

**Council of Governors Meeting: Wednesday 31 March 2021**

**CoG2021.11**

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**Title:**            **OUH Constitution Review: Recommended amendments (2nd Phase)**

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**Status:**        **For Decision**

**History:**       **Review of the OUH Constitution commenced in September 2020. Upon completing the 1<sup>st</sup> Phase of its deliberations, the Constitution Review Working Group recommended amendments which were approved by the Board and Council of Governors on 13 January 2021. Further amendments are now recommended, based on the 2<sup>nd</sup> Phase of deliberations undertaken. These amendments were approved by the Board on 10 March 2021. If approved by the Council of Governors, they will take immediate effect.**

**Board Lead:**   **Trust Chair**

**Author:**        **Susan Polywka, Corporate Governance Consultant  
Eileen Walsh, Chief Assurance Officer**

**Confidential:**   **No**

**Key Purpose:**   **Strategy, Assurance**

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## Executive Summary

1. This paper reports on the outcome of the 2<sup>nd</sup> Phase of deliberations undertaken by the OUH Constitution Review Working Group<sup>i</sup>, chaired by the Chair of the Governors' *Patient Experience, Membership and Quality Committee*.
2. 1<sup>st</sup> Phase amendments to the Constitution were approved by the Board and Council of Governors on 13 January, 2021.
3. The paper makes recommendations for further, specific amendments to the OUH Constitution, which were formally approved by the Board at its meeting held on 10 March, 2021.
4. The full text of the amendments proposed has been subjected to independent legal review, to ensure that the revised provisions do not contravene any legal or regulatory requirements.
5. When undertaking the 2<sup>nd</sup> Phase of the systematic, comparative review of the Constitution, the overarching aim has remained to ensure that OUH has a Constitution that supports its strategic objectives<sup>ii</sup>; promoting effective leadership, and serving the best interests of patients and the public.
6. Proposed amendments reflect the principles of gender-neutral drafting<sup>iii</sup>.

## Recommendations

7. The Council of Governors is asked to consider and approve the recommended amendments to the OUH Constitution in relation to:
  - Terminating a Governor's tenure (see **recommendation at paragraph 3.8** below, and the full text of the revised provision at **Appendix 1**);
  - Governors' power to appoint (or re-appoint) the Chair and other Non-executive Directors (see **recommendation at paragraph 4.7** below, and the full text of the revised provision at **Appendix 2**);
  - Obtaining Governors' approval (see **recommendation at paragraph 5.10** below, and the full text of the revised provision at **Appendix 3**); and
  - Managing Conflicts of Interest at the Board (see **recommendation at paragraph 6.9** below, and the full text of the revised provision at **Appendix 4**).

## **OUH Constitution Review: Recommended amendments (2nd Phase)**

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### **1. Purpose**

- 1.1. This paper outlines recommended amendments proposed to the OUH Constitution, the full text of which is provided in **Appendices 1 to 4, attached**.
- 1.2. The recommended amendments were approved by the Board at its meeting held on 10 March. If approved by the Council of Governors, these amendments will take immediate effect.
- 1.3. To the extent that recommended amendments are not approved by the Council of Governors, then current provision will continue to prevail.

### **2. Background**

- 2.1. Review of the OUH Constitution commenced in September 2020. Upon completing the 1<sup>st</sup> Phase of its deliberations, the Constitution Review Working Group recommended amendments which were approved by the Board and Council of Governors on 13 January 2021.
- 2.2. In proceeding with the 2<sup>nd</sup> Phase of the review, the over-arching aim has remained to ensure that the Trust has a Constitution that supports its strategic objectives; promoting effective leadership, and serving the best interests of patients and the public.
- 2.3. The further amendments now proposed reflect the outcome of deliberations of the Working Group at its meeting held on 26 January, 2021. The recommended amendments were formally approved by the Board at its meeting held on 10 March, 2021.
- 2.4. The full text of the revised provision has been subjected to independent legal review, to ensure that no aspect of the proposed amendments contravene any legal or regulatory requirements.

### **3. Terminating a Governor's tenure**

- 3.1. Under current provision, circumstances that can trigger consideration to terminate a Governor's office include:
  - a failure to attend two successive meetings in a financial year without reasonable cause; and
  - commission of a serious breach of the Code of Conduct.
- 3.2. The inclusion of some provision to consider terminating a Governor's office for 'poor attendance' without reasonable cause is in line with that of all the other trusts reviewed. There is variation in how the threshold for 'poor

attendance' is defined, but it is always qualified by the condition that a Governor's office should only be terminated if the failure to attend has been "*without reasonable cause*".

- 3.3. Most of the trusts reviewed also make express provision to terminate a Governor's tenure for a serious breach of the applicable Code of Conduct.
- 3.4. The Working Group had regard to the **underlying principles** that Governors have a duty to represent the interests of the Members of the Trust and the public; and are required to act in the best interests of the Trust, and to adhere to the Trust's values and its Code of Conduct.
- 3.5. The Working Group recommends that there should be no change made to current provision under which a serious breach of the Code of Conduct can lead to the termination of a Governor's office.
- 3.6. In defining what should constitute 'poor attendance' without reasonable cause, the Working Group considered that whilst mere attendance at formal meetings of the Council of Governors does not in itself discharge a Governor's duty to represent the interests of members and the public, repeated failure to attend without reasonable cause might indicate that a Governor was not discharging their duty adequately.
- 3.7. The Working Group recommends that the Constitution should include provision under which 'poor attendance' without reasonable cause can trigger consideration to terminate a Governor's office, and that the threshold for 'poor attendance' without reasonable cause should be 2 successive meetings, or any 3 meetings in a single financial year.
- 3.8. **In relation to terminating a Governor's tenure**, the Working Group **recommends** (see full revised text proposed at **Appendix 1**) that:
  - If a Governor fails to attend any two successive meetings of the Council of Governors, *or* three meetings of the Council of Governors in any single financial year; **and**

Unless the Chair determines (in consultation with the Head of Corporate Governance, as appropriate) that they are satisfied that

    - The absences were due to reasonable cause; and
    - The Governor will be able to attend meetings of the Council of Governors within such a period as the Chair considers reasonable

Then the Chair will recommend termination of that Governor's tenure of office with immediate effect.
  - No substantive amendment is proposed to the current provision that commission of a serious breach of the Trust's Code of Conduct may lead to termination of a Governor's tenure of office.

