

Council of Governors: 19.7.18

Agenda Item: CGo.7.18.8

Process for appointing a Chair / Non-Executive Director Annual Review 2018

Presented by:	Ruth Wood, Governor	Author:	Jacqui Maurice, Head of Corporate Governance
Previously considered by:	Nominations and Remuneration Committee (NRC) held on 15 June 2018		

Key points	Purpose:
1. The NED/Chair Appointment Process was previously reviewed and approved by the Council of Governors at the meeting held on 20 July 2017. The process is required to be approved annually.	To discuss and note
2. The Council of Governors is asked to note that there has been no change in the advice and guidance available from Monitor (NHS Improvement) since the previous review.	To discuss and note
3. Whilst there has been no change in the advice and guidance a number of revisions are proposed to make explicit the process as it relates to the Chair and, ensure that the Terms and Conditions are presented for approval to the Council of Governors at the time when a reappointment or appointment is considered.	To discuss and gain assurance
4. The Council of Governors is asked to note that the current NED / Chair Terms and Conditions (Terms of Engagement) were reviewed by the NRC in June 2017 and subsequently confirmed in September 2017 following the receipt of legal advice.	To discuss and gain assurance
5. The NRC reviewed the revised Process for Appointing a Chair / Non-Executive Director at the NRC meeting held on 15 June 2018 and now present the process to the Council of Governors for approval.	To discuss and approve

Executive Summary:
<ol style="list-style-type: none"> The NED/Chair Appointment Process was previously reviewed and approved by the Council of Governors at their meeting held 20 July 2017 following a recommendation from the NRC. The process is required to be approved annually. There has been no change in the advice and guidance available from Monitor (NHS Improvement) since the previous review. The relevant extracts from Monitor (NHS Improvement) regarding the 'appointments process' and the setting of 'terms and conditions' are attached at Appendix 1. The process was reviewed by the NRC at their meeting on 15 June 2018 and, whilst there has been no change in the advice and guidance, revisions are proposed which: <ul style="list-style-type: none"> - Make explicit that the process also applies to the reappointment / appointment of the Chair - Cover the requirement of the Council of Governors to consider and approve the Terms and Conditions (Terms of Engagement) for each reappointment / appointment made. <p>Other amendments are proposed to:</p>

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- Ensure consistency with regard to phrasing in use throughout the document.
- Ensure consistency with other corporate documents with regard to style and formatting.

The revised Process for Appointing a Chair / Non-Executive Director is attached, with track changes, at Appendix 2.

4. The NED/Chair Terms of Engagement were reviewed by the NRC in June 2017 and subsequently confirmed in September 2017 following the receipt of legal advice. The Terms of Engagement are attached at Appendix 3.

The NRC is working to finalise a clause to be added to the Terms of Engagement regarding 'access to independent professional advice'. Once this work is complete the clause will be added to the Terms of Engagement and presented to the Council of Governors for approval.

5. The NRC recommends that the Council of Governors approves the Process for Appointing a Chair / Non-Executive Director.

Financial implications:

No

Regulatory relevance:

Monitor:

Code of Governance

**Equality
Impact /
Implications:**

Choose an item.

Choose an item.

Choose an item.

Choose an item.

Choose an item.

Choose an item.

Is there likely to be any impact on any of the protected characteristics?
 (Age, Disability, Gender, Gender Reassignment, Pregnancy and Maternity,
 Race, Religion or Belief, Sexual Orientation, Health Inequalities, Human Rights)

Yes ☐ No ☒

If yes, what is the mitigation against this?

Other:

**Strategic
Objective:**

*Reference to
Strategic
Objective(s)
this paper
relates to*

To provide outstanding care for patients

To deliver our financial plan and key performance targets

To be in the top 20% of NHS employers

To be a continually learning organisation

To collaborate effectively with local and regional partners

Appendix 1

'Your Statutory Duties: A reference guide for NHS Foundation Trust Governors' is published by Monitor (NHS Improvement). The following extracts include advice and guidance with regard to:

1. the process for NED/Chair appointments
2. the setting of NED/Chair terms and conditions

1. Process for NED/Chair appointments

Appointing the chair and other non-executive directors

The *Code of Governance* states that: "There should be a formal, rigorous and transparent procedure for the appointment or election of new members to the boards of directors."

