

# **NHS Foundation Trusts and Mental Health: A Sainsbury Centre for Mental Health briefing**

## **I. Introduction**

### **Foundation Trusts and mental health**

Foundation Trusts are amongst the key measures to be introduced in the Health and Social Care (Community Health and Standards) Bill. They will bring about a significant shift in power within the NHS from the centre to localities. By establishing public interest corporations to provide NHS services, the Bill offers to give NHS trusts greater freedom from central control and to give the public a greater say in how their services are run.

These changes could have profound implications for mental health services. To date, however, the NHS Foundation Trusts debate has centred wholly on acute health care trusts, with a smaller amount of debate about primary care trusts (PCTs), who are not covered by this Bill. We feel that it is important to extend the debate on Foundation Trusts to mental health care.

There has been relative silence from the Department of Health concerning the implications of Foundation Trusts for mental health services. In its response to the Health Select Committee, the Government agreed that mental health trusts should be able to benefit from the freedoms and flexibilities (DoH, 2003). The novelty of star ratings for mental health trusts, however, was seen as a stumbling block to rapid progress.

This should not be a significant barrier. This year's star ratings placed 14 mental health trusts in the 'three-star' category, up from just four last year. Mental health trusts are frequently 'ahead of the game' in service user involvement and local partnership-building: attributes that may make them strong contenders for early transition to Foundation status. We would certainly contest the implicit notion that mental health trusts need acute hospital 'pilots' to help them along.

We do not believe that mental health trusts should 'sleepwalk' into changes designed for other sections of the health care system, but should tackle the implications of change head-on and take advantage of them for mental health service users.

This briefing outlines the likely effects of the Bill on mental health services. It concludes with a set of recommendations for changes we believe to be necessary to ensure the Bill works to the benefit of patients.

### **The historical record**

Reforms of the NHS have often been developed for and with so-called 'leading edge' organisations followed by swift movement to implement changes across the board without time for evaluation or reflection. In recent years, major changes to NHS management and structure have often been formulated with acute hospital services in mind and 'the rest' have had to follow on.

When NHS trusts were established in the early 1990s, attention (and funding) was afforded to the early 'waves' of trusts, of which few were mental health services. The original intention, to phase in later waves in a more considered way, was soon ignored. Most community services, learning disabilities and mental health services followed after two or three years as fast as they could get agreement. Many were not well prepared for the change and few had the additional financial support afforded to the first and second wave trusts.

The move from primary care groups to primary care trusts took a similar path. A stepped approach with progression over time was planned, but in the event the shift from PCG to PCT happened quickly with some PCTs well prepared and others not.

We do not believe, on past precedent, that the rest of the NHS will move on and leave mental health care unaffected. The more likely, and less desirable, outcome is that mental health will follow on the coat tails of the rest of the NHS rather than being at the 'leading edge of change'. It is important that this does not happen.

### **A changing timetable and agenda**

The Foundation Trusts debate has been heated and some original proposals have been changed. Perhaps most critically, it was at first intended that only some leading edge trusts should become Foundation Trusts based initially on the achievement of three star status in performance ratings. However, it has since been extended to cover all NHS trusts to avoid the charge of the Government's creation of a two-tier NHS. Most recently, governance arrangements have been redrafted to allow at least one local authority member to be nominated – a useful amendment (in Schedule One, clause 8).

## **2. The implications of Foundation Trusts**

This section examines the impact foundation status might have on mental health services. Some of the implications, for example for the governance of the NHS, stem directly from the creation of Foundation Trusts. Others, such as the growth of local markets for health care, will result from concurrent proposals to increase patient choice and give Foundation status to organisations previously outside the NHS.

### **Governance**

One of the key benefits arising from the creation of Foundation Trusts is that of greater community involvement in running local health care. We are particularly concerned to ensure that mental health service users, families and carers can become involved.

Schedule One of the Bill states that at least one half of the Board of Governors will be taken from elected members from the public constituency. This would allow service users and carers who live in the local area to serve.

However, it may present some difficulties in practice. At present there is said to be a common reluctance to share sensitive information with service users in senior level discussions within trusts. Confidentiality is often given as the reason for limiting discussion. The potential role of service users and carers on boards must be clear at this stage, with no barriers placed in their way.

