



BRIEFING PAPER

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NHS (Charitable Trusts Etc.) Bill

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Summary

On 24 June 2015 Wendy Morton presented the [NHS \(Charitable Trusts Etc.\) Bill \(Bill 11 2015-16\)](#) having come fifth in the Private Members' Bill ballot. The Bill received its [Commons Second Reading on Friday 6 November 2015](#), where the Government and the Labour Opposition confirmed their support for the Bill. No amendments were tabled during a short debate at [Committee stage on 2 December 2015](#). The Bill is due to receive its Commons Report Stage on 22 January 2016.

The Bill aims to reduce the Department of Health's involvement in NHS charities (charities linked to NHS bodies). Specifically it makes provision for the removal of the Secretary of State's long-standing powers (currently under the [National Health Service Act 2006](#), as amended) to appoint trustees. The Bill also contains provisions to ensure that a new independent Great Ormond Street Hospital Children's Charity can receive royalties in relation to performances or publications of the play *Peter Pan* (JM Barrie gave the hospital rights to the royalties in 1929). This right is currently conferred on the special trustees appointed by the Secretary of State for the existing NHS Charity and the Bill would transfer these rights to the new Great Ormond Street Hospital Children's Charity.

NHS charities' funding supports innovation and research and enables the provision of additional facilities, services and equipment. As well as raising their own funds, they are also the automatic recipients of money the public donate to NHS bodies. Like the hospitals they are linked with the history of many hospital charities pre-dates the creation of the NHS in 1948.

There are currently around 260 NHS charities with considerable variation of size across the sector. The top 30 NHS charities accounted for over two-thirds of total NHS charity income/assets. The vast majority of NHS charities use the corporate trustee model. The Secretary of State has appointed separate trustees to 20 NHS charities, including most of the largest charities. Collectively NHS charities hold around £2 billion of assets and receive a combined annual income of around £330 million.

The Association of NHS Charities and a number of individual NHS charities have called for reform. They have said that the current legislative framework limits NHS charities' freedom to grow and better support their beneficiaries. There are also concerns that Ministerial involvement in these charities may discourage donors, and could be seen to undermine the independence that is required by charity law.

The Government supports the Bill and the Department of Health have prepared [Explanatory Notes](#) for the Bill, with the consent of Wendy Morton, which provide further detail on each part of the Bill.

As well as providing a summary of the Bill, this briefing includes further information on the role and legal status of NHS charities, and on proposals to reform their regulation (see section 2). Section 3 of this briefing sets out further background on the relationship between *Peter Pan* and Great Ormond Street Hospital Children's Charity. Section 4 provides an overview of the wider role of charities working with the NHS, although the Bill would not affect these independent charities.

1. The Bill

1.1 Introduction

Having come fifth in the Private Members' Bill ballot, Wendy Morton presented a Bill intended to remove the Department of Health's involvement in NHS charities (NHS charities are charities regulated under charity law, but which are also linked to NHS bodies and bound by NHS legislation¹). Specifically:

- Clause 1 of the Bill makes provision to remove the Secretary of State's powers (under the *NHS Act 2006*) to appoint trustees to certain NHS bodies in England that can hold charitable property.
- Clause 2 contains supplementary provisions for the Secretary of State to make regulations to transfer charitable property from the appointed trustees back to the board of the relevant NHS trust or NHS foundation trust, who would then act as the corporate trustee of that charitable property.
- Clause 3 would amend the [Copyright, Designs and Patents Act 1988](#). This would transfer to the recently established Great Ormond Street Hospital Children's Charity the rights in perpetuity to royalties or other payments in relation to performances or publications of the play *Peter Pan* by JM Barrie. These rights are currently conferred on special trustees (appointed by the Secretary of State) for Great Ormond Street Hospital and would instead be conferred on the new independent charity.

The Department of Health, which supports the Bill, has commented on the rationale for the Bill, noting concern in the charity sector about the current regulation of NHS charities. In particular, there is concern that the "dual regulation" of NHS charities under NHS legislation and charity law could:

- limit these charities' freedom to grow and develop their charitable activity to best support their beneficiaries;
- be burdensome;
- make it difficult for such charities to achieve and demonstrate independence from Government.