As the chair leads both the board of directors and council of governors, governors will need to do a considerable amount of work to ensure that their NHS foundation trust has the right chair in place. The governors must also ensure that the other non-executive directors are fit and proper persons to serve the NHS foundation trust in this role.

General considerations

The procedure for all appointments or reappointments must be formal, rigorous and transparent. The appointment must be awarded on merit and based on objective criteria developed in the best interests of the trust. The process should be described in the NHS foundation trust's annual report.

As part of the process, the governors should consider the relevant aspects of the NHS foundation trust's constitution and the *Code of Governance*, such as:

- the requirements of the NHS foundation trust's constitution concerning the number of non-executive directors;
- the independence of non-executive directors;
- any specific skills and experience requirements such as the need to ensure relevant and recent financial experience when appointing non-executive directors to the audit committee; and
- the balance of executive and independent non-executive directors on the board of directors.

Triggers for action

The most common trigger for action will be the impending expiry of the existing chair or other non-executive director's term of appointment.

- If the chair or non-executive director decides to seek reappointment, the council of governors will need to decide whether it is in the best interests of the NHS foundation trust for this to happen.
- If the current chair or non-executive director does not seek reappointment or the council of governors decides that reappointment is not appropriate, the council of governors will need to make a new appointment.
- Governors also have the power to remove an existing chair or non-executive director. If

they use this power, they will need to make a new appointment.

Agree process and establish criteria

The governors and nominations committee should together agree a clear process for nominating a new non-executive director or reappointing an existing non-executive director. This process should include taking appropriate advice from within the NHS foundation trust, for example, from the trust's own HR department where necessary and from the chair in the case of other non-executive directors.

Where there is a second, specific nominations committee dealing with the chair and the other non-executive directors, the council of governors should agree a process with that committee.

The committee should decide a job description and person specification defining the role and capabilities required, including an assessment of the time commitment required to perform the role. The committee should propose terms and conditions for the post and, if appropriate, the post may be advertised.

The committee should take into account the views of the board of directors (particularly the non-executive directors in the case of the chair's appointment) on the process in general and the qualifications, skills and experience required for the position. For example, during the non-executive directors' appointment process, if the directors advise that the board of directors lacks specific professional experience (e.g., legal, clinical or accountancy); the recruitment process should reflect the need for that experience. In the same way, the committee should consult other key stakeholders as appropriate.

2. Setting of NED/Chair terms and conditions

Terms and conditions of the chair and other non-executive directors

Significant factors in attracting, retaining and motivating the chair and other non-executive directors are the terms and conditions on offer to them, including levels of pay. This section provides advice on how governors should strike a balance between motivating the right candidates and paying no more than is necessary.

What are the terms and conditions?

The terms and conditions will form the chair and other non-executive directors' contract for services with the NHS foundation trust. They will cover a variety of issues, the most important of which will include the:

- term that the chair and non-executive director will serve;
- responsibilities of the chair and non-executive director;
- remuneration and allowances that the chair and non-executive director will receive – this will include any pay that the individual receives, but can also include non-taxable elements;
- location of work;
- hours of work expected; and
- termination provisions, including notice periods.

The most common point at which the terms and conditions are set is on appointment. However, they can be reviewed and altered throughout the term of office, provided the correct processes are followed.

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How should the process work?

There should be a transparent procedure for deciding the terms and conditions of the chair and individual non-executive directors. The nominations committee will formulate the terms and conditions relating to a new appointment.

The council of governors as a whole at a general meeting must make the final decision on the relevant appointment's terms and conditions, and it could choose to reject the proposals. Similarly, the council of governors as a whole makes the final decision on any revised terms and conditions for existing appointments.

New appointments: how do governors meet their responsibilities?

All money paid to non-executive directors is taxpayers' money; an NHS foundation trust should therefore ensure that value for public money is obtained.

