

HEALTH AND SOCIAL CARE (COMMUNITY HEALTH AND STANDARDS) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Nhs Foundation Trusts

Introductory

Section 1: NHS foundation trusts

15. *Section 1* sets out that an NHS foundation trust is a public benefit corporation which is authorised under this Part to provide goods and services for the purposes of the “health service” in England. As this term is defined in section 128 of the National Health Service 1977 (“the 1977 Act”) as being the health service that is provided by the Secretary of State, the effect is that every NHS foundation trust has a primary purpose of providing health care to the NHS.
16. *Subsection (2)* makes it clear that a public benefit corporation is a body corporate. Each public benefit corporation must have a constitution that accords with *Schedule 1*.
17. *Schedule 1* sets out minimum statutory requirements for the constitution, governance and membership of public benefit corporations that may be authorised as NHS foundation trusts. It also sets out the audit, accounting and reporting arrangements that are to apply.
18. *Paragraph 1* requires every public benefit corporation to have a constitution that complies with the terms of *Schedule 1*. A corporation may also make further provision in its constitution that is consistent with the Schedule.
19. *Paragraph 2* requires the constitution of a public benefit corporation to name the corporation, and if the corporation is an NHS foundation trust, to include the words “NHS foundation trust” in its name.
20. *Paragraph 3* sets out the minimum eligibility criteria for the membership of a public benefit corporation. These membership criteria ensure that each corporation has representation from the public and staff. The membership may also include the patients of the hospitals managed by the corporation, and also their carers. Each public benefit corporation is given the power to specify membership criteria in its constitution.
21. The members must include individuals drawn from the public who live in specified areas, with members in each specified area being “a public constituency”. The areas from which members of a public constituency are drawn must be defined in terms of local government electoral areas in England and Wales.
22. The members must also include individuals from a corporation’s staff, who are “the staff constituency”. *Paragraph 3(3)* allows the staff constituency of a public benefit corporation to include individuals who exercise functions for the corporation, but are

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not directly employed by the corporation. Examples of such individuals include agency nurses, and individuals who work on the premises of the corporation but are employed by an independent subcontractor.

23. The paragraph also provides that the staff constituency may only include individuals with an employment contract of 12 months or longer, or without any fixed term at all; or alternatively, any person who has been continuously employed by the corporation, or exercised functions in terms of *subparagraph (1)(b)*, for a 12 month period. *Paragraph 3(4)* provides that a constitution may set out that the staff constituency may be divided into two or more classes.
24. If a corporation chooses, its constitution may also provide for there to be members who are eligible because they have attended any of the corporation's hospitals as a patient, or as the carer of a patient, who are collectively referred to as "the patients' constituency". However, a person who is employed as a carer of a patient, or works as a carer through a voluntary organisation, is not eligible for membership.
25. Under *paragraph 3(6)*, if a public benefit corporation has a patients' constituency, its constitution may provide for it to be divided into three or more classes. If it chooses to do so, however, one class must comprise the carers of patients.
26. *Paragraph 3(7)* gives public benefit corporations wide powers to set out other eligibility requirements in the constitution, as they see fit.
27. *Paragraph 4* makes provision about the constituencies of public benefit corporations. It includes a requirement that a member of a class or constituency cannot be a member of another class or constituency while that membership continues. There is also a requirement that a person who is eligible to be a member of the staff constituency may not be a member of any other constituency.
28. *Paragraph 5* requires the constitution of a public benefit corporation to specify a minimum number for each constituency, or where there are classes within the constituency, of each class.
29. *Paragraph 6* provides that an individual who is eligible to become a member of a public benefit corporation may do so by making an application to the corporation.
30. The paragraph also allows the constitution of a corporation to provide that an individual who is eligible to become a member of the staff or patient constituency (otherwise than as a carer of a patient) may become a member by way of an invitation. On receiving such an invitation, the individual will become a member of the corporation without making an application under *paragraph 6(1)*, unless he subsequently informs the corporation that he does not wish to be a member.
31. *Paragraphs 7 to 10* require each public benefit corporation to have a Board of Governors. The Board of Governors comprises the elected representatives of the members of the public benefit corporation, and also individuals who have been appointed by the public benefit corporation to represent certain interests. Under *paragraph 7*, the public, staff and (if there is one) patients' constituencies are to elect representatives from their constituencies to the Board of Governors. *Paragraph 8* disqualifies certain individuals from membership of the Board of Governors, and gives public benefit corporations the power to set out other eligibility requirements in the constitution. Under *paragraph 9*, representatives of the public and (if there is one) patients' constituencies must be in the majority. There must also be at least three members from the staff constituency, one member appointed by a Primary Care Trust ("PCT") to which the public benefit corporation provides services and one member appointed by a local authority for an area which includes all or part of the membership area specified for the purposes of a public constituency of the corporation. One member must also be appointed by a university if a hospital of the public benefit corporation includes a medical or dental school. In addition, members may be appointed to represent organisations specified in the constitution as partnership organisations.

