

# HEALTH AND SOCIAL CARE (COMMUNITY HEALTH AND STANDARDS) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Nhs Foundation Trusts

##### Introductory

##### *Section 1: NHS foundation trusts*

15. *Section 1* sets out that an NHS foundation trust is a public benefit corporation which is authorised under this Part to provide goods and services for the purposes of the “health service” in England. As this term is defined in section 128 of the National Health Service 1977 (“the 1977 Act”) as being the health service that is provided by the Secretary of State, the effect is that every NHS foundation trust has a primary purpose of providing health care to the NHS.
16. *Subsection (2)* makes it clear that a public benefit corporation is a body corporate. Each public benefit corporation must have a constitution that accords with *Schedule 1*.
17. *Schedule 1* sets out minimum statutory requirements for the constitution, governance and membership of public benefit corporations that may be authorised as NHS foundation trusts. It also sets out the audit, accounting and reporting arrangements that are to apply.
18. *Paragraph 1* requires every public benefit corporation to have a constitution that complies with the terms of *Schedule 1*. A corporation may also make further provision in its constitution that is consistent with the Schedule.
19. *Paragraph 2* requires the constitution of a public benefit corporation to name the corporation, and if the corporation is an NHS foundation trust, to include the words “NHS foundation trust” in its name.
20. *Paragraph 3* sets out the minimum eligibility criteria for the membership of a public benefit corporation. These membership criteria ensure that each corporation has representation from the public and staff. The membership may also include the patients of the hospitals managed by the corporation, and also their carers. Each public benefit corporation is given the power to specify membership criteria in its constitution.
21. The members must include individuals drawn from the public who live in specified areas, with members in each specified area being “a public constituency”. The areas from which members of a public constituency are drawn must be defined in terms of local government electoral areas in England and Wales.
22. The members must also include individuals from a corporation’s staff, who are “the staff constituency”. *Paragraph 3(3)* allows the staff constituency of a public benefit corporation to include individuals who exercise functions for the corporation, but are

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not directly employed by the corporation. Examples of such individuals include agency nurses, and individuals who work on the premises of the corporation but are employed by an independent subcontractor.

23. The paragraph also provides that the staff constituency may only include individuals with an employment contract of 12 months or longer, or without any fixed term at all; or alternatively, any person who has been continuously employed by the corporation, or exercised functions in terms of *subparagraph (1)(b)*, for a 12 month period. *Paragraph 3(4)* provides that a constitution may set out that the staff constituency may be divided into two or more classes.
24. If a corporation chooses, its constitution may also provide for there to be members who are eligible because they have attended any of the corporation's hospitals as a patient, or as the carer of a patient, who are collectively referred to as "the patients' constituency". However, a person who is employed as a carer of a patient, or works as a carer through a voluntary organisation, is not eligible for membership.
25. Under *paragraph 3(6)*, if a public benefit corporation has a patients' constituency, its constitution may provide for it to be divided into three or more classes. If it chooses to do so, however, one class must comprise the carers of patients.
26. *Paragraph 3(7)* gives public benefit corporations wide powers to set out other eligibility requirements in the constitution, as they see fit.
27. *Paragraph 4* makes provision about the constituencies of public benefit corporations. It includes a requirement that a member of a class or constituency cannot be a member of another class or constituency while that membership continues. There is also a requirement that a person who is eligible to be a member of the staff constituency may not be a member of any other constituency.
28. *Paragraph 5* requires the constitution of a public benefit corporation to specify a minimum number for each constituency, or where there are classes within the constituency, of each class.
29. *Paragraph 6* provides that an individual who is eligible to become a member of a public benefit corporation may do so by making an application to the corporation.
30. The paragraph also allows the constitution of a corporation to provide that an individual who is eligible to become a member of the staff or patient constituency (otherwise than as a carer of a patient) may become a member by way of an invitation. On receiving such an invitation, the individual will become a member of the corporation without making an application under *paragraph 6(1)*, unless he subsequently informs the corporation that he does not wish to be a member.
31. *Paragraphs 7 to 10* require each public benefit corporation to have a Board of Governors. The Board of Governors comprises the elected representatives of the members of the public benefit corporation, and also individuals who have been appointed by the public benefit corporation to represent certain interests. Under *paragraph 7*, the public, staff and (if there is one) patients' constituencies are to elect representatives from their constituencies to the Board of Governors. *Paragraph 8* disqualifies certain individuals from membership of the Board of Governors, and gives public benefit corporations the power to set out other eligibility requirements in the constitution. Under *paragraph 9*, representatives of the public and (if there is one) patients' constituencies must be in the majority. There must also be at least three members from the staff constituency, one member appointed by a Primary Care Trust ("PCT") to which the public benefit corporation provides services and one member appointed by a local authority for an area which includes all or part of the membership area specified for the purposes of a public constituency of the corporation. One member must also be appointed by a university if a hospital of the public benefit corporation includes a medical or dental school. In addition, members may be appointed to represent organisations specified in the constitution as partnership organisations.

