

Meeting Title	Council of Governors		
Date	27 April 2023	Agenda item	CGo.4.23.13

Process in the case of the proposed removal of a NED or Chair

Presented by	Laura Parsons, Associate Director of Corporate Governance, Board Secretary		
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Governance responsibility	Council of Governors		
Purpose of the paper	To present the proposed process to be undertaken in the case of the proposed removal of a NED or Chair.		
Action required	For approval		
Previously discussed at/ informed by	Governors Nominations and Remuneration Committee (NRC)		
Previously approved at:	Committee/Group	Date	
	Governors NRC	10 October 2022	
	Governors NRC	21 March 2023	

Summary

Introduction

Following the annual Governors NRC evaluation review in July 2022, the Governors NRC determined that the Council should have in place a process related to the removal from office of a NED or Chair.

Consultation was undertaken with other NHS Foundation Trusts however, no detailed processes were found to be in place for the removal of a NED or Chair.

Reasons for the termination of a NED or Chair are generally spelled out within the BTHFT terms and conditions however there is no process attached with regard to the removal of a NED or Chair.

NHS England does have in place detailed arrangements for the removal of a NED or Chair from an NHS Trust as they have the responsibility for the appointment of NHS Trust NEDs and Chairs. This document which has been reviewed is available [here](#).

Your Statutory Duties: A Reference Guide for Governors provided useful and detailed guidance on the process that NHS Foundation Trust Governors might wish to adopt in the case of the removal of a NED or Chair from office. The full document is available [here](#).

Both the NHS England arrangements and, Your Statutory Duties: A Reference Guide for Governors have influenced the development of the proposed process.

An initial draft of the process was reviewed at the Governors NRC meeting held on 10 October 2022. At that meeting a number of comments and queries were raised.

The process was revised in line with the feedback received and considered by the Governors NRC on 21 March 2023.

The Process in the case of the proposed removal of a NED or Chair is presented to the Council of Governors at Appendix 1.

Recommendation/s

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- The Council of Governors is asked to approve the Process in the case of the proposed removal of a NED or Chair
- The Council is also asked to confirm that the process is to be reviewed by the Council every two years with the next review date set for April 2025.

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Appendix 1

Process in the case of the proposed removal of a NED or Chair

Author	Associate Director of Corporate Governance / Head of Corporate Governance
Version	1.0
Status	DRAFT
Supersedes	N/A
Executive Lead	Director of Strategy and Integration
Approval Committee	Council of Governors
Ratified by	Council of Governors
Date ratified	
Date issued	
Review date	

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Introduction

It is recognised that the removal of the chair or other non-executive directors is a very serious step and the council of governors must ensure that a fair, rigorous, lawful and transparent process is in place.

Possible reasons for removal

Governors will appreciate that removing the chair or other non-executive director is only likely to be appropriate in very limited and particular circumstances. Governors must clearly understand the potential reasons which may lead to a removal decision before embarking on the removal process.

Possible reasons for removal will depend on the particular circumstances. These may include, but are not limited to the following reasons as outlined within the NED terms and conditions which are presented within a letter of engagement and signed by the Chair/NED upon appointment. They state:

7. Termination of appointment¹

- 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 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;*

¹ The NED Terms and Conditions are being considered under agenda item xx and include two key amendments to section 7 Termination of Appointment. In this document this section reflects the amendments proposed.

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- 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 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 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.*
 - 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 the Trust.*

Process for removal

The council of governors should only exercise its power to remove the chair or other non-executive directors as a last resort. The removal should not take place unless the governors, other non-executive directors (in particular the chair and senior independent director if he or she is not the subject of the process) and the chief executive have had the opportunity to put forward their views on the basis of the available evidence.

Decisions with regard to the removal of the chair/non-executive director will in the first instance be considered by the governors' nominations and remuneration committee (NRC) in line with section 7.10 of the NRC terms of reference and a recommendation will be made to the council of governors for consideration.