#### 4. Governors' power to appoint (and re-appoint) the Chair and other Non-Executive Directors [NEDs]

- 4.1. The OUH Constitution currently does not allow Governors any flexibility to exercise their power to appoint the Chair and other NEDs beyond two terms of office (equating to 6 years in office, since establishment as a Foundation Trust [FT]).
- 4.2. There is no statutory limit on the duration or number of terms for which Governors have the power to appoint NEDs (including the Chair), and all of the other trusts reviewed do allow some flexibility for Governors to appoint the Chair and NEDs beyond two terms, or a maximum of 6 years in aggregate.
- 4.3. The Working Group had regard to the **underlying principle** that the Constitution should support the proper exercise of Governors' powers, to ensure effectiveness of the Board in its leadership of the Trust.
- 4.4. Consideration was given to the *NHS Foundation Trust Code of Governance*<sup>iv</sup> under which it is advised that a term beyond 6 years (after establishment as an FT) should be subject to 'particularly rigorous review', and should take into account the need for 'progressive refreshment' of the Board.
- 4.5. Reference was also made to the briefing document circulated recently<sup>v</sup> by NHS Providers which under-scored the need to preserve NEDs' independence, balanced against the benefits of experience. It was noted that, while the general expectation was that NEDs would serve two terms, NHS Providers recognise that the re-appointment of a NED beyond 6 years might be justified in circumstances where their leadership and direction were especially needed by the Trust.
- 4.6. The Working Group recommends that, consistent with the key underlying principle of ensuring effectiveness of the Board in its leadership of the Trust, there should be some flexibility allowed for Governors to appoint the Chair and other NEDs beyond two terms, and beyond a maximum of 6 years in aggregate. Circumstances can be envisaged in which re-appointment of a NED (including the Chair) beyond 6 years in aggregate might be necessary to meet the needs of the Trust. In such a case, this would be consistent with the *NHS Foundation Trust Code of Governance*.
- 4.7. **In relation to Governors' power to appoint (and re-appoint) NEDs**, the Working Group **recommends** (see full revised text proposed at **Appendix 2**) that:
  - while NEDs (including the Chair) will generally not be expected to serve more than two terms of office (each of three years);

- provision should be made in the Constitution to allow some flexibility for Governors to re-appoint a NED (including the Chair) for a term beyond 6 years in aggregate, **but only** where it can clearly be shown that the re-appointment will meet specific business needs of the Trust, and enhance effectiveness of the Board in its leadership of the Trust. Re-appointment will always be subject to satisfactory appraisal.

## 5. Obtaining Governors' approval

- 5.1. The OUH Constitution is currently consistent with statutory and regulatory requirements, including in its specification of all matters in respect of which Governors' approval is required, and those matters in respect of which the views of the Council of Governors should be taken into account.
- 5.2. Matters in respect of which Governors' approval is required include:
  - Any amendment to the Constitution
  - Appointment of the Chief Executive
  - Any application for merger, acquisition, separation or dissolution
- 5.3. There is also a requirement on the Board to have regard to the views of the Council of Governors in preparing the *Forward Plan*.
- 5.4. The Working Group gave specific consideration to the following statutory duties:
  - **Under s.51A(2) Health & Social Care Act 2012**  
Each trust should define the threshold for a 'significant transaction', which will require Governors' approval; and
  - **Under s.43 (3D) NHS Act 2006, as amended**  
The threshold above which Governors' approval is required for an increase in 'non-NHS activity' is defined at 5% or more of total income.
- 5.5. It was noted that almost all of the other trusts reviewed define the threshold for a 'significant transaction' at 25% (of assets, income or capital).
- 5.6. It was noted that all of the trusts reviewed adhere to the statutory requirement that Governors must approve any increase of 5% or more in the proportion of the Trust's total income attributable to non-NHS activities.
- 5.7. The Working Group had regard to the **underlying principle** that Governors have a duty to represent the interests of members and the public on major decisions taken by the Board.

- 5.8. The Working Group recommends that the threshold of 25% (of assets, income or capital) should be adopted as the definition of a ‘significant transaction’, which will require Governors’ approval.
- 5.9. The Working Group recommends no change to the current provision under which Governors must approve any increase of 5% or more in the proportion of the Trust’s total income attributable to non-NHS activities, in compliance with s.43 (3D) of the NHS Act 2006 (as amended).
- 5.10. It should be noted that ‘non-NHS activity’ is defined to include Research & Development [R&D], and Education and Training; and that to the extent that the OUH *Forward Plan* includes any ‘non-NHS activity’ (including R&D and Education and Training), it must be determined that this “will not to any significant extent interfere with the fulfilment by the trust of its principal purpose [of providing goods and services for the purposes of the health service in England]”.
- 5.11. **In relation to obtaining Governors’ approval**, the Working Group **recommends** (see full revised text proposed at **Appendix 3**) that:
- A ‘significant transaction’ should be defined as one at or above the threshold of 25% of gross assets, income or capital of the Trust – at or above which threshold, Governors’ approval will be required; and
  - No amendment is proposed to current provision that requires Governors to approve any increase of 5% or more in the proportion of the Trust’s total income attributable to non-NHS activities.

