



Department
of Health

HEALTH SERVICE BODIES' AUDITOR PANELS AND THEIR INDEPENDENCE

Consultation on secondary legislation for NHS
Trusts and Clinical Commissioning Groups under
the Local Audit and Accountability Act 2014

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Trusts and Clinical Commissioning Groups under
the Local Audit and Accountability Act 2014

**Prepared by the Accounts Branch, Group Financial Management Directorate,
Department of Health.**

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1. Overview

1. The Department of Health has developed draft regulations to implement new constitutional requirements for the audit committees (acting as auditor panels) of NHS Trusts and Clinical Commissioning Groups (CCGs). These are necessary to ensure audit committees are appropriately constituted to advise their governing board/body on the selection, appointment and maintenance of independent relationships with external auditors for their future audit contracts. The Department is now seeking views on these regulations. This consultation will run from 28 July to 12 September 2014.

2. Introduction

- 2.1 On 30 January 2014, the [Local Audit and Accountability Act 2014](#) (the Act) received Royal Assent and its main provisions will come into effect in April 2015. The Act is the final step in a programme of reforms to local audit that will help people hold local public bodies to account for their spending decisions and deliver estimated cost savings for the Government of £1.2 billion over the ten year period 2012-2020. Details of the cost and benefits of the reforms are set out in the original Impact Assessment.

<https://www.gov.uk/government/publications/local-audit-and-accountability-bill-local-audit-impact-assessment>

- 2.2 The Act abolishes the Audit Commission (from April 2015), transfers its residual functions and establishes a new public audit framework setting the local arrangements for auditing England's local public bodies, including NHS Trusts and Clinical Commissioning Groups ("health service bodies"). This replaces the centralised arrangements for the audit of local bodies and gives them the freedom to manage their own audit arrangements and appoint their auditors from an open and competitive market. NHS Foundation Trust arrangements are not included under the Act as they are included in other legislation (schedule 7 of NHS Act 2006).
- 2.3 Further information on the wider reforms and timescales affecting NHS Trusts and CCGs is set out in Annex A.
- 2.4 The Act specifies how all local public bodies must have auditor panels to advise them on the selection and the appointment of their auditor and maintaining an independent relationship with their auditor. The Act allows local public bodies to nominate a committee to operate as an auditor panel. The Department expects that as NHS Trusts and CCGs have existing audit committees, they will nominate them to operate as their auditor panels. The Act sets the requirement for those nominated audit committees to comply with the provisions relating to the auditor panels when acting in that capacity. Under the Act, regulations will set out provisions for the new constitutional requirements focusing on the auditor panel's (audit committee) membership and independence.

3. Objectives of proposed secondary legislation for the constitution of auditor panels and independence

- 2.5 The Department conducted a consultation between October and December 2013 on our proposals for the independence of audit committees of NHS Trusts and Clinical Commissioning Groups. Over 60 responses were received, reflecting the views of organisations affected and other stakeholders, and these views informed our development of the proposals. Provisions are also required on the number of members, appointment and remuneration of members. The Department has developed these in association with NHS England, Trust Development Authority and Health Financial Management Association, based on current practice.
- 2.6 Our response to the consultation response is published at:
- <https://www.gov.uk/government/consultations/new-requirements-for-nhs-audit-committees>
- 2.7 The proposed scope of regulations are given in section 3 below. The regulations largely follow current practice for audit committees, so if they are nominated to act as auditor panels by NHS Trusts and CCGs then the Department does not envisage that adopting the regulations will mean substantial changes to organisations existing committee arrangements.
- 2.8 The most likely date for health service bodies taking on their selection and appointment responsibilities is for the audit year 2017-18. The current audit contracts established by the Audit Commission run until this date, and following the Commission's abolition in April 2015 the management of the contracts will be transferred to an independent company set up by the Local Government Association. The regulations are being prepared now so that health service bodies can ensure that their audit committees (or if established separate auditor panels) are appropriately constituted to meet the requirements and prepare to commence their procurement for their external audit.

