

WHAT IS THE ROLE OF THE GOVERNORS OF AN NHS FOUNDATION TRUST?

Cliff Mills



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Introduction

These are still early days for foundation trusts – or “public benefit corporations” as the Health and Social Care (Community Health and Standards) Act 2003 calls them.

Curiously, this Act created a completely new corporate structure in the context of health legislation. Although now approaching three years old, these novel corporate entities are mere striplings beside their more elderly colleagues, companies and mutual societies, which have been around for 150 years or more and are still evolving.

Foundation trusts are not only new, but their governance arrangements are novel, being based upon two groups of officers (directors and governors) rather than just one (directors alone) which is more common. Co-operative and other mutual societies, on which foundation trusts are modelled, have two groups (elected representatives and appointed professional managers), but the allocation of functions in those organisations is not the same as foundation trusts. It is therefore not surprising that the role of the governor of a foundation trust should be the cause of some puzzlement.

It is healthy to be open and honest about the novelty of these arrangements – there is no direct parallel – and to have an open discussion about how best to make them work. The comments below are intended to assist in that debate, and are based upon working with a number of applicant and authorised foundation trusts, and also with other large mutual or membership-based organisations.

No legal definition

Whilst the Act sets out specific *functions*¹ of both directors and governors (see below), it does not define the *role* of the governor. Whilst this might appear unhelpful, it is not surprising or unusual. Company law does not provide a definition of “director” in that sense either.² However, the articles of association of a company do normally say that the directors are to manage the business of the company, which is a relatively clear and straightforward description of the role³. Such a statement reflects the basic architecture of a company, whereby the members of a company (shareholders) come together for a common endeavour to trade, and delegate authority to a smaller group of people (directors) the responsibility for running the business. Basically, the directors exercise all the powers of the company, subject to any powers reserved to the members in general meeting (such as approving changes to the constitution).

The constitutions of foundation trusts do not contain such a description of the role of either directors or governors. As mentioned above, the Act sets out the *functions* and these are

¹ By *functions*, I mean specific tasks; to make sense of being a governor, we need to understand the nature of the *role*, ie how do you describe the job?

² The Companies Act 2006 has just for the first time set out in statute the duties of directors

³ Regulation 70, Table A Companies Act 1985

repeated in the constitutions. This is reasonably helpful in the case of directors; the Act (and Monitor's model core constitution) states that the powers of the foundation trust are exercised by the board of directors. It can reasonably be inferred from this and from the use of the term "director" in the Act that the *role* of the directors of a foundation trust is, similar to a company, namely to manage the business. In other words, the directors do everything, except what is specifically reserved by the Act or the constitution to the governors or the members.

It is more difficult to infer the role of governors. The *functions* set out in the legislation and the constitution are in summary as follows:

- ▶ to appoint or remove the Chairman and the other non-executive Directors;
- ▶ to approve an appointment (by the non-executive Directors) of the Chief Executive;
- ▶ to decide the remuneration and allowances, and the other terms and conditions of office, of the non-executive Directors;
- ▶ to appoint or remove the Foundation Trust's auditor;
- ▶ to be presented with the annual accounts, any report of the auditor on them and the annual report;
- ▶ to provide their views to the Board of Directors when the Board of Directors is preparing the Foundation Trust's forward planning.

On the face of it, this is a rather curious list of functions, and certainly a difficult basis from which to deduce a *role*.

To shed further light on the subject, it is helpful to take a step back. The governance of any corporate entity comprises not just what the *directors* do, but what all of the organs of the corporate entity do. In the case of a company, this comprises the directors and the shareholders.⁴ And as observed above, we can be clear about the role of company directors because they do everything except what is reserved to the shareholders. In the case of a foundation trust, the organs comprise directors, governors, and members. So if we are to build up an understanding of the role of governors (just one part of the whole), it will be helpful to build up a full picture of foundation trust governance from which to deduce that role.

What the Act does not say

In this context, it is interesting to consider not just what the Act does say, but what it *does not* say; those things you might expect to see, but which are not there.