## 6. Managing conflicts of interest at the Board

- 6.1. The OUH Constitution currently reflects the provisions of the Model Core Constitution and the NHS Act 2006, which impose a duty on members of the board to avoid a conflict of interest, and to declare an interest that could give rise to conflict.
- 6.2. A member of the board will generally be disqualified from participating in discussion or determination of a matter in respect of which they have declared a conflict of interest.
- 6.3. However, the Model Core Constitution does allow that the duty to avoid a conflict of interest will **not** be infringed **if**:
- “The matter has been authorised in accordance with the constitution”  
[ref s.36.2.2]
- 6.4. Under this provision, where a matter has been duly authorised, no member of the board will be regarded as having infringed the duty to avoid a conflict of interest, and the provision to disqualify any member of the

board from participating in discussion and/or determination of the matter may be dis-applied.

- 6.5. Most of the other trusts reviewed do adopt and give effect to the full provisions included in the *Model Core Constitution* which relate to managing conflicts of interest at the board.
- 6.6. Under current provision in the OUH Constitution, however, there is expressed to be mutuality in the application of provisions that set out the requirements made of members of the Board, and those that set out the requirements made of Governors, in relation to declaring and managing conflicts of interest. The express requirements made of Governors do not include any provision that a Governor's duty to avoid a conflict of interest will not be infringed if a matter has been duly authorised, and there is no scope to dis-apply the provision that will disqualify an individual from taking any part in discussion or determination of a matter in which they have declared an interest.
- 6.7. The Working Group had regard to the **underlying principle** that there should be openness and transparency in decision-making at the board, unless that was in conflict with the wider interests of the public or the trust (including in relation to commercial-in-confidence matters).
- 6.8. The Working Group recommends that the OUH Constitution should adopt and give effect to the full provisions included in the *Model Core Constitution* which relate to managing conflicts of interest at the board.
- 6.9. Provision to authorise a matter should be applied where it will enhance the effectiveness of the board, e.g. in the management of subsidiaries or collaborative enterprises; without diluting transparency or permitting personal conflicts to arise. In considering whether to dis-apply the provision to exclude a member of the board from discussion and/or determination of a duly authorised matter, the board will be required to base its decision upon a formal submission, and provide assurance as to the rationale for the decision taken. On this basis, the amended provision is considered to represent an enhancement to good governance.
- 6.10. **In relation to managing conflicts of interest at the board**, the Working Group **recommends** (see full revised text proposed at **Appendix 4**):
  - A board member's duty to avoid a potential conflict of interest will not be infringed if the matter to which the interest relates has been duly authorised by the board in accordance with the constitution; and
  - If a matter has been duly authorised then the duty to avoid a conflict of interest will not have been infringed and provision to exclude a member or members of the board from participating in any discussion or determination of the matter at issue may be dis-applied;



*And to that extent*

- A distinction is to be drawn between the requirements placed on members of the board, as set out in paragraph 33 of the Constitution and in Annex 7: Standing Orders for the practice and procedure of the Board; and the requirements placed on Governors, as set out in paragraph 6 of Annex 6: Standing Orders for the practice and procedure of the Council of Governors.

## 7. Conclusion

- 7.1. Upon completing the 1<sup>st</sup> Phase of its review of the Constitution, the Working Group recommended amendments to the Constitution, and these were approved by the Board and Council of Governors on 13 January, 2021.
- 7.2. Continuing with the 2<sup>nd</sup> Phase of the Constitution Review, the Working Group undertook further careful and considered deliberations at its meeting held on 26 January, 2021.
- 7.3. This paper presents further recommended amendments proposed to the OUH Constitution. The recommended amendments have been approved by the Board, and also require approval of the Council of Governors.
- 7.4. All amendments approved by the Board and the Council of Governors will be incorporated into the OUH Constitution, and a comprehensive review of the entirety of the document will be concluded before submitting the final and complete draft of the revised OUH Constitution for approval.

## 8. Recommendations

- 8.1. The Council of Governors is asked to consider and approve the recommended amendments to the OUH Constitution in relation to:
  - Terminating a Governor's tenure (see recommendation at paragraph 3.8, and the full text of the revised provision at **Appendix 1**);
  - Governors' power to appoint (or re-appoint) the Chair and other Non-executive Directors (see recommendation at paragraph 4.7, and the full text of the revised provision at **Appendix 2**);
  - Obtaining Governors' approval (see recommendation at paragraph 5.10, and the full text of the revised provision at **Appendix 3**); and
  - Managing Conflicts of Interest at the Board (see recommendation at paragraph 6.9, and the full text of the revised provision at **Appendix 4**).

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<sup>i</sup> Membership of the OUH Constitution Review Group comprises all members of the Governors' *Patient Experience, Membership and Quality Committee*, as well as the Lead Governor and the other Governor for the area served by the Vale of White Horse District Council, the Trust Chair, Trust Vice-Chair and the Chief of Assurance.

<sup>ii</sup> See OUH Draft Strategic Framework [here](#)

<sup>iii</sup> See Guide to Gender-Neutral Drafting produced by the Office of the Parliamentary Counsel and Government Legal Department found [here](#)

<sup>iv</sup> NHS Foundation Trust Code of Governance found [here](#)

<sup>v</sup> NHS Providers' Briefing found [here](#)

## Review of the OUH Constitution

Amendments to the OUH Constitution have been proposed following deliberations by the Constitution Review Working Group, in which it has been supported by the dedicated resource of a Corporate Governance Consultant.

Membership of the Working Group comprises all members of the Governors' *Patient Experience, Membership and Quality Committee*, the Lead Governor and another public elected Governor (Vale of White Horse), as well as the Trust Chair, Vice-Chair and Chief of Assurance.

### Termination of Office of a governor

Current provision relating to termination of office of a governor is found at section 5 of Annex 5 of the Constitution, Additional Provisions - Council of Governors.

Following deliberations of the Constitution Review Working Group, it is proposed that section 5 of Annex 5 of the Constitution, Additional Provisions - Council of Governors be abrogated in its entirety and replaced with full text of the revised provision that is provided **below**, with amendments **highlighted**.

This amended provision is subject to approval by the Council of Governors and the Board, as set out in paragraph 44 of the Constitution, reflecting section 37 of the 2006 Act.