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32. *Paragraphs 12 and 13* set out some minimum requirements for meetings of the Board of Governors, including requirements relating to public access to these meetings. Under *paragraph 14*, each public benefit corporation is required to make other provisions about certain matters relating to the Board of Governors in its constitution, and has the power to make further provision as it deems necessary.
33. *Paragraphs 15 to 18* require each public benefit corporation to have a Board of Directors. The Board of Directors is the body that is responsible for the day-to-day management of the public benefit corporation, and to this end, *paragraph 15(2)* requires each public benefit corporation to provide for its powers to be exercised by the Board of Directors on its behalf. The Board of Directors is made up of executive directors, one of whom is the chief executive (and accounting officer), and non-executive directors, one of whom is the chairman of the corporation. One of the executive directors must be a registered medical practitioner or registered dentist, Another executive director must be a registered nurse or registered midwife.
34. The chief executive is appointed and removed by the non-executive directors. The chairman and the other non-executive directors are appointed and removed by the Board of Governors. Only members of the public or patients' constituencies, and if a hospital of the public benefit corporation includes a medical or dental school provided by a university, a representative of that university, are eligible for appointment as a non-executive director. Under *paragraph 16(3)*, the disqualifications under *paragraph 8(1)* also apply to directors. *Paragraph 18* sets out provisions for the remuneration of the Board of Directors.
35. *Paragraph 19* makes provision about the initial directors of former NHS Trusts. It provides for the Chief Executive, Chairman and non-executive directors of the former NHS Trust, if they so wish, to become the initial Chief Executive, Chairman and non-executive directors of the corporation.
36. *Paragraph 20* requires that each public benefit corporation must keep a register of members and their constituencies, members of the Board of Governors and their interests, directors, and directors' interests. The details of each register are left to the discretion of the public benefit corporation. In addition, under *paragraph 21*, the constitution of a public benefit corporation must include provision for dealing with conflicts of interest of the members of the board of governors and the directors.
37. The public benefit corporation must make the registers listed in *paragraph 20* of the Schedule, and the documents listed in *paragraph 22(1)*- including its constitution, authorisation, accounts and reports - available to the public. However, there is a power for the Secretary of State to make regulations setting out circumstances in which registers should not be made public.
38. *Paragraph 23* requires each public benefit corporation to appoint an auditor. *Paragraph 23(3)* provides that an officer of the Audit Commission may be appointed as auditor if the Audit Commission agrees. *Paragraph 23(4)* requires that an auditor must be a member of the appropriate professional organisation, and *paragraph 23(6)* requires the establishment of an audit committee to perform monitoring, reviewing and other appropriate functions.
39. *Paragraphs 24 and 25* set out the accounting arrangements for public benefit corporations. The Independent Regulator is given general power to dictate the form and content of these accounts, with the approval of Treasury. The Independent Regulator is also given powers to direct the standards, procedures and techniques for the audit of accounts. To ensure that these bodies remain accountable for their use of public funds, *paragraph 25(4)* requires that each public benefit corporation must lay a copy of their annual accounts before Parliament.
40. *Paragraph 26* requires each public benefit corporation to make annual reports to the Independent Regulator. These reports must include information on steps taken by the

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public benefit corporation to secure that the membership of its public and (if there is one) patients' constituencies is representative of the population that is eligible for such membership, and any other information the Independent Regulator requires. The timing, and form of these reports is left to the Independent Regulator's decision.

41. *Paragraph 27* requires that each public benefit corporation must provide the Independent Regulator with annual forward business plans prepared by the directors of the public benefit corporation. The directors must have regard to the views of the Board of Governors in preparing the forward plan.
42. *Paragraph 28* provides that copies of a public benefit corporation's annual accounts, auditor's reports and annual reports must be presented to the Board of Governors at a public meeting.

