



Department  
of Health

# Review of the regulation and governance of NHS charities

Government response to consultation

March 2014

<b>Title: Review of the regulation and governance of NHS charities</b>
<b>Author: F&amp;NHS / Accountability &amp; Regulation / 17560</b>
<b>Document Purpose: Consultation</b>
<b>Publication date:</b> March 2014
<b>Target audience:</b>
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# Review of the regulation and governance of NHS charities

Consultation response

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# Foreword



NHS charities provide resources and support to our health system which are critical for the delivery of better care for patients in a wide range of services and environments. The aim of these charities has always been to enhance patients' wellbeing and experience rather than the general day to day delivery of core NHS services. As such for many decades they have delivered very significant added value for NHS patients. The work of these charities and those who help them deliver the support they give to patients, whether external volunteers or NHS staff, has always been and must continue to be protected and enhanced for the future.

The NHS, as a family of organisations delivering high quality health services, has been changing with an ever greater focus on enhancing patient care through development and innovation. Charities have a major role in supporting these changes but have told us that they sometimes feel constrained in how best to deliver that support because of the nature of policy and legislation in this area. Given the changes that are happening within the NHS and our emphasis on delivering a truly patient focused health system, I believe that now is the time to allow NHS charities to adapt to these changes.

The Department of Health conducted a review of NHS charities in 2011 and then consulted on proposals to change the policy on the regulation and governance of Charities within the current legal framework. The responses we received warmly welcomed the proposals to allow charities to seek greater independence under the sole regulation of the Charity Commission and to remove dual regulation requirements.

I am delighted that the Department's response to the consultation published here, sets out a process which will give Charities the opportunity to achieve greater independence where they wish to do so. This will allow them to further develop the support they give to patients and enhance the opportunities they have for generating future income. I am convinced that this will deliver a more dynamic health Charities sector and even better support to patients.

A handwritten signature in black ink, appearing to read 'Earl Howe', written in a cursive style.

**Earl Howe**

**Parliamentary Under-Secretary of State, Department of Health**

# Introduction

NHS charities are charities that are linked directly to NHS bodies. They are bound both by charity law and by NHS legislation. The latter enables NHS bodies to hold property on trust (usually charitable property), defines their purpose or objects, and gives the Secretary of State various powers including to appoint trustees to NHS bodies and to transfer funds between them in certain circumstances. As such, NHS charities are distinct from independent charities established solely under charity law.

NHS charities' funding supports innovation and research and enables the provision of additional facilities, services and equipment that enhance patient experience. As well as raising their own funds, they also have a special role as the recipients of money the public may donate to an NHS body to express gratitude for the quality of care they have received, or out of a desire to improve local services.

A number of NHS charities and their representative bodies and interest groups have called for reform because of concerns about the NHS legislative framework and inflexibility. The Government is also committed to reducing regulation, to promoting localism and the Big Society, and also to freeing the NHS from central government controls. The Department of Health needs to take appropriate opportunities to manage with reduced resources.

A review of the regulation and governance of NHS charities was carried out during 2011/12 and was published in the autumn of 2012. The Department issued a consultation on proposals for changes to regulation and governance in November 2012 and sought responses from interested parties. This document provides the Government's formal response to that consultation.

Responses to the consultation were requested by 31 January 2013 and 62 organisations and individuals responded. Of the responses received 30 – (48%) were from NHS charities, 22 -- (36%) from NHS provider bodies and 10 (16%) from associated organisations and individuals. Overall 83% of respondents were supportive of the proposals for change of which 54% were supportive in principle and 29% supportive with reservations. 58% of respondents had comments on the safeguards to ensure relationships with NHS provider bodies are preserved as well as on the process for establishing new charities. In addition, 47% of respondents commented on the proposed process for completing the transfer of NHS property to a new charity.

Of those Charities (47) whom responded to the question as to whether they were likely to make use of the new policy and rules 45% (21) said they would, 27% (13) said it was possible that they might and 27% (13) said they had no intention of changing their status. In terms of the timescale for adopting change 15 (32%), said they would like to adopt the changes within 1 – 2 years, 3 (7%) said they would like to adopt the changes within 2-3 years and 11 (24%) said that they would or might adopt the changes in the longer term.

A full analysis of the response to consultation questions is attached below at section 2.

