

Board of Directors (in Public)

Item 7.2a

Board report

Subject: Charity Independent Status
Date of meeting: 31st March 2015
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Presented by: David Bricknell Chair of Charitable Funds Committee

Report	Data Quality Rating	BAF Ref	Level of Assurance (Full / Incomplete/ Concerned / Immediate Action)
Charity Independent status	Internal Data	N/A	N/A

1 Introduction

The purpose of this paper is to provide outline guidance to the Board of Directors in respect of the LHCH Charity to assist them in understanding the issues and process relating to the possible transfer of an NHS Charity to a charity independent of the Department of Health and unaffected by the National Health Service Act 2006.

The background to the guidance within this paper is set out in the Department of Health's paper "Review of the regulation and governance of NHS Charities Department's ", issued in March 2014, and the outline guidance issued by the Association of NHS Charities and the Department of Health in November 2014.

At present LHCH is the corporate trustee of the Charitable Funds, and therefore the Directors of LHCH are the Directors of the Fund. The Fund is consequently assumed to be controlled by LHCH and, as was noted and agreed by the Board of Directors before the year end March 2014, the Fund was consolidated with the assets of LHCH in the latter's annual report.

To put the current debate in context, there are 263 NHS charitable trusts, and all but 20 (mainly the largest) are constituted like us. The Fund has assets of some £1.5 million and annual income of £500,000 last year. This is fairly typical for Trusts similar in size to that of LHCH.

2 Conversion to independent status

Conversion to independent status' in this context involves:

- the creation of a new charity suggested to be corporate in form – either a company limited by guarantee (CLG) or a charitable incorporated organisation (CIO) - in relation to

which the Secretary of State for Health / Department of Health has no formal powers;

- the transfer to the New Charity of all the whole undertaking of the NHS Charity; and
- the winding up of the NHS Charity.

LHCH Charity trustees will need to consider the principles of conversion to independent status, including its advantages and disadvantages. These are set out in sections 2.1 and 2.2 below.

2.1 Potential advantages of conversion

- If set up as either a CLG or a CIO, the New Charity's contractual liability will be limited.
- NHS Charities are within the public procurement regime; the New Charity will not be.
- There will be no risk of consolidation of the New Charity's accounts with either the NHS body or the Department of Health (provided no NHS body has 'control' over the New Charity - e.g. power to appoint a majority of the board). Given the Trust's previous decision not to go with independent status consolidation has already taken place but is not a restricting factor for a future decision to the status of the LHCH charity.
- The New Charity can choose its own trustees and advisers (including auditors).
- Where there is the prospect of NHS re-organisation affecting the related NHS body, the New Charity will not be directly affected by the process (although it may subsequently wish to adjust its grant-making to reflect the change), whereas the NHS Charity would be caught up in it.
- The New Charity will be able to adopt wider charitable purposes (for new money) and to enter into more innovative fund-raising initiatives, collaborations and mergers.
- The New Charity will be able to demonstrate to donors and the Charity Commission its independence of decision-making (perhaps especially important where the NHS Charity at present has an NHS body as corporate trustee).
- Easily understood by donors/supporters.

2.2 Possible disadvantages of conversion

- The process of effecting the conversion will require some expenditure and application of staff resource, and will be potentially disruptive during the transition. It is anticipated that from where a Trust takes a decision to adopt an independent trustee route for its charity the timeline is approximately 12 months. The documentation is not trivial and involves consultation and approval from the DoH, the Charity Commission, HMRC and the Information Commissioner. Whilst this

has not been costed, a significant advantage to change needs to be clearly identified if we are to undertake the cost and disruption a change entails. Implementation issues are further identified below in section 3.

- The New Charity will be an independent entity responsible for its own management and operations; this may give rise to additional administration and cost; accordingly, it may not be the right route for a small scale NHS Charity. The current size of the LHCH Charity at £1.5m is small and was subject to debate with our external auditors during the consolidation process as to whether it was material or not.
- The New Charity will have a new charity number (but may use the old NHS Charity's name).
- LHCH may be concerned over potential loss of influence over 'its' NHS Charity as the new trustee body has to have a majority of members who are not directors or governors of LHCH. There may be some overlap of membership, but ultimately the charitable fund could go its own way. This may lead to confusion, internally because of muddled objectives, and externally as donors would not distinguish between the Fund and LHCH.
- Danger of losing the link with the hospital.