## ***Section 2: Independent Regulator of NHS foundation trusts***

43. This section establishes the Independent Regulator of NHS foundation trusts. The Independent Regulator is responsible for setting the terms of, and granting authorisation to, NHS foundation trusts, and monitoring their compliance with the terms of authorisation and the requirements set out in Part 1.
44. *Subsection (2)* introduces *Schedule 2*, which makes detailed provisions regarding the Independent Regulator. The Schedule includes provisions about the appointment of members and staff to the Independent Regulator and their remuneration, and also sets out the Independent Regulator's powers, funding arrangements, reporting and accounts procedures.
45. *Paragraph 1* sets out that the Independent Regulator is to consist of up to 5 members appointed by the Secretary of State, including a chairman and deputy. *Paragraphs 2* and *3* give the Secretary of State general powers to set the terms and conditions of office of members of the Independent Regulator.
46. *Paragraph 4* provides for the Independent Regulator to appoint staff on terms and conditions it determines, subject to consultation with the Minister for the Civil Service.
47. *Paragraph 6* provides that the Independent Regulator is responsible for regulating its own procedure.
48. *Paragraphs 8* and *9* set out the general and specific powers of the Independent Regulator. *Paragraph 8(1)* gives the Independent Regulator general powers to do anything that is necessary or desirable in relation to its functions. In particular, *paragraph 8(2)* provides that this includes acquiring and disposing of property, entering into contracts, accepting gifts, and co-operating with other public authorities. *Paragraph 9* gives the regulator the power to borrow money temporarily with the consent of the Secretary of State, and to conduct research.
49. Under *paragraph 10*, the Secretary of State may make contributions to the Independent Regulator's expenses. This provision is to be read in conjunction with *section 21* which allows the Independent Regulator to impose fees on NHS foundation trusts.
50. *Paragraph 11* sets out provisions that ensure the accountability of the Independent Regulator to the Secretary of State and to Parliament. The Independent Regulator must make an annual report on the way it has exercised its functions and prepare a summary of NHS foundation trusts' accounts for each financial year, both of which must be laid before Parliament, and copied to the Secretary of State. In addition, *paragraph 11(6)* gives the Secretary of State the power to require any other reports and information relating to the exercise of the Independent Regulator's functions.
51. *Paragraph 12* sets out the accounting requirements that that will apply to the Independent Regulator.

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52. *Paragraph 13* places a requirement on the Independent Regulator to respond in writing to any recommendation relating to the exercise of its functions made by a Committee of either or both Houses of Parliament.
53. *Paragraphs 17 and 18* disqualify the members of the Independent Regulator from membership of the House of Commons and the Northern Ireland Assembly.

### ***Section 3: General duty of regulator***

54. This section requires the Independent Regulator to exercise its functions in a manner that is consistent with the Secretary of State's general duties under the 1977 Act. Amongst other things, the Secretary of State must promote and provide a comprehensive health service in England and provide clinical facilities to universities with medical or dental schools. The Secretary of State must also secure that NHS goods and services are provided free of charge.

## **Authorisation**

### ***Section 4: Applications by NHS trusts***

55. This section allows NHS trusts to make applications to become NHS foundation trusts. They may only do so with the support of the Secretary of State. The section sets out the minimum information which must be included in an application by an NHS trust for NHS foundation trust status. In addition, once an application to be an NHS foundation trust has been made, *subsection (4)* gives an NHS trust that has made an application the shadow powers necessary to prepare for authorisation to be an NHS foundation trust.

### ***Section 5: Other applications***

56. This section allows persons other than NHS trusts to apply to set up an NHS foundation trust. They may only do so with the support of the Secretary of State. This allows organisations that are not currently part of the NHS such as charities and voluntary sector organisations to become involved in the establishment of a new NHS foundation trust.
57. *Subsection (2)* sets out the minimum information which must be included in such an application. In conjunction with this, *subsection (3)* imposes a test which requires the Independent Regulator to consider certain matters before an application made under this section may proceed, and a certificate of incorporation be issued. Once such a certificate is issued, the applicants are incorporated as a public benefit corporation and are given the shadow powers necessary to prepare for authorisation to be an NHS foundation trust.

### ***Section 6: Authorisation of NHS foundation trusts***

58. This section provides the Independent Regulator with the power to authorise applicants under *sections 4 or 5*, whom the Independent Regulator is satisfied have met the necessary criteria set out in *subsection (2)*, to be NHS foundation trusts. The criteria are that the constitution and governance arrangements are in accordance with *Schedule 1*, that the applicant has taken steps to secure that the membership of its public and (if it has one) patients' constituencies will be representative of those eligible for such membership, that necessary steps to prepare for NHS foundation trust status have been taken, that the applicant will be able to provide the goods and services which it will be required to provide, and that any other requirements the Independent Regulator considers appropriate are met. Under *subsection (3)*, in deciding whether an applicant will be able to provide the goods and services required under its authorisation, the Independent Regulator must consider any Commission for Healthcare Audit and Inspection (CHAI) report or recommendation relating to the applicant, and must also consider the applicant's financial position.

