



# **Review of the regulation and governance of NHS Charities**

## **Executive Summary and Feedback Request**

**October 2012**

## DH INFORMATION READER BOX

Policy	Clinical	Estates
HR / Workforce	Commissioner Development	IM & T
Management	Provider Development	<b>Finance</b>
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<b>Document Purpose</b>	Policy
<b>Gateway Reference</b>	18273
<b>Title</b>	Review of the regulation and Governance of NHS Charities
<b>Author</b>	Department of Health
<b>Publication Date</b>	<b>1 November 2012</b>
<b>Target Audience</b>	PCT Cluster CEs, NHS Trust CEs, SHA Cluster CEs, Care Trust CEs, Foundation Trust CEs , NHS Trust Board Chairs, Directors of Finance
<b>Circulation List</b>	Voluntary Organisations/NDPBs
<b>Description</b>	The Department is seeking feedback from the NHS and other interested parties on final proposals to revise the governance of their current NHS charities that will remove regulation by ministers, and enable them to operate more independently while preserving their close relationship with the providers of NHS services that they support.
<b>Cross Ref</b>	The engagement is supported by three documents: Exec Summary, Summary Report and Review Report
<b>Superseded Docs</b>	N/A
<b>Action Required</b>	To consider your organisation's views on the proposal To feed back these views by closure date
<b>Timing</b>	<b>Responses by 31 January 2013</b>
<b>Contact Details</b>	David Pennington Strategy, Finance & NHS Directorate Department of Health Quarry, House, Quarry Hill, Leeds LS2 7UE 0113 254 5000
<b>For Recipient's Use</b>	

## Context and purpose of this document

1. In response to feedback from NHS Charity<sup>1</sup> representatives and a consideration of policy needs by officials, ministers agreed to a review of the governance of NHS Charities to consider in particular how their governance might be deregulated.
2. The initial review work was undertaken in late 2011 with the direct involvement of NHS Charities and some of their linked NHS bodies together with the Charity Commission and other groups and bodies with an interest. Outline proposals have been developed from this feedback and ministers have endorsed these.
3. The nature of the proposed changes is that they require a broader and more formal consensus. The Department is therefore undertaking a second and final round of engagement from which it is seeking the views of as many NHS Charities, their NHS bodies and other interested parties as possible.
4. This document provides a high-level overview of the drivers and the proposals and request for feedback. A Summary Report provides more comprehensive background and explanation of the proposals that should inform feedback. Those most directly involved in the operation of charities may also want to refer to the Full Report. Both of these documents have been made available with this paper.

## Current Governance

5. The National Health Service Act 2006 (“the 2006 Act”) gives powers to NHS bodies<sup>2</sup> to hold trust property, which will usually be charitable property. These NHS bodies then form charities to deal with the charitable property, which are also subject to charity law (the 2011 Charities Act). The default governance setting is that the Executive Board of an NHS body acts collectively as a corporate trustee for the charitable funds. However, powers exist for the Secretary of State to appoint a body of individual trustees to an NHS body. The legislation also gives the Secretary of State the power to transfer trust property between NHS bodies, and trustees appointed under the 2006 Act, in certain circumstances.
6. The beneficiaries of NHS Charities are NHS patients, though benefits are normally realised through the NHS bodies that provide patient services. This principle is preserved through standard charitable objects defined in NHS legislation, which enable trust property to be held by NHS bodies either for the purposes of those individual NHS bodies, or for any purpose relating to the health service. NHS Charities vary massively in scale and scope, with annual income ranging from over £60m to a few thousand pounds.

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<sup>1</sup> NHS Charities are those that are linked directly to NHS bodies and have been established through provisions in the 2006 NHS Act

<sup>2</sup> From April 2013, these will comprise NHS Trusts, NHS Foundation Trusts, Special Health Authorities, the NHS Commissioning Board and Clinical Commissioning Groups.