The nominations committee should agree the process for setting terms and conditions as part of the overall appointments process. They should do this after finalising the job description but before the post is advertised.

The factors that the nominations committee and, eventually, the council of governors, will need to examine will vary depending on the position. However, central factors will be the:

- time commitment required by the role;
- responsibilities covered by the role; and
- terms and conditions available at similar NHS foundation trusts and other comparable organisations.

In addition to seeking the advice and support available from the NHS foundation trusts own HR specialists; the council of governors may need to take professional advice, particularly on prevailing terms and conditions. The council of governors may also want to look at advice provided by other relevant bodies such as the NHS Providers.

When should terms and conditions be reviewed or changed?

It may be necessary to change the terms and conditions of the existing chair, non-executive director or a group of non-executive directors. Such changes will need to be handled carefully and councils of governors may need to take legal advice as a poorly run process could lead to disputes and, possibly, litigation. Changes to existing terms and conditions may be needed when:

- market conditions change – a significant change may mean existing terms and conditions should be reviewed. Even if market conditions do not change significantly, governors should consult external professional advisers to market-test the pay levels and the other terms and conditions of the chair and other non-executive directors at least once every three years; and
- individual responsibilities change – there may be a marked change in the range of an individual's responsibilities or in the time he or she can commit to the role. The governors should take the lead in conducting a review of the chair or other non-executive directors' terms and conditions in the light of any such change. If it seems to merit a significant alteration to the chair's terms and conditions, particularly with regards to pay, the governors should seek external professional advice (including legal advice) before making any alterations.

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Who triggers the review?

As governors have the statutory duty to decide the remuneration and other terms and conditions of the non-executive directors, the council of governors should determine whether a review is required. This should be an informed decision, made with the advice and support of bodies such as the NHS foundation trust's HR specialists and external professional advice (where market conditions have changed), the chief executive (where a chair's responsibilities have changed) or the chair (where individual non-executive director responsibilities have changed).

How will the final decision be made?

Any new or changed set of terms and conditions for the chair or other non-executive directors will require a decision by the council of governors at a general meeting. This meeting should be informed by a report (including recommendations) of the nominations committee.

When terms and conditions are revised in relation to a new appointment, the council of governors' decision on them should form part of the appointment decision.

Appendix 2

Appointment Process for appointing a Chair / Non-Executive Directors**The appointments / reappointments**

The Nominations and Remuneration Committee (NRC) will meet prior to the end of the term of office of the Chair ~~and/or~~ Non-Executive Director in sufficient time to enable an appointment / reappointment to be made.

Where a ~~NED-Chair /~~ Non-Executive Director Chair resigns mid-term or is removed then a meeting of the NRC (as defined within the NRC Terms of Reference) will be convened to confirm the process to be undertaken.

Actions**1. Review of the structure, size and composition of the Board of Directors**

1.1 The Nominations and Remuneration Committee will as part of its remit regularly review ~~(suggested annually)~~ the structure, size and composition of the Board of Directors and make recommendations for changes where appropriate.

1.2 With regard to each appointment / reappointment, views ~~to will~~ be sought from the Board of Directors on the qualifications, skills and experience required for each position.

~~The Committee should ensure no changes are required to the terms and conditions.~~

2. The process regarding reappointments

~~Where a re-appointment is to be considered:~~

2.1 The Chair / Senior Independent Director should present to the ~~NRC~~ Nominations and Remuneration Committee the outcomes from the appraisal of the Non-Executive Director / Chair in question and, should advise the ~~Committee~~ NRC if the person is seeking a further term (and that they are eligible). The Chair / Senior Independent Director would then be expected to confirm, following a formal performance evaluation that;

The performance of the individual proposed for re-appointment continues to be effective and the individual demonstrates commitment to the role, *or not*, and provide a recommendation with regard to their re-appointment.

2.2 If the recommendation from the Chair / Senior Independent Director -supports a reappointment and that is then supported by the NRC Committee then a recommendation to the full Council of Governors -should be made for reappointment along with a recommendation regarding the Terms and Conditions.