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## Annex 5: Additional Provisions – Council of Governors

[...]

### 5. Termination of Office of a governor

5.1 A governor may resign from office by giving notice in writing to the Head of Corporate Governance.

5.2 If a governor fails to attend two ( successive ) meetings of the Council of Governors ~~in any financial year~~ , or alternatively fails to attend three meetings of the Council of Governors in any single financial year, ~~his~~ the Chair should recommend to the Council that their tenure of office is terminated ~~unless the Council is satisfied that~~ unless in consultation with the Head of Corporate Governance the Chair determines that:

- (a) the absences were due to reasonable cause; and
- (b) ~~he~~ the governor will be able to attend meetings of the Council of Governors within such a period as the Chair considers reasonable

and upon such recommendation the Council of Governors may terminate that governor's tenure with immediate effect.

5.3 The Council of Governors may by a resolution approved by a majority of Governors present and entitled to vote at a properly constituted meeting of the Council of Governors terminate a Governor's tenure of office if for a reasonable cause it considers:

- (a) ~~he has~~ they have failed to undertake any training which the Council of Governors requires all Governors to undertake;

- (b) ~~he has~~ they have committed a serious breach of the trust's Code of Conduct, or
- (c) ~~he has~~ they have acted in a manner detrimental to the interests of the trust.

[...]

## Review of the OUH Constitution

Amendments to the OUH Constitution have been proposed following deliberations by the Constitution Review Working Group, in which it has been supported by the dedicated resource of a Corporate Governance Consultant.

Membership of the Working Group comprises all members of the Governors' *Patient Experience, Membership and Quality Committee*, the Lead Governor and another public elected Governor (Vale of White Horse), as well as the Trust Chair, Vice-Chair and Chief of Assurance.

### **Governors' power to appoint (and re-appoint) the Chair and other Non-executive Directors [NEDs]**

Current provision relating to Governors' power to appoint the Chair and other non-executive directors is found at paragraphs 25 and 26 of the Constitution and in paragraph 2 of Annex 5 of the Constitution: Additional Provisions – Council of Governors and Annex 8, Appendix 4: Appointment of Chairman and non-executive Directors.

Following deliberations of the Constitution Review Working Group, it is proposed that paragraphs 25 and 26 of the Constitution, paragraph 2 of Annex 5 of the Constitution: Additional Provisions – Council of Governors and Annex 8, Appendix 4: Appointment of Chairman and non-executive Directors be abrogated in their entirety and replaced with full text of the revised provision that is provided **below**, with amendments **highlighted**.

This amended provision is subject to approval by the Council of Governors and the Board, as set out in paragraph 44 of the Constitution, reflecting section 37 of the 2006 Act.

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#### **25. Board of Directors: appointment and removal of **Chairman** and other non-executive directors**

- 25.1. The Council of Governors at a general meeting of the Council of Governors shall appoint or remove the **Chairman** of the trust and the other non-executive directors. The appointment of the **Chairman** or any other non-executive directors shall be in accordance with Annex 8: Appendix 4. ~~Further provisions~~**Error! Reference source not found.** and subject to paragraph 26 below.
- 25.2. Removal of the **Chairman** or another non-executive director shall require the approval of three-quarters of the members of the Council of Governors.
- 25.3. ~~The initial Chairman and the initial non-executive directors are to be appointed in accordance with paragraph 26 below.~~

**It is proposed to delete the current paragraph 26 in its entirety, as it is no longer required:**

#### ~~**26. Board of Directors: appointment of initial Chairman and initial non-executive directors**~~

- ~~26.1. The Council of Governors shall appoint the Chairman of the applicant NHS Trust as the initial Chairman of the trust, if he wishes to be appointed.~~
- ~~26.2. The power of the Council of Governors to appoint the other non-executive directors of the trust is to be exercised, so far as possible, by appointing as the initial non-~~

~~executive directors of the trust any of the non-executive directors of the applicant NHS Trust (other than the Chairman) who wish to be appointed.~~

- ~~26.3. The criteria for qualification for appointment as a non-executive director set out in paragraph above (other than disqualification by virtue of paragraph 30 below) do not apply to the appointment of the initial Chairman and the initial other non-executive directors in accordance with the procedures set out in this paragraph.~~
- ~~26.4. An individual appointed as the initial Chairman or as an initial non-executive director in accordance with the provisions of this paragraph shall be appointed for the unexpired period of his term of office as Chairman or (as the case may be) non-executive director of the applicant NHS Trust but if, on appointment, that period is less than 12 months, he shall be appointed for 12 months.~~

## Annex 5: Additional Provisions – Council of Governors

[...]

### 2. Roles and Responsibilities of Council of Governors

#### 2.1 The Council of Governors shall:

- 2.1.1 hold the non-executive directors individually and collectively to account for the performance of the Board of Directors; and
- 2.1.2 represent the interests of the members of the trust as a whole and the interests of the public.

#### 2.2 The roles and responsibilities of Council of Governors are:

- 2.2.1 subject to paragraphs 25 ~~[delete: and 26]~~ of this constitution, to appoint or remove the Chairman and the other non-executive directors. The removal of a non-executive director requires the approval of three-quarters of the members of the Council of Governors;

[All other provision under paragraph 2 of Annex 5 to remain unchanged]

## ***Annex 8, Appendix 4: Appointment of **Chairman** and non-executive Directors***

### ~~1. Initial (first) Appointments~~

~~Provisions in paragraph 26 of the constitution shall be followed.~~

### **1. Arrangements for Appointments after Initial (first) Appointment**

- 1.1. Subject to the provisions of the constitution, the process for appointing new non-executive directors and the **Chairman** will be as follows:
- 1.2. Subject to paragraphs 1.3, **1.4, 1.5 and 2** below, the **Chairman** and other non-executive directors are to be appointed **(or re-appointed)** by the Council of Governors following a process of open competition. ~~Subject to paragraph 2 below, the current Chairman or a non-executive director may stand for reappointment.~~