# 1. Key issues and proposals for change

- 1.1 Currently, NHS charities are regulated by the National Health Service Act 2006, as well as being subject to charity law, which means they are also regulated by the Charity Commission. NHS charities have identified a number of key issues and potential problems that this dual regulation raises which include:
- adopting different legal forms appropriate to their specific needs, in particular those offering limited liability or otherwise varying their governing documents to meet local operational and strategic needs
  - appointing NHS body representatives to trustee bodies
  - transferring funds in furtherance of charitable purposes without ministerial action and direct involvement
  - demonstrating visible independence from government in the eyes of potential donors
  - flexibly adapting to changes in the NHS structural and organisational landscape
  - avoiding conflicts of interest inherent in the corporate trustee model including the need for accounts to be consolidated into the NHS body.
- 1.2 The current regulatory provisions may also be problematic for government ministers and their departments and key issues include that:
- these powers and duties are counter to government objectives on deregulation, localism and NHS autonomy
  - the regulatory activities are incurring significant staff costs and parliamentary time, both for DH and the Charity Commission. This is exacerbated by the need to respond to complex individual Trust requests, some of which aim to circumvent current legislative provisions
  - Ministers are seen by some as being ‘inappropriately’ involved in operational issues.

## Potential options for change

- 1.3 The underlying problem is that of dual regulation through both NHS legislation and charity law. The solution therefore has to be based on removing legislative overlaps and the operating constraints that they create. By definition, the Charities Act regulates all registered charities so the choice is whether to remove or amend all or just some NHS legislation.
- 1.4 The first option we considered was to remove all NHS legislation relating to NHS charities, at an agreed date in the future (with timing subject to NHS readiness and an available primary legislative vehicle). This would require all ‘NHS charities’ to be replaced by independent charities wholly established under, and regulated by, charity law before that date.
- 1.5 However, we have ruled this option out because it would jeopardise the NHS bodies’ ability to automatically receive, and pass to their charity, any gifts, legacies and bequests

that may be made to the ‘NHS body’ in the future. This increases the risk of contested wills, and NHS patients losing the chance to benefit from such gifts.

- 1.6 In addition, this option is not desirable as some NHS bodies may have good local reasons not to want to change their corporate trustee status. It is also likely to be some years before a suitable opportunity for primary legislation to amend some or all of the current NHS legislation might be available.
- 1.7 Preferred option at consultation – remove most NHS legislation including SofS powers to appoint trustees, and support early voluntary transition to linked but independent charities
- 1.8 For our preferred option, we proposed that NHS charities would be permitted (but those with appointed trustees would not be required – until the legislation is repealed – see below paragraphs 3.2 - 3.3) to transfer charitable property to another specifically established charity. This would enable them to use a new charity as their charitable vehicle and transfer their current assets to it. The new charity, regulated solely by the Charity Commission, would be free to set its own constitution including objects, legal form and trustee appointments appropriate to its needs.
- 1.9 These governance and regulatory changes could take place without any immediate change to current legislative provisions but the appropriate amendments would be made to the legislation as soon as possible. Where NHS bodies act as a corporate trustee they could use their full powers under the Charities Act to transfer the trusteeship of charitable property to a separate specifically set up charity, and where the Charity Commission requires the Department’s consent, for this consent to be deemed to be given. Where the SofS has appointed trustees to hold trust property, and those bodies wish to transfer the property to the new charity, the orders making those appointments would need to be revoked. Where trustees have been appointed, and those bodies do not wish to transfer to a new body, there will be no obligation to do so whilst the legislation remains in force. Once the legislation giving the Secretary of State power to appoint trustees is repealed, the appointment of any remaining trustees would fall away and steps would need to be taken at that stage to deal with property. Charities with appointed trustees may also choose to revert to the corporate trustee model.
- 1.10 The transfer of assets to the new charity would not be reversible by the Secretary of State. However, other safeguards could protect the interests of NHS patients and the NHS body, in particular:
- The objects of the new charity would replicate current NHS objects (but could with agreement be broadened to related services subject to any charity law provisions)
  - The NHS body would input to and approve the new charity’s full governing document including trustee arrangements
  - The NHS body would need to continue to provide support and patronage including rights to utilise its name, premises and potentially staff – we proposed that many such agreements would be formalised in the form of a Memorandum of Understanding (MoU), although these would not be regulated by either DH or the Charity Commission.
  - Under Charity law, any funds transferred to a new charity must continue to be used solely towards the purposes for which they have been originally received

- 1.11 In the future, NHS bodies would retain the power in NHS legislation to accept gifts of property to be held on trust, and to hold and deal with trust property, primarily for the purposes of accepting and passing on bequests to the new receiving charity. However, they could use this retained legislative power to continue to act as corporate trustee for all charitable funds, should they so wish. In these circumstances, the charity would remain established under NHS legislation rather than charity law (but other aspects of dual regulation would disappear such as the power for the SofS to appoint trustees).
- 1.12 NHS bodies and their charities would be briefed on the opportunities provided by the new approach, and guided and supported through the change process. We envisage that the Charity Commission, the Association of NHS Charities and DH could contribute to this support.

