Ashford and St. Peter's Hospitals NHS
NHS Foundation Trust

TRUST BOARD
27th January 2011

TITLE	**Liberating the NHS- Legislative Framework and Next Steps**
EXECUTIVE SUMMARY	The Government has set out the next steps in its plan to reform the NHS with the publication of the Command paper 'Liberating the NHS: Legislative Framework and Next Steps', (Dec 2010) which sets out the policy for reform in detail. The Health and Social Care Bill, was laid before Parliament on 19th January 2011. This report draws on the sections of the Command paper which most directly impact on the Trust.
BOARD ASSURANCE (RISK)/ IMPLICATIONS	The Board will need to ensure that its future governance arrangements are fit for purpose when the Act is passed.
STAKEHOLDER/ PATIENT IMPACT AND VIEWS	None taken
EQUALITY AND DIVERSITY ISSUES	None known
LEGAL ISSUES	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.
The Trust Board is asked to:	Note the report. The intention is to provide regular briefings to the Board.
Submitted by:	Jane Gear Head of Corporate Affairs
Date:	20 January 2011
Decision:	For noting

Ashford and St. Peter's Hospitals NHS
NHS Foundation Trust

TRUST BOARD
27th January 2011

1 INTRODUCTION

The Government has set out the next steps in its plan to reform the NHS with the publication of 'Liberating the NHS: Legislative Framework and Next Steps', (Dec 2010) which sets out the policy for reform in detail.

It shows how the Government has developed its thinking in the light of the 6,000 responses to the White Paper, 'Equity and excellence: Liberating the NHS', and sets out a timetable for implementation.

The Health and Social Care Bill, was laid before Parliament on 19th January 2011.

The following sections draw on the Command paper focusing on aspects which most directly impact on the Trust. Therefore, the paper does not cover GP consortia, the NHS Commissioning Board or improving outcomes in any detail. Briefings are available from the FTN and can be made available by the Head of Corporate Affairs.

2 REGULATING HEALTHCARE PROVIDERS

The paper outlines its support for Foundation Trusts (FTs) but signals that there will be a requirement for strong internal governance in the absence of the current Monitor regime. It confirms that FTs will have fewer legislative constraints, but will need to demonstrate strong accountability.

a Strengthening Governance

The government is to extend the duties imposed on directors under company law to Foundation Trust directors.

The Bill will also make it explicit that FT governors have a duty to hold the board of directors to account. This duty will be exercised through the chair and non-executive directors.

The Health and Social Care Bill will:

- make explicit the duty of governors to hold the board of directors to account, through the chair and non-executive directors (whom they have power to appoint and remove);
- give governors power to require some or all of the trust's directors to attend a meeting. For transparency, the FT's annual report would have to list any occasions when this power was used;
- extend to FT directors the duties imposed on directors under company law, such as the requirement to promote the success of the organisation;
- require FTs to hold an annual general meeting for its membership, at which members would be able to discuss the trust's annual report and accounts. The government envisages requiring FTs to report on directors' pay and the expenses of directors and governors and the work of their remuneration committees.

b Governors

Governors become increasingly important in demonstrating accountability.

Governors will need to agree any changes to an FT's constitution and any constitutional change concerning the governors themselves will be able to be overturned if a significant majority of the members voting at an AGM so decide. There will be a new statutory obligation to inform Monitor about amendments to the constitution, but as Monitor becomes a listing authority for FTs Monitor will not have a role in determining whether the FT is legally constituted. This will be for FTs themselves to determine.

The Bill will give power to use regulations to amend the precise voting mechanisms and the amount of support required from members, governors and directors for making changes relating to the constitution and governance of an FT. Any regulations would need the support from both of the Houses of Parliament.

ASPH Note: The current Constitution requires the Board to consult the Council on changes and then seek authorisation from Monitor. It will be important to have a continuous dialogue with the Council, to ensure the Constitution is fit for purpose and changes can be agreed efficiently.
Action: Head of Corporate Affairs- on going

The Government recognises that action will need to be taken to develop the capability of governors to undertake their new duties and has committed to involving the FTN in discussions on how best to take this forward.

The Bill will provide powers for Monitor to host an independent panel to consider complaints from governors that the FT is not following its constitution. The panel's decisions will be published but will not be binding.

ASPH Note: The Trust is committed to developing an effective Council and needs to continue with its own development programme to support the Governors.
Action: Director of Workforce and Organisational Development supported by Head of Corporate Affairs- on going

c Staff-led governance model

The DH will not be proceeding with its proposals for staff-only governance (employee led social enterprises) - but it will extend the right to staff to request a 'right to provide' services, and encourage this in FTs.

d Organisational changes – mergers and acquisitions

The DH has agreed that FTs needed greater freedom to proceed with mergers, de-mergers and acquire another FT without approval from Monitor. However FT Governors will now need to agree to mergers, de-mergers and proposals to acquire another FT or any other change which the Trust constitution defines as 'significant'.