- 1.3. On the first renewal of the appointment of a ~~the Chair or other~~ non-executive director, ~~where possible no later than four months before the end of their first term, the Council of Governors will appoint a Nominations Committee to the Council of Governors' Remuneration, Nominations and Appointments Committee [RNAC] will recommend to the Council of Governors~~ whether the Chair or other non-executive director may be reappointed for a second term without a process of open competition. If ~~the Council of Governors having considered RNAC's recommendation~~ does not consider the reappointment ~~without open competition~~ appropriate, then a suitable replacement will be identified in accordance with paragraphs 1.6 – 1.10 below.
- 1.4. In advance of the expiry of a second or subsequent term of the Chair or other non-executive director, where possible no later than four months before the expiry of their term, ~~the Council of Governors' Remuneration, Nominations and Appointments Committee [RNAC] may be asked to advise the Council of Governors whether specific and exceptional circumstances can be demonstrated which support reappointment of that non-executive director for a further term of specified duration. This will be the case only if RNAC determines that the reappointment is necessary~~
  - 1.4.1. to meet specified needs of the Trust; and
  - 1.4.2. to enhance effectiveness of the Board in its leadership of the Trust.

In such cases, RNAC will recommend reappointment for a further term of specified duration without a process of open competition as being in the best interests of the Trust. When considering whether to recommend reappointment, and when specifying the duration of any further term, RNAC will have due regard to the *NHS Foundation Trust Code of Governance*. If RNAC does not consider reappointment without open competition to be appropriate, then a suitable replacement should be identified in accordance with paragraphs 1.6 - 1.10 below.
- 1.5. The University of Oxford shall be entitled to nominate a representative to serve as a non-executive director of the trust for a period to be agreed by the ~~RNAC Nominations Committee~~, subject to appointment in accordance with the 2006 Act.
- 1.6. ~~No later than three~~ months before the end of the term of office of the ~~Chairman~~ or a non-executive director (as the case may be) ~~who is not to be reappointed without open competition in accordance with paragraphs 1.3 or 1.4 above, the Council of Governors will appoint an Appointment Panel~~ a ~~Nominations Committee~~ will be convened to seek a suitable replacement. The relevant ~~Appointment Panel Nominations Committee~~ will be constituted in accordance with paragraph 1.9 or 1.10 below.
- 1.7. The ~~Appointment Panel Nominations Committee~~ shall seek candidates for office by way of open advertisement and other means. It shall assess and select for interview such candidates as are considered appropriate and in doing so the ~~Appointment Panel Nominations Committee~~ shall be at liberty to seek advice and assistance from persons other than members of the ~~Panel Committee~~, including (without limitation) the Council of Governors and the Board of Directors.
- 1.8. The ~~Appointment Panel Nominations Committee~~ will make recommendations to the Council of Governors on the appointment of any candidate or candidates (as the case may be) identified through open competition as it considers appropriate. The ~~RNAC~~ will make recommendations to the Council of Governors about non-executive directors' pay. External professional advisers will be consulted on comparable remuneration levels for the ~~Chairman~~ and other non-executive directors at least once every three years and when they intend to make a material change to the remuneration of a non-executive director. The Council of Governors shall resolve in a general meeting to appoint such candidate or candidates (as the case may be) as it considers appropriate and in reaching its decision it shall have regard to the views of the ~~Appointment Panel Nominations Committee~~ and of the Board of Directors as to

the suitability of the available candidates and the remuneration and allowances and other terms and conditions of office.

- 1.9. The ~~Nominations Committee~~ **Appointment Panel** for the ~~Chairman~~ will consist of three Public Governors, one Staff Governor and one appointed Governor.
  - 1.9.1. If the number of Governors prepared to serve on the **Appointment Panel** ~~Nominations Committee~~ is greater than the number of places available, the ~~committee~~ members **of the Panel** will be selected by secret ballot of Governors.
  - 1.9.2. The **Appointment Panel** ~~committee~~ shall be chaired by the ~~deputy~~ **Vice-Chairman**.
  - 1.9.3. Each of the members of the **Appointment Panel** ~~committee~~ shall have one vote on making a recommendation to the Council of Governors as to potential candidates for appointment. The **Appointment Panel's** ~~committee's~~ Chair will have a casting vote.
- 1.10. The ~~Nominations Committee~~ **Appointment Panel** for Non-Executive Directors will consist of the ~~Chairman~~, two elected public governors, one elected staff governor, and one appointed governor.
  - 1.10.1. The Chief Executive may attend at the Committee's request in an advisory capacity only.
  - 1.10.2. If the number of governors wishing to serve on the **Appointment Panel** ~~Nominations Committee~~ for non-executive directors is greater than the number of places available, the **Appointment Panel's** ~~committee's~~ members will be selected by secret ballot of governors.
  - 1.10.3. The ~~Chairman~~ will chair the **Appointment Panel** ~~committee~~.
  - 1.10.4. Each of the five members of the **Appointment Panel** ~~committee~~ will have one vote on a recommendation to the Council of Governors as to potential candidates for appointment.
- 1.11. The **Appointment Panels** ~~Nominations Committees~~ will be supported by appropriate advice from the trust's **Chief People Officer**. ~~Director of Workforce.~~
- 1.12. All appointments will be conducted and made in accordance with the Human Resources policies of the trust.
- 1.13. The Council of Governors will not consider nominations for membership of the Board of Directors other than those made by the appropriate **Appointment Panel** ~~Nominations Committee~~.

## 2. Term of Office of ~~Chairman~~ and Non-Executive Directors

- ~~2.1. Subject to paragraph 1 above, Non-executive directors, including the Chairman, shall be appointed by the Council of Governors for specified terms at intervals of no more than three years.~~
- ~~2.2. No more than two terms of office may be served.~~

**2.1. Except as provided in paragraph 2.2 below, non-executive directors including the Chair shall be eligible for appointment by the Council of Governors for up to two terms of office, and each term of office will be for a duration specified by the Council of Governors that may be of up to three years' duration.**

**2.2. Where recommended by the Council of Governors' Remuneration, Nominations and Appointments Committee [RNAC] in accordance with**



paragraph 1.4 above, non-executive directors including the Chair shall be eligible for re-appointment to a further term of office by the Council of Governors. Where the Council of Governors makes a reappointment in accordance with paragraph 1.4 above, the duration of such term of office will be specified by the Council of Governors.