## 2. Reponses to the Consultation questions

**Are you supportive of the principle of permitting charitable property (usually funds) to be transferred to a nominated charity established outside of NHS legislation, subject to appropriate safeguards to ensure that the interests of NHS patients and the relationship with individual NHS provider bodies are preserved?**

Supportive in principle	33
Supportive with reservations	18
Neutral	4
Opposed	5

- 2.1 Approximately 54% of respondents were supportive in principle of the Department's proposals with a further 29% supportive with reservations. Overall, 83% of respondents were supportive in some way of the emerging proposal with only 8% of respondents totally opposed to them.

Yes, as this would allow the charity to be established under an incorporated model and remove the current unlimited liability for individual trustees and the freedom to appoint trustees without the constraints of the current set up. (*University College London Hospitals Charity*)

We broadly agree with the stated aims of the review and would welcome the outcomes listed in paragraphs 125 to 128 of the review report – particularly those that would result in NHS charities being able to deliver improved services to NHS patients as their beneficiaries. (*Barts and the London Charity and the Royal Brompton & Harefield Hospital Charitable fund*)

- 2.2 Most of those who were opposed were existing charities that did not see the need for change and wished to continue under the current rules and in their current format. The 4 organisations who were neutral were not NHS charities.

In general the charity would be resistant to change and have no immediate plans to change its structure or governance arrangements. (*Newcastle Upon Tyne Hospitals NHS Charity*)

Others were not resistant to the principle of the proposal but did not want to be compelled to make changes.

The Trustees are not likely to want to move in this direction proposed by the consultation paper in the near future, but have no objection to the Department making the transfer to an independent charity possible, providing there is no compulsion to do this. (*Trustees of the Oxford Radcliffe Hospitals Charitable Funds*)

In summary, whilst we support the increased flexibility afforded to NHS charities by these proposals, the charity is adamantly opposed to the proposed requirement for NHS charities with independent trustees to have to revert to corporate trustee status, even temporarily, which we regard as a retrograde, expensive and unnecessary step. (*Nottinghamshire Hospitals Charity*)

- 2.3 Of those bodies that indicated they had reservations about the proposals these were mainly to do with the Department’s position on managing transfer of property, the potential costs of the proposals and the need for greater legal certainty and support on a range of other issues we deal with below. Many of those organisations who were in favour of the proposal also stated that they did not necessarily believe there should be a “one size fits all approach” and that flexibility including allowing those who wished to continue under the current arrangements should be allowed.

**Do you have any comments on the safeguards to ensure that the relationships with individual NHS provider bodies are preserved?**

Yes	36
No	6

- 2.4 The majority of respondents (58%) commented on the safeguards required to ensure good relationships with NHS provider bodies. Many of the NHS charities stated that they had concerns about losing the power for NHS provider bodies to act as corporate trustees for their charities. This arrangement was seen as fundamental to their operations given that many of the charities have been set up under the auspices of one provider body.

The Trust has no objection in principle to NHS charitable funds being transferred to a nominated charity outside of NHS Legislation subject to appropriate safeguards being in place to ensure that the interests of NHS patients and the relationship with the individual NHS provider body are preserved. (*Sheffield Teaching Hospitals NHS Foundation Trust*)

The beneficiaries of NHS charities are NHS patients, but the boundaries of NHS bodies are becoming blurred as a result of collaborative working, or contracting some services out to non-NHS providers. Whilst most NHS charities may support “any purpose relating to the health service”, Academic Science Centres (AHSCs) introduce areas that NHS charities might wish to support, but which are currently beyond their remit. The Royal Free London NHS Foundation Trust is part of an AHSC, and we would wish its associated charity to the maximum flexibility of its grant giving. (*Royal Free Charity*)

We understand the rationale for this proposal, which could bring benefits. However, we are concerned that the review documents do not state that such appointments must be in a minority on the Board. Unless this is the case, the consolidation issue will arise because, under accounting standards, the NHS body will be deemed to have control. In our view a majority of trustees, including the chair, should **not** be employees of the NHS body. Also, we consider it important that trustee appointments remain competency-based rather than becoming representative appointments. Appointees will also need to understand that as trustees of the new charity they owed their fiduciary duty to the charity, not the NHS body. (*Addenbrooke's Charitable Trust*)

- 2.5 Other respondents suggested that trustees from NHS provider bodies should not have full voting rights in future in order to prevent them from determining how objectives were set or funds allocated. This was based on a perception from some that as service configurations are likely to change under the wider NHS reforms that charities may need to consider supporting different bodies or forms of service delivery. Many respondents thought that guidance was required from DH on the new arrangements a theme that was expanded upon more fully from responses to other questions. Some respondents felt that there was a need to proceed with caution.
- 2.6 The Audit Commission stated that careful consideration of the future accounting, audit and control arrangements for charities in the new system needed to be undertaken.

