



MEETING TITLE Trust Board Meeting in Public		MEETING DATE 23/07/13	
TITLE of PAPER	Proposed Changes to the Foundation Trust Constitution Including Implications for the Governance Rationale and Membership Strategy	PAPER REF	6.1
STRATEGIC OBJECTIVE	All		
PURPOSE OF THE PAPER	The purpose of this paper is to propose changes to the YAS' Constitution which also have implications for the Governance Rationale and Membership Strategy.		
For Approval	<input checked="" type="checkbox"/>	For Assurance	<input type="checkbox"/>
For Decision	<input type="checkbox"/>	Discussion/Information	<input type="checkbox"/>
AUTHOR / LEAD	Anne Allen, Director of Corporate Affairs & Trust Secretary	ACCOUNTABLE DIRECTOR	Director of Corporate Affairs & Trust Secretary
DEBATED AT:	Committee/Group: Board Development Meeting Trust Executive Group Foundation Trust Development Group	Date: 16/07/2013 10/07/13 03/07/2013	
PREVIOUSLY AGREED AT:	Committee/Group: Not Applicable	Date:	
RECOMMENDATION	The Trust Board is asked to: a) approve any proposed changes to YAS' Constitution, including their impact on the Governance Rationale and Membership Strategy; b) note that a further Solicitor's Letter of Conformity (of the Constitution) has been provided.		

RISK ASSESSMENT		Yes	No
Corporate Risk Register and/or Board Assurance Framework amended <i>If 'Yes' – expand in Section 4. / attached paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
Resource Implications (Financial, Workforce, other - specify) <i>If 'Yes' – expand in Section 2. / attached paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
Legal implications/Regulatory requirements <i>If 'Yes' – expand in Section 2. / attached paper</i>		<input checked="" type="checkbox"/>	<input type="checkbox"/>
Quality and Diversity Implications <i>If 'Yes' – please attach to the back of this paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
ASSURANCE/COMPLIANCE			
Care Quality Commission Registration Outcome(s)	All Choose an item. Choose an item.		
NHSLA Risk Management Standards for Ambulance Trusts	1: Governance		

Proposed Changes to the Foundation Trust Constitution Including Implications for the Governance Rationale and Membership Strategy

1. PURPOSE/AIM

- 1.1 The purpose of this paper is to outline for discussion proposed changes to the YAS' Constitution which also have implications for the Governance Rationale and Membership Strategy.

2. BACKGROUND/CONTEXT

- 2.1 The YAS' Constitution was approved by the Trust Board on 29 January 2013. Since that time the Health & Social Care Act, 2012 ['the Act'] has come into force. In early June 2013, Monitor published a new model template for the Core Constitution which reflects the changes in legislation.

Aspirant Trusts are expected to update their Constitution to reflect the new template which, on submission to Monitor, must display any deviations from the model by way of track changes.

Included in its submissions for Foundation Trust (FT) authorisation, YAS is required to submit, in July 2013, to the NHS Trust Development Authority (NHS TDA) the following Appendices to the Trust's Integrated Business Plan (IBP):

- a) The Constitution (IBP Appendix 3)
- b) Governance Rationale (IBP Appendix 2)
- c) Membership Strategy (IBP Appendix 5)

- 2.2 **The YAS' Constitution has been updated to reflect the new Monitor model template (V.31) including the following changes which the Trust Board will be asked to discuss and approve:**

1. The term Board of Governors has been replaced with the Council of Governors.
2. Inclusion (in the Principle Purpose for the Trust) to ensure its income from the provision of goods and services for the purposes of the health service is greater than its income from other purposes.
3. The new statutory duties of the Council of Governors have been reflected:
 - a. To hold the Non-Executive Directors individually and collectively to account for the performance of the Board;
 - b. To represent the interests of the Members of the Trust as a whole and the interests of the public.

