

RESPECTIVE POWERS OF NHS TRUSTS AND NHS FOUNDATION TRUSTS

POWER / FUNCTION	NHS TRUSTS	NHS FOUNDATION TRUSTS
<p>1. Type of entity</p>	<p>Bodies corporate established by order of the Secretary of State under s 25 of the National Health Service Act 2006 ('2006 Act')</p>	<p>Bodies corporate, specifically 'public benefit corporations', authorised by Monitor under the 2006 Act.</p>
<p>2. Legislative purpose</p>	<p>To provide goods and services for the purposes of the health service (s. 25 of 2006 Act)</p> <p>NHS trusts have a duty to exercise their functions effectively, efficiently and economically (s. 26 of 2006 Act)</p>	<p>To provide goods and services for the purposes of the health service in England (s. 30 of 2006 Act)</p> <p>NHSFTs have a duty to exercise their functions effectively, efficiently and economically (s. 63 of 2006 Act)</p>
<p>3. Governance</p>	<p>Governance structure requirements are contained in Para. 3 Schedule 4 of 2006 Act and in the NHS Trusts (Membership and Procedure) Regulations 1990, which set out the rules concerning the board membership and procedure of NHS Trusts</p> <p>Secretary of State ("SoS") appoints the chair and NEDs (para. 4 Schedule 4 of 2006 Act). This function has been delegated to TDA.</p> <p>Each Trust has an establishment order (a form of secondary legislation) which sets out their governance structure inc. number of directors. No requirement for a constitution but trusts can choose to have one.</p>	<p>Governance structure is set out in their own constitution which must be consistent with Schedule 7 to the 2006 Act.</p> <p>The basic governance structure of all FTs includes membership, a council of governors and a board of directors.</p> <p>The FT is responsible for appointing its own directors including the chair.</p>

<p>i.</p>	<p>Board of Directors</p>	<p>Consists of Chairperson, EDs and NEDs</p> <p>SoS appoints/removes the non-executive directors and chairperson. This function is performed by the TDA on behalf of the SoS.</p> <p>Trust appoints its own executive directors.</p> <p>Limit of 12 directors, excluding chairperson (no more than 7 NEDS and no more than 5 EDs). See trust’s own establishment order.</p> <p>(Mental health and care trusts can have 14 (no more than 7 EDs)</p> <p>EDs must include Chief Officer, Chief Finance Officer, medical/dental practitioner and nurse/midwife. The TDA appoints the chief officer as the Accountable Officer.</p>	<p>All FT powers can be exercised by the board</p> <p>Board must include Chief Exec and Finance Director as well as NEDs (one of whom is Chairperson). The CE is the Accounting Officer.</p> <p>One ED must be registered medical/dental practitioner and another must be registered nurse/midwife</p> <p>NEDs must be a member of the public or patient constituency</p> <p>NHSI cannot remove or appoint directors, unless FT in breach of additional licence condition (as imposed under s.111 of Health and Social Care Act 2012 (“2012 Act”))</p>
<p>ii.</p>	<p>Membership</p>	<p>None</p> <p>However some NHS Trusts may have recruited members as part of an application for FT status.</p>	<p>Includes staff, public and can include patients / carers.</p> <p>Constituencies are defined in FT constitution and FT must have a public and a staff constituency. There might be a patient one as well</p> <p>Members vote to elect governors or can stand for election</p>

iii.	Governors	<p>None</p> <p>However some NHS Trust may have held elections for governors as part of an application for FT status.</p>	<p>Both elected and appointed</p> <p>>50% must be elected by public or patient members</p> <p>≥3 must be elected by staff constituency</p> <p>≥1 must be appointed by qualifying Local Authority</p> <p>Duties to: hold NEDS to account individually; and collectively for performance of the Board; and represent members' interest and public interest</p> <p>FT constitution can set out exclusion conditions over and above those in para 16(3) of Schedule 7 to 2006 Act</p>
4. Powers		<p>Contained in Part 2 Chapter 3 and Schedule 4 of Part 2 of 2006 Act</p>	<p>Contained in Part 2 Chapter 5 of 2006 Act</p>
i.	General	<p>To do anything which appears to it to be necessary or expedient for the purposes of or in connection with its functions</p> <p>Para 14 Schedule 4 of 2006 Act</p>	<p>To do anything which appears to it to be necessary or expedient for the purposes of or in connection with its functions</p> <p>s. 47(1) of 2006 Act</p>

ii.	Specific		
	Acquire / dispose of property	✓ Para 14 (2)(a) Schedule 4 of 2006 Act	✓ s. 47 (2)(a)
	Enter into contracts	✓ Para 14(2)(b) (ibid)	✓ s.47 (2)(a)
	Accept gifts of property	✓ Para 14(2)(c)	✓ s.47 (2)(b)
	Enter into NHS contracts	✓ Para 15 NHS contracts, as defined in section 9 of the 2006 Act, do not give rise to enforceable rights and liabilities if the party to the contract is an NHS trust. NHS contracts for high secure services can only be entered into with approval of SoS.	✓ NHS contracts where one party is an FT is legally binding.
	Undertake / commission Research	✓ Para 16	✓ s. 47 – under general powers (not expressly provided)
	Provide Training	✓ Para 17	✓ s. 47 – under general powers (not expressly provided)

