

# Report to the Meeting of the

# Oxford Health NHS Foundation Trust

# Board of Directors

**25 April 2012**

**Health and Social Care Act 2012 – Implications for the Trust**

**For: Information**

**Executive Summary**

This report provides a brief overview of the Health and Social Care Act 2012 and provides an initial assessment of the Act’s implications for the Trust. The report has been written using initial reports/letters published by the Department of Health and FTN as well as through examining the legislation concerned.

This report has been considered by the Extended Executive Board on 17 April 2012 and it is proposed that it be presented to the Members’ Council on 8 May 2012.

**Recommendation**

The Board is asked to note the report and consider what actions should be taken to prepare the Trust for the implementation of the Act’s provisions.

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1. *A risk assessment has been undertaken around the legal issues that this paper presents and there are issues that need to be referred to the Trust Solicitors.*
2. *This paper (including all appendices) has been assessed against the Freedom of Information Act and the following applies:*

* *THIS PAPER MAY BE PUBLISHED UNDER FOI*

**Health and Social Care Act 2012 – Implications for Trust**

1. **Health and Social Care Act 2012 – Background**

1.1 The Health and Social Care Act 2012 (the ‘Act’) received Royal Assent on 27 March 2012 following agreement by both Houses of Parliament of the text of the Bill. The relevant Bill was introduced into Parliament on 19 January 2011 as a crucial part of the Government’s vision to modernise the NHS by proposing to create an independent NHS Board, promote patient choice and to reduce NHS administration costs. The key areas of the Bill were:-

* establishing an independent NHS Board to allocate resources and provide commissioning guidance;
* increasing GPs’ powers to commission services on behalf of their patients;
* strengthening the role of the Care Quality Commission;
* developing Monitor into an economic regulator to oversee aspects of access and competition in the NHS; and
* reducing the number of health bodies to help meet the Government's commitment to cut NHS administration costs by a third, including abolishing Primary Care Trusts and Strategic Health Authorities.

1.2 Since coming in to law, both the Secretary of State for Health, Andrew Lansley CBE MP, and the NHS Chief Executive, Sir David Nicholson, have written to NHS foundation trust chief executives to explain what the Act means for FTs. The core principles of the NHS remain – care provided free at the point of use, funded from general taxation and based on need not ability to pay – but the Act ushers in significant changes to the way FTs will operate.

1. **Overview of Changes to Impact on FTs**

2.1 The Act largely amends sections of the National Health Service Act 2006 (the 2006 Act sets out the provisions relating to FTs). The Act’s implications for FTs may be categorised into two groupings: those that are specific and ‘internal’ to providers, and will require FTs to make changes to structures and practices; and those that are ‘external’ to providers but will still have some impact on the way FTs may choose to operate or respond to the broader environment. This report mostly focuses on the former category.

***External***

2.1 Suffice to say, over the coming months the Trust will need to take account of the Act’s external implications and consider how best to work in the new and emerging health care environment. Such external implications include (but are not limited to):-

* Development of clinically-led commissioning.
  + on 1 April 2013, SHAs and PCTs will be abolished with the NHS Commissioning Board taking on its full statutory responsibilities. Across England, the vast majority of local Clinical Commission Groups (CCGs) will be established and become fully authorised.

*The Trust will need to consider how it works with and tries to influence the new commissioning arrangements and what, if any, internal changes the Trust should make to work within the new commissioning environment.*

* Sector regulation.
  + from July 2012 onwards, Monitor’s role as the ‘sector regulator for health in England’ will start to emerge. This will see Monitor license providers for NHS services in England (jointly with the CQC), regulate prices, enable integrated care and prevent anti-competitive behaviour, and support service continuity.

*The Trust will need to consider the impact of the new regulatory regime and ensure that the Trust is structured in a way to meet this, and should seek to influence the development of the licensing proposals (through participating in Monitor’s consultation).*

* Empowering patients and communities.
  + Health and wellbeing boards will be established in April 2013, and will work on developing needs assessment and health and wellbeing strategies to tackle issues that matter to the communities. The boards will have a duty to encourage commissioners of health and social care services to work in an integrated manner. In addition, HealthWatch will be established on a national and local basis. Nationally, HealthWatch England will be the patient champion within the CQC. Locally, HealthWatch will provide a focal point for communities to have a voice in commissioning and provision of health and social care. Also, if commissioned by the local authority, local HealthWatch will also provide NHS complaints advocacy services. Local HealthWatch will take over the duties of Local Involvement Networks (LINks will be abolished).