As a result, the previous Government committed in 2014 to move towards a model of greater independence for NHS charities and away from the Secretary of State appointing bodies of separate trustees for NHS bodies.²

The Explanatory Notes to the Bill state that Great Ormond Street Hospital Children's Charity was keen to take advantage of the new policy on independence for NHS charities. The existing NHS Charity transferred most of its undertaking to an independent charitable company. However, the original NHS Charity has been kept in existence to avoid its statutory rights to royalties from *Peter Pan* being lost (because legislation specifies that the "*Peter Pan* rights", bestowed on

¹ See section 2, page 8, of this briefing for the Charity Commission's working definition of a NHS charity.

² DH, [Review of the regulation and governance of NHS charities: Government response to consultation](#), March 2014

Great Ormond Street Hospital by JM Barrie, are vested in special trustees appointed for the Hospital).

1.2 Clauses 1 and 2: Removal of power to appoint trustees and consequential provision

Clause 1 makes provision for the removal of the Secretary of State's powers under the *NHS Act 2006* to appoint trustees for NHS bodies in England, and makes amendments to primary legislation consequential on the removal of those powers. In this connection, **clause 2** would provide a power for the Secretary of State to provide by order for the transfer of trust property from trustees appointed by the Secretary of State to the relevant NHS trusts and NHS foundation trusts. This would enable the Secretary of State to ensure that, prior to the appointment powers being revoked, any trust property held by trustees appointed for NHS bodies, which have not been transferred to an independent charity, could be transferred from the appointed trustees to the NHS trust or NHS foundation trust for which the trustees were appointed. The Board of that NHS trust or NHS foundation trust would then act as corporate trustee of that trust property.

Further commentary on these clauses is provided in the Explanatory Notes to the Bill:

Clause 1: Removal of Secretary of State's powers to appoint trustees

28 Subsection (1) repeals the Secretary of State's power to appoint trustees to certain NHS bodies in England that can hold charitable property. Those bodies are NHS foundation trusts, the NHS Commissioning Board (informally known as NHS England), clinical commissioning groups, and special health authorities. Legislation already provides for the repeal of the power of the Secretary of State to, by order, appoint trustees for NHS trusts (section 179(2) of the Health and Social Care Act 2012). This repeal has not yet commenced (but will be commenced at the same time as the Secretary of State's powers to appoint trustees to the NHS bodies covered by this bill are repealed).

29 Subsection (2) confers on the Secretary of State a power to make regulations to make provision in consequence of the repeal of the appointment of trustee powers.

30 Subsections (3) to (7) sets out the general provisions about the powers to make regulations under subsection (2) and the Parliamentary procedures that apply to such regulations.

Clause 2: Section 1: supplementary provision

31 This clause confers on the Secretary of State a power to make regulations to transfer charitable property from the trustees of an NHS trust or an NHS foundation trust to that trust, and sets out what further provision the regulations may make and what Parliamentary procedure will apply to them. This power will enable the Secretary of State to ensure that prior to the repeal of his powers to appoint trustees by clause 1, and, as a result, trustees' appointments being revoked, any trust property held by

trustees appointed for an NHS trust or NHS foundation trust can be transferred back to the trust for which the trustees were appointed. The Board of the NHS trust or NHS foundation trust would then act as the corporate trustee of that charitable property. This power applies only to transfers from trustees appointed for NHS trusts and NHS foundation trusts, (rather than trustees appointed for other NHS bodies) because, in practice, the Secretary of State has only appointed trustees for these two types of NHS body.

32 Where the Secretary of State exercises this regulation making power, subsection (2) ensures that any discretion given to the trustees in legislation is exercisable by the NHS trust or NHS foundation trust following the transfer of the charitable property to them. This provision is subject to subsections (3) and (4) which give a person to whom trust property is transferred under this clause the discretion to apply that property, or income arising from it, for “any purposes relating to the health service”. This applies even where the terms of the original trust were more restrictive, for example where property was held by trustees wholly or mainly for the hospitals for which they were appointed or for purposes relating to hospital services.

33 Subsections (5) and (6) apply the provisions of section 217 of the National Health Service Act 2006 to subsection (1). This enables regulations made under subsection (1) to make provision for transfers of trust property to include rights and liabilities arising from that property, for the effect of any such transfer on third parties, and in relation to stamp duty.³

Further background on the role and legal status of NHS charities, and on proposals to reform their regulation can be found in section 2 of this briefing.