Firstly, there is no mention of members meetings. Considering that the foundation trust model is a membership-based one, and was expressly said to be based on traditional co-operative and mutual societies which are also membership-based organisations, this is

⁴ The "organ" of the company for these purposes is the shareholders in general meeting

curious. Having said that, a number of the functions of governors set out in the Act are more commonly functions of the annual members meeting (usually called the annual general meeting) of other corporate entities. For example, the general meeting of a company usually appoints and removes directors, appoints auditors, and receives the annual report and accounts. Broadly, these are functions allocated to governors of a foundation trust.

A further curiosity of the Act is that it calls meetings of governors “general meetings” which causes some confusion. You get the feeling that in some respects, the draftsman of the Act regards governors meetings as in some ways fulfilling the functions of general meetings of other corporate entities; and that in some way, the governors are doing the members’ job for them. This is a curious situation, given the express intention to model foundation trusts on traditional co-operative and mutual organisations where members are most definitely involved in doing these things.

Second, there is no mention in the Act of the mechanism by which the constitution of a foundation trust is to be changed. The legislation governing companies (companies limited by shares or by guarantee, and community interest companies) provide that the constitutions of such corporations are amended or revised by means of a resolution of the members in general meeting. The ability to decide what changes are to be made to the constitution of their company is one of the few rights which shareholders need to reserve to themselves to ensure that they remain in ultimate control, and not the directors who are merely their agents.

It is similar in mutual societies, namely that the members approve changes to the constitution of their society.⁵ Without such a right, the incentive to become a member is somewhat undermined, as is any sense of ownership of the organisation, since it gives to others the ability to alter the rights of the members. The power of members to approve changes to the constitution is, in effect, one of the hallmarks of a membership-based organisation.

By its silence about which “organ” of the foundation trust – members or governors⁶ - is to have responsibility to approve changes to the constitution and leaving the matter for decision in each case, the Act does nothing to clarify the role of governors. Those coming from a mutual background, or concerned to ensure the development of a meaningful role for members of foundation trusts will provide for constitutional change to be approved by the members. Those more concerned with convenience or minimising procedure may opt for approval by the governors.⁷

⁵ The Industrial and Provident Societies Act 1965 does not actually specify that members must approve changes to the constitution: it merely provides that the rules must provide for “the mode of making, altering or rescinding rules”. However, the context (Paragraph 5 of Schedule 1 IPFA 1965) suggests that it is in a members meeting, and it is difficult to imagine the FSA registering a society which provided for the board or committee to approve rule amendments.

⁶ It seems inconceivable that Parliamentary draughtsmen can have envisaged the possibility that the board of directors could approve changes to the constitution, but it is not precluded by the Act.

⁷ Under the 2003 Act, Monitor must approve any change to the constitution.

There is one further matter to mention in the context of what the Act does not say. Nowhere does it say that the governors are responsible for scrutinising what the directors do. Not only does the Act not say that they have this role, but it would be inconsistent with the general design of the foundation trust governance arrangements for them to assume it, because there is no mechanism to ensure that the governors have the necessary skills and experience to carry out such a function.⁸ It is a basic requirement of successful governance that the design of the structure ensures that functions are allocated to people most likely to be able to discharge them. It is for this reason that commercially competent and experienced non-executive directors are required in a foundation trust, as Monitor is quite rightly insisting. It *is* the role of the non-executive directors to test and challenge the executive decision-making, and they should have the technical competence to do so.

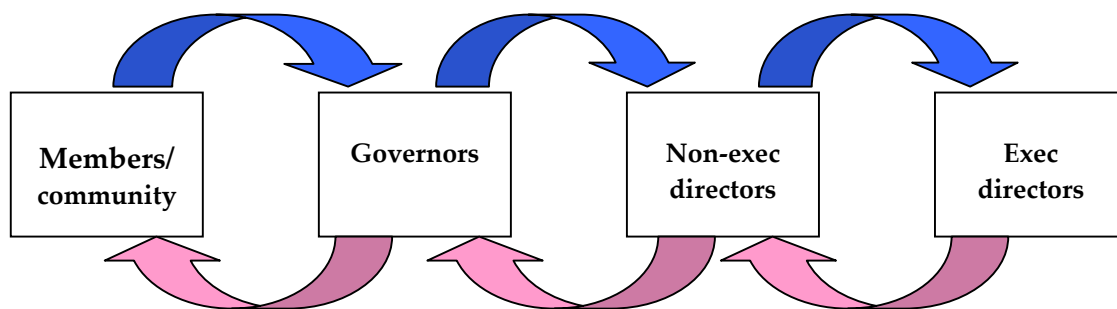
For sure, if it had been the intention of the Parliamentary draughtsman for the governors to scrutinise the board of directors, the Act would have explicitly said so. It does not; so it is clear that there is no intention to set up a second power-base within the governance of a foundation trust – that would be a recipe for disaster. There is only one power-base: the board of directors. The governors clearly have some other role.