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59. *Subsection (5)* sets out that the Independent Regulator may not authorise an applicant as an NHS foundation trust unless satisfied that the applicant has sought the views of specified persons. The specified persons are: individuals who live in the applicant's proposed public and patient constituencies; the local authorities who it is proposed will appoint a member of the board of governors; and, if the applicant is an NHS trust, its staff and its Patients' Forum.
60. Under *subsection (5)(e)* the Secretary of State may make regulations setting out additional consultation requirements. Under *subsection (6)*, an authorisation may not be granted unless the Independent Regulator is satisfied that the applicant has complied with any regulations on consultation.

### ***Section 7: Effect of authorisation***

61. *Section 7* sets out the legal effect of an authorisation to be an NHS foundation trust. Under the section, where authorisation is granted to an NHS trust it ceases to be an NHS trust and becomes an NHS foundation trust. Where authorisation is granted to a public benefit corporation it becomes an NHS foundation trust.
62. *Subsection (5)* provides that the property, rights and liabilities of applicants continue with the NHS foundation trust.
63. *Subsection (7)* provides that, like NHS trusts, NHS foundation trusts are not Crown bodies: see paragraph 18 of Schedule 2 to the National Health Service and Community Care Act 1990 ("the 1990 Act").

### ***Section 8: Amendments of constitution***

64. This section sets out that an NHS foundation trust's constitution may only be amended with the Independent Regulator's consent, so that the Independent Regulator can ensure any alterations are appropriate.

### ***Section 9: Variation of authorisation***

65. This section allows the Independent Regulator to vary an NHS foundation trust's terms of authorisation. In deciding whether to vary an authorisation, the Independent Regulator must take into account any report or recommendation by an overview and scrutiny committee of a local authority made pursuant to the Local Government Act 2000, or by the Commission for Patient and Public Involvement in Health.

### ***Section 10: Register of NHS foundation trusts***

66. *Subsections (1) to (3)* require the Independent Regulator to keep a register of NHS foundation trusts, and set out the information that the register must contain.
67. *Subsections (4) and (5)* provide that the register must be available to the public for inspection, and that copies or extracts from the register must be available for a reasonable charge.

## **Financial matters**

### ***Section 11: Power of Secretary of State to give financial assistance***

68. This section provides for the Secretary of State to give loans, public dividend capital, grants or other payments to NHS foundation trusts.
69. *Subsection (3)* provides the necessary statutory cover for the Secretary of State to guarantee payments due under Private Finance Initiative (PFI) agreements entered into by NHS foundation trusts. Such agreements are currently entered into by NHS trusts. They are certified as "externally financed development agreements" within the meaning

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of the National Health Service (Private Finance) Act 1997. The section envisages that these certification arrangements will continue.

### ***Section 12: Prudential borrowing code***

70. This section provides for the Independent Regulator to set a code according to which the total borrowing limit of an NHS foundation trust will be determined. The code, and any revisions to it, must be laid before Parliament by the Independent Regulator.
71. The section requires that, in making and revising the code, the Independent Regulator must have regard to commercial best practice for determining the amount of loans to not-for-profit sector organisations. This would include taking into account the current and future ability of NHS foundation trusts to service debt. In addition, before making the code, the Independent Regulator must consult interested parties including the Secretary of State, NHS foundation trusts and any other persons the Independent Regulator considers appropriate. The Independent Regulator must also consult interested parties before revising the code.

### ***Section 13: Public dividend capital***

72. Under section 10 of the 1990 Act, each NHS trust is given an originating capital representing the excess of its assets over its liabilities when it is established. This originating capital is “public dividend capital” and the NHS trust must pay dividends on it at a set rate. It constitutes an asset of the Consolidated Fund.
73. *Subsection (1)* sets out that the public dividend capital of an NHS trust applicant immediately before authorisation is granted continues as public dividend capital under the same conditions for the NHS foundation trust. Under *subsection (2)* the capital remains an asset of the Consolidated Fund.
74. *Subsection (3)* provides for the Secretary of State, with the consent of Treasury, to decide the terms on which any public dividend capital of an NHS foundation trust is issued. Under *subsection (4)* the dividend to be paid by an NHS foundation trust is the same as that payable by NHS trusts in England under section 9(7) of the 1990 Act.
75. *Subsection (5)* requires the Secretary of State to consult the Independent Regulator before deciding the terms on which any public dividend capital of an NHS foundation trust is to be issued.
76. *Subsection (6)* requires that any repayment of public dividend capital made to the Secretary of State must be paid into the Consolidated Fund, as it is for NHS trusts.

