

Guidance on consultation

1. The Health and Social Care Bill presently before Parliament includes a power to make secondary legislation (Regulations) prescribing consultation requirements which must be met before the Regulator can give an authorisation to an NHS Foundation Trust. The Department will be preparing these Regulations in the coming months.
2. The Regulations will not come into force in time for the first wave of NHS Foundation Trust applications. This guidance has been prepared to inform first wave applicants about the requirements for formal consultation. It is likely that the Regulations will closely reflect the requirements set out here.
3. In addition to formal consultation, applicants will also need to engage informally and seek to reach agreement locally on a range of issues including the HR strategy and the detail of the service development strategy, protected assets and services etc.

Primary purpose of consultation

4. The primary purpose of the consultation is to ensure that NHS trusts properly prepare to become NHS Foundation Trusts. The Bill has a number of mechanisms designed to incorporate representation from the local community. Amongst other things, it requires each NHS Foundation Trust to have a public membership, potentially including patients and their carers, and staff membership. The Bill also places a duty on each NHS Foundation Trust to ensure that the actual public membership of the Trust is representative of those eligible for membership. NHS Foundation Trusts may also appoint individuals from partnership organisations to be members of the Board of Governors, which is a further mechanism for local involvement.
5. In this regard, the primary aim of the consultation is to ensure that each NHS Foundation Trust has an appropriate structure. The Secretary of State will accordingly only support an application if he is confident that robust consultation has taken place during the preparatory stage. The materials submitted for consideration by the Secretary of State must demonstrate evidence of consultation with key stakeholders. Different stakeholders will have necessarily different priorities and the level and type of consultation should reflect those differences.

Other consultation requirements

6. Applicants will be aware that there are separate statutory requirements for consultation imposed by the body of health legislation. These are set out in the following paragraphs. However, as the Secretary of State needs to be assured that the local health community has been properly consulted as an NHS Trust prepares to become an NHS Foundation Trust, consultation should not be seen as the fulfilment of any minimum statutory criteria. Rather, the Secretary of State will only support applications where there is evidence of consultation with key stakeholders and the exercise should be approached with this goal in mind.
7. NHS trusts have a duty under section 11 of the Health and Social Care Act 2001 to secure that persons to whom they provide, or may provide, health services to are consulted on -
 - the planning of the provision of those services;

- the development and consideration of proposals for changes in the way those services are provided;
 - decisions to be made by the body affecting the operation of those services.
8. NHS trusts also have a duty to consult with local overview and scrutiny committees where the trust has under consideration any proposal for substantial development of a health service, or for a substantial variation in the provision of such a service¹. Where an overview and scrutiny committee feels that consultation has not been adequate, it may report to the Secretary of State.
 9. Finally, NHS trusts have a duty to consult with relevant Community Health Councils where they are to be dissolved and also staff where they are being transferred to another organisation². While these regulations do not apply where an NHS trust is authorised to be an NHS foundation trust, it is considered appropriate that both groups are consulted in the context of the current exercise.
 10. Consultation by an NHS Trust in the context of an application to become an NHS Foundation Trust is undertaken by the NHS Trust in its own right, not by a PCT on the Trust's behalf.

Who to consult

11. Bearing in mind the wide range of stakeholders with a potential interest in at least some part of the application, it is suggested that applicants ensure that the consultation document is available to (and where appropriate send to):
 - those members of the public who they provide, or may provide, health services to, and any other members of the public who may fall within the trust's proposed public constituency;
 - MPs;
 - Community Health Councils;
 - local Overview and Scrutiny Committees;
 - Primary Care Trusts;
 - Strategic Health Authority (including Workforce Development Confederation);
 - any other local NHS partners;
 - other local health care providers;
 - any local authority with a significant interest, including those who provide services in partnership with the NHS trust;
 - any relevant university;
 - staff;
 - unions;
 - voluntary sector organisations;
 - relevant community groups;
 - education and training providers.

Period of consultation

12. The Department advises that applicants should consult for a minimum of 10 weeks. This is slightly shorter than the period generally recommended by the Cabinet Office Code of Practice on Written Consultation. However, it is in keeping with the general principle in the code that, where departure from the twelve weeks is necessary, it is

¹ the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002

² the National Health Service (Consultation on Establishment and Dissolution) Regulations 1996

helpful if the broad principles have been flagged up first. NHS Foundation Trust policy has been widely debated during the passage of the Health and Social Care Bill and in many cases discussion with some key stakeholders has started locally already.