1.3 Clause 3: Transfer of rights to *Peter Pan* royalties

Clause 3 amends the *Copyright, Designs and Patents Act 1988* to ensure that the new independent charity for Great Ormond Street Hospital can receive royalties in relation to performances or publications of the play *Peter Pan*. These right are currently conferred on special trustees for Great Ormond Street Hospital, who are appointed by the Secretary of State. The clause would change the identity of the charity on whom the right to royalties is conferred. The following commentary on these clauses is provided in the Explanatory Notes to the Bill:

Clause 3: Transfer of right to royalties relating to “Peter Pan”

34 This clause makes the necessary amendments to sections 301 and 304 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988 to provide for the transfer of the rights in perpetuity to royalties, or other remuneration as agreed, in respect of the public performance, commercial publication or communication to the public of the play “Peter Pan” by J.M. Barrie. These right are currently conferred on special trustees (appointed by the Secretary of State) for Great Ormond Street

³ [Explanatory Notes to Bill 11 2015-16](#)

Hospital and will instead be conferred on the new independent charity for Great Ormond Street Hospital.⁴

Further background on Great Ormond Street Children's Charity and *Peter Pan* can be found in section 3 of this briefing.

1.4 Territorial extent

The provisions of the Bill relating to appointment of trustees and consequential provision (clauses 1 and 2 and Schedule 1) would extend to England and Wales. However the powers would only be removed in respect of trustees appointed by the Secretary of State for Health in relation to English NHS bodies. Clause 3 and the remainder of the provisions of the Bill, relating to the "*Peter Pan* rights", would extend to England, Wales, Scotland and Northern Ireland.

⁴ *Ibid.*

2. Background on NHS charities

The working definition of NHS charity employed by the Charity Commission is that:

- the charity is established for charitable purposes relating to the NHS; and
- its trustee arrangements have been established by the Secretary of State for Health/Welsh Ministers under NHS legislation; and
- the individuals responsible for ensuring that trustee duties are fulfilled are appointed by the NHS by one means or another.⁵

There are currently around 260 NHS charities with considerable variation of size across the sector. Collectively NHS charities hold around £2 billion of assets and receive a combined annual income of around £330 million but the 30 biggest NHS charities accounted for over two-thirds of total NHS charity income/assets.⁶ The Department of Health review of NHS charities, published in 2012, noted that the five biggest NHS charities accounted for over a third of the total. These five are: Great Ormond Street Hospital Children's Charity; University College London Hospitals Charities; Barts and the London Charity; The Christie Hospital Charitable Fund; and Guy's and St Thomas' Charity.⁷

Great Ormond Street Hospital Children's Charity, has the largest income – £64 million in 2010-11, equivalent to around 20% of the Trust's income from the NHS budget – its income is greater than the next four largest NHS charities combined. At the other end of the scale the majority of NHS charities report an annual income of less than £1 million.

The 2012 review noted that for almost all NHS charities, the majority of their income comes from voluntary donations. One notable exception is Guy's and St Thomas' Charity, which holds the largest assets – over £500 million, much of the wealth dating back to the 1700s – and earns significant investment income.⁸

The default position for NHS charities is that property is held on trust by the NHS body itself acting as a corporate trustee. However, the Secretary of State has the power to appoint special trustees or bodies of individual trustees to NHS bodies. The Explanatory Notes to the Bill provide background on how NHS charities are currently regulated:

NHS charities are charities regulated under charity law, but which are also linked to NHS bodies and bound by NHS legislation. They are charitable trusts established under NHS legislation and have as their trustee an NHS body, such as a foundation trust, or trustees appointed by the Secretary of State for an NHS body. The Secretary of State also has statutory powers to transfer trust

⁵ The Charity Commission includes charities linked to NHS Foundation Trusts in its working definition of NHS charities. See Charity Commission, [NHS charities guidance](#), February 2012

⁶ [Explanatory Notes to Bill 11 2015-16](#)

⁷ DH, [Review of the regulation and governance of NHS Charities, Summary Report](#), October 2012

⁸ *Ibid.*

property NHS charities hold. As such they are distinct from independent charities established solely under charity law.