## **Functions**

### ***Section 14: Authorised services***

77. This section sets out the powers and functions of the Independent Regulator when authorising an NHS foundation trust to provide goods and services.
78. Under *subsection (1)* an authorisation must authorise an NHS foundation trust to provide goods and services for purposes related to the provision of health care. But *subsection (2)* provides that the authorisation must ensure that the principal purpose of the NHS foundation trust is the provision of goods and services for “the health service in England”, which, by virtue of *section 40* (the interpretation provision to Part 1) means the National Health Service provided by the Secretary of State pursuant to the 1977 Act.
79. *Subsection (3)* gives NHS foundation trusts powers to enter into other, non-health care related activities for the purposes of generating income to be used for the health service in England. Such activities may be subject to any restrictions set out in the authorisation.

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80. *Paragraph 85(a) of Schedule 4* gives NHS foundation trusts the power to make accommodation or services or both available for patients who give undertakings to pay such charges as the trust may determine. The power is conferred in the same terms as it is conferred upon NHS trusts.
81. *Subsection (4)* allows the Independent Regulator, as part of an authorisation, to require an NHS foundation trust to provide particular NHS services. By exercising this power, the Independent Regulator can ensure that NHS foundation trusts are obliged to continue to provide certain goods and services to the NHS. *Subsection (6)* provides that an authorisation must authorise an NHS foundation trust to carry out health care research and to make facilities and staff available for education, training and research carried on by others. An authorisation may also require such services. *Subsection (7)* sets out the factors the Independent Regulator is to consider in deciding whether to require provision of particular services by an NHS foundation trust; and *subsection (8)* sets out the terms in which such a requirement may be framed.

### ***Section 15: Private health care***

82. This section gives the Independent Regulator power to restrict any goods or services provided by an NHS foundation trust that are not provided for the purposes of the health service in England.
83. *Subsection (2)* obliges the Independent Regulator to exercise this power to impose a cap on the total level of income derived from the provision of services to private patients, if the NHS foundation trust was an NHS trust. In the case of an NHS foundation trust that was an NHS trust in the financial year ending 31 March 2003, the cap must restrict the NHS foundation trust to the proportion of total income received from private patients in that year. For NHS foundation trusts that were not an NHS trust throughout this period, the cap must restrict the NHS foundation trust to the proportion of total income received from private patients in its first full financial year as an NHS trust.

### ***Section 16: Protection of property***

84. This section provides a ‘lock’ on any assets of an NHS foundation trust that are needed for the provision of goods or services required under its authorisation.
85. The section allows the Independent Regulator to designate property as “protected” if it considers that the property is needed for the provision of: goods or services that the NHS foundation trust must provide to the NHS in England; research the trust is required to carry out, or staff and facilities that the trust is required to make available for the purposes of education, training and research under its authorisation.
86. If property is designated as protected in this way, an NHS foundation trust may not dispose of it without the Independent Regulator’s approval.

### ***Section 17: Financial powers***

87. This section gives NHS foundation trusts powers to borrow money, subject to the prudential borrowing limit calculated according to the code set under [section 12](#).
88. *Subsections (4) and (5)* give NHS foundation trusts financial and investment powers for the purposes of their functions, including powers to invest money, form subsidiaries and enter into joint ventures.
89. In addition, *subsection (6)* allows NHS foundation trusts to give financial assistance to anyone in connection with their functions. The powers are however, potentially subject to any terms of the authorisation set by the Independent Regulator.



### **Section 18: General powers**

90. This section gives an NHS foundation trust general powers to do anything it needs to in relation to its functions. In particular, *subsection (2)* sets out that this includes acquiring and disposing of property, entering into contracts, accepting gifts and employing staff.