4. The requirement for the Trust to take steps to secure that the Governors are equipped with the skills and knowledge they require in their capacity as such.
5. That the Council of Governors can request the attendance of Directors at the Council Meetings.
6. Inclusion of the requirement for the Trust to hold an Annual Members' Meeting and for a Director to present the Annual Accounts and Report at this meeting.
7. The right of Governors to refer matters to the *Independent Panel for Advising Governors* (set up under the Act) if they have a question regarding the Trust acting in compliance with its Constitution or under Chapter 5 of the 2006 Act (Terms of Authorisation). At least half of the Council of Governors has to agree to the referral.
8. The new general duty of the Board of Directors and of each Director individually to act with a view to promoting the success of the Trust so as to maximise the benefits for the Members of the Trust as a whole and for the public.
9. Requirement for Board of Directors' meetings to be open to the public (except where exclusions apply).
10. Requirement for the Board of Directors to send a copy of the agenda before the meeting and the minutes after the meeting to the Council of Governors.
11. The Register of Interests section for the Board of Directors has been replaced with the following:
 36. *Board of Directors - conflicts of interest of directors*
 - 36.1 *The duties that a director of the trust has by virtue of being a director include in particular –*
 - 36.1.1 *A duty to avoid a situation in which the director has (or can have) a direct or indirect interest that conflicts (or possibly may conflict) with the interests of the trust.*
 - 36.1.2 *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.*
 - 36.2 *The duty referred to in sub-paragraph 36.1.1 is not infringed if –*
 - 36.2.1 *The situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or*
 - 36.2.2 *The matter has been authorised in accordance with the constitution.*

- 36.3 *The duty referred to in sub-paragraph 36.1.2 is not infringed if acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.*
- 36.4 *In sub-paragraph 36.1.2, “third party” means a person other than –*
36.4.1 *The trust, or*
36.4.2 *A person acting on its behalf.*
- 36.5 *If a director of the trust has in any way a direct or indirect interest in a proposed transaction or arrangement with the trust, the director must declare the nature and extent of that interest to the other directors.*
- 36.6 *If a declaration under this paragraph proves to be, or becomes, inaccurate, incomplete, a further declaration must be made.*
- 36.7 *Any declaration required by this paragraph must be made before the trust enters into the transaction or arrangement.*
- 36.8 *This paragraph does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.*
- 36.9 *A director need not declare an interest –*
36.9.1 *If it cannot reasonably be regarded as likely to give rise to a conflict of interest;*
36.9.2 *If, or to the extent that, the directors are already aware of it;*
36.9.3 *If, or to the extent that, it concerns terms of the director’s appointment that have been or are to be considered –*
36.9.3.1 *By a meeting of the Board of Directors, or*
36.9.3.2 *By a committee of the directors appointed for the purpose under the Constitution.*
- 36.10 *A matter shall have been authorised for the purposes of paragraph 36.2.2 if:*

[insert relevant provisions...]

12. The documents available to the public have been extended to include:

- 41.1 *The trust shall make the following documents available for inspection by members of the public free of charge at all reasonable times:*
41.1.1 *a copy of the current constitution,*
41.1.2 *a copy of the latest annual accounts and of any report of the auditor on them, and*
41.1.3 *a copy of the latest annual report.*

41.2 *The trust shall also make the following documents relating to a special administration of the trust available for inspection by members of the public free of charge at all reasonable times:*

41.2.1 *a copy of any order made under section 65D (appointment of trust special administrator), 65J (power to extend time), 65KC (action following Secretary of State's rejection of final report), 65L (trusts coming out of administration) or 65LA (trusts to be dissolved) of the 2006 Act.*

41.2.2 *a copy of any report laid under section 65D (appointment of trust special administrator) of the 2006 Act.*

41.2.3 *a copy of any information published under section 65D (appointment of trust special administrator) of the 2006 Act.*

41.2.4 *a copy of any draft report published under section 65F (administrator's draft report) of the 2006 Act.*

41.2.5 *a copy of any statement provided under section 65F (administrator's draft report) of the 2006 Act.*

41.2.6 *a copy of any notice published under section 65F (administrator's draft report), 65G (consultation plan), 65H (consultation requirements), 65J (power to extend time), 65KA (Monitor's decision), 65KB (Secretary of State's response to Monitor's decision), 65KC (action following Secretary of State's rejection of final report) or 65KD (Secretary of State's response to re-submitted final report) of the 2006 Act.*