#### Do you have any comments on the proposed process for establishing new charities?

Yes	36
No	11

- 2.7 Again the majority of respondents (58%) provided comments on the proposed process for establishing new charities. A number of charities, including Barts and the Brompton, argue that the process set out to change non-corporate trustee models was overly complex with three stages and was a significant potential barrier to them adopting the new charities model.

First, we are unclear as to why the Department seems at pains to preserve the Secretary of State's prerogative – that is, his ultimate control over the appointment and removal of trustees – on the one hand when it is happy to argue for a wholesale reinterpretation of NHS legislation on the other (see particularly paragraphs 141 to 148 of the review report). We would respectfully submit that, if the Secretary of State is willing in the longer term to repeal the bulk of the NHS legislation relating to NHS charities – *including* the provisions giving him powers of appointment – he might be prepared to overlook the fact that, on a strict reading of the legislation, existing appointees might usurp him by bringing their current trusts to an end, particularly since, as the review report notes, there is unlikely to be any interest in bringing a challenge to the repeal of the legislation concerned. Secondly, the presumption seems to be that it would be necessary for any transfer by independent trustees to another body to be of the *whole* of the charity's undertaking. This is not the case: the independent trustees could retain assets of a nominal amount in order that the trust (and therefore their trusteeships) continued post-

transfer. (*Barts and the London Charity and the Royal Brompton & Harefield Hospital Charitable fund*)

- 2.8 Nottingham Hospitals Charity said they wished to retain the current NHS charities model and did not wish to be forced to follow this process. A number of smaller charities were concerned that the process was potentially highly costly for organisations of their type. Other respondents had serious concerns about the notion of retaining the existing charity as shell organisation as part of the transition. Others thought the costs for the proposed transition process should be met by DH.

There is potentially a large legal cost if a significant number of new charities are established and trustees of existing NHS charities decide that legal advice is required on governance arrangements. It would be incorrect for generous public donations to be spent on these costs and they should be minimised by guidance and proposed templates provided by the Department of Health. (*University Hospital of South Manchester NHS Foundation Trust*)

As an association we have been advised that there is no reason in law why individual trustees would have to pass their charities assets to an NHS body. If a corporate trustee has powers to grant its funds to a third party charity in pursuit of its charitable objects, then by extension a body of individual trustees must have the same powers. The presumption in either case that a transfer of the whole of the assets would cause the original trust to cease to exist must be incorrect, as the trust exists over future as well as current assets and it is in the nature of NHS charities that new donations and gifts are received on a regular, often daily basis. Furthermore, a nominal sum could be retained by the trustee(s) to ensure that the trust did continue to exist until such time as Parliament revoked the Statutory Instrument appointing the trustees. This should deal more than adequately with the suggestion that the trustees might be deemed to be usurping the role of the Secretary of State. (*Association of NHS Charities*)

The consultation document states that in the case of NHS charities with separate trustees, such as the Charity, their assets will need to be transferred to their linked NHS body (in the Charity's case GSTFT), which will then transfer those same assets to a new independent charity. The Charity understands that there is some legal debate as to the necessity for this measure and notes that there is some disquiet amongst certain affected NHS charities. Legal advice made available to the Association of NHS Charities suggests that it should be possible to effect the transfer to the new charity without the intermediate stage whereby all assets are returned to the linked NHS body. This is supported by the fact that DH has already authorised such transfers on a number of occasions, directly between a NHS Charity and a new independent charity. Quite apart from the legal basis of the DH recommendation, it is certainly likely that the process of transferring (in the case of this charity) assets of approximately £500m, made up of a large variety of different assets types, to GSTFT and then to a new independent charity, may be an extremely complex and costly exercise, possibly requiring 'due diligence' by both the Charity and GSTFT. The Charity therefore proposes that serious consideration is given to an alternative arrangement that allows for direct transfer of assets. (*Guys & St Thomas' Charity*)