To ensure the widest possible representation of the local community on Boards of Governors, modest payments should be made to those who serve. Given that some governors may not be in paid employment, arrangements will need to be made to safeguard their benefit entitlements. There should be no financial penalty to becoming a Foundation Trust governor.

Boards of Governors need real powers to influence service provision. Yet recent government documents have suggested that the role of the Board of Governors may be constrained. Its direct influence over service delivery will be strictly limited and it has no power of veto over decisions made by the Board of Directors (DoH, 2003). We are concerned that citizens' and service users' efforts to seek election to the Board of Governors may not be justified by the amount of power they have once elected. This, alongside the proposal that Foundation Trusts need not have Patient Forums, could create a very combative relationship between governors and directors in some trusts.

However, there may be negative as well as positive reasons for members of the public to seek election to a Mental Health Foundation Trust Board of Governors. Acute hospitals often generate great loyalty from local communities. Sadly, mental health services generally do not. Many constantly face battles to open new facilities.

People who do not want a new community facility might, for example, use membership to campaign to stop development 'in their back yard'. Others may seek to close down unpopular services e.g. services for mentally disordered offenders or they might form a 'return to the asylums' group to oppose community care.

Safeguards are needed to ensure that pressure groups opposed to mental health services in their area are not able to overwhelm Boards of Governors and frustrate the provision of good mental health care. This may be achieved in two ways. First, Foundation Trust chairs could be given the power to remove from the Board of Governors individuals who do not adhere to the constitution of the trust. Second, the Regulator may be given power to suspend Boards of Governors whose actions put at risk the duties of the Foundation Trust towards the NHS.

Crucially, a balance will need to be attained between making involvement in a Foundation Trust meaningful for users, carers and citizens and allowing those hostile to mental health facilities to distort priorities and damage valuable services.

There are no failsafes in this area. It will be imperative, however, that NHS trusts genuinely demonstrate widespread local interest in Foundation Trust status and that, once they attain it, they seek a broad membership from all sections of the community.

## **User involvement**

The Government's response to the Health Committee report states that Foundation Trusts will be under no statutory requirement to retain Patients' Forums, on the basis that Boards of Governors will supersede their role.

This is a matter of concern for all parts of the NHS. The governors of a Foundation Trust are, in effect, its owners and trustees. They represent the local community and form part of

the organisation's management structure. This is a very different function to that of a Patients' Forum, whose role will be to put forward users' views about services and challenge the trust's management to improve services.

### **Local democracy**

An attractive feature of Foundation Trusts is their potential to enliven local democratic processes. Indeed, groups such as the Co-operative Party have suggested this as a strong argument in favour of Foundation Trusts. Health and Social Care Trusts and Partnership Trusts, moreover, have already developed a promising model for bringing local democratic accountability into the heart of the NHS through existing local authorities. These are discussed in more detail in the next section.

The local authority associations have, however, so far been opposed to Foundation Trusts. They are concerned that the election to boards may create a new kind of democracy without the legitimacy of local government elections.

It is crucial for good mental health care that Foundation Trusts have good relationships with local authorities and complement, rather than compete with, their democratic mandate. We believe it is essential to develop the membership constituency for local councillors and believe this is a route to capitalise on the move to localism.

The Bill currently states that 'one or more' local authority representatives will be able to be nominated to the Board of Governors. This may not be sufficient where a mental health trust is working with many local authority social services departments (in London, just nine NHS trusts work with 32 boroughs to deliver mental health services). Effective local authority representation in Foundation Trusts requires that each local authority with social services that carries out substantial work with the trust is represented on the Board of Governors.

Meaningful engagement with local authority Overview and Scrutiny Committees will also be important to ensure the two complement one another rather than getting into a negative, combative relationship.

### **Health and social care trusts**

We see the development of health and social care trusts as one of the most important ways of bringing together the major mental health care agencies in local government and the NHS. They are also a means of increasing local accountability and cross-boundary working in the NHS. We believe that by moving to NHS Foundation status, health and social care trusts could be strengthened to develop greater independence within locally driven partnerships.