2.3 If the recommendation from the Chair / Senior Independent Director -supports a reappointment and that is not supported by the NRC Committee then an open -appointments process will be instigated and the ~~Non-Executive Director~~ person in question will be at liberty to take part in an open appointments process.

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If the recommendation from the Chair / Senior Independent Director does not support reappointment then an open appointments process will be instigated.

3. The process regarding new appointments

~~The Nominations and Remuneration Committee;~~

3.1 The NRC May consider procuring the services of an independent recruitment agency to assist with the recruitment process.

3.2 Where a conflict of interest is declared by a member of the NRC they are to withdraw from the appointment process.

3.3 The NRC will, with regard to each appointment;

3.3.1 Confirm the job description and person specification

3.3.2 Confirm the terms and conditions which will form the Chair /Non-Executive Directors' contract for services with the NHS ~~F~~oundation ~~t~~rust.

3.3.3 ~~Confirmation of the associated~~ recruitment campaign

3.3.4 ~~Carry out confirmation of~~ shortlisting ~~to be carried out~~ in line with the person specification and involving all members of the ~~NRC~~ominations and Remuneration Committee.

3.3.5 Confirm ~~ation of~~ the interview panel membership ensuring the panel is comprised of a majority of Governors and conduct ~~arry out~~ interviews.

All panel members ~~will have been~~are required to have undergone completed training learning / development sessions with regard to 'equality and diversity' and 'interviewing and recruitment'.

4. Decision making process

4.1 A recommendation for approval will be presented to the ~~next~~ Council of Governors ~~meeting~~ from the ~~NRC~~ominations and Remunerations committee regarding reappointment / appointment, or not.

4.2 Where a reappointment / appointment is recommended for approval the NRC will also recommend for approval the associated Terms and Conditions.

4.2 Where no recommendation is forthcoming the process in relation to new appointments will begin again.

June 2018

Appendix 3

Terms and Conditions

The following reflects the current generic NED Terms and Conditions. These are adapted to reflect Chair Appointments.

Dear

TERMS OF ENGAGEMENT

These are the terms and conditions on which your engagement as Non-Executive Director of Bradford Teaching Hospitals NHS Foundation Trust (the Trust) has been made. Please indicate your acceptance of these terms of engagement by signing one copy and returning to the Director of Human Resources.

1. **Basis of Appointment** - Non Executive Directors of the Trust hold office under the Constitution of the Trust. Your appointment gives rise to a contract for services between yourself and the Trust. The appointment and tenure of office of the Non-Executive Directors of the Trust are governed by the Trust's Constitution and the Trust's Standing Orders for the Board of Directors (available on request from the Trust Board Secretary).
2. **Employment Law** - This appointment does not create a contract of employment and is not within the jurisdiction of Employment Tribunals. Neither is there any entitlement for compensation for loss of office through employment law.
3. **Appraisal** – Annual appraisal will be led by the Chairman of the Trust within a framework agreed by the Council of Governors and taking into account the views of directors and governors.
4. **Tenure of office** – Your appointment is effective from **[date]** for an initial period of **[period]** years unless terminated by either party giving to the other **[three month's]** prior written notice.
5. **Time Commitment** – You will be expected to devote such time as is reasonably necessary and appropriate for the performance of your duties as Non-Executive Director. It is estimated that you will devote a minimum of [] days a month to your board level responsibilities including both day and evening work according to the requirements of the Trust.
6. **Re-appointments** – Non-Executive Directors are eligible to be considered for re-appointment at the end of their period of office in accordance with the Trust's Constitution, but you have no absolute right to be reappointed. Any reappointment after a period of six years will only be in exceptional circumstances and will be subject to annual re-appointment.
7. **Termination of appointment**
 - 7.1 The Trust's Constitution sets out the circumstances that disqualify an individual from holding a directorship. Should any of those circumstances become applicable to you; your appointment will be terminated with immediate effect.
 - 7.2 If the Council of Governors is of the opinion that it is no longer in the interests of the National Health Service that you continue to hold office then, subject to the