ASPH Note: It will be important to get the wording appropriate in a revised constitution.

e Taxpayer investment in foundation trusts

The government has a significant investment stake in FTs and NHS trusts in the form of public dividend capital and loans. In future, the management of this investment stake will be through an operationally independent banking function. This new banking function will take over the role previously performed by the DH (through its finance function and the FT Financing Facility) of managing new public lending to FTs.

The Secretary of State will no longer be able to give grants and subsidies to FTs; in future only repayable loans on commercial principles can be made. As loans can only be made where due diligence demonstrates affordability, the DH will no longer be able to lend to FTs in special administration.

The paper states that the DH will require new reporting requirements as FT expenditure will still fall within the DH Departmental Expenditure Limit (DEL). This is driven by legislation passed a month before the May 2010 General Election which aligns all public service accounting with HM Treasury requirements. Monitor will not be in a position to provide this information on the sector.

The Secretary of State will be given powers to define accounting and reporting requirements for FTs.

ASPH Note: Await new guidance to be issued.
Lead: Director of Finance and Information

f Borrowing limits

It is confirmed that borrowing limits will be removed.

g Private Patient Income Cap

The private patient income cap will be lifted and foundation trusts will have the freedom to earn private income.

FTs will be required to produce separate accounts for NHS and private services to improve public scrutiny. The bill will set out the form of FT accounts. The aim of this is to seek to ensure NHS resources are not diverted for the benefit of private patients and to ensure competition is fair.

ASPH Note; Consider opportunities for income generation afforded to the Trust by the removal of the cap which can then support the Trust's core NHS activities.
Lead: Director of Finance and Information.

h Transitional Intervention Powers

Terms of Authorisation will end in 2012 with the move to licensing. Monitor currently has intervention powers to remove Directors and Governors or require a FT to do something. These powers will remain for FTs authorised after April 2012 and for a defined subset of existing FTs. These transitional arrangements will end by 2014. Definition of the subset is yet to be made.

Thereafter the only function held by Monitor relating purely to FTs is that of registrar; Monitor will have no power to scrutinise or intervene in an FTs internal governance.

ASPH Note: Track the definition of the subset of organisations which will fall into the transitional interventional regime.
Lead Head of Corporate Affairs

g Monitor's roles and duties

The Bill will make clear that Monitor's overarching duty will be to protect the interests of patients (and other service users) in the provision of health and adult social care by promoting and regulating competition. They will have a duty to promote efficiency, economy and effectiveness.

The Bill will place an overarching duty on Monitor to manage potential conflicts of interest between its role as economic regulator and remaining roles over FTs.

The paper confirms that Monitor will have three core functions

- Promoting competition
- Setting or regulating prices
- Supporting the continuity of services.

h Licensing

There will be a Monitor licensing regime for all providers of NHS care with some exemptions for providers that do not require regulation of prices and continuity of service provisions (details of exemption regime to be agreed).

Monitor will be able to fine providers who do not comply with licence conditions. These powers will be modelled on the powers available to other economic regulators and will mean being able to issue fines of up to 10% of turnover.

In line with other regulatory regimes, individual providers will be able to raise objections to modifications to the licence conditions and appeal to the Competition Commission. Only providers themselves will be able to do this, not bodies that represent providers.

If Monitor modifies licence conditions they will have to consult with providers and if a (as yet undetermined) proportion object, Monitor will have to respond to these objections or refer the issue to the Competition Commission for a binding decision.

Monitor will have the power to charge reasonable and proportionate fees to cover the costs of licensing.

i Promoting competition

Monitor will be given concurrent powers with the Office of Fair Trading to apply the Competition Act 1998 in health and social care services. This includes the power to disqualify directors for material breaches of competition law.

The government has decided the Bill should allow Monitor to set licence conditions wherever it feels there is a need for regulation to protect competition. As a check on this power they will have to carry out impact assessments demonstrating the benefits of new conditions.

j Regulation of Mergers

Under the new system, from April 2012, the regulation of mergers will be the responsibility of the OFT and the Competition Commission. (Ie the DH Co-operation and Competition Panel will not have a role).

However, Monitor will be able to force FTs, via licence conditions, to pre-notify the OFT of mergers that qualify for investigation. Monitor's involvement will be limited to 5 years while the system transitions.

k Price setting and regulation

As funding from NHS services comes from a single cash limited budget set by the Government, affordability is a key issue.

Monitor's role in price setting is confirmed. The government recognise that delivering financial balance is the responsibility of commissioners; however, they have concluded

that Monitor need to have regard to the overall financial envelope and affordability.

The Bill will confirm a joint process for setting prices with Monitor setting prices and the Commissioning Board designing the tariff. They will have a duty to agree with each other and disputes would be resolved under the Arbitration Act.

l Special administration regime

FTs are brought within the scope of ordinary corporate insolvency procedures and the creation of a special administration regime. The current 'unsustainable provider regime' brought in in 2009 will disappear.

The government recognise the complexity of designing this regime and plan to use secondary legislation to define special administration and insolvency. The Bill will be clear that the special administration regime will be triggered by Monitor not the Secretary of State and that the administrator will be court appointed without the ability for political interference. There remains the provision for public consultation should the special administrator's proposals involve significant changes to designated services.

