

**TRUST BOARD**  
**24<sup>th</sup> February 2011**

<b>TITLE</b>	<b>Health and Social Care Bill 2011</b>
<b>EXECUTIVE SUMMARY</b>	<p>The Health and Social Care Bill, was laid before Parliament on 19<sup>th</sup> January 2011.</p> <p>The attached report looks at aspects of the Bill which have significance for foundation trusts.</p>
<b>BOARD ASSURANCE (RISK)/ IMPLICATIONS</b>	<p>The Board will need to ensure that its future governance arrangements are fit for purpose when the Act is passed.</p>
<b>STAKEHOLDER/ PATIENT IMPACT AND VIEWS</b>	<p>None taken</p>
<b>EQUALITY AND DIVERSITY ISSUES</b>	<p>None known</p>
<b>LEGAL ISSUES</b>	<p>The Trust will need to comply with the final requirements of the Health and Social Care Act 2011 when enacted together with any subsequent Regulations.</p>
<b>The Trust Board is asked to:</b>	<p>Note the report. This is the second briefing to the Board.</p>
<b>Submitted by:</b>	<p>Jane Gear Head of Corporate Affairs</p>
<b>Date:</b>	<p>14 February 2011</p>
<b>Decision:</b>	<p>For noting</p>

**TRUST BOARD**  
**24<sup>th</sup> February 2011**

**The Health and Social Care Bill 2011**

**1 Introduction**

The Bill was presented to Parliament on 19 January 2011. On 31 January 2011 the House of Commons debated the main principles of the Bill. The Commons decided that the Bill should be given its Second Reading and sent it to a Public Bill Committee for scrutiny. The Health and Social Care Bill Committee is now accepting written evidence.

**2 Extent of secondary legislation**

The Bill is subject to change as it passes through Parliament, different elements of the Bill are likely to be brought into force at different times and transitional provisions will apply in some cases.

The Bill largely makes its changes through amendments and additions to the National Health Service Act 2006.

**3 Navigating the Bill**

The Bill is divided into 12 parts; the most relevant to NHS foundation trusts are:

- a. Part 1 – The health service (including NHSCB and consortia) (Clauses 1 – 45)
- b. Part 3 – economic regulation and Monitor (Clauses 51 – 135)
- c. Part 4 – NHS Foundation Trusts (Clauses 136 – 165)

Part 5 covers local government and Health Watch; part 8, NICE; part 9 – provisions around information and the information centre; part 11 (c.264-5) outlines the duties of Monitor and CQC to co-operate.

The 22 schedules provide more detail on the various component parts of the proposed architecture. The ones most relevant to Foundation Trusts will include Schedule 1 regarding the NHSCB; Schedule 2 on commissioning consortia and Schedule 7 – Monitor.

**3 FT Governance and freedoms**

Provisions in respect of FT governors, Directors, Members, accounting, meetings and voting are outlined in clauses 136 to 143. The key provisions are set out below.

### Governors

The Bill includes changing the name of the board of governors to the council of governors, and deleting the requirement to appoint a PCT representative to the council of governors.

It also enables any organisation specified in the in the constitution to appoint one or more governors.

Governors are given a duty to hold non-executives individually and collectively to account for the board's performance and to represent the interests of FT members and the public. Governors can also require one or more directors to attend a meeting to provide information on the directors' performance of their duties, and annual reports must include information on any occasions where this power has been exercised.

Foundation Trusts will also have a duty to ensure that governors have the skills and knowledge they need to carry out their role

### Directors

The new description of FT directors duties is similar to corresponding provisions in the companies legislation and it seems likely that courts will look at the way in which the companies provisions have been applied when they come to interpret the scope of FT duties

The Bill adds specific duties for directors including severally and collective to promote the success of the corporation to maximise benefit to members and the public, to avoid direct and indirect conflicts of interest, and not to accept benefits from third parties. Directors must declare direct and indirect interests.

Also boards of directors will have to give governors a copy of the agenda for the board of directors meeting prior to it taking place, and minutes as soon as practicable after the meeting.

### Members and voting

The Bill requires that a Foundation Trust's membership is broadly representative of the population it serves. There will be requirement to hold an annual meeting of members (which will be open to the public) to receive the annual report, accounts and auditor's report. The annual report must include information on the Foundation Trusts' pay policy and procedures, and work of the remuneration committee. Foundation Trusts must publish directors' remuneration and expenses, as well as governors' expenses, in the annual report. At least one director must present the report to the annual meeting.

Clauses 139-140 effect a gradual change in responsibility for setting requirements as to the accounts to be kept and published by Foundation Trusts. When the Bill comes into full force the Secretary of State will have responsibility for setting requirements. Similarly, eventually a Foundation Trust's forward plan will have to be sent to the Secretary of State rather than Monitor.

There is a new power for the Secretary of State to make regulations on voting arrangements by the council of governors, covering mergers and significant transactions (see below).

#### Constitutional amendments and Governor Advisory Panel

These are covered in Clauses 146 and 147. At least half of the council of governors and half of the board of directors must vote to approve any changes. The membership of the FT must confirm any changes to the constitution where they relate to the powers of governors.