## Review of the OUH Constitution

Amendments to the OUH Constitution have been proposed following deliberations by the Constitution Review Working Group, in which it has been supported by the dedicated resource of a Corporate Governance Consultant.

Membership of the Working Group comprises all members of the Governors' *Patient Experience, Membership and Quality Committee*, the Lead Governor and another public elected Governor (Vale of White Horse), as well as the Trust Chair, Vice-Chair and Chief of Assurance. When considering the specific terms of the amendments proposed herein, the Working Group has also welcomed contributions from the Chief of Finance.

### Obtaining Governors' Approval

The Roles and Responsibilities of the Council of Governors, as detailed in paragraph 2 of Annex 5 of the Constitution, Additional Provisions - Council of Governors, include approval of:

- any merger, acquisition, separation or dissolution application in respect of the trust [...] and the entering into of any **significant transactions**  
ref paragraph 2.2.9 of section 2 of Annex 5 of the Constitution

Under paragraph 45.3 of the Constitution, it is currently provided that:

**"significant transaction"** means a transaction which meets the definition of significant transactions as given in Monitor's *Risk Assessment Framework* as amended.<sup>i</sup>

The role of the Council of Governors in relation to **development of the Trust's Forward Plan** is described in paragraph 41 of the OUH Constitution, including (in compliance with s.43 (3D) of the NHS Act 2006, as amended) the express provision that:

A trust which proposes to increase by 5% or more the proportion of its total income in any financial year attributable to activities other than the provision of goods and services for the purposes of the health service in England [**"non-NHS activity"**] may implement the proposal only if more than half of the members of council of governors of the trust voting approve its implementation

Ref paragraph 41.7 of the Constitution

Following deliberations of the Constitution Review Working Group,

- no amendments are proposed to paragraph 2 of Annex 5 of the Constitution, Additional Provisions - Council of Governors; and
- no amendments are proposed to paragraph 41 of the Constitution.

However, it is proposed that paragraph 45.3 of the Constitution be abrogated in its entirety and replaced with full text of the revised provision that is provided **below**, with amendments **highlighted**. (*This follows the precedent of many trusts in setting the threshold for a 'significant transaction' at 25% of assets, income or capital. The wording of the provision follows that adopted by University Hospitals Bristol and Weston NHS FT.*)

This amended provision is subject to approval by the Council of Governors and the Board, as set out in paragraph 44 of the Constitution, reflecting section 37 of the 2006 Act.

.....

### 45. Mergers etc. and significant transactions

45.1. The trust may only apply for a merger, acquisition, separation or dissolution with the approval of more than half of the members of the Council of Governors.<sup>ii</sup>

45.2. The trust may enter into a significant transaction only if more than half of the members of the Council of Governors voting approve entering into the transaction.<sup>iii</sup>

45.3. Significant Transaction is defined as investments, divestments or other transactions comprising more than 25% of the assets, income or capital of the NHS Foundation Trust.

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<sup>i</sup> The Model Core Constitution advised that: "The trust may insert descriptions of significant transactions pursuant to section 51A(2) of the 2006 Act (e.g. by reference to the Risk Assessment Framework.) Alternatively, if the trust does not wish to specify any descriptions of significant transactions, the constitution must specify that it contains no such descriptions (section 51A(3) of the 2006 Act. Trust to delete/amend accordingly."

<sup>ii</sup> This reflects section 56(1A), 56A(2), 56B(2 and 57A(2)of the 2006 Act and Monitor's latest model core constitution.

<sup>iii</sup> This reflects section 51A(1) of the 2006 Act and Monitor's latest model core constitution.

## Review of the OUH Constitution

Amendments to the OUH Constitution have been proposed following deliberations by the Constitution Review Working Group, in which it has been supported by the dedicated resource of a Corporate Governance Consultant.

Membership of the Working Group comprises all members of the Governors' *Patient Experience, Membership and Quality Committee*, the Lead Governor and another public elected Governor (Vale of White Horse), as well as the Trust Chair, Vice-Chair and Chief of Assurance. When considering the specific terms of the amendments proposed herein, the Working Group has also welcomed contributions from the Chief of Finance.

### Managing Conflicts of interest at the Board

Current provision relating to the management of conflicts of interest at the board is found at paragraph 33 of the constitution, and *Annex 7: Standing Orders for the Practice and Procedure of the Board of Directors* makes provision for excluding a member of the board from any discussion or consideration of a matter in respect of which an interest has been disclosed.

Paragraph 6 of *Annex 6: Standing Orders for the Practice and Procedure of the Council of Governors* sets out the requirements placed on Governors with regard to declarations of interest. No amendments are proposed to those provisions at this time.

Following deliberations of the Constitution Review Working Group, it is proposed that paragraph 33 of the constitution and paragraphs 10 and 20 of *Annex 7: Standing Orders for the Practice and Procedure of the Board of Directors* be abrogated in their entirety and replaced with full text of the revised provision that is provided **below**, with amendments/clarifications **highlighted**.

This amended provision is subject to approval by the Council of Governors and the Board, as set out in paragraph 44 of the constitution, reflecting section 37 of the 2006 Act.

.....

### 33. Board of Directors: conflicts of interest of members of the board

33.1. The duties that a member of the board of the trust has by virtue of being a member of the board include in particular:<sup>1</sup>

33.1.1. A duty to avoid a situation in which the member of the board has (or can have) a direct or indirect interest that conflicts (or possibly may conflict) with the interests of the trust.

33.1.2. A duty not to accept a benefit from a third party by reason of being a director or doing (or not doing) anything in that capacity.

