

NHS Foundation Trust Constitutions: five reasons why you should review your constitution

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An NHS foundation trust's constitution is the central document which establishes the fundamental principles and processes the directors and council of governors of a foundation trust must follow. Whilst much of the front-end of the constitution is mandated by the requirements set out in National Health Service Act 2006 (NHSA), the annexes to the constitution provide the foundation trust with an opportunity to set out how its board and council of governors will function and work together.

A constitution with inadequate or outdated provisions can result in difficulties when it comes to implementing change and making decisions. It is therefore important that the constitution is regularly reviewed and updated to reflect best practice.

Based on our work with foundation trusts over the last 12 months we have identified 5 key situations in which a foundation trust may need to refresh its constitution:

1. To ensure it is legally compliant The constitution must comply with the NHSA.
 2. We still regularly see constitutions that do not fully implement the changes that came in under the Health and Social Care Act 2012 or are inconsistent with legislation and are therefore not legally compliant.
 3. If your constitution has never been reviewed by a solicitor, or it has been many years since the last review, there is a chance that the constitution is not legally compliant.
 4. In some cases, this may impact on the lawfulness of decisions made by the board or council of governors and therefore it is critical that all trusts ensure their constitutions meet the requirements of the NHSA.
5. To facilitate good working relationships between the directors and the council of governors
 6. Good working relationships between the board of directors and council of governors is essential to the functioning of the trust. We have seen recent examples of where NHSEI have taken steps to intervene where these relationships start to break down.
 7. The Trust has a duty to ensure that governors understand their role within the trust (and the limits of this role). The constitution is an important document that sets out how the council of governors is to function and how it interacts with the board of directors.
 8. The constitution should set out the lines of communication between the board and the council of governors and how any issues are to be dealt with.
 9. A well drafted constitution can give the trust board and council of governors the tools they need to ensure the smooth governance of the trust, which will become increasingly important as we head into a period of system change.
10. To have processes to resolve membership and governor issues
 11. Occasionally trusts may face a situation where a member or governor raises an issue that affects the functioning of the trust. On reviewing the constitution many trusts find that the provisions for resolving issues are not sufficiently well drafted to provide a clear process for the trust to follow.
 12. We recommend that trusts review such provisions prior to being faced with such difficult situations.
 13. Clear and pragmatic drafting can aid corporate governance teams in knowing what steps they may need to follow as well as make clear to governors and members how issues will be resolved.
14. Prior to a transaction

15. The NHTA provides flexibility to foundation trusts in defining a “significant transaction” in its constitution.
16. Significant transactions must be approved by more than half of the council of governors voting and therefore knowing when the council of governors will need to approve a transaction will be an essential consideration when planning transactions.
17. Many trusts have adopted a definition of significant transaction which states that a significant transaction is defined by Monitor. But the current transactions guidance gives NHTSI a high degree of discretion as to whether a transaction is significant. This can lead to uncertainty when a trust is planning a transaction as it will not know whether the transaction requires approval of its council of governors until it has notified NHTSI.
18. In addition, confirmation in the constitution that a statutory transaction is not a significant transaction can avoid confusion as to whether the council of governors needs to approve a statutory transaction as a significant transaction in addition to the statutory approval requirements.
19. The significant transactions definition within a constitution can help facilitate planning for change and allow directors to explain to the council of governors what their role will be.
20. Any trust considering future transactions may want to consider reviewing these provisions early in the planning process.
21. To prepare for future change
 22. We now have a good idea of the changes that will come in under the Health and Care Bill.
 23. While trusts should not attempt to pre-empt these changes within their constitutions there are steps trusts can take to prepare for the shift to ICSs from 1 April 2021.
 24. Trusts will want to review their constituencies to ensure that these reflect the future services and geography of the trust under new place-based partnership arrangements. Such changes may necessitate changes to the membership of the council of governors and for elections to be held.

How we can support you.

- At Browne Jacobson we can review your constitution and proposed amendments to ensure that the provisions are not only legally compliant, but that they also reflect the desired position and help achieve the intended outcome.
- Our team can support corporate governance teams in drafting the constitution in a way which is robust and succinct so that existing and new governors are clear of their obligations and responsibilities.
- We can provide assistance when a trust is considering taking steps to resolve issues raised by a member or governor.
- For an initial discussion about any of these issues please don't hesitate to contact our Commercial Health team.

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