The government recognises that developing the regime may take time. The target date is for April 2013 but it may slip to 2014. There will be a transition period until then in which the current unsustainable regime will apply. However, the Bill will modify this to make Monitor rather than the Secretary of State responsible for triggering the regime in the case of foundation trusts.

j Care Quality Commission

CQC's registration regime will need to be risk based and proportionate. They will continue to have wide-ranging enforcement powers including the ability to issue statutory warnings, set extra conditions, issue fines and in extreme cases suspend or remove registration.

CQC will no longer have a role in assessing NHS Commissioners and for carrying out periodic reviews of NHS providers. Instead their core role will be on regulating providers (the need for scrutiny will be replaced by the information revolution)

k Education and training

The government confirmed that it would consulting on employer-led arrangements for workforce, education and training. This consultation was issued on 20 December 2010 and closes on 31 March 2011.

ASPH Lead; Director of Workforce and Organisational Development

4 PUTTING PATIENTS AND THE PUBLIC FIRST

a NHS complaints

In the light of events at Mid-Staffordshire and elsewhere, the government feels it is crucial that people know how to make complaints about health services, and that information about the complaints raised is used to improve services. The forthcoming Bill will be used to change the Ombudsman's legislation to strengthen the arrangements for her to share more widely with the NHS and others investigation reports and the statement of reasons in those cases where she decides not to investigate a complaint.

b HealthWatch

HealthWatch England is to be established as a statutory committee within the CQC and its chair will be a member of the CQC board and be appointed by the Secretary of State.

Local HealthWatch will be commissioned by local authorities and be based on existing Local Involvement Networks to provide advocacy, advice and information to people. There will be extensive transitional arrangements with local HealthWatch bodies being commissioned from April 2012

ASPH Note: local HealthWatch is to be based on existing LINks and it will be helpful to work closely with our local LINk over the coming months. We will also need to help the Governors understand how they can interrelate with HealthWatch.
ASPH lead: Chief Nurse with support from Head of Corporate Affairs.

c **Local Democratic legitimacy**

The government will give an enhanced role for councils in health commissioning.

Local Councils will also have the power to require any provider of any NHS funded services to account to its scrutiny session.

ASPH Note: The Trust must continue to work collaboratively with the local authority and Scrutiny Committee.
ASPH lead: Chief Executive

5 **CONCLUSION**

The Command paper includes the 4-year Transition timetable (attached)

The Bill has just been introduced and can now be examined in detail so that the issues raised above will be clearer together.

The Board will be updated regularly.

TRANSITION PHASED OVER FOUR CALENDER YEARS

2010/11 **Design and early adoption**

- The Department of Health confirms the design framework, subject to Parliamentary approval
- The Department of Health gives permission to pathfinders and early implementers to model the new arrangements and explore key issues for wider roll-out
- Refinement of HealthWatch following the choice and information consultations
- The Department of Health publishes transition plan setting out the role of LINks in influencing local services while local HealthWatch prepares to start exercising functions
- The Government begins working with local authorities as they prepare for their new role in commissioning support for choice and complaints advocacy

2011/12 **Learning and planning for roll-out**

- Shadow national arrangements progressively implemented for the NHS Commissioning Board, new Monitor, and the Public Health England programme
- Sharing lessons from the GP consortia pathfinder programme and early implementer health and wellbeing boards
- More pathfinders and early implementers, including local HealthWatch
- Plans drawn up for GP consortia, involving all GP practices
- Emerging consortia to lead the process for identifying which PCT-employed staff should be "assigned" to them
- Plans to be drawn up for health and wellbeing boards
- NHS trusts to apply for foundation trust status, or be planning to apply in 2012/13
- The new Provider Development Authority to be established by 1 April 2012
- SHAs to establish PCT cluster arrangements in preparation for the NHS Commissioning Board

2012/13 **Full dry run**

- From April 2012, NHS Commissioning Board and new

	Monitor come into effect, SHAs are abolished, PCT clusters are accountable to the Board, and the Department will have made substantial progress on its change programme and established Public Health England. The Provider Development Authority will oversee NHS trusts • More learning from GP pathfinders and health and wellbeing board early implementers • Authorisation process of comprehensive system of GP consortia begins, with all practices becoming members, acting under delegated arrangements with PCTs • Health and wellbeing boards are in place • Comprehensive local HealthWatch arrangements in place • From April 2012, local authorities to fund local HealthWatch to deliver most of their new functions • Consortia notified on 2013/14 allocations • By the end of the year, a significant number of NHS trusts have achieved foundation trust status • All applications for FT status to be made by end March 2013
2013/14	**First full year of the new system** • From April 2013, PCTs abolished and all consortia assume new statutory responsibilities • From April 2013, health and well being boards assume their statutory responsibilities • Consortia and health and wellbeing boards learning from their participation in the full dry run • From April 2013, Monitor's licensing regime is fully operational, and the Government aims to have the new special administration regime in place • From April 2013, local authorities to have responsibility for commissioning NHS complaints advocacy • At end March 2014, the Provider Development Authority ceases to exist • By 1 April 2014, all NHS trusts to have become FTs, and NHS trust legislation is repealed