It is stated in the guidance that independence is an advantage for innovative fund raising and collaboration. However it is not clear what innovative fund raising is not open to the current fund which would also fit within the LHCH ethos. There is a potential for conflict between LHCH and the independent trustees.

Once this step is taken it is not reversible. Once the charity is independent it will remain that way.

3. Implementation

3.1 Future relationship between NHS Body and the New Charity

As described above, conversion will involve the creation of an independent charity outside the NHS; the future relationship between the NHS body and the New Charity will therefore be of great importance. The "Review of the Regulation and Governance of NHS Charities" requires a formal agreement or 'memorandum of understanding' to be put in place.

Where the NHS body is the corporate trustee of the NHS Charity, it will be its responsibility to decide on the principles of this agreement and then formalise it when the New Charity is in existence. Where there are separate trustees of the NHS Charity, they will need to negotiate the agreement's terms with the NHS body, and then formalise it when the New Charity is in existence.

Items which might be addressed and recorded in the memorandum of understanding / agreement(s) are set out below;

1. Details of the parties:

1.1 NHS Charity, acting through its trustee(s)

1.2 New Charity

1.3 NHS body (NHS Trust or NHS Foundation Trust).

2. Background explanation as to what is being done and why

3. Transfer of future gifts: Binding legal commitment by NHS body to transfer of all future gifts (from live donors or by will) to New Charity.

4. NHS body's formal agreement to the transfer of current NHS Charity assets to New Charity.

5. Any relevant statements as to aspects of future relationship between NHS body and New Charity³⁰, such as:

5.1 scope of New Charity's objects – confirmation that they at minimum replicate existing objects and that funds transferred will be used for those objects

5.2 future consultation between parties (and, if relevant, dispute resolution mechanism);

5.3 any on-going involvement of NHS body in New Charity's governance procedures (e.g. power to nominate trustee to New Charity's board);

5.4 arrangements as to use of NHS body's premises / staff by New Charity;

5.5 related intellectual property issues (eg New Charity's use of NHS body's name).

6. If trustees of NHS Charity are individuals, statement that they acknowledge termination of their appointment on a specified date up to 6 months after the transfer of NHS Charity assets to New Charity, once the revocation Order giving effect to that comes into force.

Note: The Department of Health will expect to see:

- a copy of the signed memorandum of understanding / agreement(s) with NHS body; and
- evidence of due approval of its terms by the NHS body (e.g. from NHS body's Chair).

The Department is, however, of the view that there are good governance reasons why the NHS body should have some continuing means of input into decisions on the use of the New Charity's resources - to ensure that there is shared understanding of how the New Charity is meeting its charitable objects in the use of those resources.

Prior to completion of the conversion, the Department will require to see the following:

- a copy of the memorandum of understanding / agreement(s) in final form, and
- evidence of its due consideration and approval by the LHCH Board of Directors.

3.2 New Charity's governing instrument

As the new Charity will be a new entity, it will require a new governing document.

Assuming the advantages of corporate status (including limitation of contractual liability) are sought, that governing instrument will be

- Articles of Association, if the New Charity is to be a Company Limited by Guarantee (CLG); or
- A Constitution, if it is to be a Charitable Incorporated Organisation (CIO).

Aspects to consider include:

- the charitable objects: it will be essential for these to include the existing terms of the NHS Charity (to enable the transfer of the NHS Charity's assets to the New Charity), but it will be possible to include in addition wider objects for new money, if appropriate;
- which other provisions (if any) from the NHS Charity's existing governing document will be included;
- the New Charity's name - this can be the same as the NHS Charity;
- the composition and mechanism for the appointment of the Board of the New Charity;
- the extent of the involvement of the NHS body in the New Charity's governance arrangements; (this might involve the NHS body having a specific place on the Board of Directors to which it appoints - see above; and
- who the members of the New Charity will be; it is possible for the trustees and the members of the New Charity to be the same people.

