

# NHS (CHARITABLE TRUSTS ETC) BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the NHS (Charitable Trusts Etc) Bill as brought from the House of Commons on 25 January 2016 (HL Bill 89).

- These Explanatory Notes have been prepared by the Department of Health with the consent of Baroness Massey of Darwen, the Peer in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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## Overview of the Bill

- 1 The NHS (Charitable Trusts Etc) Bill makes provision in relation to two main subject matters. First, it makes provision to remove the Secretary of State's powers to appoint trustees for NHS bodies, and to appoint special trustees, in England, and makes amendments to primary legislation consequential on the removal of those powers. This seeks to fulfil a commitment made by the government in 2014, following a consultation on the regulation of NHS charities, to move towards greater independence for NHS charities and away from the Secretary of State appointing bodies of separate trustees for NHS bodies. The Bill is supported by the government.
- 2 Second, it makes provision to amend sections 301 and 304 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988 so as to transfer to Great Ormond Street Hospital Children's Charity ("the new GOSH Charity") the right to a royalty in relation to performances or publications of the play "Peter Pan" by JM Barrie. It also makes related and transitional provision.
- 3 This right is currently conferred on the special trustees appointed by the Secretary of State for Great Ormond Street Hospital under NHS legislation (ie the trustees appointed for the existing NHS Charity).

## Policy background

- 4 NHS charities are charities regulated under charity law, but which are also linked to NHS bodies and bound by NHS legislation. They are charitable trusts established under NHS legislation and have as their trustee an NHS body, such as a foundation trust, or trustees appointed by the Secretary of State for an NHS body. The Secretary of State also has statutory powers to transfer trust property NHS charities hold. As such they are distinct from independent charities established solely under charity law.
- 5 Funds donated to the NHS must be held separately from exchequer funding provided by the taxpayer. NHS bodies' statutory remit is derived from NHS legislation, which allows NHS bodies to hold property on trust both for the purposes of their linked NHS body (usually an NHS trust or foundation trust), or for any purposes relating to the health service. NHS bodies which can hold charitable funds are NHS trusts, special health authorities, foundation trusts, clinical commissioning groups, and the NHS Commissioning Board (known informally as NHS England). The default position is that the board of the NHS body acts as corporate trustee of the charitable funds, though those charitable funds may also be held by trustees appointed by the Secretary of State for the NHS body in question.
- 6 Since 1973, the Secretary of State has had powers to appoint so-called "special trustees" to manage charitable property on behalf of hospital boards; in 1990 powers for the Secretary of State to appoint trustees in relation to NHS Trusts were enacted, which have since been extended to the other NHS bodies. These powers are now set out in the National Health Service Act 2006 (as amended).
- 7 Trustees appointed by the Secretary of State have powers to hold trust property on the same terms as NHS bodies. The Secretary of State has directed the National Health Service Trust Development Authority, a special health authority, to carry out his functions relating to the appointment and removal of trustees, in accordance with orders made by the Secretary of State under the National Health Service Act 2006. Corporate trustees who considered that the appointment of separate trustees might be appropriate, e.g. to separate trustee and exchequer responsibilities, or to harness expertise in administration of charitable funds, could approach

the Department of Health to ask the Secretary of State to use his powers to enable the appointment of separate trustees. The Department of Health would consider the business case for doing so, taking account of factors such as the size of the funds involved. As an example, guidance issued by the Department of Health in 2011 said that assets of more than £10 million and annual income/expenditure of £1 million would provide a clear case for appointment of separate trustees.

- 8 As at March 2015, there were around 260 NHS charities, with a combined income of £327 million and asset value of £2 billion. The top 30 NHS charities accounted for over two-thirds of total NHS charity income/assets. The vast majority of NHS charities use the corporate trustee model. The Secretary of State has appointed separate trustees to 20 NHS charities, including most of the largest charities.

