

# RCN Policy Unit

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## Policy Briefing 01/2007

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# **Mergers; Markets; and Monitor: An Update on NHS Foundation Trust Developments**

January 2007

## Background

NHS Foundation Trusts were introduced as a result of new legislation in the Health and Social Care Act (2004) as one of the flagship elements of the government's NHS reform programme. Based upon NHS Principles and with greater autonomy and extended powers including greater financial and managerial freedoms, NHS Foundation Trusts have presented the RCN with a serious challenge because these new powers represent a significant shift in the way in which NHS services are managed and governed. In response to the introduction of Foundation Trusts the RCN adopted an approach which enables our members, activists and staff to evaluate applications for NHS Foundation Trust status on a case by case basis at local level. Whilst the RCN has not opposed the government's policy on NHS Foundation Trusts, this approach does allow RCN members to determine their support for; opposition to; and concerns about each and every application for authorisation.

To assist with this process and in order to maintain our scrutiny of NHS Foundation Trust developments the RCN Policy Unit have published a number of resources including the RCN NHS Foundation Trusts Scorecard<sup>1</sup> and the RCN Principles<sup>2</sup> which describe the principles and criteria against which proposals must be evaluated. The prospect of mergers between Foundation Trusts and NHS Trusts has created further complications but the RCN position on developments of this nature remains the same; authorisation of Foundation Trusts either individually or by merger MUST improve standards of care and services for patients in the communities and across health economies that that they serve.

## NHSFTs- how are they doing?

On 1<sup>st</sup> December 2006 Monitor, the body responsible for regulating NHS Foundation Trusts (NHSFT), announced that two further NHSFTs had been authorised, and that these were Kings College Hospital NHS Foundation Trust and Basingstoke and North Hampshire NHS Foundation Trust. This, the publicity said, now increased the number of NHSFTs to 54 with a combined income of £10.81bn. That equates to almost 10% of the total NHS funding. What is more, in August 2006 Monitor was predicting that the existing 48 NHSFTs at that time were forecasting a surplus of £18m for the forthcoming financial year 2006-07. Add to this the fact that the two leading Trusts in the new Healthcare Commission Rating Scheme were both NHSFTs and there appears to be a growing body of evidence that the "Foundation Trust" model is achieving results at a time when the

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<sup>1</sup> <http://www.rcn.org.uk/downloads/foundationtrusts/foundations-reps.pdf>

<sup>2</sup> [http://www.rcn.org.uk/publications/pdf/rcn\\_principles.pdf](http://www.rcn.org.uk/publications/pdf/rcn_principles.pdf)

rest of the NHS is too frequently failing to do so. So how are NHS Trusts coping with the task of becoming Foundation Trusts?

## Making the Grade

In June 2005 the Department of Health announced the government's intention that by April 2008, the whole of acute sector NHS Trusts in England would have become NHS Foundation Trusts. By October 2005 this ambition was altered and the intention was that all NHS Trusts would "have the opportunity" to become NHSFTs by April 2008. As a means of gauging the potential for NHS Trusts to become Foundation Trusts, the Department introduced "fitness for purpose" reviews, beginning in June 2005. With a system designed by US healthcare consultants, McKinsey, all NHS organisations, including NHS Trusts, Mental Health Trusts and PCTs have been reviewed by this process, regardless of whether they are to become FTs or not. As a result, the Department of Health (DH) now have a comprehensive picture of the likely candidates for FT status by April 2008 and the identity of those organisations which, according to the McKinsey assessment methodology, are unlikely to be able to proceed to FT authorisation, even by the end of 2008.

Although the DH have never published a comprehensive record of the outcomes of the "fitness for purpose" reviews it seems likely that around 170 or so of the existing NHS Trusts will be deemed fit to apply, many after undergoing rigorous programmes of preparation. This would leave somewhere in the region of 60 NHS Trusts who would not be in a position to become NHS Foundation Trusts by January 2009. So what will become of these organisations and the services that they offer?

## Winners and losers; who gets the biggest slice of the FT cake?

In September 2006 Monitor published a guide *Applying for a merger involving an NHS Foundation Trust*<sup>3</sup>. The guidance provides for NHSFTs and NHS Trusts to "merge", and for existing NHS Foundation Trusts to "merge". The relevant legal provisions are contained within Sections 27 and 28 of the *Health and Social Care (Community Health and Standards) Act* which is the primary legislation that gave rise to NHS Foundation Trusts. What is clear from the legislation, and a point which Monitor reinforce in their guidance, is that both parties must be willing partners in any merger and that the fullest consultation must take place upon merger proposals before they can be supported by the Secretary of State for Health. Once these criteria have been achieved Monitor will commence the process of authorisation; so any existing NHSFT that wishes to

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<sup>3</sup> Monitor, *Applying for a merger involving an NHS Foundation Trust*, London 2006

become involved in a merger must be prepared to undergo a full secondary process of authorisation with new terms of operation if they become part of a merged organisation. What is clear from the Monitor guidance is that mergers of this nature are not “a contested takeover”. Even so, NHSFTs do have the power under section 17 of the Act to invest and this includes:<sup>4</sup>

*“The acquisition of other corporate bodies, their assets, staff and contracts.”*

Monitor go on to say that provision for one NHSFT to acquire another is covered within their best practice advice, Risk Evaluation for Investment Decisions by NHS Foundation Trusts, and that there are principle differences between mergers between and acquisition of NHS Foundation Trusts and NHS Trusts. In the case of a merger, this must be authorised by Monitor and supported by the Secretary of State for Health, leading to the formation of a new Foundation Trust. In the case of acquisition, of NHS Trusts, NHSFTs or private-sector bodies, although not necessarily requiring the support of the Secretary of State, similar considerations apply but the existing Foundation Trust would not be dissolved.