## The Challenge

7. Representatives of NHS Charities advised us, and the review has confirmed, that constraints imposed by provisions in the 2006 Act relating to charitable property are preventing them from both maximising their income potential and best supporting patient needs. Key issues include difficulties in:
  - 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.
8. Current regulatory provisions are also problematic for government ministers and their departments. Key issues include:
  - these powers and duties are counter to government objectives on deregulation, localism and NHS autonomy
  - 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.

## Emerging Proposal

9. To address these issues we need to create a deregulated, enabling environment in which NHS Charities can organise themselves in the most appropriate way to meet their local circumstances and are appropriately regulated solely by the Charity Commission. Ideally, it should remove all ministerial involvement or influence. It must protect key charitable income streams (particularly bequests and legacies), safeguard the relationship between an NHS body and its linked NHS Charity, and enable NHS bodies to implement changes at their own pace, and give them the option to retain corporate trustee status for the foreseeable future ('no change option').
10. The underlying problem is that of dual regulation through NHS legislation and the Charities Act. The solution therefore has to be based on removing regulatory overlaps and the operating constraints that they create. We have considered, but discarded, the option of removing all NHS legislative provisions in the 2006 Act as this creates some risk to the receipt of future bequests and legacies. It would also prevent the required 'no change' option.

11. Following detailed consideration and discussions with the Charity Commission we believe that a different interpretation of the NHS legislation can be supported that would enable NHS bodies to rely on the provisions of the Charities Act to establish a new 'independent' charity and then to transfer current charitable assets to it (with the agreement of all involved parties). This change would however require a clear mandate obtained through formal consultation.
12. There is no immediate need to amend or repeal those elements of NHS primary legislation to enable the Department to achieve its aims, but changes to the legislation will need to be enacted at the earliest available opportunity.
13. The proposals are consistent with the recently published Hodgson Report that considered the future legal and regulatory framework for charities in England and Wales. It emphasises the principle of independence, (which would support greater independence for NHS charities). It also makes the case for further de-regulation, in return for which charities should be more transparent and accountable to their donors and beneficiaries.

### Key benefits and safeguards

14. Although the charities would operate more independently, they would still be required solely to support the provision of NHS healthcare for patients. NHS provider bodies would determine and formalise the relationship with their nominated charity, including its objects (scope) and formal representation on the trustee body. Transfer of funds and assets would be subject to this agreement.
15. Each new charity would be free to adopt whatever legal and governance structure suits its specific needs and scale of operation. This includes benefiting from different forms of trustee structure, company status and limited liability that are either precluded or difficult under the constraints of NHS legislation.
16. Subject to a positive consultation outcome, NHS bodies could proceed at their own pace from late spring 2013, or indeed choose not to proceed at this time.
17. However, the new arrangements should be sufficiently attractive as to encourage most if not all large NHS Charities and many smaller ones to adopt the new model. The potential to merge local charities where beneficial to secure the expertise and commitment of appointed trustees and professional management should lead to improved levels and increased scope of charitable support.
18. The assets of new charities, as long as they are properly managed, would fall outside the definitions of 'control' under new international accounting standards that would otherwise trigger consolidated reporting of accounts from 2013, and the definition of public funds that would require inclusion in national accounts.

19. There would be an initial resource commitment for DH and possibly the Charity Commission, to support change implementation but subsequently there would be a substantial reduction in ongoing regulatory support responsibilities. It might be beneficial for aspirant charities and NHS bodies to be offered guidance and support from a combination of the Department, Charity Commission and NHS Charities to facilitate local implementation
20. The proposals are consistent with key recommendations from Lord Hodgson's review of the Charities Act, in particular making it easier to set up and run a charity, and promoting public trust and confidence. A further planned review by the Law Commission could however require us to consider further changes including possible removal of the corporate trustee model from around 2015.