When the governing instrument's terms have been decided upon, the New Charity can be created (so that it is ready to receive the transfer from the NHS Charity):

- If it is a CLG, this will require incorporation by application to Companies House and subsequent registration as a charity with the Charity Commission.
- If it is a CIO, only application to the Charity Commission is required.

Whether it is a CLG or CIO, the New Charity will need subsequently to apply to HM Revenue and Customs for recognition as a charity for tax purposes.

3.3 Engagement with regulators

The NHS Charity trustees will need to contact the regulators on the following occasions:

Department of Health:

Having decided in principle to start the conversion process, to notify the Department that they are proposing to re-structure and to give an estimate of the likely timescale for the transfer:

- Where the NHS body is the corporate trustee of the NHS Charity, this can be done by email or letter, with a copy of the relevant board minute.
- Where the NHS Charity has separate trustees, a joint letter from the NHS body's chair and the chair of the NHS Charity board is required.

At least 6 weeks before the projected transfer date, to provide:

- a copy of the memorandum of understanding / agreement(s) with NHS body, and evidence of its due consideration by the NHS body's board; and
- where there are separate trustees of the NHS Charity, a joint request from the NHS Charity's trustees and the NHS body's board to the Department for the Secretary of State to revoke the order which empowers him to appoint trustees for the NHS body; (the Department will confirm agreement to this,

once it is satisfied that suitable terms are agreed; the order will be made on or before the transfer date and take effect on an agreed date – say 3/6 months after the transfer date to allow the NHS Charity's trustees time to deal with all loose ends post-transfer; the trustees' appointments will terminate on that agreed date).

Charity Commission

At the outset:

- To notify the Charity Commission that it is proposing to re-structure
- To give an estimate of the likely timescale for the transfer.
- To advise the Commission whether the re-structure may require any Orders or Schemes so the process can be planned more efficiently.

HM Revenue & Customs

After registration of the New Charity with the Charity Commission, to register it with HMRC for tax purposes.

3.4 Other issues

Due diligence

An essential part of the transfer exercise will be for the NHS Charity trustees to carry out 'due diligence' on its current position:

- to identify all the NHS Charity's assets and liabilities (in particular contracts, investments and properties) and how these will transfer to New Charity (assignment / novation), and then to have discussions with any lead contractors, if necessary;
- to open new bank accounts for the New Charity; and

- to prepare a list of related tasks (e.g. charity re-branding, internal and external briefings, website re-development etc) and to allocate responsibility and include in the timetable.

Employees and pensions

The NHS Charity trustees will need to consider the status of the current staff of the NHS Charity - who may be employees of the NHS Charity trustees, staff of the NHS body who may be assigned (as all or part of their duties) to the NHS Charity, or independent contractors – in order to ascertain whether all or any of them will automatically transfer (by operation of the Transfer of Undertaking Regulations, known as 'TUPE') to the New Charity, and also what needs to be done in relation to their pension rights and related benefits.

If the staff do not transfer automatically to the New Charity, the NHS Charity trustees and the New Charity will need to consider how the New Charity will operate and whether, for instance:

- to enter into a secondment arrangement or service level agreement with the NHS body; or
- to recruit its own staff, after the transfer to it of the NHS Charity's assets.

Fundraising and Trustee relationships

In discussing the potential advantages and disadvantages of any change it must be borne in mind that LHCH is acting primarily in two capacities.. Firstly it is looking at the change as trustees of the trust fund, and what is best for the future of the Fund. Secondly, it is looking at the question from the point of view of LHCH and what is best for the future of LHCH and its relationship with the Fund. In our conclusions we should be clear in recording the outcomes of both debates.

Whilst it is important that LHCH debates this issue now, in line with guidance from DoH, the Trust is also undergoing a major review of our fundraising activities and charitable objectives. If it is decided that no change should be made to the current structure this is not an irrevocable decision. The question can be reviewed at any time in the light of any change of fundraising strategy on the part of the Fund.

4.Recommendation

That the LHCH Board of Directors note and discuss the contents of this paper and accept the recommendation of the Charitable Funds Committee not to pursue independent trustee status currently.