What is the overall governance scheme?

I believe that the answer to this has to be inferred from the overall architecture of the foundation trust as it emerges from the Act. It may assist in doing this to see in overview the way the organs of the corporate entity fit together. It goes like this:

- the members/community elect/appoint the governors;
- the governors appoint (and may remove) the non-executive directors;
- the non-executive directors (in the main⁹) appoint the executive directors.

This might be shown in graphic form as follows.



⁸ By way of comparison, scrutinising the executives in managing the business *is* the responsibility of the democratically elected board of the large retail co-operative societies: they do oversee the executive, determine the forward plans with them, and have the power to hire and fire the chief executive. This is a governance weakness, where the business of the society is very large. Co-operative society directors have such power as a result of the historical evolution of the movement, and some governance integrity is maintained by providing that management of the business of such organisations is delegated by the constitution to appointed and appropriately skilled professional executives.

⁹ The appointment of the chief executive is subject to the approval of the board of governors; and the chief executive is on the committee which appoints the remaining executive directors.

The blue arrows represent the appointment or election process specified by the Act – the mechanism by which the individuals holding the relevant office are put into that position. Such election or appointment carries the implication that the people so elected or appointed are authorised or delegated to carry out their role by those who elected or appointed them. It also carries the implication that the people holding such office have some accountability back to those who elected or appointed them. This is specifically provided in the Act insofar as the governors have the power to remove the non-executive directors, and the non-executive directors have the power to remove the executive directors. The members do not have the power to remove elected governors; though they do have the power not to re-elect them, and the appointing organisations do have the power to remove their appointees.

The pink arrows therefore represent the answerability back to those who appointed or elected; it represents the fact that those who are appointed to an office and impressed with some kind of delegated responsibility or authority are answerable to those who gave them such authority. If they discharge the responsibility appropriately, they may continue in office. If they do not, they must either adapt to the wishes of those who placed trust in them, or they might be replaced.

Each set of relationships, e.g. that between non-executive and executive directors, is established within the framework of appointment/driver (blue arrow) and challenge/review (pink arrow), and together the revolving circle comprises accountability. It is the whole circle which depicts the full relationship of accountability and what it entails. The structure is designed to build in tension – to provide for the non-executive directors to hold the executives in check, to keep them on the right path, with the ultimate possibility of removal if the executives do not fulfil their responsibilities. In other words, the constructive tension is intended to drive the efficiency and success of the organisation.

The other relationships (members/community-governors, and governors-NEDs) are similarly structured, leading to a chain of interlocking relationships driving the performance of the organisation. This is the mechanism of accountability.

The foundation trust project aims to replace central control with local control; to move from state to community ownership. The governance arrangements which have been created provide a mechanism to link local people to their provider of acute and other services; to create a framework within which patients, public, staff and local organisations have a formal role within the constitution of the foundation trust, feeding into the forward planning of the services to be provided, and playing a part in holding the provider to account. It could be said that it is a long chain of accountability between members/community and the executives in charge of day to day decision-making; but it is a good deal more direct than what it replaced.

At one end of the chain are the members and local community: those for whom the service is provided including patients and carers, taxpayers who are paying for it, and those employed in directly providing the service. These are the members; the owners of the

organisation on behalf of the local community. Their role is to become engaged, insofar as they are interested and willing; to be informed; to express views; to take part in discussion; to vote for representatives; to engage with their representatives; to seek election themselves; in short, to participate at grass-roots level in the process of local ownership, seeking to get their organisation to meet their and their community's needs. It also includes those organisations within the local health economy which are identified as being relevant to what the foundation trust is doing, and have an important contribution to make to its success.

At the other end of the chain are those entrusted with management of the delivery of the service, the board of directors; those responsible for delivery of a service which the local community wants and needs, subject to national standards, subject to the funds available, and within the context of a national health service serving all citizens.