41.2.7 *a copy of any statement published or provided under section 65G (consultation plan) of the 2006 Act.*

41.2.8 *a copy of any final report published under section 65I (administrator's final report),*

41.2.9 *a copy of any statement published under section 65J (power to extend time) or 65KC (action following Secretary of State's rejection of final report) of the 2006 Act.*

41.2.10 *a copy of any information published under section 65M (replacement of trust special administrator) of the 2006 Act.*

13. The forward plan section has been extended to make reference to what information must be included. This section also includes the requirement for the Council of Governors to determine whether they are satisfied that any activity that is carried out other than for the provision of goods and service for the purposes of the health service will not interfere significantly with the Trust's principle purpose. It also includes the requirement for the Council of Governors to approve where the Trust proposes to increase by 5% or more the proportion of its total income in any financial year due to activities other than for the provision of goods and service for the purposes of the health service* (please see over).

* NB: The Trust's solicitors' advise that the phrase "for the purposes of the health service" is not defined; all that may be inferred is that the "health service" means "the NHS".

14. The process for the amendment of the Constitution has also changed as Monitor no longer need to approve changes. More than half the Council of Governors and more than half of the Board of Directors must approve amendments. If the changes are to the powers or duties of the Council of Governors then this needs to be approved by the Membership at the Annual Members' Meeting. Trusts have to notify changes to Monitor.
15. A section regarding mergers etc and significant transactions has been added. This identifies that the Council of Governors must approve any mergers and significant transactions.

2.3 SIGNIFICANT ISSUES FOR CONSIDERATION OF THE TRUST BOARD

(a) Changes Under the Health & Social Care Act, 2012

The new model template and the changes following the Act include a number of issues where the Trust Board has discretion. These should be discussed and, if approved, included in YAS' Constitution.

Trust solicitors have confirmed any decision of the Board would not create any issues with the legality of our Constitution.

2.3.1 Whether the Commissioners as Appointed Governors should be removed? It was previously required under the 2006 Act to have Primary Care Trusts (PCTs) as Appointed Governors however the requirement to include Commissioners was removed in the 2012 Act. If a representative(s) of the Clinical Commissioning Groups (CCGs) is not included then this would reduce the Appointed Governors to five and could therefore lead to a reduction of the total number of Governors on YAS' Council to twenty two. The current Appointed Governors are:

- NHS Bradford & Airedale
- NHS North Yorkshire & York
- East Riding of Yorkshire Council
- Sheffield City Council
- Barnsley Hospital NHS Foundation Trust
- Leeds Partnerships NHS Foundation Trust
- West Yorkshire Police (regional representative for all police forces)

The Trust Board is asked to consider the following options:

- I. Remove Commissioner posts *and* remove* two Governor posts (reducing the overall Council to 22 members);
- II. Retain Commissioner posts and decide which Commissioners to invite* as Appointed Governors (retaining the overall Council @ 24 members);
- III. Remove* Commissioner' posts and replace with others, for example additional Public/Staff Governor(s) (retaining the overall Council @ 24 members);
- IV. Review* all current Governor positions

** NB: the Act no longer requires aspirant FTs to consult with the public therefore any review has no implications for public consultation.*

2.3.2 What provisions should be included regarding the authorisation of conflict of interests? Monitor has included a section where the Trust enters their own provisions with regards to 36.2.2 below:

36.1 The duties that a director of the trust has by virtue of being a director include in particular –

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

36.2 The duty referred to in sub-paragraph 36.1.1 is not infringed if –

36.2.1 The situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or

*36.2.2 **The matter has been authorised in accordance with the Constitution [AA's emboldenment].***

The Trust Board is asked to consider the following options:

- I. Include a statement in YAS' Constitution defining an 'authorised conflict of interest(s)';
- II. That YAS' Constitution remains silent on the matter of an 'authorised conflict of interest(s)'.