What this amounts to is a spread of provisions that could, by the end of 2008, enable the potential 170 NHSFTs to acquire or merge with the 60 or so NHS Trusts that could not make the grade as foundation trusts in their own right. Already there is one proposal for the Birmingham Heartlands NHS Foundation Trust to merge with the Good Hope NHS Trust to form a new NHSFT in that part of the West Midlands conurbation. One of the features of the Labour public service reform programme has been the achievement of “tipping points”. This means achieving a sufficient critical mass of new or reformed organisations so as to accelerate the pace of reform in a given market of operation. In this case, although there has been no official statement to this effect, the “tipping point” may well be 50%, or less, of the previous NHS Trusts achieving FT status because with the power to acquire or merge with other corporate bodies they would have the potential to create a foundation trust economy by building upon their own authorised status. It seems highly unlikely that a successful NHSFT with the support of the Secretary of State would risk its authorisation by entering into a merger that would prove detrimental to its ambitions. Equally, any acquisition would be a part of that FT’s investment programme and should therefore represent an opportunity to expand without the risks of dissolving its status.

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<sup>4</sup> Monitor, *Applying for a merger involving an NHS Foundation Trust*, London 2006, p.4

## Principles, Partnerships and Practice; where to next?

But isn't this talk of acquisition and merger out of keeping with the culture of NHS Foundation Trusts which are deemed to be organisations that primarily function in the best interests of the community that they serve; are governed by NHS Principles; and which only produce a surplus so that they can reinvest it in improving services? Well, perhaps there are now signs that some of the NHSFTs are already becoming more macho and aggressive in their style of working and business management. On 4<sup>th</sup> December 2006 Monitor announced that it would be seeking more detailed information from Foundation Trusts about the operation of its services. Just like the operation of a car production line, Monitor now wants NHSFTs to be able to measure performance and profitability at the "service-line" level. That way, Monitor says NHSFTs can exercise better control in the management of financial risk. In the Health Service Journal website article covering this issue, Secretary of State for Health Patricia Hewitt whilst welcoming the framework that had been developed chose to address the issue of the need for greater co-operation on the part of some NHSFTs. She noted that<sup>5</sup>;

*"A number of PCTs have raised with me the problem of the guidance that Monitor is giving to Foundation Trusts... creating real barriers to the kind of co-operation we need. We need dialogue between PCTs, Monitor and foundation trusts to try to resolve that. We need a framework that is a bit clearer about the need for co-operation as well as some healthy competition."*

If concern is being felt at the highest levels in the Department of Health about the developing culture in some NHSFTs, it may be that these organisations are showing a degree of self-determination that exceeds the expectations of the Secretary of State and the government. But isn't this a consequence of promoting competition above co-operation and hasn't it always been the stated intent of government that foundation trusts would function free from the controls of Westminster?

It has always been the concern of the RCN that unchecked and lacking public accountability, NHSFTs could have seriously detrimental effects across the wider health and social care economy whilst promoting their own development in the name of the communities that they serve.

With these concerns about organisational and business culture in mind, and aware of the growing possibility of a period of acquisitions and mergers in the foundation trust movement, the RCN Policy Unit will be conducting a survey of its members experiences and observations of NHS

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<sup>5</sup> [www.hsj.co.uk/healthservicejournal/pages/en1/061206](http://www.hsj.co.uk/healthservicejournal/pages/en1/061206)

Foundation Trusts. Focussing primarily on partnership working and co-operation, the survey will take place in Spring 2007 with a report ready for RCN Congress 2007.

If you have any further queries about these issues or any other matters related to NHS Foundation Trusts, please contact Colin Beacock in the RCN Policy Unit at [colin.beacock@rcn.org.uk](mailto:colin.beacock@rcn.org.uk)

## Associated Policy Unit Publications

RCN Briefing; NHS Foundation Trusts (2004)

[http://www.rcn.org.uk/downloads/rcndirect/NHS\\_Foundation\\_Trusts\\_and\\_the\\_Growth\\_of\\_Mutualisation\\_in\\_Public\\_Services.pdf](http://www.rcn.org.uk/downloads/rcndirect/NHS_Foundation_Trusts_and_the_Growth_of_Mutualisation_in_Public_Services.pdf)

RCN Survey of NHS Foundation Trusts

<http://www.rcn.org.uk/aboutus/policy/foundationtrusts/review.php>