We therefore need to be sure that health and social care trusts will be able to apply to become NHS Foundations Trusts. It is also vital that potential conflicts caused by separate streams of local accountability are avoided either on the face of the Bill or in the accompanying guidance.

It is arguable, indeed, that the health and social care trust model may be the best way forward for mental health care in England. They have in-built local roots and enable mental

health services to connect with housing, regeneration and other relevant agencies more effectively. Foundation status may thus be considerably more meaningful if combined with this model of working in many areas, especially where trusts are coterminous with local authorities responsible for social services. It is therefore important that an NHS Foundation Trust should be able to attain health and social care trust status. It may be, indeed, that the health and social care trust model may be the preferred option for organising mental health services under the Foundation Trust scheme.

The following need to be clarified:

- Whether existing health and social care trusts can become NHS Foundation Trusts.
- Whether NHS Foundation Trusts be able to become Foundation Health and Social Care Trusts.
- Whether health and social care trusts that become Foundation Trusts require special governance arrangements so that local authorities get greater representation on boards of governors and directors.

### **Commissioning**

The introduction of Foundation Trusts sharpens concern about the strength of health service commissioning. With primary care trusts (PCTs) still finding their feet as organisations, priorities, targets and earmarked funds from the centre tend to dominate commissioning decisions. PCTs have a great deal to do to become effective commissioners across the board. It is our experience that commissioning specialist mental health care is a particularly weak area for PCTs, many of which have just one staff member part of whose job is to cover this function.

There are two major concerns about commissioning. First, when facing the first wave of powerful, large acute Foundation Trusts, PCTs may find it even harder to influence local health care economies. Thus, as already relatively independent acute trusts become Foundation Trusts, they could build up their domination of both priorities and spending bolstered by a localist mandate, to the detriment of other types of service.

Second, mental health trusts themselves have grown to the point where they are often so big that they are daunting to PCT commissioners. Their eventual move to Foundation Trust status may exacerbate this trend both in terms of a growth in size and probably in terms of a general move to act independently rather than in collaborative relationships with commissioners, other statutory agencies and the voluntary sector.

Both of these developments will further weaken PCT commissioning and potentially reduce responsiveness to local needs.

This is a matter for concern. In the Government's response to the Health Select Committee report on Foundation Trusts (DoH,2003), the commissioning role of PCTs was put forward as a major safeguard against the new organisations 'going it alone' in local health economies or in deviating from their core NHS duties. Yet it also stated, in the context of them becoming Foundation Trusts, that PCTs needed 'time to mature as organisations'.

Experience from abroad suggests that where providers are independent of the state, they leave commissioners with a very limited role in shaping services. And the experience of the

internal market in the UK is that commissioning can become an administrative chore rather than a positive force in shaping the local health care market (Le Grand *et al.*, 1998).

Improvements to commissioning are vital in the face of Foundation Trusts. The following options are worth considering:

- Providing commissioners with more support from the centre to cope better with commissioning specialist mental health care.
- Encouraging PCTs to band together in lead arrangements more vigorously, in order to increase knowledge and capacity.
- Giving strategic health authorities (StHAs) a more hands-on role in commissioning for the first few years.
- Assisting PCTs to develop their own local democratic mandate, building upon their existing partnership arrangements with local authorities.

### **Management capacity**

Foundation Trusts will rely for their success on the quality of management. Local accountability offers an opportunity for mental health services to provide care based on the needs of those they serve. Achieving this, however, relies upon a high calibre of management alongside sufficient financial and human resources.

Here we do have some concerns about the current state of readiness of mental health services to take up the challenge. The Audit Commission report 'Achieving the NHS Plan' (2003) states that many mental health trusts lack management ability and face financial/staffing problems in achieving NSF targets. Many mental health trusts performed badly in this year's star ratings because of poor management of finances and staff.

This in itself is not a good reason to delay mental health trusts achieving Foundation status. Rather, it is an argument for increased attention to good management and the achievement of financial stability in mental health services as a top priority.

In building the management capacity of mental health trusts, it is important to consider:

- The additional competencies that are required for managing Foundation Trusts compared with existing NHS trusts;
- How they can be built into existing mental health trusts;
- Whether the current star ratings are adequate measures of a trust's readiness for Foundation status.