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- provisions of the Constitution your appointment may be terminated with immediate effect
- 7.3 For the purposes of paragraph 7.2, the following list provides examples of matters, which may indicate to the Council of Governors that it is no longer in the interests of the health service that the Non-Executive Director continues in office. The list is not intended to be exhaustive or definitive; the Council of Governors will consider each case on its merits, taking account of all relevant factors:
- 7.3.1 If you fail to meet the requirements of the Fit and Proper Persons Test as set out in Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (as amended or supplemented from time to time) ("the Regulations");
- 7.3.2 If an annual appraisal or sequence of appraisals is unsatisfactory;
- 7.3.3 If the Non-Executive Director no longer enjoys the confidence of the Council of Governors;
- 7.3.4 If the Non-Executive Director loses the confidence of the public or local community in a substantial way;
- 7.3.5 If the Non-Executive Director fails to deliver work against pre-agreed targets incorporated within their annual objectives;
- 7.3.6 If there is a terminal breakdown in essential relationships, for example, between a Non-Executive Director and the Board of Directors.
- 7.4 Your appointment may also be terminated **[with three months' notice] [or] [with immediate effect]** if:
- 7.4.1 You do not properly comply with the requirements of the Standing Orders of the Trust with regard to pecuniary interests in matters under discussion at meetings of the Trust (e.g. a failure to disclose such an interest).
- 7.4.2 You do not attend a meeting of the Trust for a period of three months unless the Council of Governors is satisfied that your absence was due to a reasonable cause and you will be able to attend within such time as is considered reasonable.
- 7.4.3 You do not comply with the requirements of the Standing Orders with regard to pecuniary interests under discussion at meetings, for example, you fail to disclose an interest.
- 7.4.4 You cease to be independent within the meaning of the NHS Foundation Trust Code of Governance.
- 7.5 If any of the above conditions are applicable to you must notify the Board Secretary in writing as soon as reasonably practicable of the circumstances of the issue.
- 7.5.1 The Trust may suspend you from the performing of your functions of Non-Executive Director while consideration is given as to whether your appointment should be terminated.

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7.5.2 On termination of your appointment you shall at the Trust's request resign from your office as Director of the Trust and all other offices held by you connected with Trust.

8. **Your Role as Non-Executive Director** – Your role and responsibilities as a Non-Executive Director are set out in the Trust's Constitution and the role description (copy attached). Non-Executive Directors have the same general legal responsibilities to the Trust as any other director and you will exercise your powers in your role having regard to relevant obligations under the Companies Act 2006, the Trust's Constitution and Standing Orders and the Trust's policies and procedures. The Board of Directors is collectively responsible for promoting the success of the Trust and supervising the Trust's affairs. As part of your role you will be required to comply with the NHS Foundation Trust Code of Governance, the Quality Governance Framework and the Nolan Principles plus other guidance and regulations as issued by Monitor (NHS Improvement) or other relevant bodies from time to time.
9. **Remuneration** - As a consequence of your appointment, you are entitled to be remunerated by the Trust for so long as you continue to hold office as Non-Executive Director, at the rate set by the Council of Governors of the Trust. You are entitled to receive remuneration only in relation to the period for which you hold office. There is no entitlement to compensation for loss of office.

The current rate fixed for your remuneration is £ [] per annum and relates to the time commitment of approximately [] days per month.
10. **Mileage Allowances** – Non-Executive Directors are eligible to claim mileage allowance for travel and subsistence costs necessarily incurred on Trust business equivalent to those set under Agenda for Change.
11. **Outside Interests/Conflict of Interest** – It is accepted and acknowledged that you have business interests other than those of the Trust and that you have declared any conflicts that were apparent on appointment. The Standing Orders of the Board of Directors require the Chairman and members of the Board of Directors to declare on a regular basis any business interests, position of authority in a charity or voluntary body in the field of health and social care, and any connection with bodies contracting for NHS services. In addition, any material interests (as defined in the Trust's Constitution) must be notified to the Board Secretary as soon as you become aware of them. These must be entered into a register which is available to the public.
12. **Indemnity** – You will be indemnified by the Trust in the event of any claim against you for a wrongful act, including associated, reasonable defence costs, providing that your actions were honest, not fraudulent and in good faith, and you have not acted recklessly. This indemnity will not extend to any civil or criminal fines or penalties imposed by law.
13. **Fit and Proper Persons Warranty**- You warrant that you are a fit and proper person as defined by Regulation 5 of the Regulations to hold a Board level appointment within the Trust. You understand there is an ongoing duty to advise the Trust immediately if you become aware of any facts or circumstances that may mean you are no longer a fit and proper person to hold the position you hold. In the event you may not be a fit and proper person the Trust, in accordance with paragraph 7 above may terminate your appointment.
14. **Criminal Matters** – You are required to declare immediately to the Chairman if you are ever arrested or interviewed under caution, any pending prosecutions or convictions (including driving offences) and any cautions. Failure to disclose the fact of an arrest, a caution, pending prosecution or conviction may result in termination of your appointment and this contract for services by the Council of Governors.

