

The Scrutiny Role of the Non-Executive Director (NED) in the NHS

Briefing note by Mike Cooper, Tamarind Chambers, Dec 2009

The NED on an NHS Trust Board

Typical NHS Trust Board comprises five executive directors, paid employees, including the CE and finance director; and equal or larger number of non-executive directors, including the chair. Board is accountable to Department of Health (DH). Board has a responsibility for taking forward DH / Government strategy and policy, and to follow guidance of NHS Plan.

All directors, executive and non-executive:

- share responsibility for Board decisions;
- are required to act in the best interest of the NHS; and
- have a role in ensuring the probity of the organisation's activities and contributing to the achievement of its objectives in the best interest of patients and the wider public.

To fulfil their role, all Board members need effective relationships with key stakeholders, including elected councillors and the local authority. (*DH Guide to NHS Boards*)

Role of NED:

1. **Strategy:** 'to *constructively challenge* and contribute to the development of strategy'.
2. **Performance:** 'to *scrutinise* the performance of management in meeting agreed goals and objectives and monitor the reporting of performance'.
3. **Risk:** 'to *satisfy themselves* that financial information is accurate and that controls and systems of risk management are robust and defensible'.
4. **People:** role in appointment and remuneration of executive directors.
5. Plus **Accountability:** to ensure the Board acts in the best interests of the public and is accountable to the public for the services provided and the public funds it uses.

(From 'Governing the NHS' 2004, 1 to 4 taken from the Higgs Report, DTI, 2003)

The **SAGE** criteria – NEDs act as:

1. Steward – includes *independent scrutiny* and financial stewardship;
2. Ambassador – ensuring patients come first, local partnerships;
3. Guardian – providing leadership and strategic direction;
4. Experience – draw from own, external experience.

NEDS should:

1. *Challenge* the executive team as plans are developed.
2. Maintain objectivity, and not get distracted into operational detail or cross the line into management responsibilities.
3. *Question and probe* the executive team on its performance; monitor against planned objectives.
4. Be constructive and guiding so their *scrutiny* leads to better outcomes and strategies.
5. Be assured of controls and standards of governance, finance and risk management.
6. Be a source of support for chair – constructive, not uncritical.
7. Add value – should not substitute for or supplement executive effort.

They are NOT external policing. Their role is to assist in governance, not be 'representative'.
(From 'Governing the NHS' DH 2004)

Responsibility of NED includes:

- To 'help the board work in the public interest'. (*NHS Appointments Commission*)
- To provide reassurance that standards of governance are observed. (*DH Guide for NHS Boards*)
- NEDs need to be able to work as a team, challenging yet supportive, independent yet involved, to maintain independence yet not be aloof, uninformed or peripheral. Need to take the wider view and establish their credibility. (*HSJ Nov 2006*)
- NEDs need to gain the 'trust and respect of other board members'. (*Higgs*)
- They should question intelligently, debate constructively, challenge rigorously and decide dispassionately. (*Higgs*)

Foundation Trust – as above except:

Two-tier governance –

1. Board of Directors (corporate leadership); and
2. Board of Governors (oversight).

Board of Directors: responsible for the performance of, and exercising the powers of, the FT; accountable to FT members through Board of Governors (not to SHA, DH or SofS). Also accountable to Monitor. Board has duty to consult and involve Board of Governors.

NEDs:

- are appointed by the Board of Governors;
- provide independence, balance and challenge to the executive directors (*Monitor*); and
- take full and equal responsibility and accountability for the function and success of the trust .

Board of Governors: Also called Council of Governors, Membership Council, member's council, governing body. Proportion of governors elected by the members and accountable to members. Guidance says that Governors:

- *challenge and collectively hold to account* the board of directors;
- *scrutinise* the trust's annual plan; and
- must act in best interest of the FT.

Strengths and weaknesses of the Non-Executive scrutiny role

Benefits of Non-Executive Scrutiny:

- External expertise.
- Varied experience and perspective.
- Community focus?

Limitations of Non-Executive Scrutiny:

- Their shared responsibility for: a) setting policy and objectives; and b) organisational performance; limits the independence they can bring to scrutiny.
(*Benefits & Limitations: Dr Roger Moore, CE, NHS Appointments Commission, 2006*)

Tensions within the Non-Executive role (*From Audit Commission*):

Part of corporate team and therefore supportive of the Chair and CE	vs	Acting as a counterbalance to the power of the Chairman and Chief Executive
Good team spirit is essential to the operation of the Board	vs	Monitoring the performance of executive directors
Contribute to development of strategy	vs	Monitoring the implementation of strategy, they may be drawn into operational issues

Further issues with FTs:

- FT NEDs, being closer to the management of the trust, compromise their independence and ability to scrutinise the executive; so the 'internal' scrutiny role and holding the executive to account falls to the Board of Governors.
- FT NEDs appointed more as 'experts', so community accountability is a role of Governors.
- But governors also have a responsibility to act in the interests of the Trust, so their 'scrutiny' is not independent.

Summary by Dr Roger Moore:

- We are all scrutineers of the public services we use.
- NEDs have a key role in shaping organisational objectives and scrutinising performance.
- But *external scrutiny* can provide further safeguards.

ie There is a distinctive and necessary role for local authority health scrutiny; the roles of health scrutiny and the Non-Executive Director can be complementary.