

Council of Governors (in Public)

Item 16.1

Subject: Proposal to Amend the LHCH Foundation Trust Constitution
Date of meeting: 19th September 2023
Presented by: Karan Wheatcroft, Director of Risk and Improvement
Purpose: To Approve

1. Executive Summary

The purpose of this paper is to seek approval to make a number of amendments to the Trust's Constitution (as attached) which are explained within this paper. The main changes are to reflect the Health and Care Act 2022. There is also a proposal to change the terminology Senior Governor to Lead Governor which is more consistent with other organisations especially as organisations work more collaboratively.

In line with the Code of Governance, the composition of the Council of Governors has also been reviewed and no changes are proposed at this time. This will be kept under review as the system, collaborations and partnerships continue to develop.

The Council of Governors is asked to consider the rationale for making these outlined amendments and vote to enable the amendments to be made to the Trust's constitution.

2. Background and Rationale for Change

The main driver for reviewing the constitution at this time is the change in legislation brought about by the Health and Care Act 2022.

This review of the constitution has been supported by Hill Dickinson LLP who provided a generic set of amendments to the model constitution, and these have been reflected in the Trust's constitution.

The review of the new Code of Governance, and 'Addendum to Your statutory duties – reference guide for NHS foundation trust governors' (NHSE, October 2022) also identified a number of provisions which have now been included within the Trust's constitution.

3. Proposed Amendments to the Constitution

A copy of the LHCH constitution showing all proposed amendments as tracked changes is attached. Each amendment is described as follows:

Amendment 1

The Foundation Trust's powers have been amended to reflect legislation and in particular specific references to Integrated Care Board (ICB), inequalities and the power to establish joint committees.

- 3.4 *The Trust may enter into arrangement for the carry out, on such terms as the Trust considers appropriate, of any of its functions jointly with any other person.*
- 3.5 *The Trust may arrange for any of the functions exercisable by the trust to be exercised by or jointly with any one or more of the following:*
 - 3.5.1 *A relevant body;*
 - 3.5.2 *A local authority within the meaning of section 2B of the 2006 Act;*
 - 3.5.3 *A combined authority.¹*
- 3.6 *The Trust may also enter into arrangements to carry out the function of another relevant body, whether jointly or otherwise*
- 3.7 *Where a function is exercisable by the trust jointly with one or more of the other organisations mentioned at paragraph 4.5, those organisations and the trust may:*
 - 3.7.1 *Arrange for the function to be exercised by a joint committee of theirs;*
 - 3.7.2 *Arrange for the trust, one or more of those other organisations, or a joint committee of them, to establish and maintain a pooled fund in accordance with section 65Z6 of the 2006 Act.*
- 3.8 *The trust must exercise its functions effectively, efficiency and economically.²*
- 3.9 *In making a decision about the exercise of its functions,³ the trust must have regard to all likely effects of the decision in relation to:*
 - 3.9.1 *The health and well-being of (including inequalities between) the people of England;*
 - 3.9.2 *The quality of services provided to (including inequalities between benefits obtained by) individuals by or in pursuance of arrangements made by relevant bodies for or in connection with the prevention, diagnosis or treatment of illness, as part of the health service in England;*
 - 3.9.3 *Efficiency and sustainability in relation to the use of resources by relevant bodies for the purposes of the health service in England.*
- 3.10 *In the exercise of its functions, the trust must have regard to its duties under section 63B of the 2006 Act (complying with targets under section 1 of the Climate Change Act 2008 and section 5 of the Environment Act 2021, and to adapt any current or predicted impacts of climate change in the most recent report under section 56 of the Climate Change Act 2008).*
- 3.11 *For the purposes of this section, “relevant body” means NHSE, an integrated care board, an NHS trust, a NHS foundation trust (including the trust) or such other body as may be prescribed under section 65Z5(2). “Relevant bodies” means two or more of these organisations as the context requires.*

¹ Section 65Z5 2006 Act

² Section 63 2006 Act

³ Section 63A

3.12 *The arrangements under this paragraph 4 shall be in accordance with:*

3.12.1 *any applicable requirements imposed by the 2006 Act or regulations made under that Act;*

3.12.2 *any applicable statutory guidance that has been issued and*

3.12.3 *otherwise on such terms as the trust sees fit.*

Amendment 2

Amendment two is the replacement of regulator references from “Monitor” to “NHS England”. There is also a minor change from “Department of Health” to “NHS Providers” to reflect a change in responsibility for the model election rules.