3. Objectives of proposed secondary legislation for the constitution of auditor panels and independence

- 3.1 The Local Audit and Accountability Act 2014 sets out the need to have an auditor panel and the core functions of this panel. Their main function is to oversee and advise on the maintenance of an independent relationship between the health service body and their auditor, and on the auditors selection and appointment. Clause 10 and Schedule 4 of the Act gives the Secretary of State the power to make further provision in regulations about the constitution and operation of independent auditor panels.
- 3.2 Proposed regulations that relate to NHS bodies under these powers will:
- i) require auditor panels to have a minimum of three members, and that at least two members (and a majority of the independent members) need to be present for the auditor panel to be quorate;

- ii) require that independent members of the auditor panel are appointed through an open and transparent process. NHS Trusts and CCGs will also be required to adopt a policy specifying the removal or resignation of panel members;
 - iii) make clear that NHS Trusts and CCGs may choose to pay their panel members, and it is expected that any arrangements are consistent with payments made to members of their other boards;
 - iv) give the auditor panel a further function, to advise on the adoption and content of a policy on awarding additional “non-audit” work to their appointed auditors;
 - v) require that the Chair of the auditor panel must be an independent member of the governing board or governing body. This is consistent with the regulations for CCGs set by the Health and Social Care Act 2012 and requires that a lay (independent) member of Governing Bodies will be the Chair of their audit committee. This is also consistent with the arrangements for NHS Trusts although they are not set in regulations;
 - vi) permits auditor panels to appoint independent members who are not on the governing board or governing body, and members of the governing board or governing body that do not meet the independence requirements. This is in recognition that some organisations may need to include such members to ensure that the panel/committee has the requisite knowledge and skills, and could, for example in CCGs, allow GP representation; and
 - vii) sets the broad definition of “independence” for auditor panel members and that the governing board or governing body determines whether a prospective member is independent, through consideration of a number of factors.
- 3.3 The approach set out in these draft regulations follow the Government’s aim to establish local auditor panels in a way that protects their independence, while minimising any bureaucratic burden on the NHS bodies and providing them with as much flexibility as possible in developing local arrangements.
- 3.4 The approach also follows the provision at section 10 in the Act that enables the Secretary of State to issue further guidance on the operation of auditor panels. The Department recognises that certain detailed matters, such as the appropriate skills and experience of independent panel members and the panel’s precise role in the appointment of auditors process, are better set out in guidance rather than specified in these regulations. The Department, NHS England and the Trust Development Authority intend to work closely with NHS Trusts and CCGs in developing the subsequent guidance.
- 3.5 It should be noted that all independent members of a health service body / board are paid as office holders, rather than as employees,. This means that although they receive any allowances through payroll, they are not under the same arrangements as for employees. Therefore the payment received by a non-executive member would not mean they would be an employee and disqualify them as a non-executive member of the auditor panel.
- 3.6 A specific issue relating to CCGs raised by the 2013 consultation was whether their lay members would be their only independent non-executive members. We intend that the regulations should allow a clinical doctor and/or registered nurse to also meet the criteria, in accordance with the position outlined in the consultation response. The ability to appoint

further independent members is also intended to allow CCGs (and NHS Trusts) to ensure they have the appropriate skills and experience.

4. Consultation questions

Question 1: Do you agree that auditor panel's role (regulation 5) in agreeing non-audit work is set in regulations.

Question 2: Do you have any comments on the proposed regulations?

The draft regulations are set out below.

Draft Regulations prepared for the purposes of consulting on provisions to the Local Audit and Accountability Act 2014.

STATUTORY INSTRUMENTS

2015 No.

NATIONAL HEALTH SERVICE, ENGLAND

THE LOCAL AUDIT (HEALTH SERVICE BODIES AUDITOR

PANEL AND INDEPENDENCE) REGULATIONS 2015

The Local Audit (Health Service Bodies' Auditor Panel and

Independence) Regulations 2015

<i>Made</i>	- - - -	<i>2014</i>
<i>Laid before Parliament</i>		<i>2014</i>
<i>Coming into force</i>	- -	<i>2015</i>

The Secretary of State for Health makes these Regulations in exercise of powers conferred by section 10(8) of, and paragraphs 3 and 4 of Schedule 4 to, the Local Audit and Accountability Act 2014.⁽¹⁾

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Local Audit (Health Service Bodies Auditor Panel and Independence) Regulations 2015 and come into force on xxx 2015.

(2) In these Regulations —

“the 2006 Act” means the National Health Service Act 2006⁽²⁾;

“the 2012 Act” means the Health and Social Care Act 2012⁽³⁾;

“the 2014 Act” means the Local Audit and Accountability Act 2014;

“additional remuneration” means any remuneration other than that which relates solely to a person’s role as a member of a governing board;

“CCG” means clinical commissioning group⁽⁴⁾;

“governing board” means

(a) in relation to an NHS trust⁽⁵⁾, the body of executive and non-executive directors⁽⁶⁾ of that trust; and

(b) in relation to a CCG, the governing body of a CCG⁽⁷⁾;

“a member of a CCG” has the meaning given in section 14A(4) of the 2006 Act;

“a non-executive member” means—

(a) in the case of a CCG—

(i) an individual who is a lay person⁽⁸⁾; or

(ii) a person who is not an employee or a member of the CCG; and

(b) in the case of an NHS trust, a person who is a non-executive director of that trust.