## Reform of NHS Charities

- 9 A number of the largest NHS charities called for reform of NHS charities because of concerns that the NHS legislative framework limited the charities' freedom to grow and develop their charitable activity to best support their beneficiaries. For example, the Secretary of State appointing the trustees made it difficult to demonstrate visible independence from government in the eyes of potential donors. Being bound by NHS legislation prevented the charities adopting different legal forms appropriate to their specific needs, in particular those offering limited liability. The Charity Commission also believed that dual regulation under both NHS and charity legislation made it difficult for NHS charities to achieve and demonstrate independence.
- 10 As a result of these concerns, the Department of Health conducted a review of NHS charities in 2011, consulting publicly on its proposals in 2012. In the response to the consultation published in 2014, the department announced the intention to allow NHS charities to move to independent charity status. Charities that decided to become independent would no longer be NHS charities, but independent charities, regulated solely by the Charity Commission, and responsible for appointing their own trustees. The Department of Health put safeguards in place to preserve the unique relationship between the charities and the trusts they are associated with. The funds that are transferred to the new charity can only be used for the same charitable purpose as originally intended; and the NHS body should have some involvement in the new charity's governance arrangements, for example having a specific place on the board. The Department of Health and the Association for NHS Charities have published detailed guidance for charities on the policy.
- 11 The Department of Health stated in its response to the consultation that given this new freedom for NHS charities to become independent, the Secretary of State's power to appoint trustees was no longer necessary. The Department of Health stated that "where trustees have been appointed by the Secretary of State, the provisions for these appointments will be repealed as soon as possible, and any such arrangements would fall away". The Department of Health has said that it will not compel NHS charities with trustees appointed by the Secretary of State to go through the process of setting up an independent charity, as they have the choice of reverting to the NHS body acting as corporate trustee if they so wish.
- 12 The Department of Health stated that it will not appoint trustees to any further NHS bodies that are not already named in the existing trustee appointment orders, but will continue to enable the replacement of trustees for those who currently have Secretary of State appointed trustees, until the trustee appointment powers are repealed.
- 13 This bill, therefore, provides for the powers of the Secretary of State to appoint trustees for NHS bodies and to appoint special trustees (in England) to be repealed, and makes related and

consequential provision.

## Great Ormond Street Hospital Children's Charity

- 14 JM Barrie's gift of the rights to "Peter Pan" in 1929 has provided a significant source of income to Great Ormond Street Hospital Children's Charity. The copyright first expired in the UK and the rest of Europe in 1987, 50 years after the death of JM Barrie. However, Lord Callaghan successfully proposed an amendment to the Copyright, Designs and Patents Act 1988, giving Great Ormond Street Hospital Children's Charity the unique right to royalties from publications and performances of "Peter Pan" in perpetuity.
- 15 Great Ormond Street Hospital Children's Charity wished to take advantage of the new policy on independence for NHS charities, but had difficulty in doing so, because the Copyright, Designs and Patents Act 1988 specifies that the "Peter Pan rights" are vested in special trustees appointed under NHS legislation for Great Ormond Street Hospital. The Department of Health made an agreement with Great Ormond Street Hospital whereby the existing NHS charity transferred most of its undertaking by assignment to an independent charitable company limited by guarantee. The Department of Health also appointed that new charitable company as corporate special trustee of the existing NHS charity under section 212 of the National Health Service Act 2006 in respect of the "Peter Pan rights".
- 16 At present the Great Ormond Street Hospital Children's Charity is unable to fully complete the conversion to an independent charity, as the NHS charity has to be kept in existence until the Copyright, Design and Patents Act 1988 is amended, to avoid its statutory rights being lost. According to the Charity, this causes a number of complications, including the risk that legacies to the charity may fail, as a result of which significant charitable donations could be lost to the NHS provision of healthcare at Great Ormond Street Hospital. In addition because the charity is operating two charities side-by-side, it has a duplication of governance arrangements, separate accounts and may need to submit duplicate returns to the Charity Commission.

## Legal background

### Trustee appointment powers

- 17 Currently, the Secretary of State can, by order, appoint trustees to hold trust property in respect of the following NHS bodies under the corresponding provisions of the National Health Service Act 2006 –
  - Foundation trusts – section 51
  - NHS Commissioning Board – Schedule A1, paragraph 11
  - Clinical commissioning groups – Schedule 1A, paragraph 15
  - NHS trusts – Schedule 4, paragraph 10
  - Special Health Authorities – Schedule 6, paragraph 9
- 18 Orders have been made in relation to NHS trusts and Foundation Trusts as follows –
  - The National Health Service Trusts (Trust Funds: Appointment of Trustees) Order 2000 (SI 2000/212) (as amended)

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- The NHS Foundation Trusts (Trust Funds: Appointment of Trustees) Order 2007 (SI 2007/1766) (as amended)
- 19 Provisions relating to special trustees are set out in section 212 of the National Health Service Act 2006. According to that section, special trustees are trustees appointed by the Secretary of State in relation to England under section 29 of the National Health Reorganisation Act 1973 (now repealed), section 95 of the National Health Service Act 1977 (repealed subject to savings) and section 212 for certain specified hospitals.
  - 20 The appointments themselves are made by the National Health Service Trust Development Authority on behalf of the Secretary of State in accordance with the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 S.I. 2012/901 (as amended by S.I. 2013/235 and 2013/260) and the National Health Service Trust Development Authority Directions 2013 (as amended).
  - 21 As well as providing the Secretary of State with the power to appoint trustees, the National Health Service Act 2006 enables the Secretary of State to transfer property to those trustees from the NHS body for which they are appointed. Additionally, section 213 of the National Health Service Act 2006 enables the Secretary of State to transfer trust property, by order, between relevant health service bodies (including NHS bodies and trustees appointed for those NHS bodies) where there is a change in the arrangements for the administration of a hospital (or other establishment or facility) or in the area or functions of any NHS body other than a foundation trust.
  - 22 The bill will remove the powers of the Secretary of State to appoint special trustees and other trustees appointed for NHS bodies in England and to transfer trust property between such trustees and NHS bodies (and vice versa).