*The Trust will need to consider how it works with local HealthWatch and health and wellbeing boards, working with commissioners and local authorities as they are established.*

***Internal***

2.3 The Act sets out a number of very explicit changes for all FTs, the majority of which will come into force two months after Royal Assent (so June 2012). Many of the changes will require the Trust to amend its Constitution and the Trust’s solicitors will be instructed to assist with this. The FTN has also indicated that it will publish guidance on the Act in May 2012 which will provide an overview of the legislation, its individual provisions and consider the practical implications. This guidance is likely to be of assistance to the Trust in ensuring that all challenges are identified and addressed.

2.4 The specific provisions to come into force in June 2012 are set out below and the initial assessment of the implication on the Trust is provided (*in italics*).

2.5 ***Provisions Relating to Governors / Members’ Council***

* All boards of governors must be renamed ‘Council of Governors’.

*This will require the Trust’s Constitution to be amended.*

* There is no requirement for PCT appointed governors to sit on the Council of Governors (given that PCTs will be abolished).

*This will require the Trust’s Constitution to be amended.*

*Thought should be given to the timetable to implement this change.*

*Thought should be given to offering the Trust’s main Clinical Commissioning Groups a seat on the Council.*

* Partner organisitions set out in the Constitution may appoint one or more Governors (but no more than the number specified in the Constitution).

*This will require the Trust’s Constitution to be amended.*

* Governors have two new general duties:-
  + to hold the Non-Executive Directors individually and collectively to account for the performance of the Board; and
  + to represent the interests of members as a whole and of the public.

*Thought need to be given as to what training and support could be provided to Governors to assist them in performing these new duties.*

*This may require an amendment to the Trust’s Constitution (to ensure the role and function of Governors is accurately reflected).*

* FTs must equip Governors with the skills and knowledge they require to carry out the role.

*Thought needs to be given as to what additional support Governors may require and amend the induction programme accordingly. Currently, Governors are supported through the Trust Secretary’s office (consisting of part of Trust Secretary’s role and part of an Administrative Assistant’s role).*

*Current Governors should be consulted to seek views on what, if any, additional support may be helpful.*

* Governors have a new power to require one or more directors to attend a meeting of the Council in order to obtain information on the performance of the FT or performance of directors.

*This will require the Trust’s Constitution to be amended to formalise this power.*

*The Trust’s current practice is such that this would already be met as the Chair and Chief Executive have explicitly requested all directors attend Members’ Council meetings on a regular basis.*

* FTs must hold an ‘annual meeting of members’, open to members of the public, to receive the annual accounts, any report of the auditor on them and the annual report.

*The Trust’s current practice is such that this would already be met (through the AGM).*

*This is likely to require a change in the Trust’s Constitution to ensure wording is consistent with the Act’s provisions*

* Monitor has the new power to establish a panel to advise governors in the event that the Council of Governors passes a resolution and complains to Monitor that the FT has failed or is failing to act in accordance with its constitution or with the provisions of Part 4 of the Act. The panel will have the power to decide whether or not to investigate and must publish a report on any investigation.

*Governors should be informed of this power and the Standing Orders of the Council should be amended accordingly.*

2.6 ***Provisions relation to Directors / Board***

* There is a new duty on the board generally and directors individually to act with a view to promote the success of the FT and maximise the benefits for members and the public.
* Directors have an explicit duty to avoid conflicts of interest and declare if any should arise.
* Directors have an explicit duty not to accept benefits from a third party by reason of being a director or for doing or not doing anything in this regard.

*These three provisions are already practised and some are explicitly set out in existing documents.*

*Nevertheless, further thought should be given as to whether or not current practice could be enhanced through further support / training or amending existing documents (e.g. – employment contracts, Standing Orders relating to interests).*

* The Constitution must make provision for Board meetings to be held in public but may also provide for members of the public to be excluded from a meeting for ‘special reasons’.