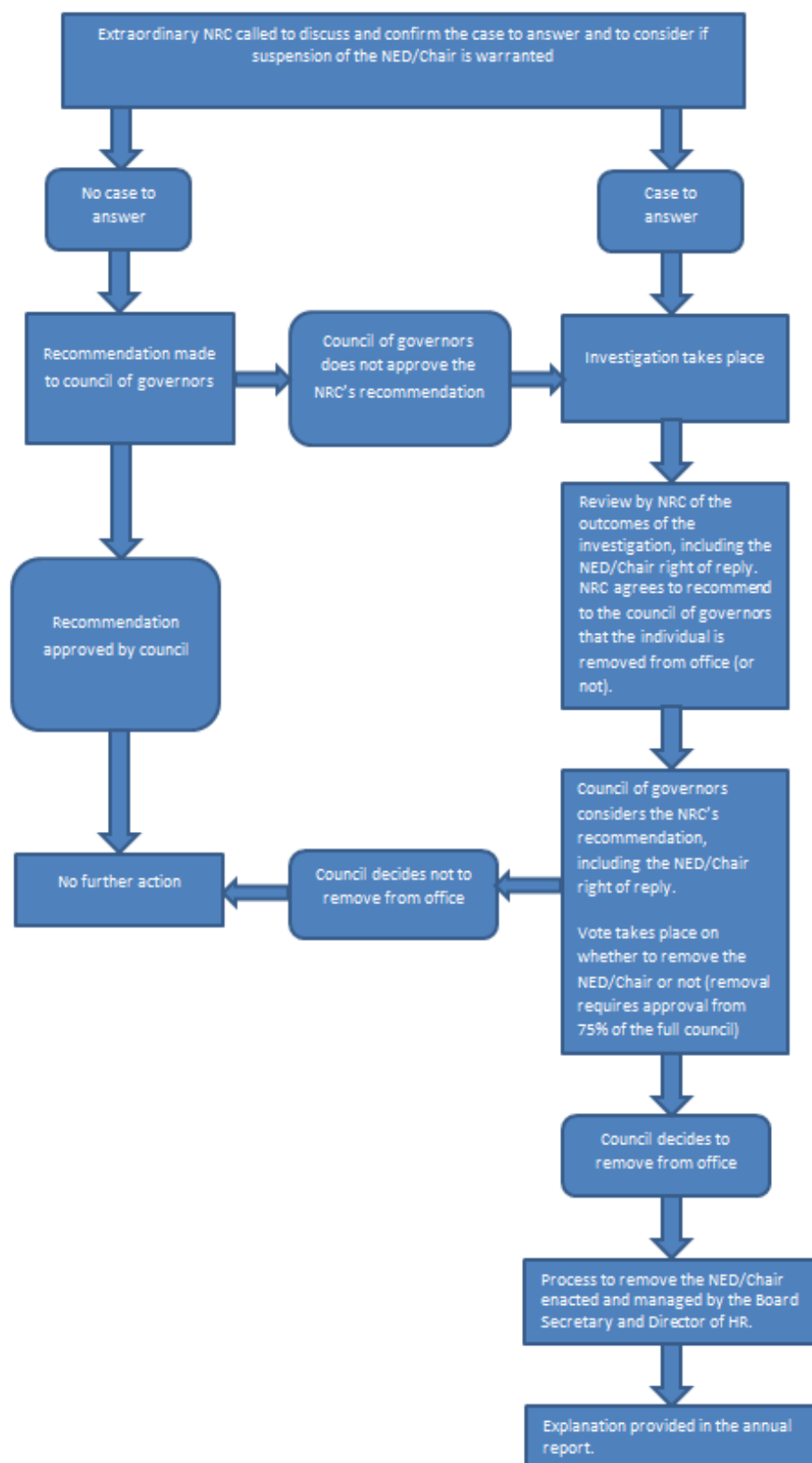
Legal advice on the legality of any removal and the process for it will be sought throughout.

The lead governor should directly inform NHS England upon the instigation of this process and keep them up to date throughout each stage, through the trust's board secretary.

The process is set out below, followed by further detail on some of the steps outlined.

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Figure 1: Key stages for the removal of a chair or other non-executive director



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Investigation, advice and consultation

The governors' NRC will hear the matter, including any allegations made against the individual and their response to them. Subject to any conflicts of interest which may arise, the governors NRC will consult with the chair (or senior independent director if the chair is the subject of the process); the chief executive, the board secretary, and the director of HR to first consider if there is a case to answer.