## Great Ormond Street Hospital

- 23 Section 301 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988 set out the trust for the royalties relating to the “Peter Pan” play, as an exception to the limitation of copyright otherwise provided for in that legislation. Section 301 confers the right to royalties in respect of the play on the trustees for the benefit of Great Ormond Street Hospital. Paragraph 1(1) of Schedule 6 defines these as special trustees appointed for GOSH under the National Health Service Act 1977 or the National Health Service Act 2006 (the current appointment powers are set out in section 212 of that Act). Section 304 applies the law of England and Wales to the trust created by Schedule 6.
- 24 Schedule 6 sets out the terms of the entitlement, including exceptions, savings, the procedure for determining the royalty amounts payable, the terms of the trust, and prohibitions on assignment, transfer or alteration of the arrangements established by the Schedule.
- 25 The bill makes the necessary amendments to the Copyright, Designs and Patents Act 1988 to effect a change in the identity of the person on whom the right is conferred. This is because the trustees have, under charity law, converted from special trustees appointed by the Secretary of State to an independent charitable company.

## Territorial extent and application

- 26 The provisions of the bill relating to appointment of trustees and consequential provision (Clauses 1 and 2 and Schedule 1) extend to England and Wales only. However the powers are only being removed in respect of trustees appointed by the Secretary of State for Health in relation to English NHS bodies. The remainder of the provisions of the bill extend to England

and Wales, Scotland and Northern Ireland.

- 27 The bill does not contain any provision which gives rise to the need for a legislative consent motion in the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

# Commentary on provisions of Bill

## Clause 1: Removal of Secretary of State's powers to appoint trustees

- 28 Subsection (1) repeals the Secretary of State's power to appoint special trustees in England and trustees to certain NHS bodies in England that can hold charitable property. Those bodies are NHS foundation trusts, the NHS Commissioning Board (informally known as NHS England), clinical commissioning groups, and special health authorities. Legislation already provides for the repeal of the power of the Secretary of State to, by order, appoint trustees for NHS trusts (section 179(2) of the Health and Social Care Act 2012). This repeal has not yet commenced (but will be commenced at the same time as the Secretary of State's powers to appoint trustees to the NHS bodies covered by this bill are repealed).
- 29 Subsection (2) confers on the Secretary of State a power to make regulations to make provision in consequence of the repeal of the appointment of trustee powers.
- 30 Subsections (3) to (7) sets out the general provisions about the powers to make regulations under subsection (2) and the Parliamentary procedures that apply to such regulations.

## Clause 2: Section 1: supplementary provision

- 31 This clause confers on the Secretary of State a power to make regulations to transfer charitable property from the trustees of an NHS trust or an NHS foundation trust to that trust, and sets out what further provision the regulations may make and what Parliamentary procedure will apply to them. This power seeks to enable the Secretary of State to ensure that prior to the repeal of his powers to appoint trustees by clause 1, and, as a result, trustees' appointments being revoked, any trust property held by trustees appointed for an NHS trust or NHS foundation trust can be transferred back to the trust for which the trustees were appointed. The Board of the NHS trust or NHS foundation trust would then act as the corporate trustee of that charitable property. This power applies only to transfers from trustees appointed for NHS trusts and NHS foundation trusts, (rather than trustees appointed for other NHS bodies) because, in practice, the Secretary of State has only appointed trustees for these two types of NHS body.
- 32 Where the Secretary of State exercises this regulation making power, subsection (2) seeks to ensure that any discretion given to the trustees in legislation is exercisable by the NHS trust or NHS foundation trust following the transfer of the charitable property to them. This provision is subject to subsections (3) and (4) which give a person to whom trust property is transferred under this clause the discretion to apply that property, or income arising from it, for "any purposes relating to the health service". This applies even where the terms of the original trust were more restrictive, for example where property was held by trustees wholly or mainly for the hospitals for which they were appointed or for purposes relating to hospital services.
- 33 Subsections (5) and (6) apply the provisions of section 217 of the National Health Service Act 2006 to subsection (1). This enables regulations made under subsection (1) to make provision for transfers of trust property to include rights and liabilities arising from that property, for the effect of any such transfer on third parties, and in relation to stamp duty.

## Clause 3: Transfer of right to royalties relating to the play "Peter Pan"

- 34 This clause makes amendments to sections 301 and 304 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988 to provide for the transfer of the rights in perpetuity to royalties, or other remuneration as agreed, in respect of the public performance, commercial publication or communication to the public of the play "Peter Pan" by J.M. Barrie. These rights are currently conferred on special trustees (appointed by the Secretary of State) for Great Ormond Street Hospital and will instead be conferred on the new independent charity for Great

Ormond Street Hospital.