33.2. The duty referred to in sub-paragraph 33.1.1 is not infringed if:

**33.2.1. the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or**

**33.2.2. the matter has been authorised in accordance with the constitution.**

33.3. The duty referred to in sub-paragraph 33.1.2 is not infringed if acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

33.4. In sub-paragraph 33.1.2, "third party" means a person other than:

33.4.1. the trust, or

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<sup>1</sup> These provisions reflect paragraphs 18B and 18C of Schedule 7 to the 2006 Act and the latest version of the model core constitution.

- 33.4.2. a person acting on its behalf.
- 33.5. If a member of the board has in any way a direct or indirect interest in a proposed transaction or arrangement with the trust, the member of the board must declare the nature and extent of that interest to the other members of the board.
- 33.6. If a declaration under this paragraph proves to be or becomes inaccurate or incomplete, a further declaration must be made.
- 33.7. Any declaration required by this paragraph must be made before the trust enters into the transaction or arrangement.
- 33.8. This paragraph does not require a declaration of an interest of which the member of the board is not aware or where the member of the board is not aware of the transaction or arrangement in question.
- 33.9. A member of the board need not declare an interest:
- 33.9.1. if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
  - 33.9.2. if, or to the extent that, the members of the board are already aware of it;
  - 33.9.3. if, or to the extent that, it concerns terms of the board member's appointment that have been or are to be considered:
    - 33.9.3.1. by a meeting of the Board of Directors, or
    - 33.9.3.2. by a committee of the board appointed for the purpose under the constitution.
- 33.10. For the purposes of paragraph 33.2.2:**
- 33.10.1. A matter shall have been authorised in accordance with the constitution if it has been approved by a majority of members of the board voting (excluding any member of the board who has declared an interest in the matter which is the subject of authorisation) on the basis that to do so would be in the best interest of the trust;**
  - 33.10.2. The board may authorise a matter pursuant to paragraph 33.10.1 subject to such terms and conditions as the board thinks fit;**
  - 33.10.3. The board may decide to revoke or vary any authorisation granted pursuant to paragraph 33.10.1 at any time, but such a decision will not affect anything done prior to such revocation or variation by the member(s) of the board who declared an interest in the matter which is the subject of authorisation.**
- 33.11. Annex 7: Standing Orders for the Practice and Procedure of the Board of Directors make provision for the disclosure of interests and arrangements for the exclusion of a member of the board declaring any interest from any discussion or consideration of the matter in respect of which an interest has been disclosed.

## Annex 7: Standing Orders for the Practice and Procedure of the Board of Directors

[...]

### 10. Quorum

- 10.1 The quorum of a meeting will be at least half of the whole number of members of the Board of Directors (including at least one non-executive director and one executive director).
- 10.2 **Except as provided for in paragraph 10.3 below if where a member of the Board of Directors has been has declared an interest in a matter under paragraph 33.5 of the constitution, that member will be** disqualified from participating in the discussion on

any **the** matter and/or from voting on any resolution ~~by reason of a declaration of a conflict of interest~~ **in relation to that matter** **and** that person **member** shall not longer count towards the quorum. If a quorum is then not available for the discussion and/or the passing of a resolution on any matter, that matter may not be discussed further or voted upon at that meeting. Such a position shall be recorded in the minutes of the meeting. The meeting must then proceed to the next item of business.

**10.3** Where a member of the board has declared an interest in a matter under paragraph 33.5 of the constitution which is authorised in accordance with paragraph 33.2.2 and 33.10 of the constitution the consequences of that authorisation are that the relevant member of the board:

**10.3.1** is not (without more) in breach of the duty referred to in sub-paragraph 33.1.1 of the constitution ; and

**10.3.2** is excluded, subject to paragraph 10.3.3 below, from participating in discussion by the board or from voting on any resolution in relation to the authorised matter in respect of which an interest has been declared; but

**10.3.3** the relevant member may participate in discussion and may vote on any resolution relating to the authorised matter if:

**10.3.3.1** a majority of members of the board (excluding any member of the board who has declared an interest in the matter which has been duly authorised) determines that this would be in the best interest of the trust.

**10.4** The requirement in Standing Order 10.1 above for a least one executive director to form part of the quorum shall not apply where the executive directors are excluded from a meeting.

[...]

## **20. Declarations of Interest and Register of Interests**

**20.1** The constitution, the 2006 Act and the Code of Conduct and Accountability require members of the board to declare interests which are relevant and material to the NHS board of which they are a member. All existing members of the board should declare such interests. Any members of the board who are appointed subsequently should do so on appointment.

~~The requirements set out in paragraph 33 of the constitution and for Members of the Council of Governors at paragraph 6 in Annex 6: Standing Orders for the Practice and Procedure of the Council of Governors apply equally to members of the Board of Directors.~~

**20.2** The requirements made of members of the board in relation to declaring and managing conflicts of interest are set out in paragraph 33 of the constitution.

**20.3** The requirements made of members of the Council of Governors in relation to declaring and managing conflicts of interest are set out at paragraph 6 in *Annex 6 to the Constitution: Standing Orders for the Practice and Procedure of Governors*.

Other than amendments to reflect gender-neutral drafting, no substantive amendment is proposed at this time to the requirements of members of the Council of Governors in relation to declaring and managing conflicts of interest.

The text of paragraph 6 in Annex 6 to the constitution: Standing Orders for the Practice and Procedure of Governors is provided overleaf for reference.

## Annex 6: Standing Orders for the Practice and Procedure of the Council of Governors

[...]

### 6. Declarations of Interests and Register of Interests

#### 6.1. Declaration of Interests

6.1.1. The Regulatory Framework requires each Governor to disclose to the other Governors:

- 6.1.1.1. any actual or potential interest, direct or indirect, which is relevant and material to the business of the trust, as described in Standing Order 6.2.1; and
- 6.1.1.2. any actual or potential pecuniary interest, direct or indirect, in any contract, proposed contract or other matter concerning the trust, as described in Standing Orders 6.2.2 and 6.2.3; and
- 6.1.1.3. any actual or potential family interest, direct or indirect, of which the Governor is aware, as described in Standing Order 6.2.5.