### How the change would be implemented

21. This consultation seeks views on the proposals and in particular on the principle of permitting charitable property (usually funds) to be transferred to a nominated charity established outside of NHS legislation (subject to appropriate safeguards).
22. If a sufficient consensus to this principle is secured, a mandate will be drafted setting out this principle and how it would operate. This mandate, subject to final ministerial consent, would be announced through appropriate parliamentary procedures in spring 2013.
23. Subsequent to this mandate, NHS bodies, at their own pace, would be able to consider and develop the appropriate form of a new charity and all details of its governance. Those bodies whose charities already have appointed bodies of individual trustees would hold these discussions with the current trustees. Those operating as a corporate trustee may identify partners or advisors to assist them.
24. Following agreement, the new charities would be registered with the Charity Commission and initial appointments made by locally determined process. An agreement (MoU) may also be established with the linked NHS body to formalise the relationship between the two bodies.
25. The NHS body acting as corporate trustee would then use its own powers under charity law to transfer all existing assets to the new charity. This transfer would be approved by the Charity Commission as long as it conformed to the new ministerial mandate.
26. However, in the case of appointed trustee bodies it would be for the Secretary of State to revoke the Order providing for their appointment and transfer the property from the trustees back to the NHS body. It would then be for the NHS body as corporate trustee to make the transfer to the new charity. This would only be done with the prior and binding agreement of both parties to the full transfer process.

27. Remaining NHS Charities governed by an NHS body still acting as corporate trustee who do not wish to change would continue. They may also have to consolidate the accounts of the NHS Charity into Trust accounts.
28. The full process for delivering the change proposal is shown in diagram form in Annex A. We anticipate that the full process for an NHS body to transfer all of its charitable funds to an outside charity may take around six months but this will vary depending on the complexity of new arrangements.

## Request for Feedback

29. This consultation process is directed specifically at NHS providers that currently maintain NHS Charitable Funds (as a corporate trustee), trustees appointed by the Secretary of State, trustee bodies of NHS charities where established, and other groups or bodies that contributed or were invited to contribute to the earlier phase of engagement. Feedback is also being sought from patient groups and organisations. However, contributions would also be welcome from other interested individuals or parties.
30. The Department will be presenting explaining the proposals at forthcoming NHS events for the NHS Charities 'community'. We will offer regional workshops to discuss the proposals. We will also consider requests for individual meetings, or any other practical form of engagement.
31. Where the charitable interests of an NHS body are governed by an appointed body of trustees, it would be helpful to receive the views of both parties.
32. Completed feedback should be returned to the nominated mailbox [NHSCharitiesReview@dh.gsi.gov.uk](mailto:NHSCharitiesReview@dh.gsi.gov.uk) no later than **Thursday 31<sup>st</sup> January 2013**.
33. Requests/expressions of interest for meetings or workshop attendance should also be sent to mailbox [NHSCharitiesReview@dh.gsi.gov.uk](mailto:NHSCharitiesReview@dh.gsi.gov.uk) by the end of November
34. For any specific queries or requests for further information please contact: [david.pennington@dh.gsi.gov.uk](mailto:david.pennington@dh.gsi.gov.uk)

# Feedback Request

This is an optional format, although responses covering as many of the specific questions as possible (where relevant to your interest), together with any wider comments and observations, would be appreciated.

1. **Name and nature of organisation – are you an NHS body (Corporate Trustee), NHS body with an appointed trustee body, an appointed trustee body or other interested agency, group or individual**
2. **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?**
3. **Do you have any comments on the safeguards to ensure that the relationships with individual NHS provider bodies are preserved?**
4. **Do you have any comments on the proposed process for establishing new charities?**
5. **Do you have any comments on the proposed process for completing the irrevocable transfer of charitable property to the new charity (including the process for currently established trustee bodies)?**
6. **Do you have any comments on the interests of NHS patients?**
7. **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?**
8. **What other issues and difficulties have we missed?**
9. **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?**
10. **Are there any particular concerns or local circumstances that you have that may make you decide not to make such a change?**
11. **What other comments do you have?**

Please return to [NHSCharitiesReview@dh.gsi.gov.uk](mailto:NHSCharitiesReview@dh.gsi.gov.uk) by Thursday 31<sup>st</sup> January 2013

In case of queries please contact [david.pennington@dh.gsi.gov.uk](mailto:david.pennington@dh.gsi.gov.uk)

# Annex A Implementation Process