However, we share the concern of many independent NHS Trust bodies that if a new charity is formed, the existing NHS Charity will have to pass its assets to the associated NHS body, which as corporate trustee of the charitable funds could – but in theory might not – then make a grant to a new charity. NHS charities may make grants to other charities if they believe that that furthers their charitable objects. We note that the Department of Health has been advised that for an NHS charity to grant all of the funds at its disposal would amount to its trustees usurping the Secretary of States powers of appointment of trustees, by making themselves redundant through having no funds to administer. The Royal Free Charity, like many other NHS charities, receives donations paid directly into its bank account, almost daily. If at a given date it paid all its funds to a new charity, it might well receive a £5 donation or £5,000 legacy the next day. Even £5 would have to be administered by the trustees. (*Royal Free Charity*)

- 2.9 The Charity Commission responded on the lines that the proposal was the most sensible way of dealing with the desire for NHS Charity's to change their status. They suggested that otherwise, the issues could only be resolved by making Parliamentary schemes in each case, which would not be a proportionate or practical solution. We also set out at paragraph 3.4 why this would not be possible in the timescales for which many Charity's wish to adopt change. We agree that the proposed preferred option would be the simplest and most cost effective way of delivering what is required.

As the review report highlights, there are many issues and problems with the current regulatory position for NHS charities, and a position of 'no change' is becoming increasingly untenable. If Ministers do not adopt the review proposals, the only alternative is to address these issues on a case by case basis with individual NHS charities. Based on previous experience, we anticipate high demand for our intervention, particularly from larger NHS charities. The issues can only fully be resolved in each case, however, by making a Parliamentary scheme to remove the Secretary of State's control over trustee appointment. This would be a time consuming and resource intensive solution for charities, the Commission, DH, the Cabinet Office and Parliament; each scheme could take months or years to complete. The route proposed in the consultation would be much simpler and more cost effective. (*Charity Commission*)

- 2.10 Many thought this should be a direct process and should avoid putting the funds into a corporate body particularly as there was nothing to prevent the body not passing on all of the funds.

We find the proposed transfer of charity assets to the NHS body before onward transfer to the new charity body perplexing and ask why not, as part of the proposal for the independence legislation, also include the power for the Secretary of State to transfer the current charity assets direct to the new charity. (*University College London Hospitals Charity*)

We would strongly advocate the Secretary of State allow for assets to be directly transferred from the NHS Charity to the independent charity without this 'middle' step. (*Alder Hey Children's Charity*)

- 2.11 One charity suggested that DH should provide an indemnity against losses in such a transfer process. An overarching theme was that this process should be as simple as

possible and that the current proposal does not provide the necessary flexibility and represents a “one size fits all” solution. Others suggested that where this process was used that there should be legal certainty for both the existing and new charities with a suggestion that any new “memorandum of understanding” with NHS provider bodies should be legally binding on the parties.

### **Do you have any comments on the interests of NHS patients?**

2.12 The majority of those who commented (47% of all respondents) stated that the interests of patients were paramount. Some felt that it was vital that the link between NHS provider bodies and charities remained in order to foster patient interests. There was some concern that the transfer process and changes might discourage patients from making legacies to charities if it was not clear what they might be used for or the new charity was not recognisable in respect of its relation to a provider. Others suggested that if there was any truth that some charities were too close to their NHS provider body and funds were being used to subsidise general NHS activity that DH should investigate this and take action as necessary to stop it.

### **Do you have any comments on the assessment of equality duties as set out in the Full Report? Do you have any further evidence that will impact on protected equality characteristics?**

2.13 Only 4 respondents (approximately 7%) commented on the assessment of equality duties. Those who did thought that this had been adequately assessed and there was no reason why the proposals should impact on equality.

### **What other issues and difficulties have we missed?**

- 2.14 The majority of respondents commented on potential difficulties or issues with the proposals. There were a number of familiar themes including:
- that changes should be made but certain aspects of current NHS legislation retained;
  - the proposed route for moving to the corporate trustee model was too complex;
  - there was considerable discomfort about the idea of placing funds with NHS provider bodies during the transition process;
  - concerns about the robustness of DH’s position;
  - there were potential significant costs for NHS charities that might result from the proposals and these could disproportionately affect smaller charities;
  - that the governance costs of corporate trusts seem excessive.
- 2.15 In addition to these themes, there were a number of extra comments which included:
- many charities being concerned about the implications of VAT applying to their activities as a result of moving to regulation under Charities legislation. That DH should be working with HMRC to ensure this did not happen.
  - concern about the implications for staff and whether or not TUPE applied particularly where staff were supplied or seconded from NHS provider bodies;
  - the issue of access to NHS pensions for staff and the potential costs to charities if TUPE applies in having to fund pensions to a similar level to NHS pensions;

- detailed guidance from DH was required on premises, infrastructure, people issues and the MOU (DH should develop a draft MOU);
- some charities suggested that there might be potential risks of legal challenge if the changes were made prior to the necessary changes in legislation having been made;

**Is your NHS body/charity likely to make use of the new policy and rules, if approved, to change the management and governance of your charity interests? If so is that most likely to be within one two, three or more years?**

Yes	21
Possibly	13
No	13

2.16 Of all respondents 47 specifically responded to this question and these were generally charities. The majority (34%) were committed to following this path but not necessarily immediately. 13 respondents (21%) said they might pursue this route but some suggested they wanted to see how it worked for larger charities in the first instance and others thought this was a matter their trustees who would decide in due course. In addition, 13 respondents (21%) said they had no intention of pursuing this change and most of these indicated they preferred to maintain their current status with a couple indicating that their trustees would be entirely opposed to any change.