13. The Guide to the Preparatory Phase, issued in August 2003, has been issued to wave 1 applicants. It states that applicant Trusts' service development strategy and proposed constitution should be submitted to the Department by 12 December. In order to meet this timetable the consultation period needs to end by 30 November. Consultation therefore needs to start at the latest on 22 September. Individual Trusts may wish to start consultation earlier.

Scope of consultation

14. The key issues to be addressed in the consultation document are
 - **the case for NHSFT status:** a description of the pros and cons arising from NHS Foundation Trust status.
 - **governance arrangements:** proposals for new governance arrangements; proposed membership community, composition of Board of Governors and Board of Directors, election processes, proposals for communicating with and recruiting members and for ensuring a representative membership; proposed roles and responsibilities of Governors, Directors and members; proposed transition arrangements for present executive team and chair.
 - **service development vision:** a description of what the NHSFT expects to achieve in broad terms over the next five years, focussing on patient benefits rather than organisational gain. The vision for the first two years should be consistent with (and will largely reflect) developments agreed as part of the LDP process, which have been subject to consultation and agreement with local stakeholders. The vision for 2006/7 onwards can be presented in very high-level terms. It does not need to be agreed in detail with PCTs although it should as far as possible chime with the SHA view of what is required within the local health economy and reflect the financial environment of principal commissioners.
15. The consultation does not have to be on the basis of finalised proposals. Many applicants have already started discussing aspects of their proposals for NHSFT status with stakeholders: the consultation process should mesh in with this rather than running in parallel. It is entirely acceptable (and indeed desirable) for the consultation document to set out the range of options that are being considered at this stage. So for example on governance, the document might outline the basic shape of the governance arrangements and present alternatives for the size and composition of the Board of Governors.

The consultation document

16. The consultation document need not be long. All the issues to be consulted upon could be covered in a document of around 15 or so pages, the larger focus being on governance arrangements. Alternatively, applicants may wish to develop separate documents if that better suits local conditions.
17. A possible structure for the consultation document is at Annex A. This is intended as an aide-memoire for applicants developing their own document and is not mandatory.

Responses to consultation

18. Views received from those consulted should be analysed and taken into consideration when finalising proposals. Documents describing the service development strategy and proposed governance arrangements should include a description of how comments received have influenced the proposals on which Secretary of State approval is sought.
19. If reasonable views put forward by consultees are not to be reflected in the eventual proposals put forward then clear reasons as to why they have not been included should be considered and be available.

Support in undertaking consultation

20. To assist applicants DH has provided core consultation materials (guides to the policy and Q&A) for use by applicants where they wish. Cabinet office guidance (<http://www.cabinet-office.gov.uk/regulation/Consultation/introduction.htm>) also provides more information on conducting effective consultations.

Annex A

Consultation Document Layout

This document provides a suggested layout for consultation documents for NHS Foundation Trust applications. It is not a requirement of the applications process to use this format; applicants are free to prepare documents in a manner that best reflects their own local circumstances.

Section 1: Summary

It is good practice to include a maximum 2-page summary of the proposals, main arguments for and against and the questions to which answers are sought.

Section 2: Introduction / Baseline

A description of present services and performance / working practices in the organisation (the preliminary stage application would be a good source) and a description of the local health economy and the challenges it faces.

Section 3: Benefits of NHS Foundation Trust status for applicant

Description of the pros and cons of NHSFT status for the applicant and the main arguments for and against the proposals advanced. Important to identify any particular impacts on specific groups.

Section 4: Service Development Vision

4.1 Short term vision

A description of the vision for the next two years (goals, key deliverables, how services will be developed / partnerships entered into etc..) with key steps towards achieving that vision and how it links into the LDP.

4.2 Medium term vision

A higher level statement of how the vision will be developed for the following three (or so) years in line with the overall strategic direction of travel proposed for the organisation. Again, with key deliverables and goals where they can be identified and an indication of fit with local health economy needs.

Section 5: Governance Arrangements

5.1 Membership

Proposals and rationale for defining the membership community and how the organisation will interact with members.

5.2 Governors

Proposals for the constituencies from which Governors will be recruited, the composition of the Board and the election processes to be adopted. Proposed appointment process for Chair (including transitional arrangements). Proposals on how Governors will interact with membership.

5.3 Directors

Proposals for appointing Chief Executive, executive directors and NEDs as well as proposed roles and responsibilities, terms of office and remuneration of NEDs. Proposed transitional arrangements.