The Bill gives Monitor the power to establish a panel for advising governors. Governors will be able to refer questions to the panel as to whether the trust has failed to act in accordance with its constitution. A question can only be referred if more than half of the council of governors approve the referral.

## **4 Finances**

Clause 148 establishes greater freedom to borrow, in line with previously notified proposals for an operationally independent banking function; the Secretary of State will be required to report on the activities undertaken in this regard.

This clause also removes borrowing limits.

The prohibition of disposal of 'protected property' without the approval of Monitor is removed. This is significant in terms of opening up possibilities for FT mergers by other Foundation Trusts or other providers and in relation to the scope for lending to Foundation Trusts. However Monitor will be able to restrict Foundation Trust's ability to dispose of property associated with the delivery of designated services.

#### Private patient income cap

This is removed

#### Significant transactions

There will be a new provision for a majority (over 50%) of the Foundation Trust's Council of Governors voting to approve significant transactions, though the determination of significant will be specified by Foundation Trusts' own constitutions; Foundation Trusts may choose not to constitutionally describe what is significant.

#### Mergers and acquisitions

Clauses 153 – 7 give more details on mergers, acquisitions, separations and dissolutions. A governor-majority in each FT taking part is required to proceed with integrations (again 50%).

#### The failure regime

The failure regime is provided for in clauses 158 -63. De-authorisation is to be

repealed. The new failure regime will be triggered if “the regulator is satisfied that an NHS foundation trust is, or is likely to become, unable to pay its debts”.

The regulator may make an order authorising the appointment of a trust special administrator to exercise the functions of the governors, chairman and directors of the trust.

## **5 Economic Regulation and Monitor**

### Chapter 2 – Competition

- Monitor will have concurrent powers with the OFT under the Competition Act 1998 and the Enterprise Act 2002.
- The Bill flags that the NHSCB and consortia will have requirements imposed on them relating to good practice procurement, patient choice and promoting competition. These regulations are not set out in the Bill.
- The Enterprise Act will now cover NHS foundation trust mergers. This will mean they are generally subject to the agreement of the OFT and Competition Commission rather than the Secretary of State.

### Chapter 3 – Designated Services

Commissioners will apply to Monitor for the designation of services. The criterion that they are to use is if removing the service (without available alternatives) would have a significant adverse impact on patients' health now or in future. They will have to consult local authorities, local health watch and the provider of the service.

Providers have the ability to appeal against designation and commissioners are required to review designations at least once every 10 years.

The NHSCB will have to ensure commissioners agree on designations and if they can not it will determine the decision itself.

### Chapter 4 – Licensing

The new licensing regime will operate jointly with the current licensing regime of the Care Quality Commission.

The Chapter sets out the requirement for NHS health care providers to be licensed. The criteria for licenses and the grant of licenses are set by Monitor, who will also hold and publish the register of licensed providers.

Monitor will determine the conditions within the license which will be part standard conditions and part special conditions with the consent of the applicant.

Special conditions can be applied for a range of reasons relating to price, choice, competition and other responsibilities of Monitor.

The conditions could include

- Fees to Monitor
- 'risk pool' requirements
- Notifications of mergers to the OFT (Foundation Trusts and NHS trusts only and for a 5 year period only)

- Information requirements
- Requirements to use the national tariff and other payment rules
- Notice of intention to cease provision of designated services
- Use or disposal of assets used in the provision of designated services
- Investment in relation to designated services.

Monitor has powers to modify standard license conditions but providers are able to object and if a sufficient (undetermined) proportion object then the modifications can be blocked. Monitor can then refer the matter to the Competition Commission.

Monitor has the power to impose discretionary requirements on breaches of the license, including the ability to fine up to 10% of organisation turnover. Monitor will set out in further guidance how and when it will impose such requirements.

Monitor maintains the power to designate foundation trusts and maintain a compliance regime for a period of two years after the start of licensing (the sunset clause anticipated, so that newly authorised Foundation Trusts have a degree of oversight and stability in transition). The Secretary of State has the power however to extend this period.

#### Chapter 6 – Insolvency and Special Administration

Sets out the applicability of insolvency laws to NHS foundation trusts (Insolvency Act 1986).

Monitor will be able to apply for a health special administrator order for the court to appoint an administrator to continue providing designated services until the organisation is rescued or the service is transferred.

The regulations governing the health special administrator and the special administration regime are yet to be fully set out.

#### Chapter 7 – Financial assistance in health special administration cases

Monitor is required to establish mechanisms for providing financial assistance for special administration. This might be either

- a) Mechanisms for raising money (e.g. risk pool), or
- b) Mechanisms for ensuring providers arrange insurance facilities

Monitor may make grants or loans if it is satisfied it is necessary to enable the continued provision of designated services or secure a viable long term business and there are no alternative funding sources.

Monitor will be able to require commissioners to pay charges to support the continuing provision of designated services. This will be determined by future regulations set by the Secretary of State and is not confirmed in the bill.

Monitor will definitely have the power to set a levy on providers in order to fund the risk pool. This will be reviewed each year and can be varied by provider, including being zero.

## **Paper 8.0**

Monitor will have to periodically consult on their methodology for setting and collecting the levy and if it makes any changes. As usual if a sufficient number object the matter can be referred to the Competition Commission.