### **Section 19: Information**

91. This section sets out requirements for NHS foundation trusts and other health service bodies to provide information in certain circumstances.
92. Under *subsection (1)*, both the Secretary of State and the Independent Regulator are given the power to specify information which an NHS foundation trust is required to disclose. In each case, the provision of the information is included as a term of the NHS foundation trust's authorisation.
93. *Subsection (2)* gives the Independent Regulator a power to require other health service bodies – defined in *section 40* as being Strategic Health Authorities, Special Health Authorities, NHS trusts, Primary Care Trusts and NHS foundation trusts - to provide any information the Independent Regulator requires for the purposes of its functions.

### **Section 20: Entry and inspection of premises**

94. This section provides for the Independent Regulator to include right of entry and inspection of premises as a term of authorisation for NHS foundation trusts.

### **Section 21: Fees**

95. This section allows the Independent Regulator to charge NHS foundation trusts a reasonable annual fee as a term of their authorisation.

### **Section 22: Trust funds and trustees**

96. This section provides for the Secretary of State to appoint trustees for an NHS foundation trust to manage charitable assets on its behalf. The arrangements are analogous to those set out under the 1990 Act for NHS trusts.
97. *Subsection (2)(a)* allows for the Secretary of State to make provision as to the persons by whom trustees are to be appointed. It is anticipated that the appointment of trustees will be delegated to the NHS Appointments Commission, which is a Special Health Authority established under the 1977 Act.
98. *Subsection (3)* allows the Secretary of State to transfer property from an NHS foundation trust to the trustees of the NHS foundation trust where trustees have been appointed under this section.
99. *Subsection (4)* provides that trustees of an NHS trust that becomes an NHS foundation trust are to be treated as though they were appointed under this section.

## **Failure**

### **Section 23: Failing NHS foundation trusts**

100. This section gives the Independent Regulator broad powers where an NHS foundation trust is breaching or has breached obligations under an Act or its authorisation. Under the section, the Independent Regulator may issue a warning notice, and may also require Directors or the Board of Governors to act, or to cease acting, in a particular way. The Independent Regulator also has the power to remove or suspend any or all of the directors and members of the Board of Governors, and appoint directors to act in the interim period.

### **Section 24: Voluntary arrangements**

101. This section gives the Independent Regulator powers to intervene in the operation of an NHS foundation trust in cases of financial difficulty.
102. Under this section, the Independent Regulator has powers to require an NHS foundation trust's directors to make a proposal for a voluntary arrangement with its creditors. In addition, the Independent Regulator also has the power to require an NHS foundation trust's directors to obtain a moratorium on its business prior to the approval of a voluntary arrangement.
103. Provisions to require the directors of a company to reach a voluntary arrangement with the company's creditors, and also to obtain a moratorium over its business, are set out in detail in Part 1 of the Insolvency Act 1986. *Subsection (2)* gives the Secretary of State the powers to apply Part 1 of the Insolvency Act 1986, including related provisions of that Act, with modifications to NHS foundation trusts.

### **Section 25: Dissolution etc.**

104. This section gives the Secretary of State the power in certain specified circumstances to dissolve an NHS foundation trust by order. The power may be exercised where an NHS foundation trust fails to comply with a notice under *sections 23* or *24*, or where an NHS foundation trust fails to implement a voluntary arrangement under *section 24*, and where the Independent Regulator considers that, despite the exercise of its powers under either of those sections, the goods and services of the NHS foundation trust remain at risk. Before an NHS foundation trust is dissolved, the Independent Regulator must consult those individuals specified by the Secretary of State. This provision is intended as a safeguard on the use of the power. Where an NHS foundation trust is dissolved under this section, the Secretary of State may transfer any of its property, rights and liabilities to the persons listed in *subsection (3)*. The transfer is made by order.
105. *Subsection (4)* makes provision for *Schedule 3* which sets out the legal effect of any transfer of employees of a dissolved NHS foundation trust. Under the Schedule, the contract of any employee that is transferred under *section 25(3)* is not terminated. Rather, it transfers to the transferee as if it were originally made between the employee and the transferee. The employee is however, given the right to object to such a transfer. Where an employee objects in this way, his contract of employment is terminated.
106. *Subsection (6)* gives the Secretary of State the powers to apply Part 4 of the Insolvency Act 1986, which relates to the winding up of companies, with modifications to the dissolution of NHS foundation trusts.
107. *Subsection (7)* allows the Secretary of State to exercise his powers under this section where the Independent Regulator refuses to give an authorisation to a public benefit corporation.

