

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – NHS foundation trusts and NHS trusts

Functions

Section 164 – Goods and services

1038. This section amends section 43 of the NHS Act on authorised services to remove references to ongoing terms of authorisation, since terms of authorisation will no longer exist under changes proposed by the earlier section on foundation trust authorisation.
1039. *Subsection (1)* retains the position that the principal purpose of a foundation trust is to provide goods and services for the health service in England and that a foundation trust may provide goods and services for any purposes related to the provision of health care. It provides that the effect of the principal purpose is that a foundation trust must raise the majority of its income from the provisions of goods and services for the health service in England. This covers services commissioned by and for the health service in England, as well as the publicly funded public health services commissioned by local authorities.
1040. *Subsection (3)* requires every foundation trust to explain in their annual reports the impact that non-NHS income earned has had on their NHS service provision. It also places a duty on the directors to detail their proposals to earn non-NHS income in the foundation trust's forward plan and the income they expect to receive from those activities. *Subsection (3)* also requires governors to consider the forward plan and to satisfy themselves that any proposal to increase non-NHS income would not significantly interfere with the fulfilment by the foundation trust of its principal purpose or the performance of its other functions. Any proposal by the directors to increase the proportion of total income earned from non-NHS work by five percentage points or more requires agreement by more than half of the members of the council of governors of the trust voting. For example, the governors will be required to vote where a foundation trust plans to increase its non-NHS income from 2% to 7% or more of the trust's total income.

Section 165 - Private health care

1041. This section repeals the restriction on the amount of income a foundation trust can derive from private charges, otherwise known as the "private patient income cap".
1042. The cap, which was introduced in 2003, had the effect that a foundation trust cannot earn in any financial year a higher proportion of its total income from private charges than it derived from private charges in the financial year 2002-03 (the year before the first foundation trusts were authorised). For example, as no mental health foundation trust derived income from private charges in 2002-03, their cap was 0%. The cap on mental health foundation trusts' income derived from private charges was increased to 1.5% by section 33 of the Health Act 2009. This Act does not repeal the provisions of

section 44 of the NHS Act which allow foundation trusts to charge NHS patients for the provision of accommodation, such as a private room, and additional services, such as an ancillary service like the provision of a television.

Section 166 - Information

1043. This section transfers from Monitor to the Secretary of State the power to require information from foundation trusts necessary for the Secretary of State to exercise his functions effectively. Whilst foundation trusts sit within the Department of Health accounting and budgeting boundaries the Department needs information from foundation trusts in order to carry out its functions. These functions include financial management against Parliamentary estimates, Departmental Expenditure Limits and other controls, financial reporting to HM Treasury and those wider reporting requirements made of all Government Departments for both financial and non-financial matters.
1044. This information was previously collected and provided to the Department by Monitor under the terms of authorisation of foundation trusts. Given Monitor's new remit, it is no longer appropriate for it to continue to collect information on behalf of the Department when it does not have a similar role for other healthcare providers. Therefore, this section requires foundation trusts to provide the required information directly to the Department.

Section 167 – Significant transactions

1045. This section inserts a new section 51A into the NHS Act which provides that a foundation trust may designate in its constitution certain transactions as “significant transactions” which cannot proceed unless a majority of governors agree to them. Foundation trusts will be able to decide which transactions they want to designate as significant, for example, they could provide that this included any contract valued over a certain amount or over a particular percentage of the trust's turnover. As the definition of a “significant transaction” needs to be specified in the constitution of the trust, it would have to be agreed by a majority of the council of governors and of the board of directors. Trusts could choose not to specify any transactions as “significant transactions”, but this will need to be stated in the constitution, ensuring the agreement of the governors.