### **Regulation and inspection**

The Bill will set up a new Commission for Healthcare Audit and Inspection (CHAI), a Commission for Social Care Inspection (CSCI), and an Independent Regulator for NHS Foundation Trusts. There will need to be clarity about their respective roles and responsibilities. We understand that the CHAI regime, including the repositioned Mental Health Act Commission, will apply to NHS Foundation Trusts and that there will be a duty for the Regulator and CHAI to work together.

Effective regulation is clearly vital for a more devolved NHS to maintain high standards across the board. The Regulator could be an important safeguard against local opposition to improved mental health services (see above). But there is also a danger that, in discharging its duties, the regulatory regime may become ever bigger and erode genuine local autonomy over time. The boundaries between effective regulation and excessive intervention should be defined during the current debate.

### **Markets and patient choice**

Foundation Trusts are part of a raft of reforms designed to bring about greater 'choice and contestability' (Blair, 2003) among them the initiative to give elective patients a choice of hospital and the current consultation on extending choice to those with chronic (including mental) illnesses.

The health care system will, in this vision, be nationally funded and free at the point of use, but with greater diversity in types of provider between which both PCTs and individual patients can choose which services to use. This is intended to stimulate efficiency and innovation in two ways. First, NHS Foundation Trusts themselves are expected to have in-built incentives to improve the quality of their services and to make efficient use of resources. Second, stimulating new entrants to the market from the private and 'not for profit' sectors is also intended to improve quality and choice. Capacity building will be important if existing smaller providers, especially those from the voluntary sector, are to have the infrastructures and staff to become equal members of the NHS family.

New providers, including user-led services, will be vital to bring in new ideas and create more responsive services. The Government has stated that one of the key drivers for improving quality once Foundation Trusts are up and running will be enhanced patient choice (DoH, 2003). Without new entrants into the local health economy, it is difficult to see how this would be feasible within mental health care, where trusts are geographically-based and cover increasingly large areas.

The secretary of state for health has clearly stated his desire to extend choice to all areas of health care (Reid, 2003). It is as yet unclear how this will work in practice in mental health care, especially where compulsory treatment is in place. The two crucial issues with regard to choice in this context are:

- Whether people admitted compulsorily to hospital under the Mental Health Act will be able to choose where and how they are treated;
- How choice can be brought into community services that are organised geographically and depend upon proximity to local facilities and specialist teams.

### 3. Recommendations

The following recommendations are, we believe, necessary for Foundation status to work for the benefit of those using mental health services, their families and carers. Some require amendments to the Bill; others should be covered in the guidance that follows or in the way the Department of Health implement the new legislation.

**Mental health trusts should be encouraged to make early application for NHS Foundation status.** Development funds earmarked for acute and specialist trusts should be extended to mental health trusts and health and social care trusts at the earliest opportunity to facilitate the transition.

**The role of the Board of Governors should be clarified.** While governors should not be involved in day-to-day management issues, they should have an explicit role developing and deciding upon strategies for a Foundation Trust. This would be similar to the role of a charitable organisation's management committee.

**Governors should be paid for their services without affecting any benefits they receive.** This is important to make access to the Board of Governors truly equitable. The Regulator should ensure payments are within a reasonable range.

**Statutory safeguards against 'entryism' need to be put in place.** These may be in the form of extra powers for the Foundation Trust chair or for the Regulator. They may be vital to prevent local services being frustrated by those opposed to improving services for people who are considered 'dangerous' or 'undesirable'.

**Foundation Trusts should have a statutory duty to retain Patients' Forums or their equivalent.** Trusts could be given freedom to design their own user involvement mechanisms, but their robustness would need to be tested as part of a CHAI inspection.

**The specific category of Board of Governor membership created for local authority councillors should be extended** so that each local authority in its main catchment area with a social services department is represented. This should enable effective partnership working between the trust and relevant local authorities.

**Health and social care trusts should be included explicitly in the move to NHS Foundation Trust status.** The Bill should ensure the roles of local authority councillors and of mental health service users in health and social care trusts are maintained once they attain Foundation status.

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