#### Clause 4: Extent

- 35 Clauses 1 and 2 and Schedule 1 extend to England and Wales only, and that the remainder of the provisions of the Bill extend to England and Wales, Scotland and Northern Ireland.

#### Clause 5: Commencement

- 36 Clauses 1 and 2 and Schedule 1 come into force on such day or days as the Secretary of State may by regulations appoint. Clause 3 and Schedule 2 come into force at the end of the period of two months beginning with the day on which the Bill receives Royal Assent. Clause 4, 5 and 6 come into force the day on which the bill receives Royal Assent.

#### Clause 6: Short Title

- 37 This clause is self-explanatory.

#### Schedule 1: Consequential Amendments

- 38 Schedule 1 makes the consequential changes to primary legislation that are required as a result of the amendments made by clause 1. For example, it makes consequential changes to address the position that it is only the Secretary of State's powers to appoint trustees to English NHS bodies and to appoint English special trustees that are being repealed.

#### Schedule 2: Supplementary Provisions

- 39 Schedule 2 provides that the new recipient of the royalties in respect of "Peter Pan" (the new GOSH Charity) is to be entitled to payment of the royalties or other remuneration due to the old recipient (the special trustees for Great Ormond Street Hospital) where the royalties fell due before clause 3 and Schedule 2 come into force. It also provides that paragraph 5 of Schedule 6 to the Copyright, Designs and Patents Act 1988 (procedure for determining the amount payable) applies in relation to such royalties or other remuneration as if the new GOSH Charity had been the trustee before clause 3 and Schedule 2 come into force.
- 40 Paragraph 5 of Schedule 2 provides a power for the Secretary of State to amend by regulations the provisions of the Copyright, Designs and Patents Act 1988 which confer the right to royalties in respect of "Peter Pan" on the Great Ormond Street Hospital Children's Charity. If the new GOSH Charity is involved in a charitable merger such regulations may confer the right to the "Peter Pan" royalties on the charitable body into which the new GOSH charity has merged. The Schedule also sets out the Parliamentary procedure applicable to such regulations and provides that they may also make transitional, transitory, saving, incidental or supplementary provision.

## Commencement

- 41 Clauses 1 and 2 and Schedule 1 come into force on a day or days appointed by the Secretary of State in regulations. Clause 3 and Schedule 2 come into force at the end of the period of two months beginning with the day on which the Bill receives Royal Assent. Clauses 4, 5 and 6 come into force on the day on which the bill receives Royal Assent.

## Financial implications of the Bill

- 42 The bill will result in a reduction in administrative costs to the National Health Service Trust Development Authority, a special health authority directed by the Secretary of State for Health to carry out his functions relating to appointment and removal of trustees for NHS bodies and

special trustees. It will also result in a reduction in such costs to the Department of Health. In both cases, this is because the Secretary of State for Health will no longer be involved in the appointment of such trustees from the intended commencement date of Clauses 1 and 2 and Schedule 1 to this Bill (namely 1 April 2018).

## Parliamentary approval for financial costs or for charges imposed

- 43 No money resolution or ways and means resolution in the House of Commons is required to authorise any provisions of the bill.

## Compatibility with the European Convention on Human Rights

- 44 This is a Private Members' Bill and the Minister is not required to give a statement of compatibility with the Human Rights Act 1998, in accordance with section 19(1)(a) of that Act.
- 45 The Department of Health has, nevertheless, considered the question of compatibility and has concluded that the Bill is compatible with the European Convention on Human Rights.

## Related documents

- 46 The following documents are relevant to the Bill and can be read at the stated locations:
- <https://www.gov.uk/government/publications/nhs-trust-development-authority-directions-2013>
  - <https://www.gov.uk/government/consultations/regulation-of-nhs-charities>
  - <https://www.gov.uk/government/consultations/regulation-of-nhs-charities>
  - <https://www.gov.uk/government/publications/how-nhs-charities-can-convert-to-independent-status>

## Annex - Territorial extent and application

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion required?	Extends to Scotland?	Legislative Consent Motion required?	Extends to Northern Ireland?	Legislative Consent Motion required?
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Clause 1	Yes	Yes	No	No	No	No	No
Clause 2	Yes	Yes	No	No	No	No	No
Clause 3	Yes	Yes	No	Yes	No	Yes	No
Clause 4	Yes	Yes	No	Yes	No	Yes	No
Clause 5	Yes	Yes	No	Yes	No	Yes	No
Clause 6	Yes	Yes	No	Yes	No	Yes	No
Schedule 1	Yes	Yes	No	No	No	No	No
Schedule 2	Yes	Yes	No	Yes	No	Yes	No

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