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15. **Confidentiality** – All information, including patient and staff records, and any details of contract prices and terms, acquired during your appointment is confidential to the Trust and should not be released, communicated or disclosed, either during your appointment or following termination to any unauthorised person or persons without prior consent. This restriction will cease to apply to any confidential information which may (other than by reason of your breach) become available to the public generally. Nothing in this paragraph shall prevent you from disclosing information which you are entitled to disclosure under the Public Interest Disclosure Act 1998, provided the disclosure is made in accordance with the provisions of that Act and you have complied with Trust policy. Upon termination for whatever reason you will deliver to the Trust all documents, records, papers or other Trust property which may be in your possession or control and which relate in any way to the business of the Trust and you shall not retain any copies thereof.

 16. **No Smoking Policy** – In the interests the health of staff, patients and visitors, the Trust is a non-smoking organisation. It is a condition of your terms of engagement that you do not smoke within the Trust's premises and grounds.

 17. **Health and Safety/Risk Management** - You must comply at all times with the Trust's Health and Safety policies, in particular by following agreed safe working procedures and reporting incidents using the Trust's Risk Incident Reporting System.

 18. **Equality and Diversity** - You are required to abide by the Trust's policies and procedures and to actively support the Trust's commitment to equality and diversity in both employment and the delivery of services. All patients, staff and visitors must be treated equitably, with dignity and respect taking into account their race, gender, ethnic origin, religion, age, disability, sexuality or marital status.

 19. **Environment and Sustainability** - You have a responsibility to promote sustainability and carbon reduction within the Trust adhering to our Sustainable Development Strategy and therefore ensuring that all our business is conducted in a sustainable manner

 20. **Infection Prevention and Control** - You have a personal responsibility to comply with Trust's Infection Prevention and Control policies to protect your own health, the health of patients, visitors and other employees and to prevent health care associated infections. [This includes a requirement to maintain a safe, clean and tidy work environment and to complete mandatory Infection Prevention and Control training as provided by the Trust]

 21. **Safeguarding Children and Adults** -You have a responsibility to safeguard and promote the welfare of children and adults. You will be responsible for ensuring you undertake the appropriate level of training in accordance with the Trust's safeguarding policy training strategy and that they are aware of and work within the safeguarding policies of the Trust.

 22. **Data Protection** – You consent to the Trust holding and processing information about you for legal, personal, administrative and management purposes and in particular to the processing of any sensitive personal data (as defined by the Data Protection Act 1998). You will at all times comply with the Trust's data protection policy, a copy of which will be provided to you.

 23. **Change of Personal Details** – You shall advise the Trust Board Secretary promptly of any change in your address or other personal contact details.

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24. **Rights of Third Parties** – The Contracts (Rights of Third Parties) Act 1999 shall not apply to the letter containing details of your terms and conditions. No other person other than you and the Trust shall have any rights under this letter and the terms shall not be enforceable by any person other than you and the Trust.

25. **Law** – This constitutes the entire terms and conditions of your appointment and no waiver or modification shall be valid unless in writing and signed by both parties.

Yours sincerely

[signed]

Trust Chairman

Acceptance Statement

I have read and accept the terms and conditions of appointment.

Signed: _____

Dated: -----