#### Timescale for change

1-2 years	15
2-3 years	3
Longer	11

2.17 2.17 Of those charities who agreed that the change should happen only 15 (24% of respondents) were keen to move quickly on this with several asking if the process could be speeded up. 3 more (5%) wanted to make the change over a two to three year period and 11 (18%) wanted to take longer. This chimes with the view that there should be a flexible approach and no mandatory requirement for the change in the short term.

#### **Are there any particular concerns or local circumstances that you have**

2.18 Only a few respondents made any comments on this question and the issues raised were:

- the timetable should be brought forward but it is imperative that the process is right.
- the no change option must remain and there should be no formal requirement;
- the benefits of this proposed change are not clear and appear minimal.

## 3. DH Response to concerns raised

### The process for transfer and trustees

- 3.1 It is clear from the responses we quote and in general that there are many NHS charities and NHS bodies with concerns about how the process might work in transferring objects and property to new charities. We respond to the main comments raised below but the Department of Health believes that the further work we set out in the conclusions and next steps section below will provide more detailed information on the issues raised for interested Charities.
- 3.2 Some charities with trustees appointed by the Secretary of State raised a range of concerns about what the process for transfer would mean in relation to the current NHS charities and trustees and whether there would be an obligation upon them to make changes at this time. The Department's position is that whilst the legislation giving the Secretary of State power to appoint trustees remains in place, there will be no requirement on such trustees to adopt the proposed way forward. However, it is the Department's intention that the provisions providing for the appointment of such trustees will be revoked as soon as possible once a legislative vehicle is available. We will not compel NHS charities with trustees appointed by the Secretary of State to go through the process of setting up an independent charity and they will have the choice to revert to the model of the NHS Body acting as corporate trustee if they wish (but would need to be mindful of the Charity Commission's guidance on conflicts of interest for NHS bodies acting in this capacity).
- 3.3 A number of charities suggested that given the Secretary of State has indicated he is in favour of allowing existing NHS charities to change their status that he might be able to overlook his legal responsibilities relating to trustees in the short-term while awaiting a vehicle to amend the legislation. The Department's view is that where the Secretary of State has appointed trustees, it would not be a proper use of his powers to retain such appointments where the trustees are not carrying out their role of holding and managing trust property or are doing so on a nominal basis. Furthermore, it would not be proper for the Secretary of State to allow trustees to make themselves obsolete. Any decision on terminating these appointments must necessarily be made by the Secretary of State. However, he has indicated that he is willing to adopt the process set out at paragraphs 4.4 – 4.7 below.
- 3.4 There were also suggestions that the Secretary of State should set up a specific legal scheme for transfers which would manage the issue of appointed trustees as well as the holding of property and future donations/bequests. This is not possible since it would require primary legislation to repeal existing provisions and the Department is not in a position to bring such legislation forward at this time.
- 3.5 Some charities were particularly concerned about the potential need to revert to corporate trustee status which was seen as a retrograde step. Given that the Secretary of State has appointed trustees to hold and manage the trust property, the Secretary of State cannot allow trustees to effectively make themselves obsolete. The Secretary of State will need to revoke the appointment of trustees where charities decide to change their status. He will also need to be involved in discussions regarding such revocation

and the transfer of property. This should be seen in the context that it was not the Secretary of State, nor the Department of Health, whom instigated the proposal that NHS charities with appointed trustees be allowed to change their status but the request was made by a number of those charities. The Department is seeking to establish a process within the current law to accommodate that goal.