Funds donated to the NHS must be held separately from exchequer funding provided by the taxpayer. NHS bodies' statutory remit is derived from NHS legislation, which allows NHS bodies to hold property on trust both for the purposes of their linked NHS body (usually an NHS trust or foundation trust), or for any purposes relating to the health service. NHS bodies which can hold charitable funds are NHS trusts, special health authorities, foundation trusts, clinical commissioning groups, and the NHS Commissioning Board (known informally as NHS England). The default position is that the board of the NHS body acts as corporate trustee of the charitable funds, though those charitable funds may also be held by trustees appointed by the Secretary of State for the NHS body in question.⁹

Further information of the different governance models of NHS charities can be found in the Department of Health review of NHS charities, published in 2012.¹⁰

2.1 Background to the Secretary of State's statutory powers to appoint trustees

The vast majority of NHS charities use the corporate trustee model but the Secretary of State has appointed separate trustees to 20 NHS charities, including most of the largest charities. The Explanatory Notes to the Bill explain that corporate trustees who considered that the appointment of separate trustees might be appropriate, e.g. to separate trustee and exchequer responsibilities, or to harness expertise in administration of charitable funds, could approach the Department of Health to ask the Secretary of State to use his powers to enable the appointment of separate trustees.¹¹

Trustees appointed by the Secretary of State have powers to hold trust property on the same terms as NHS bodies. The Explanatory Notes provide a brief history of the development of the Secretary of State's powers to appoint trustees:

Since 1973, the Secretary of State has had powers to appoint so-called "special trustees" to manage charitable property on behalf of hospital boards; in 1990 powers for the Secretary of State to appoint trustees in relation to NHS Trusts were enacted, which have since been extended to the other NHS bodies. These powers are now set out in the National Health Service Act 2006 (as amended).¹²

The Charity Commission 2012 guidance for NHS charities states that "NHS legislation from the *National Health Service Act 1946* onwards has provided for the Minister of Health and his successors [i.e. the Secretary of State for Health] to appoint trustees to hold charitable funds."¹³

⁹ [Explanatory Notes to Bill 11 2015-16](#)

¹⁰ DH, [Review of the regulation and governance of NHS Charities. Summary Report.](#) October 2012

¹¹ [Explanatory Notes to Bill 11 2015-16](#)

¹² *Ibid.*

¹³ Charity Commission, [NHS charities guidance](#), February 2012, page 8

The Secretary of State has directed the National Health Service Trust Development Authority, a special health authority that oversees NHS Trusts on behalf of the Department of Health, to carry out his functions relating to the appointment and removal of trustees, in accordance with orders made by the Secretary of State under the *NHS Act 2006*.¹⁴

2.2 Proposals for change

The Department of Health conducted a review of NHS charities in 2011, consulting publicly on its proposals in 2012. The 2012 consultation set out the rationale for reform:

A number of NHS Charities and their representative bodies and interest groups have called for reform. They raised concerns that the NHS legislative framework, and how it is applied, limits these charities' freedom to grow and best support their beneficiaries. The issue of Ministerial involvement in particular may be controversial with donors and the public, and could be seen to cut across the independence of charities that is required by law.

Ministerial and departmental considerations also prompted the review. The Government is committed to reducing regulation, to promoting localism and the Big Society, and also to freeing the NHS from central government controls. The Department of Health needs to take appropriate opportunities to manage with reduced resources.¹⁵

As a result of this review the Government committed in 2014 to move towards a model of greater independence for NHS charities and away from the Secretary of State appointing bodies of separate trustees for NHS bodies. In March 2014 the Department of Health published its consultation response following its review of the regulation and governance of NHS charities. The Department's overall conclusion was that it is appropriate to allow those NHS charities who wish to move to independent status to do so and to facilitate this, subject to suitable safeguards being adopted and a suitable process followed:

In view of the fact that the majority of respondents supported the principle of the proposals for the transition of NHS charities to independent Charity status, the Department believes that it is appropriate to allow those who wish to follow this course to proceed subject to the appropriate safeguards and process being followed. At the same time DH will assure that those organisations that wish to retain the status of an NHS Charity may do so.¹⁶

The majority of respondents to the consultation supported having a process to allow NHS charities to move to independent charity status under charity law.¹⁷ However, a large number of respondents had

¹⁴ *National Health Service Trust Development Authority (Establishment and Constitution) Order 2012* S.I. 2012/901 (as amended by S.I. 2013/235 and 2013/260) and the *National Health Service Trust Development Authority Directions 2013* (as amended).