(3) These Regulations apply to health service bodies⁽⁹⁾.

⁽¹⁾ 2014 c. 2.

⁽²⁾ 2006 c. 41.

⁽³⁾ 2012 c. 7.

⁽⁴⁾ A clinical commissioning group is a body established under section 14D of the 2006 Act. Section 14D was inserted into the 2006 Act by section 25(1) of the 2012 Act.

⁽⁵⁾ An NHS trust is a body established under section 25(1) of the 2006 Act.

⁽⁶⁾ See paragraph 16 of Schedule 7 to the 2006 Act as to directors of NHS trusts.

⁽⁷⁾ See section 14L of the 2006 Act for the meaning of “governing body”. Section 14L was inserted into the 2006 Act by section 25(1) of the 2012 Act.

⁽⁸⁾ “Lay person” has the meaning given in section 14N(6) of the 2006 Act.

⁽⁹⁾ “Health service bodies” has the meaning given in section 3(9) of, and paragraph 4 of Schedule 13 to the 2014 Act. [These provisions have not been commenced in so far as they relate to special trustees appointed as mentioned in section 212(1) of the 2006 Act and trustees of NHS trusts appointed under paragraph 10 of Schedule 4 to that Act.]

Members of auditor panels

- 2.—(1) The following provisions apply to the auditor panel of a health service body.
- (2) An auditor panel must have a minimum of three members.
- (3) A person may not be appointed as an independent member of an auditor panel unless—
- (a) a vacancy for an independent member has been advertised in such manner as the health service body considers is likely to bring it to the attention of the public;
 - (b) the person has submitted an application to fill the vacancy to the health service body; and
 - (c) the person's appointment has been approved by a majority of the members of the health service body's governing board .
- (4) The health service body must adopt a set of rules with regard to the removal or resignation of members of the auditor panel, or of its chair, and may from time to time revise any of those rules.

Remuneration or allowances of auditor panel members

3. The health service body may pay members of the auditor panel such remuneration or allowances as the body may determine.

Proceedings and validity of proceedings of auditor panels

4. In relation to a meeting of the auditor panel—
- (a) the quorum is two; and
 - (b) the proceedings of the panel are valid if the majority of the members present at the meeting are independent members of the panel.

Further functions of auditor panels: Non-audit services

- 5.—(1) The auditor panel must advise the health service body on—
- (a) adopting a policy on the purchase, from the health service body's local auditor, of services ("non-audit services") that are not part of the carrying out of the local auditor's functions under the 2014 Act; and
 - (b) the contents of such a policy.
- (2) The policy mentioned in paragraph (1) must include—
- (a) the circumstances or manner in which the health service body may or may not purchase non-audit services from the body's local auditor; and
 - (b) the circumstances or manner in which the health service body may ask the auditor panel for advice.
- (3) In this regulation, "non-audit services" in relation to a health service body means services provided by the health service body's local auditor to the body other than in the exercise of the functions of the local auditor under the 2014 Act.

Independent requirements of the auditor panel

- 6.—(1) The auditor panel of a health service body must have—
- (a) a chair who is an independent non-executive member of the governing board; and
 - (b) a majority of independent non-executive members.
- (2) The auditor panel of a health service body may include—
- (a) members of the governing board who do not meet the requirements of "independent" determined in accordance with regulation 7; or
 - (b) persons who meet the requirements of "independent" determined in accordance with regulation 7 who are not members of the governing board.

Determination of the meaning of independent

- 7.—(1) The governing board must determine whether a prospective member of the auditor panel is independent, by—

- (a) considering whether the person has relationships or circumstances which are likely to affect, or could affect his or her judgement; and
 - (b) having regard to the factors mentioned in paragraph (2).
- (2) The factors referred to in paragraph (1)(b) are whether the person —
- (a) has been a member or an employee of the health service body within the last five years immediately preceding the date of the proposed appointment;
 - (b) in the case of a CCG, has been, within the period of five years immediately preceding the date of the proposed appointment, an employee of a member of that group;
 - (c) has had, within the period of three years immediately preceding the date of the proposed appointment—
 - (i) a direct material business relationship with the health service body; or
 - (ii) an indirect material business relationship as a partner, senior employee of a body that has such a relationship with the health service body;
 - (d) has, within the period of three years immediately preceding the date of the proposed appointment—
 - (i) received additional remuneration from the health service body;
 - (ii) participated in the health service body's performance related pay scheme; or
 - (iii) is a member of the health service body's pension scheme (other than the NHS pension scheme).
 - (e) has close family ties with any of the health service body's advisors, directors, members or senior employees;
 - (f) holds a cross-directorship or has significant links with other auditor panel members or board members of the health service body through involvement in other companies or bodies;
 - (g) has served on the board of the health service body for a period of more than 9 years beginning with the date of his or her first appointment [as a member of the board]
 - (h) is an appointed representative of the health service body's medical or dental school provided by a university.
- (3) For the purposes of paragraph (2)(c), a material business relationship means what the governing board determines to constitute such a relationship.
- (4) For the purposes of paragraph (2)(f), a person holds a cross-directorship where-
- (a) he or she is a prospective member of a health service body's auditor panel and serves as a member of another organisation's governing board, audit committee or auditor panel; and
 - (b) at the same time, a member of the governing board at the organisation referred to in sub-paragraph (a) serves as a member of the governing board or the auditor panel of the health service body.