Section 6 : Sending in your views

A description of the arrangements for gathering views from consultees – e.g. any special events or meetings. The address (web and postal) to send views and the specific questions on which comments are sought (these may be generic or a choice between options/preferences). The deadlines for comments and details of someone they can contact with questions on the consultation.

Section 7: Next Steps

A description of how comments will be used and how results of consultation will be fed back to consultees sending in comments. Timetable for submitting preparatory phase materials and establishment.

Is consultation with Local Authority Overview and Scrutiny Committees (OSCs) and Community Health Councils (CHCs) necessary before an NHS Trust applies to become an NHS Foundation Trust?

1. This note is drafted to help clarify legal issues around consultation with Overview and Scrutiny Committees (“OSCs”) and Community Health Councils (“CHCs”) where an NHS trust proposes to become an NHS foundation trust.
2. There are two separate avenues through which consultation might occur, and each has different consequences. This note considers each in turn.

(i) Consultation under the Health and Social Care Bill

3. The Health and Social Care (Community Health and Standards) Bill makes provision for regulations to require consultation on NHS foundation trust applications. However, these regulations will not be in force when the first wave of NHS trusts consult. In the interim, the Secretary of State has indicated that he expects consultation to occur with a number of groups before he will support an NHS trust’s application to be an NHS foundation trust. A trust cannot proceed without this support.
4. The Department has issued a note to applicants on what consultation should cover – a copy is attached to this paper.
5. The note makes clear that the Department does expect applicants to consult local OSCs and CHCs before making an application to become an NHS foundation trust, on the same basis that they should engage in wide consultation with the relevant (in most cases local) health community. As you will see, the note indicates that the Secretary of State will only support applications from NHS Trusts that can demonstrate that their proposals have been discussed with those stakeholders that have an interest.

(ii) Consultation under existing legislative requirements

6. There is also a separate issue of whether existing legislation would require an NHS Trust applying to become an NHS foundation trust to consult with OSCs or CHCs.
7. As far as OSC consultation is concerned, the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 provide that NHS trusts should consult with local overview and scrutiny committees whenever they are considering a “substantial development” of health services, or a “substantial variation” in the provision of such services.
8. The Department of Health’s view is that the transition from NHS Trust to NHS Foundation Trust is unlikely to constitute “substantial” variation or development. However, the question of whether any proposal amounts to a “substantial” one in terms of the regulations is for local, and not central, determination. Each case depends both on the terms of the proposal and the configuration of services in the area.
9. The Department’s expectation that NHS Trusts will consult with local overview and scrutiny committees is based on a desire to see wide consultation with key stakeholders before an application proceeds. It is the Department’s view that this should occur irrespective of whether the higher threshold of “substantial” variation is achieved. It may also be desirable for OSCs to liaise informally with each other to provide combined comments on the application. As an application for NHS Foundation Trust status is unlikely to constitute a substantial development or variation, the directions requiring OSCs to form a joint committee are similarly unlikely to apply.
10. Whilst an application for NHS Foundation Trust status is unlikely to constitute a substantial development or variation, any other substantial changes that are proposed by the applicant must

comply with requirements to consult OSCs arising from sections 7 to 10 of the Health and Social Care Act 2001.³

11. Applications for NHS Foundation Trust status will not fall within regulation 4(2) of the OSC regulations, which states that NHS trusts do not have to consult overview and scrutiny committees where they propose to dissolve. This is because the provisions of the Bill are drafted so that, when an NHS trust is authorised to be an NHS foundation trust, it does not dissolve. Rather, the same body continues with a new legal status.
12. As far as consultation with CHCs is concerned, there is no requirement for NHS trusts to consult under the Community Health Council Regulations 1996. These regulations require the Strategic Health Authority (SHA) to consult with CHCs where the SHA, or a PCT in its area, is considering a substantial development of health services or a substantial variation in the provision of such services. The proposal to become an NHS foundation trust is formulated by the NHS trust and not the SHA or PCT. It therefore falls outside the scope of this consultation requirement.
13. There is also no requirement for NHS trusts to consult with CHCs as a result of the NHS Trust (Consultation on Establishment and Dissolution) Regulations 1990. This is because the regulations apply only where a NHS trust is established or dissolved. As set out in paragraph 11 above, authorisation to become a NHS foundation trust does not involve dissolution of the applicant NHS Trust.

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³ The Health and Social Care (Community Health and Standards) Bill amends the Health and Social Care Act 2001 to extend the scrutiny powers of Oversight and Scrutiny Committees over matters relating to their local health service to NHS Foundation Trusts as well as NHS Trusts.