## The role of MOUs

- 3.6 There were some charities which raised issues about the future relationships with NHS bodies as the boundaries of those bodies become increasingly blurred. How will relationships with NHS bodies be maintained and how will it be ensured that those bodies do not have a disproportionate influence over the trustees of new bodies. In our opinion these are the type of issue that should be dealt with through a “Memorandum of Understanding” (MOU) between the new charity and NHS Body. So, for example, an MOU should be clear that an NHS Body or bodies could not have a majority of their personnel as trustees of the board. Charity Boards should be made up of diverse interests and a majority of trustees should be from outside the NHS Body.
- 3.7 Charities also asked about how it would be ensured that donations and property could be transferred to a new charity without it reverting to an NHS Body who may not pass all of this on. Some suggested that there should be a legal power to ensure this. However, there is no current power for the Secretary of State to transfer property from an NHS Body or the trustees appointed for that body to a non- NHS Body. The Department is of the view that the MOU between the NHS Body and the charity should set out clearly that the NHS Body agrees that the new charity will hold all donations and bequests and it will pass these on. The MOU would also specify that all current property would be transferred at a mutually agreed date in time. The Department also accepts that in some instances NHS bodies, NHS charities and the new Charity may wish to set out a binding agreement on the transfer of property as an annex to the MOU.

## 4. Conclusions and next steps

- 4.1 Having assessed the responses to consultation it is clear that the majority of respondents agree that a process to allow NHS charities to move to independent charity status under Charity law is supported. A large number of respondents had significant reservations about the process particularly in relation to the transitions for trustees and property. There were also concerns on the potential complexity of the process for transition in relation to pensions, VAT and the cost of legal advice.
- 4.2 It is also clear that the number of NHS charities whom wish to pursue this option soon is relatively small but those who do probably represent the group of NHS charities with the largest amounts of property and assets. 15 charities indicated they would wish to do so within 1-2 years and a further 3 over 3-5 year period. This represents only 10% of the 200 or so current NHS charities. Nevertheless, the Government believes that there is sufficient support for this change to happen and therefore intend to set up a process for those charities who do wish to change to be able to do so.
- 4.3 We note that many NHS charities and NHS bodies, who responded, while supporting the principle of the proposal, were very clear they either had no desire to follow this path in the near future or had no intention of changing their current status. The Government, while permitting charities to make changes will not make this a mandatory requirement where the NHS Body acts as corporate trustee. Where trustees have been appointed by the Secretary of State, the provisions for these appointments will be repealed as soon as possible (and other necessary changes made to the legislation) and any such arrangements would fall away. However, until the Secretary of State's powers to appoint trustees are repealed, where trustees have been appointed and those trustees do not wish to adopt the proposal, there will be no requirement for them to decide which future arrangement they prefer. In this way, we will ensure that the proposals do not constitute a one size fits all approach and are based on the local circumstances and wishes.

### The process for transfer

- 4.4 Many respondents raised significant concerns about the process for transfer to a new charity in particular those with trustees appointed by the Secretary of State. There was general concern that the current NHS charity in these circumstances would need to transfer property to the NHS Body with which the charity is associated rather than transferring property directly to the new charity from the old. There were a number of suggestions as to how this process could be simplified including:
- that the Secretary of State should set aside his formal legal responsibilities here and allow charities and their NHS bodies to organise the transition in the least complex way;
  - that there was already a model for this given earlier transfers of property etc. in relation to some NHS charities;
  - that if the Secretary of State could not set aside his legal responsibilities then he should set out a single legal scheme to formally allow those in this position to make the transition without complex basis and without having to go through individual consideration.

- 4.5 The Department's position is that Parliament has set out a legislative scheme for how NHS bodies hold and manage trust property. That legislative scheme provides two options for NHS bodies or trustees appointed by the Secretary of State. Where trustees have been appointed, it would not be a proper use of the Secretary of State's powers for him to consent to trustees remaining in post where they are not holding and managing trust property or doing so on a nominal basis only. Nor would it be appropriate for the trustees to make themselves obsolete and thereby usurp the Secretary of State's role.
- 4.6 However, given the concerns expressed regarding the Secretary of State's involvement in appointing trustees, he is willing to seek to remove those specific legislative provisions as soon as possible. In the meantime, the Secretary of State is also willing, in the cases where he has appointed trustees to agree to consider requests from the trustees, where agreement has been reached with the NHS Body, to revoke the trustees appointment, and for those trustees immediately prior to revocation, to transfer the property they hold to a specifically established charity. The decision to revoke the trustees appointment will be a decision of the Secretary of State, taking account of the agreement of both trustees and the NHS body to transfer the property.
- 4.7 Where the NHS Body acts as trustee, the Secretary of State is content for the body to transfer its property to the newly established charity, and where the Charity Commission requires his consent, for this process and decision to be treated as that consent. As indicated above, we will in due course repeal the necessary legislation including the powers to for the Secretary of State to appoint trustees but the power for NHS bodies to receive and hold trust property will remain. The NHS Body would then have a choice, either to act as corporate trustee, or use the option of establishing a separate charity.
- 4.8 Notwithstanding what is seen by some as a complicating factor in the transfer process we believe that the Secretary of State can discharge his responsibilities in a relatively unburdensome way if the Department, NHS bodies and NHS charities work in a coordinated way to deliver the transition process. It will be necessary for DH to consider each proposal on an individual basis because of the constraints of the current legislation. However, we will look to streamline that process wherever possible, for example, some charities may wish to follow a common transition timetable and therefore it may possible for DH to group charities together in one order or a smaller number for the trustee revocation orders. Where all parties are in agreement that the transition should happen, DH will seek to expedite action by the Secretary of State in line with the timetable agreed by the bodies. For this reason it is imperative that NHS charities notify the Department and Charity Commission of any plans for change at the earliest opportunity.