6.1.2. Such a declaration shall be made either at the time of the Governor's election or appointment or as soon thereafter as the interest arises, but **in any event** within five clear days of becoming aware of the existence of that interest, and in such manner as the Head of Corporate Governance may prescribe from time to time.

6.1.3. In addition, if a governor is present at a meeting of the Council of Governors and has an interest of any sort in any matter which is the subject of consideration, ~~he~~ **they** shall at the meeting and as soon as practicable after its commencement disclose the fact and shall not vote on any question with respect to the matter. Where a non-pecuniary interest is declared the **Chairman** shall determine whether the governor should take part in the consideration or discussion of the matter, seeking advice from the Head of Corporate Governance where required.

6.1.4. Subject to Standing Order 6.2.3, if a governor has declared a pecuniary interest, ~~he~~ **they** shall not take part in the consideration or discussion of the matter. At the time the interests are declared, they should be recorded in the Council of Governors meeting minutes. Any changes in interests should be officially declared at the next relevant meeting following the change occurring.

6.1.5. This Standing Order 6 applies to any committee, sub-committee or joint committee of the Council of Governors and applies to any member of any such committee, sub-committee, or joint committee (whether or not ~~he is~~ **they are** also a governor).

6.1.6. The interests of governors in companies likely or possibly seeking to do business with the NHS should be published in the trust's Annual Report. The information should be kept up to date for inclusion in succeeding Annual Reports.

#### 6.2. Nature of Interests

6.2.1. Interests which should be regarded as "relevant and material" are as follows and are to be interpreted in accordance with guidance issued by Monitor:



- 6.2.1.1. Directorships, including non-executive directorships held in private companies or public limited companies (with the exception of those of dormant companies); or
  - 6.2.1.2. ownership, part-ownership or directorship of private companies, businesses or consultancies likely or possibly seeking to do business with the NHS; or
  - 6.2.1.3. majority or controlling shareholdings in organisations likely or possibly seeking to do business with the NHS; or
  - 6.2.1.4. a position of authority in a charity or voluntary organisation in the field of health and social care; or
  - 6.2.1.5. any connection with a voluntary or other organisation contracting for NHS services or commissioning NHS services; or
  - 6.2.1.6. any connection with an organisation, entity or company considering entering into or having entered into a financial agreement with the trust, including but not limited to, lenders or banks.
- 6.2.2.A governor shall be treated as having indirectly a pecuniary interest in a contract, proposed contract or other matter if:
- 6.2.2.1. the individual, or a nominee of the individual's, is a director of a company or other body, not being a public body, with which the contract was made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration; or
  - 6.2.2.2. ~~he is~~ **they are** a partner of, or is in the employment of a person with whom the contract was made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration.
- 6.2.3.A governor shall not be treated as having a pecuniary interest in any contract, proposed contract or other matter by reason only:
- 6.2.3.1. of ~~his~~ **their** membership of a company or other body, if ~~he or she has~~ **they have** no beneficial interest in any securities of that company or other body; or
  - 6.2.3.2. of an interest in any company, body or person with which ~~he is~~ **they are** connected which is so remote or insignificant that it cannot reasonably be regarded as likely to influence a governor in the consideration or discussion of or in voting on, any question with respect to that contract or matter; or
  - 6.2.3.3. of any travelling or other expenses or allowances payable to a Governor in accordance with the constitution.
- 6.2.4.An interest in the securities of a company or other body shall for the purposes of paragraph 6.2.3.2 above be regarded as remote or insignificant if:
- 6.2.4.1. the total nominal value of those securities does not exceed £5,000 or one-hundredth of the total nominal value of the issued share capital of the company or body, whichever is less, and
  - 6.2.4.2. if the share capital is of more than one class, the total nominal value of shares of any one class in which they have a beneficial interest does not exceed one-hundredth of the total issued share capital of that class.
- 6.2.5.A family interest is an interest of the spouse or partner or any parent, child, brother or sister of a governor which if it were the interest of that governor would be a personal interest or a pecuniary interest of the individual's.



6.2.6. If governors have any doubt about the relevance or materiality of an interest, this should be discussed with the **Chairman**. Influence rather than the immediacy of the relationship is more important in assessing the relevance of an interest. The interests of partners in professional partnerships including General Practitioners should also be considered.

### **6.3. Exclusion from proceedings of the Council of Governors**

6.3.1. Subject to Standing Order 6.2.3 above, if a governor discloses a pecuniary interest pursuant to Standing Order 6 to the other governors, ~~he~~ **they** shall not take part in the consideration or discussion of the matter or vote on any question with respect to it. Where a non-pecuniary interest is declared the **Chairman** shall determine whether the governor should take part in the consideration or discussion of the matter, seeking advice from the Head of Corporate Governance where required. At the time any interest is declared, it should be recorded in the meeting minutes.

6.3.2. Any change in interests should be officially declared at the next relevant meeting following the change occurring.

6.3.3. If a conflict of interest is established during the course of a meeting, the governor concerned should withdraw from the meeting and play no part in the relevant discussion or decision.

### **6.4. Register of Interests**

6.4.1. The Head of Corporate Governance shall keep a Register of Interests of Governors, which shall contain the names of each governor, whether ~~he has~~ **they have** declared any interest, and if so, the interest declared.

6.4.2. These details will be kept up to date by means of an annual review of the Register of Interest in which any changes to interests declared during the preceding twelve months will be incorporated.

6.4.3. The Register of Interests will be available to the public in accordance with the constitution and the Chief Executive will take reasonable steps to bring the existence of the Register of Interests to the attention of the local population.

6.4.4. In establishing, maintaining and publicising the Register of Interests, the trust shall comply with all guidance issued from time to time by Monitor.

[...]