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32. *Paragraphs 12 and 13* set out some minimum requirements for meetings of the Board of Governors, including requirements relating to public access to these meetings. Under *paragraph 14*, each public benefit corporation is required to make other provisions about certain matters relating to the Board of Governors in its constitution, and has the power to make further provision as it deems necessary.
33. *Paragraphs 15 to 18* require each public benefit corporation to have a Board of Directors. The Board of Directors is the body that is responsible for the day-to-day management of the public benefit corporation, and to this end, *paragraph 15(2)* requires each public benefit corporation to provide for its powers to be exercised by the Board of Directors on its behalf. The Board of Directors is made up of executive directors, one of whom is the chief executive (and accounting officer), and non-executive directors, one of whom is the chairman of the corporation. One of the executive directors must be a registered medical practitioner or registered dentist, Another executive director must be a registered nurse or registered midwife.
34. The chief executive is appointed and removed by the non-executive directors. The chairman and the other non-executive directors are appointed and removed by the Board of Governors. Only members of the public or patients' constituencies, and if a hospital of the public benefit corporation includes a medical or dental school provided by a university, a representative of that university, are eligible for appointment as a non-executive director. Under *paragraph 16(3)*, the disqualifications under *paragraph 8(1)* also apply to directors. *Paragraph 18* sets out provisions for the remuneration of the Board of Directors.
35. *Paragraph 19* makes provision about the initial directors of former NHS Trusts. It provides for the Chief Executive, Chairman and non-executive directors of the former NHS Trust, if they so wish, to become the initial Chief Executive, Chairman and non-executive directors of the corporation.
36. *Paragraph 20* requires that each public benefit corporation must keep a register of members and their constituencies, members of the Board of Governors and their interests, directors, and directors' interests. The details of each register are left to the discretion of the public benefit corporation. In addition, under *paragraph 21*, the constitution of a public benefit corporation must include provision for dealing with conflicts of interest of the members of the board of governors and the directors.
37. The public benefit corporation must make the registers listed in *paragraph 20* of the Schedule, and the documents listed in *paragraph 22(1)*- including its constitution, authorisation, accounts and reports - available to the public. However, there is a power for the Secretary of State to make regulations setting out circumstances in which registers should not be made public.
38. *Paragraph 23* requires each public benefit corporation to appoint an auditor. *Paragraph 23(3)* provides that an officer of the Audit Commission may be appointed as auditor if the Audit Commission agrees. *Paragraph 23(4)* requires that an auditor must be a member of the appropriate professional organisation, and *paragraph 23(6)* requires the establishment of an audit committee to perform monitoring, reviewing and other appropriate functions.
39. *Paragraphs 24 and 25* set out the accounting arrangements for public benefit corporations. The Independent Regulator is given general power to dictate the form and content of these accounts, with the approval of Treasury. The Independent Regulator is also given powers to direct the standards, procedures and techniques for the audit of accounts. To ensure that these bodies remain accountable for their use of public funds, *paragraph 25(4)* requires that each public benefit corporation must lay a copy of their annual accounts before Parliament.
40. *Paragraph 26* requires each public benefit corporation to make annual reports to the Independent Regulator. These reports must include information on steps taken by the

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public benefit corporation to secure that the membership of its public and (if there is one) patients' constituencies is representative of the population that is eligible for such membership, and any other information the Independent Regulator requires. The timing, and form of these reports is left to the Independent Regulator's decision.

