

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 – NHS foundation trusts and NHS trusts**

##### **Foundation trust status**

##### *Section 159 – Authorisation*

1022. This section changes the nature of foundation trust authorisation to a one-off test, ahead of the repeal of the provisions on authorisation under a later section. Prior to this Act, Monitor set terms of authorisation when authorising an NHS Trust to become a foundation trust, and those terms formed the basis of Monitor's foundation trust-specific regulatory regime. Under Part 3 of this Act, Monitor will issue licences to providers with conditions attached, and all providers will be regulated on the basis of such conditions. An NHS trust wanting to become a foundation trust after implementation of Monitor's licensing regime will still need to meet the standards necessary to be authorised by Monitor as a foundation trust, but rather than receiving ongoing terms of authorisation, would undergo a one-off test to gain authorisation.
1023. This section therefore amends the NHS Act to change the application process for NHS trusts wishing to become foundation trusts and to remove ongoing terms of authorisation. *Subsection (4)* places a new requirement on Monitor to seek confirmation from the Care Quality Commission that an applicant trust is currently complying with the requirements mentioned in section 12(2) of the Health and Social Care Act 2008 in relation to the regulated activity or activities carried out by the applicant trust, before Monitor authorises its foundation trust status. *Subsection (5)* removes Monitor's discretion to give an authorisation on particular terms, and *subsection (6)* removes Monitor's ability to vary those terms of authorisation. *Subsections (7) and (9)* make consequential changes which remove the requirement for a copy of the authorisation to be on the register and available for public inspection.
1024. *Subsection (2)* repeals the requirement in section 33(2)(a) of the NHS Act to describe the goods and services to be provided in an application for foundation trust status and for Monitor to be satisfied that an applicant can provide them. This information is currently required to set the terms of authorisation. Monitor as provider regulator will be able to use its licensing regime to require a provider to provide a particular service. The powers under which Monitor could use terms of authorisation to ensure the provision of a particular service are therefore no longer required. Monitor's previous foundation trust-specific powers to enter and inspect a foundation trust's premises are also no longer required given its proposed new functions as regulator of all providers of NHS services, so *subsection (8)* repeals section 49 of the NHS Act which enables Monitor to exercise such a power.

***Section 160 – Bodies which may apply for foundation trust status***

1025. This section removes the ability for organisations other than NHS trusts to apply for foundation trust status using section 34 of the NHS Act. There is little prospect of any organisation other than an NHS trust applying to become a foundation trust (no other type of organisation has ever applied using section 34) and section 34 is therefore unnecessary. Section 34 will be repealed when Monitor's licensing regime is implemented. The section also makes consequential amendments to the NHS Act, for example removing powers for Monitor to authorise foundation trusts. If an organisation were to submit an application prior to the repeal of section 34, *subsections (4) to (7)* enable Monitor to consider the application and authorise the organisation as a foundation trust.

***Section 161 – Amendment of constitution***

1026. This section gives foundation trusts powers to amend their constitutions without seeking external permission. The Act retains the existing requirement on foundation trusts to have a constitution and continues to require trusts' constitutions to include certain information. This section transfers responsibility for approving changes to a foundation trust's constitution from Monitor to the council of governors and board of directors of the foundation trust. *Subsection (2)*, among other things, requires that foundation trusts inform Monitor of any amendments they decide to make to their constitutions, since Monitor will continue to act as the registrar of foundation trusts, so will be responsible for maintaining on the foundation trust register the constitutions of such organisations.

***Section 162 – Panel for advising governors***

1027. This section inserts a new section into the NHS Act giving Monitor the power to establish a panel to consider questions brought by governors about the appropriateness of actions taken by their foundation trust. Such a panel could provide a source of independent advice to governors which, at present, they receive informally from Monitor. Its purpose in providing advice is to help governors to fulfil their role of holding non-executive directors to account for the performance of the board. *Subsection (2)* provides that questions can be referred to the panel only if more than half of the members of the council of governors of the trust voting agree. Decisions of the panel will not be binding on the trust, but a court or tribunal could take the panel's determination into account if considering a question previously considered by the panel. *Subsections (3) and (4)* enable the panel to regulate its own procedures in order to ensure its independence from Monitor. However, the Secretary of State will have the power, under *subsection (10)*, to make regulations about the membership of the panel in the event that the arrangements made by the panel proved problematic in practice or to ensure the panel's independence from Monitor. For example, if the panel decided to appoint members for life, this power will allow the Secretary of State *to introduce term limits*.