## Revised process

- 4.9 In outline, we propose that the process for setting up new independent charities would be as follows:
1. The NHS Charity with appointed trustees or the NHS body as corporate trustee decides to set up a new charity;
  2. For NHS charities with appointed trustees they formally agree that this should happen with the NHS Body.

3. In all circumstances DH is notified of the intention to create a new independent charity (this is particularly important because of the consolidation of all NHS charities accounts into the DH account) .
  4. The NHS Charity and NHS body agree a memorandum of understanding which sets the detail for transfer, including agreement from the NHS Body to transfer all current property by an agreed date and future bequests and donations to the new charity;
  5. A common date is set for the ending of the function of the old charity, revocation of trustee appointments (where appropriate), the transfer of property and the commencement of the new charity;
  6. In due course the Secretary of State will remove the relevant parts of NHS charities legislation, whilst allowing those bodies who wish to remain as corporate trustees of NHS charities to do so and retaining provisions for NHS bodies to accept and hold gifts of property.
- 4.10 Given the responses to consultation and that we know only a relatively small number of charities intend to follow this path in the near future we believe that such a process should be possible without being either over complex or cumbersome. Nevertheless, in order to ensure that there are appropriate safeguards in place we will add to those set out at Paragraph 1.10 as follows:
- Requiring NHS bodies to commit to the transfer of all current property formally in an MOU before transfer as well as the transfer of all future gifts to the new Charity.
  - A common transfer date of objects and property to the new charity. This would occur on the same date the appointment revocation order.
  - DH will not make the revocation order until an appropriate MOU has been signed by all the relevant parties.
- 4.11 Where these safeguards are met and agreement between the bodies is made, DH will seek to ensure that the necessary approvals and orders are in place for the agreed timetable.

## The impact of consolidation of accounts

- 4.12 The accounts of all NHS charities have now been consolidated into the DH Account for the years 2010/11 and 2012/13 but clear notes have been included within the accounts to make it clear that these are charitable funds and not resources available for the general expenditure of the Department or the NHS. The Department has agreed a reporting process with the Treasury for transfers of funds from NHS charities to other bodies to ensure that these transfers do not count against the day to day expenditure of the NHS. For this reason it will be necessary for all NHS charities whether they have corporate or appointed trustees to notify DH of any plans to transfer funds to an independent charity at an early stage in the planning process.

## Additional work to be carried out

- 4.13 Many of those who raised concerns about the process, tax or employment/ pension issues also requested that the Department develop guidance to help NHS bodies and Charities work through this process. In addition, many respondents requested that the Department should develop a template Memorandum of Understanding for the organisations to use. The proposals under consideration were developed because of concern from NHS bodies and Charities about the Secretary of State's involvement in NHS charities – there was a desire to remove that involvement and allow charities to be more independent. Therefore, it would seem to run contrary to that desire for the Secretary of State to set out in detail how charities should be organised in future. Furthermore, the Department believes that most of the issues raised above can be relatively easily resolved.
- 4.14 Nevertheless, the Department wishes to alleviate some of the concerns regarding the potential expense and complexity for charities in drafting appropriate agreements, or obtaining advice on how to achieve the end result. In addition, the Department sees the value in having a common template for MOUs both in terms of accountability and for audit purposes. Although we would wish that such a template can allow for local variations and be adaptable to individual circumstances whilst ensuring that core requirements are met.
- 4.15 To that end the Department is asking the Association of NHS Charities to undertake work on its behalf to develop guidance for charities and bodies and a template MOU. Our aim would be that these tools should be available to organisations as soon as possible during 2014.

## Overall Conclusions

- 4.16 In view of the fact that the majority of respondents supported the principle of the proposals for the transition of NHS charities to independent Charity status, the Department believes that it is appropriate to allow those who wish to follow this course to proceed subject to the appropriate safeguards and process being followed. At the same time DH will assure that those organisations that wish to retain the status of an NHS Charity may do so.