitrator external to the Trust such as the chair of another NHS provider.

6. Distribution

6.1. This policy document will be made available on the Trust's intranet and public website.

6.2. Awareness will be raised through Equality Impact Assessment training, all ratifying committees/groups, policies and procedures training and intranet.

7. Key Contacts

7.1. For further information about this policy, contact foundationtrust.tsdf@nhs.net.

Appendix 1

Rapid Equality Impact Assessment *(for use when writing policies and procedures)*

Policy Title (and number)		CoG and Board of Directors Engagement Policy		Version and Date	V2.0 April 24
Policy Author		Corporate Governance Manager			
An equality impact assessment (EIA) is a process designed to ensure that a policy, project or scheme does not discriminate or disadvantage people. EIAs also improve and promote equality. Consider the nature and extent of the impact, not the number of people affected.					
EQUALITY ANALYSIS: How well do people from protected groups fare in relation to the general population? <i>PLEASE NOTE: Any 'Yes' answers may trigger a full EIA and must be referred to the equality leads below</i>					
Is it likely that the policy/procedure could treat people from protected groups less favorably than the general population? (see below)					
Age	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Disability	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Sexual Orientation	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Race	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Gender	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Religion/Belief (non)	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Gender Reassignment	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Pregnancy/ Maternity	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Marriage/ Civil Partnership	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Is it likely that the policy/procedure could affect particular 'Inclusion Health' groups less favorably than the general population? (substance misuse; teenage mums; carers ¹ ; travellers ² ; homeless ³ ; convictions; social isolation ⁴ ; refugees)					Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Please provide details for each protected group where you have indicated 'Yes'.					
VISION AND VALUES: Policies must aim to remove unintentional barriers and promote inclusion					
Is inclusive language ⁵ used throughout?					Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Are the services outlined in the policy/procedure fully accessible ⁶ ?					Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Does the policy/procedure encourage individualised and person-centered care?					Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Could there be an adverse impact on an individual's independence or autonomy ⁷ ?					Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
If 'Yes', how will you mitigate this risk to ensure fair and equal access?					
EXTERNAL FACTORS					
Is the policy/procedure a result of national legislation which cannot be modified in any way?					Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
What is the reason for writing this policy? (Is it a result in a change of legislation/ national research?)					
To provide the CoG with an engagement policy when working with the Trust/Trust Board of Directors.					
Who was consulted when drafting this policy/procedure? What were the recommendations/suggestions?					
Council of Governors					
ACTION PLAN: Please list all actions identified to address any impacts					
Action		Person responsible		Completion date	
n/a					
AUTHORISATION:					
By signing below, I confirm that the named person responsible above is aware of the actions assigned to them					
Name of person completing the form		Sarah Fox		Signature	<i>Sarah Fox</i>
Validated by (line manager)		Emily Long		Signature	<i>Emily Long</i>

Any issues Please contact Diversity & Inclusion Lead

For Torbay and South Devon NHS Trusts, please call 01803 656676 or email pfd.sdhct@nhs.net

¹ Consider any additional needs of carers/ parents/ advocates etc, in addition to the service user

² Travellers may not be registered with a GP - consider how they may access/ be aware of services available to them

³ Consider any provisions for those with no fixed abode, particularly relating to impact on discharge

⁴ Consider how someone will be aware of (or access) a service if socially or geographically isolated

⁵ Language must be relevant and appropriate, for example referring to partners, not husbands or wives

⁶ Consider both physical access to services and how information/ communication is available in an accessible format

⁷ Example: a telephone-based service may discriminate against people who are d/Deaf. Whilst someone may be able to act on their behalf, this does not promote independence or autonomy