Amendment 3

A number of amendments have been made to align to the new Code of Governance. These are:

22.3 *The Council of Governors should raise issues to the Chair or in the case of the Chair to the Senior Independent Director prior to formal action to remove a non-executive director or the Chair.**

23.2 *The Deputy Chair should not chair the Audit Committee.*

24.2 *The Senior Independent Director should not chair the Audit Committee.*

**this amendment is also made in Annex 6, section 2.1.*

Amendment 4

Addition to the referral to panel section to ensure support to the governors.

15.3 *Without prejudice to the ability of a governor to make a referral to the Panel, the trust must take steps to secure that governors are able to access support and/or advice, as and where necessary to enable to fulfil their duties.*

Amendment 5

Addition to the decision making on significant transactions, including the interests of the public at large which is reflective of the ‘Addendum to Your statutory duties – reference guide for NHS foundation trust governors’ (NHSE, October 2022).

43.3 *In taking decisions on significant transactions, mergers, acquisitions, separations or dissolutions, Governors need to be assured that the process undertaken by the Board was appropriate, and that the interests of the public at large were considered. A Council of Governors may disagree with the merits of a particular decision of the Board on a transaction, but still give its consent because due diligence has been followed and assurance received. To withhold its consent, the Council of Governors would need to provide evidence that due diligence was not undertaken.*

Amendment 6

The references to signing minutes in person has been replaced with formal approval to reflect current practice.

4.13.1. The minutes of the proceedings of a meeting shall be drawn up and maintained as a permanent record. They will be submitted for agreement at the next meeting where they will be formally approved as an accurate record.

Amendment 7

The terminology “Senior Governor” has been replaced with “Lead Governor” which is more consistent with other organisations especially as organisations work more collaboratively.

4. Review of the composition of the Council of Governors

The composition of the Council of Governors has been reviewed as per the requirement of the Code of Governance (section B COG).

“2.2 The Council of Governors should not be so large as to be unwieldy. The Council of Governors should be of sufficient size for the requirements of its duties. The roles, structure, composition, and procedures of the Council of Governors should be reviewed regularly”

Whilst we felt it timely to review alongside this update, there are no changes proposed to the composition of the COG at this time. As always, this will be kept under review as the LHCH collaborations and partnerships continue to develop.

5. Approving the Changes to the Constitution

The process for amending the constitution is set out in Paragraph 41 of the constitution:

Amendment of the Constitution

- 41.1 *No amendment shall be made to this Constitution (or to any of its Annexes, save as otherwise specified) unless:*
 - 41.1.1 *it has been approved by more than half of the members of the Council of Governors of the Foundation Trust voting; and*
 - 41.1.2 *it has been approved by more than half of the members of the Board of Directors voting.*
- 41.2 *Amendments made under paragraph 41.1 take effect as soon as the conditions in that paragraph are satisfied, but the amendment has no effect in so far as the Constitution would, as a result of the amendment, not accord with schedule 7 of the 2006 Act.*
- 41.3 *Where an amendment is made to the Constitution in relation to the powers or duties of the Council of Governors (or otherwise with respect to the role that the Council of Governors has as part of the Foundation Trust) –*
 - 41.3.1 *At least one member of the Council of Governors must attend the next Annual Members’ Meeting and present the amendment, and*

- 41.3.2 *The Foundation Trust must give the members an opportunity to vote on whether they approve the amendment.*
- 41.4 *If more than half of the members voting approve the amendment, the amendment continues to have effect; otherwise, it ceases to have effect and the Foundation Trust must take such steps as are necessary as a result.*
- 41.5 *Amendments by the Foundation Trust to its Constitution are to be notified to NHSE . For the avoidance of doubt, NHSE's functions do not include a power or duty to determine whether or not the Constitution, as a result of the amendments, accords with Schedule 7 of the 2006 Act.*

The Council of Governors will be asked to consider and vote on these amendments on 19th September 2023. Members will be given the opportunity to vote on the changes at the Joint COG/ Annual Members Meeting on 25th September 2023. The Board of Directors will consider and vote on the amendment on 27th September 2023. Providing the COG, Board and members vote in favour at their respective meetings, then the changes to the constitution will take immediate effect (i.e. following the Board of Directors meeting).

6. Recommendation

The Council of Governors is asked to

- (i) consider the rationale for the recommended amendments to the constitution, as set out in Section 3 of this report and approve these as outlined.
- (ii) consider the review of the composition of the COG and approve the decision to make no changes at this time.