2.3.3 Whether a definition of a Significant Transaction should be included in the YAS' Constitution?

NB: in its Compliance Framework, Monitor defines a Significant Transaction as, '25% of the assets, income or capital of the NHS foundation trust' (please see Appendix A for further information on Significant Transactions).

The Trust Board is asked to consider the following options:

- I. Include a YAS' definition of 'Significant Transaction';
- II. Include the generic statement outlined by Monitor:

49.2 The constitution does not contain any descriptions of the term 'significant transaction' for the purposes of section 51A of the 2006 Act (Significant Transactions.)

(b) Changes Previously Discussed by the Trust Board

Since YAS' Constitution was approved (January 2013) various changes to the Constitution have been suggested internally.

Trust solicitors have confirmed these would not create any issues with the legality of our Constitution.

The proposed changes are:

Item:	Change:	Reason:
17.1.3 and 33.3 a person who within the preceding five years has been convicted in the British Islands of any offence if a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him.	To be amended to include any convictions anywhere in the world	British Islands is not broad enough

Annex 6 – Additional Provisions – Council of Governors item 2.	The addition of Health & Wellbeing Boards to the list of exclusions*	New organisation not originally included in the Core Constitution.
Annex 9 Section 2d	Reference to the Complaints & Concerns Policy’s definition of Vexatious Complainant.	Will ensure Constitution is clear regarding the definition of a Vexatious Complainant

* NB: The Trust’s solicitors’ advise that the argument for excluding Health and Wellbeing Boards is that they fulfil an important role as an external scrutiniser of the Trust’s activities; therefore their exclusion removes any potential for conflict of interest.

(c) Following legal advice the following has been added into the disqualification of Governors section of the Constitution which was an omission made by Monitor in their new template:

17.1.2 a person in relation to whom a moratorium period under a debt relief order applies (under Part 7A of the Insolvency Act 1986).

3. PROPOSALS/NEXT STEPS

3.1 Following approval of any changes to the Constitution and associated documentation (Governance Rationale; Membership Strategy) by the Trust Board updated versions will be made available to the public and stakeholders.

A further [Constitution] solicitor’s *Letter of Conformity* will also be made available.

4. RISK ASSESSMENT

4.1 It is noted that it is vital for YAS to demonstrate it is prepared to become a Foundation Trust and operate in accordance with the Monitor Code of Governance and any relevant statutory requirements.

5. RECOMMENDATION

5.1 The Trust Board is asked to:

- c) approve any proposed changes to YAS' Constitution, including their impact on the Governance Rationale and Membership Strategy;
- d) note that a further Solicitor's Letter of Conformity (of the Constitution) has been provided.

6. APPENDICES/BACKGROUND INFORMATION

Appendix A – Further information regarding Significant Transactions

IBP Appendix 3 – Draft YAS' Constitution (V.31) (new Monitor Template) - with YAS' amendments as tracked changes

IBP Appendix 2 – Draft YAS' Governance Rationale (V.22) - with tracked changes

IBP Appendix 5 – Draft Membership Strategy (V.4) with tracked changes

Diagram 19: categories for major investments/divestments

IF A TRANSACTION MEETS ANY ONE OF THESE CRITERIA, THE FOUNDATION TRUST SHOULD REPORT THIS TRANSACTION TO MONITOR

Ratio	Description	Categories*	
		Material	Significant
Assets	The gross assets or capital** subject to the transaction, divided by the gross assets of the foundation trust	> 10%	> 25%
Income	The income attributable to: • the assets; or • the contract associated with the transaction, divided by the income of the foundation trust	> 10%	> 25%
Consideration to total NHS foundation trust capital	The gross capital*** of the company or business being acquired/divested, divided by the total capital**** of the foundation trust following completion, or the effects on the total capital of the foundation trust resulting from a transaction	> 10 %	> 25%

* For non-healthcare/international transactions the thresholds will be reduced by 50% for investments only

** Gross assets is the total of fixed assets and current assets

*** Gross capital equals the market value of the target's shares and debt securities, plus the excess of current liabilities over current assets

**** Total capital of the foundation trust equals taxpayers' equity