¹⁵ DH, [Review of the regulation and governance of NHS Charities, Summary Report](#), October 2012

¹⁶ DH, [Review of the regulation and governance of NHS charities: Government response to consultation](#), March 2014

¹⁷ As set out in the *Charities Act 2011*, which consolidated earlier Acts of 1993 and 2006 (though note that certain parts of the *Charities Act 2006* remain in force).

significant reservations about the process, particularly in relation to the transitions for trustees and property. There were also concerns on the potential complexity of the process for transition in relation to pensions, VAT and the cost of legal advice.

The Explanatory Notes to the Bill provide the following background:

Charities that decided to become independent would no longer be NHS charities, but independent charities, regulated solely by the Charity Commission, and responsible for appointing their own trustees. The Department of Health put safeguards in place to preserve the unique relationship between the charities and the trusts they are associated with. The funds that are transferred to the new charity can only be used for the same charitable purpose as originally intended; and the NHS body should have some involvement in the new charity's governance arrangements, for example having a specific place on the board. The Department of Health and the Association for NHS Charities have published detailed guidance for charities on the policy.¹⁸

As noted above, the Department of Health and the Association of NHS Charities published guidance for NHS charities on conversion to independent status in March 2015.¹⁹ This noted plans for the Government to legislate to remove the Secretary of State's power to appoint trustees. The Explanatory Notes provide further background on the Government's intentions for the future of NHS charities, and how the Bill would help to achieve them:

The Department of Health stated that "where trustees have been appointed by the Secretary of State, the provisions for these appointments will be repealed as soon as possible, and any such arrangements would fall away".

The Department of Health has said that it will not compel NHS charities with trustees appointed by the Secretary of State to go through the process of setting up an independent charity, as they have the choice of reverting to the NHS body acting as corporate trustee if they so wish.

The Department of Health stated that it will not appoint trustees to any further NHS bodies that are not already named in the existing trustee appointment orders, but will continue to enable the replacement of trustees for those who currently have Secretary of State appointed trustees, until the trustee appointment powers are repealed.

This bill, therefore, provides for the powers of the Secretary of State to appoint trustees for NHS bodies (in England) to be repealed to fulfil this policy intention, and makes related and consequential provision.²⁰

¹⁸ [Explanatory Notes to Bill 11 2015-16](#)

¹⁹ DH and Association of NHS Charities, [NHS charities: Conversion to independent status - outline guidance](#), March 2015; the [Association of NHS Charities](#) was founded in 2000 as an informal group of the largest NHS charities and now represents 106 charities. Its members are largely charitable trusts associated with major hospitals.

²⁰ [Explanatory Notes to Bill 11 2015-16](#)

3. Background on Great Ormond Street Children’s Charity and *Peter Pan*

JM Barrie, who created the character “Peter Pan”, gave the rights to the performances and publications of the stage play to Great Ormond Street Hospital in 1929 (and this was later confirmed when he died in 1937).

Since then, the hospital has received royalties in relation to performances or publications of the play *Peter Pan*, as well as other agreed reimbursements from the sale of *Peter Pan* books and other products. [Great Ormond Street Hospital Children’s Charity website](#) states that the rights have been valuable in financial terms, and also as a symbol and icon for the hospital.²¹ The Explanatory Notes to the Bill set out further detail on the “*Peter Pan* rights”, and how the Bill would ensure they can continue to be used to support Great Ormond Street Hospital:

Great Ormond Street Hospital Children’s Charity

14 JM Barrie’s gift of the rights to “Peter Pan” in 1929 has provided a significant source of income to Great Ormond Street Hospital Children’s Charity. The copyright first expired in the UK and the rest of Europe in 1987, 50 years after the death of JM Barrie. However, Lord Callaghan successfully proposed an amendment to the Copyright, Designs and Patents Act 1988, giving Great Ormond Street Hospital Children’s Charity the unique right to royalties from publications and performances of “Peter Pan” in perpetuity.