### **Section 26: Sections 24 and 25: supplementary**

108. This section makes further provision about modification of the Insolvency Act 1986 under *section 24*, and the transfer of property, rights and liabilities under *section 25(3)*.
109. *Subsection (3)* provides that an order made under *section 25(3)* must be exercised to secure the provision of essential NHS goods and services.
110. *Subsection (4)* requires the power in *section 25(3)* to be exercised in a way that does not result in a net loss of value to the trust. If necessary, this can be achieved through the use of the powers in section 11, which allow the Secretary to give financial assistance to NHS foundation trusts. *Subsection 4* provides for regulations to set out how to determine whether a transfer would result in a net loss of value.

## **Mergers**

### ***Section 27: Mergers***

111. This section provides a mechanism for mergers between two NHS foundation trusts or between an NHS foundation trust and an NHS trust.
112. Under *subsection (1)* an NHS foundation trust and another NHS foundation trust, or an NHS foundation trust and an NHS trust, may make a joint application to the regulator for authorisation as a new NHS foundation trust. *Subsection (2)(a)* provides that, as for new NHS foundation trusts, if the application involves an NHS trust, the application must be supported by the Secretary of State; and *subsection (2)(b)-(d)* sets out the matters that must form part of such an application.
113. *Subsection (4)* allows the Independent Regulator to issue a certificate incorporating the directors of the applicants as a public benefit corporation, and to authorise the corporation to become an NHS foundation trust, if the Independent Regulator is satisfied that the criteria set out in *subsection (5)* have been met. The criteria are that the constitution and governance arrangements are in accordance with *Schedule 1*, that the actual membership of the applicant's public constituency (and, if there is one, of its patients' constituency) will be representative of those eligible for such membership, that the new NHS foundation trust will be able to provide the goods and services which it will be required to provide, and that any other requirements the Independent Regulator considers appropriate are met.
114. *Subsection (8)* sets out that the Independent Regulator may not issue an authorisation unless satisfied that the applicant has sought the views of specified persons.
115. Under *subsection (5)(f)*, the Secretary of State may make regulations setting out additional consultation requirements. Under *subsection (7)*, an authorisation may not be granted unless the Independent Regulator is satisfied that the applicant has complied with any such regulations.

### ***Section 28: Section 27: supplementary***

116. This section provides for the Secretary of State to make orders dissolving the applicants, and transferring their property, rights, liabilities and staff to the new NHS foundation trust authorised under *section 27*.

## **Co-operation**

### ***Section 29: Co-operation between NHS bodies***

117. This section amends section 26 of the Health Act 1999. This amendment requires NHS foundation trusts to co-operate with other NHS bodies in exercising their functions. In turn, other NHS bodies must also co-operate with NHS foundation trusts.

## **Patient and public involvement**

### ***Section 30: Public involvement and consultation***

118. This section amends section 11(2) of the Health and Social Care Act 2001. This amendment provides that, when planning service provision and considering service change, NHS foundation trusts must involve and consult patients and the public.

### ***Section 31: Patients' Forums***

119. *Subsection (2)* amends section 15 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act"). This amendment will require a Patients' Forum to be established for every NHS foundation trust.

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120. *Subsections (3)-(5)* make consequential amendments to Part 1 of the 2002 Act so that the provisions relating to public and patient involvement in health apply to NHS foundation trusts in a consistent way. The subsections include an amendment to section 17(1) of the 2002 Act, which provides for the Secretary of State to make regulations requiring NHS foundation trusts to allow members of a Patients' Forum authorised to do so under the regulations to enter and inspect the premises of NHS foundation trusts. There is also an amendment to section 18(2) of the 2002 Act, which provides that where a Patients' Forum prepares an annual report about activities that relate to an NHS foundation trust, it must send a copy to the Independent Regulator.

### ***Section 32: Commission for Patient and Public Involvement in Health***

121. This section amends section 20 of the 2002 Act. The amendments enable the Commission to promote the involvement of members of the public in England in decisions made by NHS foundation trusts which might affect their health.

## **Miscellaneous**

### ***Section 33: Taxation***

122. *Subsection (1)* amends section 519A of the Income and Corporation Taxes Act 1988. This amendment exempts NHS foundation trusts from income and corporation taxes.
123. *Subsection (2)* amends section 61(3) of the 1990 Act. This amendment exempts NHS foundation trusts from stamp duty.
124. *Subsection (3)* amends section 41(7) of the Value Added Tax Act 1994. This amendment provides for Value Added Tax to apply to NHS foundation trusts in the same way it applies to NHS trusts.