The role of governors

Between the membership and local community on the one hand, and the board of directors on the other, sits the board of governors. Their role is to provide the link between the local community and the board. They are the conduit between local people expressing their needs, views and aspirations about what the service should be and how it should be delivered, and those making decisions about what that service is and being responsible for delivering it. They are also the conduit in the other direction, transmitting messages back to the local community about what is affordable and realistic; what are the financial and other constraints within which the service has to be provided; how different services could be provided if the community behaved in a different way; and ultimately playing a part in transmitting information about healthy living and life-styles, enabling changed behaviour by people to reduce costs and influence the services provided in the future. This is mainstream policy, and a high level ambition throughout public service reform.

So this is the role of governors: to be the link between the members who are the local owners of the foundation trust, and the board of directors responsible for delivering the service. They are the mechanism by which the professionals responsible for running the service are formally and constitutionally linked to the community for whom the service is provided. Their role is to be the interface or medium between the owners and the managers: the customer and the provider. Their specific statutory functions are merely tools to use in discharging this role; making sure that they have the right people as non-executive directors who they can work with and rely upon; making their formal contribution in the forward planning of strategy, but as part of a continuing process whereby they are linking the community and the trust all of the time, to ensure it remains rooted in its community, owned by the community, and responding to the community's needs.

This analysis highlights the importance of the link which the governors themselves have with their local community, and the links they have with the directors. In relation to community links, they need to find appropriate and locally convenient ways of maintaining contact, so that they can be an effective bridge-head into the trust. In relation to the board of directors, they need to develop personal as well as formal relationships with the directors and particularly with the non-executive directors; ensuring that their community's messages are getting through to the board, and that an open channel of communication exists. There has been much emphasis on the role of the chair in linking the board of directors and board

of governors. True, there is a formal point here in that the Act requires the chair of the board of directors to preside at governors meetings; but the governors appoint *all* of the non-executive directors, and they should see *all* of the non-executive directors as their voices in the directors' board-room.

It is not a very glamorous-sounding role – being the link. But that is what it is. And the governors are exactly the right people to discharge that role; either they have voluntarily put themselves forward to act in a representative capacity and their electorate has confirmed its trust in them; or they are the chosen representative of specifically identified organisations which the foundation trust wishes to work with. In other words, it is a role within their capacity and suited to the mechanism by which they assumed office.

To help in discharging their role, the Act gives the governors some significant powers of appointment and removal. This makes it clear that the governors' role is not cosmetic or tokenistic. The powers are there to be used: to be used for the good of the foundation trust and the community which owns it; to be used as part of the mechanism of accountability, ensuring that those in charge of the foundation trust remain accountable to its owners. But the powers are not there to enable the governors to take control, or override the directors.

If the foundation trust model is to be successful, it is vital that the board of governors is not seen as some kind of rival or alternative power base within the trust. The more governors become side-tracked by trying to second-guess or scrutinise executive decision-making (for which they do not have the competence), the less they will pay attention to their proper role of securing engagement with the local community. They should leave scrutiny to those with the competence and legal authority to undertake it – the non-executive directors; internal and external auditors; the Healthcare Commission; Monitor; and Local Authority Overview and Scrutiny Committees. Their role is to link the foundation trust to the community. Their success in doing so is likely to have a direct impact on the foundation trust's success and future viability.

Concluding remarks

The foundation trust model is a serious attempt to deliver both democracy and professional competence in the management of a key public service. Democracy on its own is inadequate, because it cannot guarantee professionally competent management. Professional management alone is inadequate because it would be unaccountable. The foundation trust model knits together in one entity local democratic accountability, and technical competence; and the board of governors is the interface, or the hinge between the two.

Testing out novel governance arrangements on existing organisations, which are already going through a process of substantial change, is a bold and challenging thing to do. It is really important to provide support to those who are trying to make these new arrangements work. It may transpire that some alterations would be helpful to make the governance function more smoothly – that is something to be considered. In the meantime, the new arrangements create great opportunities for trusts looking for a new way of operating and engaging with their local communities. It is to be expected that there will be some painful experiences as each trust finds its way of adapting to the new regime. But it is

also to be hoped that the new arrangements will provide a better way of meeting the day to day challenge of delivering a core public service.

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This article sets out my own personal views, which are put forward in an independent capacity. Over recent years, I have advised a number of applicant and authorised trusts on establishing and operating their new governance arrangements.