15 Great Ormond Street Hospital Children’s Charity were keen to take advantage of the new policy on independence for NHS charities, but recognised a difficulty in doing so, because the Copyright, Designs and Patents Act 1988 specifies that the “Peter Pan rights” are vested in special trustees appointed under NHS legislation for Great Ormond Street Hospital. The Department of Health made an agreement with Great Ormond Street Hospital whereby the existing NHS charity transferred most of its undertaking by assignment to an independent charitable company limited by guarantee. The Department of Health also appointed that new charitable company as corporate special trustee of the existing NHS charity under section 212 of the National Health Service Act 2006 in respect of the “Peter Pan rights”.

16 At present the Great Ormond Street Hospital Children’s Charity is unable to fully complete the conversion to an independent charity, as the NHS charity has to be kept in existence until the Copyright, Design and Patents Act 1988 is amended, to avoid its statutory rights being lost.

This causes a number of complications for the charity. Most significantly, according to the charity, it creates a significant risk that legacies to the charity may fail, as a result of which significant charitable donations could be lost to the NHS provision of

²¹ JM Barrie asked the hospital never to reveal the actual income received and they have always respected this wish.

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healthcare at Great Ormond Street Hospital. In addition, this half-way house complicates the charity's position.

As it is operating two charities side-by-side, it has a duplication of governance arrangements, separate accounts and may need to submit duplicate returns to the Charity Commission.²²

Further information on the relationship between *Peter Pan* and the hospital can be found on the [Great Ormond Street Hospital Children's Charity website](#).

²² *Ibid.*

4. The role of independent charities in the NHS

In addition to “NHS charities” (charities which are specifically established for charitable purposes relating to the NHS and linked to NHS bodies), there are also a large number of independent charities, such as Macmillan Cancer Support or the British Heart Foundation, that work with the NHS. Even the largest NHS charities are small in comparison with well-known independent health charities. This section provides an overview of the wider role of charities working with the NHS, although the Bill would not affect these independent charities.

There has been no formal assessment regarding the role of charity and voluntary organisations in delivering services with the NHS, but the Government has said that these organisations play a critical role in health and social care. In particular, they are important providers of services and advocates for patients and carers.²³ The role of charities in funding health care provision is also expected to increase given the financial pressures facing the NHS.²⁴

The delivery of hospice care to meet palliative care needs is an example of a part of the healthcare system that has for many years operated as a mixed economy, in which charitable providers work in close partnership with the public, private and voluntary sector. Specialist palliative care in England is currently provided through a combination of NHS and voluntary sector provision, with adult hospices receiving on average around 35% of their funding from the NHS.²⁵ Further background on the history of charitable involvement in health services can be found in Meakin, R., *Charity in the NHS: Policy and Practice* (Jordans, 1999).

While it is not possible to say how many charities are contracted to provide NHS-funded services, the latest available data from the [2015 UK Civil Society Almanac](#) indicates that in 2012/13 there were 6,532 charities operating in the health sector with a total income of £4,445 million (“health sector” excludes research but includes: organisations involved in providing health care, administration of health care services, and health support services; this represented 4.1% of all registered charities).

The vast majority of NHS services are purchased from NHS providers (NHS Trusts and Foundations Trusts), however over £10 billion of these types of services were purchased from non-NHS healthcare providers in 2014-15. These non-NHS providers include Local Authorities, voluntary sector organisations and private sector providers. The following table, adapted from data in the Department of Health Annual Report for

²³ HC Deb 17 July 2013 c720W

²⁴ The [NHS Five Year Forward View](#) (October 2014) contained a commitment to stronger partnerships with charitable and voluntary sector organisations.

²⁵ [Commissioning guidance](#) on specialist palliative care services published by Marie Curie Cancer Care and the National Council for Palliative Care (December 2012)

2015/16 provides a breakdown of this spending and compares it to the previous year.

Purchase of healthcare from charities and other non-NHS providers, breakdown 2013-14 and 2014-15:

	2013-14 £m	2014-15 £m
Independent Sector Providers	6,467	6,913
Voluntary sector	510	526
Local authorities	2,473	2,927
Total spend on all non NHS bodies	9,450	10,367
Total Revenue Departmental	106,495	110,554
Spend with voluntary sector as % of	0.5%	0.5%
Spend with private sector as a % of	6.1%	6.3%
Spend on all non-NHS bodies as a % of total RDEL*	8.9%	9.4%

*Revenue Departmental Expenditure Limit

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