41. *Paragraph 27* requires that each public benefit corporation must provide the Independent Regulator with annual forward business plans prepared by the directors of the public benefit corporation. The directors must have regard to the views of the Board of Governors in preparing the forward plan.
42. *Paragraph 28* provides that copies of a public benefit corporation's annual accounts, auditor's reports and annual reports must be presented to the Board of Governors at a public meeting.

Section 2: Independent Regulator of NHS foundation trusts

43. This section establishes the Independent Regulator of NHS foundation trusts. The Independent Regulator is responsible for setting the terms of, and granting authorisation to, NHS foundation trusts, and monitoring their compliance with the terms of authorisation and the requirements set out in Part 1.
44. *Subsection (2)* introduces *Schedule 2*, which makes detailed provisions regarding the Independent Regulator. The Schedule includes provisions about the appointment of members and staff to the Independent Regulator and their remuneration, and also sets out the Independent Regulator's powers, funding arrangements, reporting and accounts procedures.
45. *Paragraph 1* sets out that the Independent Regulator is to consist of up to 5 members appointed by the Secretary of State, including a chairman and deputy. *Paragraphs 2* and *3* give the Secretary of State general powers to set the terms and conditions of office of members of the Independent Regulator.
46. *Paragraph 4* provides for the Independent Regulator to appoint staff on terms and conditions it determines, subject to consultation with the Minister for the Civil Service.
47. *Paragraph 6* provides that the Independent Regulator is responsible for regulating its own procedure.
48. *Paragraphs 8* and *9* set out the general and specific powers of the Independent Regulator. *Paragraph 8(1)* gives the Independent Regulator general powers to do anything that is necessary or desirable in relation to its functions. In particular, *paragraph 8(2)* provides that this includes acquiring and disposing of property, entering into contracts, accepting gifts, and co-operating with other public authorities. *Paragraph 9* gives the regulator the power to borrow money temporarily with the consent of the Secretary of State, and to conduct research.
49. Under *paragraph 10*, the Secretary of State may make contributions to the Independent Regulator's expenses. This provision is to be read in conjunction with *section 21* which allows the Independent Regulator to impose fees on NHS foundation trusts.
50. *Paragraph 11* sets out provisions that ensure the accountability of the Independent Regulator to the Secretary of State and to Parliament. The Independent Regulator must make an annual report on the way it has exercised its functions and prepare a summary of NHS foundation trusts' accounts for each financial year, both of which must be laid before Parliament, and copied to the Secretary of State. In addition, *paragraph 11(6)* gives the Secretary of State the power to require any other reports and information relating to the exercise of the Independent Regulator's functions.
51. *Paragraph 12* sets out the accounting requirements that that will apply to the Independent Regulator.

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52. *Paragraph 13* places a requirement on the Independent Regulator to respond in writing to any recommendation relating to the exercise of its functions made by a Committee of either or both Houses of Parliament.
53. *Paragraphs 17 and 18* disqualify the members of the Independent Regulator from membership of the House of Commons and the Northern Ireland Assembly.

Section 3: General duty of regulator

54. This section requires the Independent Regulator to exercise its functions in a manner that is consistent with the Secretary of State's general duties under the 1977 Act. Amongst other things, the Secretary of State must promote and provide a comprehensive health service in England and provide clinical facilities to universities with medical or dental schools. The Secretary of State must also secure that NHS goods and services are provided free of charge.