### ***Section 34: Other amendments relating to NHS foundation trusts***

125. This section introduces *Schedule 4*, which includes various minor and consequential amendments relating to NHS foundation trusts.
126. *Paragraph 18* amends section 113 of the Local Government Act 1972. This amendment allows NHS foundation trusts to enter into joint staffing arrangements with local authorities.
127. *Paragraph 20* amends Part 3 of Schedule 1 of the House of Commons Disqualification Act 1975. This amendment disqualifies Chairmen and other non-executive directors of NHS foundation trusts from membership of the House of Commons.
128. *Paragraph 25* amends section 22 of the 1977 Act. This amendment includes NHS foundation trusts among the list of NHS bodies required to co-operate with one another in exercising their functions.
129. *Paragraph 34* amends section 91 of the 1977 Act. This amendment sets out that where property held on trust is given to an NHS foundation trust for a specified purpose, the trustees for the NHS foundation trust must apply those funds for the specified purpose.
130. *Paragraph 37* amends section 96A of the 1977 Act. This amendment allows NHS foundation trusts to raise money by appeals etc. and to hold, administer and apply any property given on trust for the purpose it was given.
131. *Paragraph 84* amends section 21 of the 1990 Act. This amendment provides that NHS foundation trusts may choose to participate in schemes established by the Secretary of State for meeting losses and liabilities etc. of certain health service bodies. *Paragraph 109* amends section 31 of the Health Act 1999. This amendment allows regulations to be made which enable NHS foundation trusts to enter into joint arrangements with local authorities.

*These notes refer to the Health and Social Care (Community Health and Standards) Act 2003 (c.43) which received Royal Assent on 20 November 2003*

132. *Paragraph 116* amends section 7 of the Health and Social Care Act 2001. This amendment provides for the powers of local authority oversight and scrutiny committees to apply to NHS foundation trusts as to other NHS bodies.

### ***Section 35: Conduct of elections***

133. This section provides a power for the Secretary of State to make regulations about the conduct of elections for the membership of an NHS foundation trust. The regulations may include details on the nomination of candidates, systems and methods of voting, supervision of elections and the consequences of irregularities. There is also a power to create offences, punishable on summary conviction with a maximum fine not exceeding level 4 on the standard scale.

### ***Section 36: Offence***

134. This section makes it an offence for a person to vote at an election to the Board of Governors, stand for election to the Board of Governors or vote at a meeting of the Board of Governors unless the person has made a declaration about the particulars of his qualification to be a member of the corporation. The provision does not apply to elections held for the staff constituency.

### ***Section 37: Representative membership***

135. This section provides that an authorisation may require an NHS foundation trust to take steps to ensure that, taken as a whole, the actual membership of its public constituency (and, if there is one, of its patients' constituency) is representative of the population eligible for such membership.

### ***Section 38: Audit***

136. This section introduces *Schedule 5* which sets out provisions relating to the audit of NHS foundation trusts' accounts.
137. *Paragraph 1* of the Schedule places a number of duties on auditors of NHS foundation trusts. They include a duty that, when auditing an NHS foundation trust's accounts, the auditor must be satisfied that they are prepared in accordance with directions and any relevant enactments, and that proper practices have been observed in their compilation. The auditor must also be satisfied that the trust has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources.
138. *Paragraph 2* gives the auditor rights of access to documents and information relating to the NHS foundation trust. The provision also gives auditors the power to require such explanation as is necessary to enable an audit to be properly completed. Failure to provide information, or to give an explanation related to audit matters, is an offence.
139. *Paragraphs 3 to 5* set out some provisions relating to auditors' reports on NHS foundation trusts, including requirements for submitting reports.
140. *Paragraph 6* requires the auditor to inform the Independent Regulator if an NHS foundation trust has or is about to incur unlawful expenditure or take action that is likely to be unlawful and cause a loss or deficiency.
141. *Paragraph 8* places restrictions on when auditors may disclose information relating to an NHS foundation trust. It is an offence to contravene these restrictions.

### ***Section 39: General duty of NHS foundation trusts***

142. This section requires each NHS foundation trust to exercise its functions effectively, efficiently, and economically.

## **Supplementary**

### ***Section 40: Interpretation of Part 1***

143. *Subsection (2)* provides that expressions used in Part 1, other than those specifically defined in *subsection (1)*, have the same meaning as in the 1977 Act. Examples are the terms “property”, which in the 1977 Act includes rights; “hospitals” which is given a detailed definition that includes a number of health care institutions; and “the health service”, which means the National Health Service provided by the Secretary of State pursuant to the 1977 Act.