Signatory text

Date

Parliamentary Under Secretary of State
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under the Local Audit and Accountability Act 2014. They make provision for the constitution of auditor panels in respect of health service bodies.

Regulation 2 makes provision for membership of auditor panels and in particular the minimum number of members of such a panel. Regulation 2(2) makes provision for the appointment of members of the auditor panel. Regulation 2(4) makes provision for the removal and resignation of members of the auditor panel and of its chair.

Regulation 3 makes provision for remuneration and allowances of auditor panels.

Regulation 4 makes provision for the proceedings and validity of proceedings of the auditor panel.

Regulation 5 makes provision for further functions of auditor panels. In particular, regulation 5(1) makes provision for the auditor panel to advise the health service body on adopting a policy of the purchase of “non-audit services” from the health service body’s local auditor and the contents of such a policy.

Regulation 6 makes provision for “independent requirements” in respect of the chair and other members of the auditor panel.

Regulation 7 sets out the factors that the health service body must have regard to when determining whether a prospective member of the auditor panel is independent.

An impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

5. How to give your views on the proposed new requirements

- 5.1 The consultation is being run, as far as is practical, in accordance with the Cabinet Office Code of Practice on Consultations. We welcome all comments from organisations, groups or individuals. The proposals in this consultation document apply to England only.
- 5.2 To give your views you may complete the online consultation response document at: <http://consultations.dh.gov.uk>
- 5.3 Alternatively, there is a response form on the GOV.UK website which can be either printed and sent by post to:

Audit Consultation, Department of Health, Room 2S12, Quarry House,
Quarry Hill, Leeds, LS2 7UE

Or sent electronically by e-mail to: auditconsultation@dh.gsi.gov.uk

- 5.4 The closing date for the consultation is Friday 12 September 2014. It will help us to analyse the responses if respondents fill in the online consultation response document. Responses that do not follow the structure of the questionnaire will be considered equally. It would also help if responses were sent in Word format, rather than in pdf format.

Annex A: Outline expected Timetable for NHS Trusts and CCGs

The Local Audit and Accountability Act 2014 abolishes the Audit Commission on 1 April 2015. In relation to the management of the existing audit contracts there will be a transitional body set up as an independent company by the Local Government Association. This company will appoint auditors (for any new bodies established), regulate the audit work, monitor quality, manage audit relationships and set scale of audit fees. The Audit Commission's work on the Code of Audit Practice and technical guidance will pass to the National Audit Office. The National Fraud Initiative work will pass to the Cabinet Office and the Counter-fraud work will pass to CIPFA.

While the local appointment of auditors will possibly not take place until 2017-18, there are a number of milestones NHS Trusts and CCGs should be aware of in preparation for their own appointment of audit panels and preparing for the other aspects of the Act.

July – September 2014	Consultation on Health Service Bodies Auditor Panel regulation proposals
November 2014	National Audit Office (NAO) publishes new Code of Audit Practice to replace the Audit Commission's code
December 2014	Health Service Bodies' Auditor Panel Regulations SI to come into effect
January – February 2015	Guidance on appointment of Health Service Bodies Auditor Panels developed with affected bodies
March 2015	Guidance on appointment of Health Service Auditor Panels issued
March 2015	Audit Commission approve the level of audit fees for 2014-15 and 2015-16
April 2015	Audit Commission abolished and Transitional Body takes over management of the current audit contracts
January – February 2016	NHS Trusts and CCGs to comply with local audit regulations and appoint auditor panels
March 2016	Transitional Body approve level of audit fees for 2016-17
Summer 2016	Local procurement of auditors for 2017-18 from approved list
December 2016	Local auditors to be in place by 31 December
April 2017	Commencement of audit contracts for the 2017-18 financial year.