Joint exercise of functions	✓ Para 18 – with another Trust, Special Health Authority, Local Health Board or other body	✗ FTs don't have the ability to perform their functions jointly with others.	
Payment charges for accommodation / services	✓ Para 19	✓ s. 44 of 2006 Act	
Additional income generation	✓ as listed in s. 7(2) of the Health and Medicines Act 1988 (buy / make / supply goods, buy and manage land, supply accommodation and services, develop and exploit ideas/intellectual property) – ie non-NHS services. Can set up companies to do so. Para 20	✓ s. 43(3) and s.46 of 2006 Act Can set up companies to do so.	
Set up companies (to support NHS operations)	✗ No express powers NHS trusts can set up companies only if income generating – see section above on income generation	✓ s.46(5) of 2006 Act	
Arrange for provision of accommodation / services	✓ Para 21	✓ No express provision however the initial view is that FTs have implied	

	outside England and Wales		power to do this under their general powers.
	Acquire more powers	If ordered by SoS Para 22	Would require legislative change (no express provision)
	Enter into externally financed development agreements (PFI)	✓ Para 23	✓ s.46 of 2006 Act
	Provide primary medical or dental services	✓ Para 24	✓ No express power but FTs have the function of providing NHS services which includes primary care services.
	Public health services	✓ The services which NHS trusts can provide include public health services as they are within “the health service”.	✓ Same as for NHS trusts. In addition, FTs have express power to provide services which are related to public health s43(2)(b) .
	Staff	✓	✓

	Trusts can employ, remunerate and set T&Cs as appropriate in accordance with regulations and any directions given by the SoS Para 25	No requirement for T&Cs to be in accordance with SoS regulations / directions. FTs can set their own T&Cs, however in reality, FTs utilise AfC terms. s.47 (2)(d)
Pension schemes	Can establish and administer Para 26	✓ s. 47(3)
Compulsory acquisition of land	✓ If authorised by SoS to do so Para 27	✗ SoS could acquire land compulsorily (s.211) and transfer to FT (s.2)
Borrow money	✓ Schedule 5, para. 3(1) of 2006 Act	✓ s. 40 of 2006 Act (loan from SoS) and s.46 (1) (generally)
Give financial assistance to others	✗ No express power	✓ s. 46(6) of 2006 Act
Mortgage / charge over	✗	✓

	<p>property or assets as loan security</p>	<p>Para. 3(3) ibid</p>	<p>However, NHSI (Monitor) has set licence conditions to protect property needed to deliver essential NHS services. Condition COS 2 of the licence restricts disposal (including by charge/mortgage) of key assets in certain situations.</p>
	<p>Retain surpluses</p>	<p>✘</p> <p>Must pay any surpluses into Consolidated Fund – Para 8 ibid. Duty to break even (Schedule 5 para 2)</p>	<p>✓</p> <p>FTs are not under duty to break even or return surpluses to the Consolidated Fund</p>
	<p>Invest money</p>	<p>✓</p> <p>Para 9(1)</p>	<p>✓</p> <p>s. 46 (4) of 2006 Act</p> <p>Investment may also be by forming or participating in bodes corporate or otherwise acquiring membership of bodies corporate</p>
	<p>Raise money</p>	<p>✓</p> <p>To assist in providing or improving any service, facilities or accommodation or in connection with research functions</p>	<p>✓</p> <p>s.222 of 2006 Act</p>

		s.222 of 2006 Act	
	Section 75 Agreements (2006 Act) between NHS bodies and Local Authorities	✓	✓
	Dissolution	✓ Only by order of SoS (through own discretion or by application). Property and liability is transferred to bodies including trusts. Para 28, 29	✗- not in reality s. 57A requires application to regulator (NHSI as Monitor) But can only approve if satisfied FT has no liabilities which is virtually impossible
	Mergers & Acquisitions (s56 and 56A of the 2006 Act)	✓ - with approval of SoS and Monitor NHS trusts cannot be the acquirer under s56A . 2 NHS trusts can, in theory, merge if SoS created a new trust, dissolved 2 existing ones and transferred property / liabilities to new trust.	✓ - with >50% council of governor's approval and Monitor Can merge with/acquire other FTs or NHS Trusts.

	Separation	✓ They can, in theory, be separated if SoS dissolved an existing trust and transferred its property/liabilities to newly created trusts.	✓ Can be separated into 2+ FTs (s.56B)
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