Where it is found that there is a case to answer, the council of governors will be informed and the board secretary and the director of HR will be charged with managing the investigation. Terms of reference will be agreed with the NRC. The NRC will consider the need for independence and, where required, an independent person will be appointed. As a minimum, the terms of reference will confirm:

- Background and information regarding the concerns raised
- Details of the investigating / decision making officers
- Matters to be investigated
- Timescales
- Arrangements for the production and sharing of the investigation report

This investigation should include consideration of the views of key personnel within trust, as necessary, dependent on the issues under investigation including:

- in particular the senior independent director (where he or she is not the individual under scrutiny);
- the chair (where he or she is not the individual under scrutiny); and
- the chief executive.

The lead governor should directly inform NHS England upon the instigation of an investigation and keep them up to date throughout each stage, through the trust's relationship manager.

If the governors NRC finds that there is no case to answer, a representative of the governors NRC will present this recommendation to the council of governors for consideration. If the council agrees that there is no case to answer then no further action will be taken. If the council disagrees with the recommendation of the governors NRC, then an investigation will be undertaken as outlined above. At this stage decisions can be made by a simple majority of the governors present for the vote, subject to the meeting being quorate in line with the standing orders for the council of governors.

Suspension

While an investigation process has been set in train by the governors NRC or the council of governors, the NRC/council should consider whether the chair/non-executive director should be suspended while the investigation is carried out. Suspension is permitted under the terms of engagement (section 7.5.1).

Suspension may be appropriate in circumstances where:

- there is a potential risk to patients or staff;
- the governors NRC/council of governors deems that an individual may disrupt an investigation; or
- there is an allegation of fraud.

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The purpose of the suspension period would be to allow a full investigation to be carried out to establish whether there are grounds for the chair/non-executive director to be removed from office. Whilst the period of suspension should be kept to a minimum, further periods of suspension can be considered if more time is needed to complete an investigation. The initial period of suspension can also be extended in order to take any resulting case for removal of office through a termination process.

Reporting the findings to the governors NRC

The governors NRC should consider the report on the findings, which should ensure that all individuals are given an adequate opportunity to respond to any allegations made. The governors NRC will agree whether to recommend to the council of governors that the individual is removed from office or not.

Final decision

A formal meeting of the council of governors should be convened for governors to vote on the matter. A representative of the governors NRC will present the findings of the investigation, and the recommendation of the governors NRC to the council of governors. All individuals will be given an adequate opportunity to respond to any allegations made. The council of governors should ensure it is satisfied that a full and proper process has been followed. If it is in any doubt about the process, it should seek clarification and remedy any deficiencies before voting.

In accordance with the NHS Act 2006 (as amended), removal requires the approval of three-quarters of the members of the whole council of governors and not just those who attend the meeting.

Removal of the chair / non-executive director

- **Resignation**

Where the council of governors votes to remove the chair/non-executive director from office, the individual may choose to resign, or alternatively a resignation may actively be sought.

- **Termination**

If resignation is either not appropriate or not forthcoming, a termination procedure will begin.

Depending on the circumstances, this could also commence following a review of evidence submitted or following the outcome of the investigation or, in line with section 7.4 of the chair / non-executive director terms of engagement and/or section 7.3 of the trust's constitution. The decision to remove will require approval from 75% of the Council members in line with the NHS Act 2006 (as amended) which states that - "17(1)It is for the council of governors at a general meeting to appoint or remove the chairman and the other non-executive directors. (2)Removal of a non-executive director under sub-paragraph (1) requires the approval of three-quarters of the members of the council."

What happens when NHS England removes a chair or other non-executive director?

Following a breach of an NHS foundation trust's [provider licence](#), circumstances may arise that

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require NHS England to exercise its statutory powers to suspend or remove a chair or other non-executive director. Under such circumstances, NHS England's statutory powers take precedence over the powers that may be exercised by the council of governors. For further information on NHS England and how it may exercise its powers, governors can refer to the [risk assessment framework and reporting manual for independent sector providers of NHS services](#).

Next steps following removal

In the event that removal takes place, the council of governors will need to make a new appointment to replace the removed individual. A description of the reasons for, and process of, removal will need to be set out in the trust's next annual report.

April 2023