*This will require the Trust’s Constitution to be amended.*

*Thought will need to be given to the practical arrangements for holding meetings in public (including: location / timing of meetings, structure of agendas, etc).*

*Thought will need to be given as to what ‘special reasons’ could constitute excluding members of the public from meetings.*

* Directors must send a copy of the board agenda to the Council of Governors prior to the meeting taking place and, as soon as practicable after, a copy of the minutes of the board meeting to the Council of Governors.

*This will require a change in current practice (linked with the point above).*

2.7 ***FT Members***

* FTs must ensure that membership is representative of those eligible (this amends the 2006 Act which had the duty on the regulator). In addition, there is a new provision that when deciding on areas for public constituencies or deciding whether to have a patients’ constituency, the FT must have regard to the need for those eligible for membership to be representative of those to whom services are provided.

*Thought needs to be given to the Trust’s current membership constituencies and experiences in building a representative membership. Changes to constituencies may be required (which will require the Trust’s Constitution to be amended).*

2.8 ***Constitution***

* Monitor no longer has a role in approving FTs’ constitutions. Rather, a majority of both the board of directors and Council of Governors voting must approve any amendments to the constitution. Furthermore, any amendments regarding the powers or duties of governors must be approved by the annual members’ meeting.

*This will require the Trust’s Constitution to be amended.*

2.9 ***Significant Transactions***

* ‘Significant transaction’ must be defined in a FT’s constitution and FTs may only enter into a significant transaction with approval of the majority of the Council voting.

*This will require the Trust’s Constitution to be amended.*

2.10 ***Mergers, Acquisitions, Separations and Dissolutions***

* Applications may only be made where they are supported by more than half of the council of governors of each applicant (where more than one FT is involved). Monitor must grant an application if it is satisfied that such steps have been taken to prepare for the transaction. Where more than one party is an NHS trust the approval of the Secretary of State for Health is required.

*This will require the Trust’s Constitution to be amended.*

2.11 ***Finance***

* Prudential borrowing code is removed and new provisions relating to loans in place.

*Thought needs to be given to the impact on the Trust’s financial position and process.*

2.12 ***Goods and Services***

* The principal purpose of FTs is defined in the Act (provision of goods and services for the purposes of the health service in England).

*This may require an amendment to the Trust’s Constitution.*

* An FT will not fulfill its purpose unless total income from the provision of goods and services for the purpose of health services in England is greater than its income from all other provision.
* Each annual report must include a section on the impact of non-NHS funded income on the provision of NHS funded services and each forward plan must include a section on non-NHS funded services and the likely income to be generated.
* Where a forward plan includes proposals for non-NHS funded services the Council of Governors must consider whether it is satisfied that it will not, to any significant extent, interfere with the fulfillment of the FT’s principal purpose or the performance of other functions and notify the Board of Directors accordingly.
* Where an FT proposes to increase income from non-NHS funded sources by more than 5% of its total income it may only implement the proposal if more than half of the Council of Governors voting approve its implementation.

*The provisions relating to private patient income should be considered by the group, previously established by the Board of Directors, to consider private income options.*

1. **Conclusion**

3.1 The Act sets out a number of significant changes that the Trust will need to work on implementing over the coming two months. Accordingly, the Board should consider what actions should be taken to prepare for the implementation and it is proposed that the May 2012 Board seminar be used as an opportunity for this.

3.2 As the role of Governors and the Members’ Council changes considerably, the Trust needs to consider how it provides support to Governors and whether or not the current arrangements are sufficient to allow Governors to take on the new duties. The Board should also seek to engage the Governors in the implementation of the Act’s provisions as soon as possible.

3.3 As the Trust’s Constitution will need to be amended, the opportunity should be used to reconsider the current membership constituencies and composition of the Members’ Council taking account of the past experience in membership recruitment and retention, and number of nominations received and election turnout rates.

3.4 The Trust should seek to work with other FTs (through the FTN) to ensure, where appropriate, a consistent approach to the interpretation and implementation of provisions is adopted.