

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3 - Regulation of Health and Adult Social Care Services**

##### **Chapter 5 – Health special administration**

916. This Chapter provides for a health special administration regime, based on insolvency legislation, for the purposes of securing the continued provision of NHS services provided by a company that becomes insolvent. The regime is intended to enable commissioners to secure continued access to NHS services to meet the needs of their communities.
917. Health special administration provides an alternative to the corporate insolvency procedures set out in the Insolvency Act 1986 that would otherwise apply if a company providing NHS services becomes insolvent.
918. The health special administration regime applies only to “relevant providers” which are defined as companies providing NHS services to which licence conditions have been applied by Monitor for the purposes of ensuring continuity of NHS services. Part 4 of the Act makes separate provision for trust special administration for unsustainable foundation trusts, including arrangements for securing continuity of NHS services in line with requirements determined by commissioners.
919. **Chapter 6** makes provision about financial assistance in cases of health special administration or trust special administration (for NHS foundation trusts under Chapter 5A of Part 2 of the NHS Act).

##### **Section 128 - Health special administration orders**

920. Health special administration could commence only by an order of the court on an application made by Monitor.
921. A health special administration order may only be sought against a company providing NHS services that is subject to specific licence conditions set by Monitor, under section 97(1)(i), (j) or (k), that relate to the continued provision of NHS services. Section 130 makes provision for the health special administration regulations to set out requirements for Monitor to publish and maintain details of relevant providers that are potentially within the scope of the health special administration regime.
922. Where the court makes a health special administration order, a health special administrator is appointed (*subsection (1)*). The health special administrator is an officer of the court and in carrying out their functions acts as the company’s agent (*subsection (4)*). Only a qualified insolvency practitioner could be appointed as a health special administrator (*subsection (5)*).
923. Under *subsection (6)* the health special administrator is obliged to manage the affairs, business and property of the provider to achieve the objective of health special administration as quickly and efficiently as reasonably practicable.

924. In doing so, the health special administrator must ensure that the provider continues to comply with the requirements and conditions of the Care Quality Commission's provider registration regime (provided for in Part 1, Chapter 2 of the Health and Social Care Act 2008).
925. The health special administrator is also required to act in a manner that, insofar as it is consistent with the objectives of a health special administration, protects the interests of the creditors of the provider as a whole, and, subject to those interests, the interests of its members.

### ***Section 129 - Objective of a health special administration***

926. *Subsection (1)* provides that the objective of health special administration is to secure the continued provision of certain NHS services provided by relevant providers, so that it becomes unnecessary for the health special administration order to remain in place. These services are those determined by the relevant commissioners in accordance with the criteria set out in the health special administration regulations.
927. *Subsection (2)* provides that the objective of health special administration may be achieved by either rescuing the provider as a going concern, so that it was able to continue in business, and/or the transfer of all or some of the services it provided to one or more alternative providers.
928. The section provides for a hierarchy in these two possible outcomes. The health special administrator is required to work towards rescuing the company as a going concern, under *subsection (5)*, and may only make transfers to the extent that:
- a rescue is not reasonably practicable at all or without the transfer of some services;
  - a rescue would not achieve the objective of health special administration or would not do so unless services were transferred;
  - transfers would produce a better result for the company's creditors as a whole; or
  - transfers would produce a better result for members without prejudicing the interest of creditors.

### ***Section 130 - Health special administration regulations***

929. *Subsection (1)* requires the Secretary of State to make regulations setting out the detail of the health special administration regime. The regulations will be subject to consultation and the affirmative resolution procedure in Parliament.
930. These provisions are designed so that health special administration can reflect existing insolvency law and practice. *Subsection (2)* provides that the regulations may apply, with modifications, the procedure of administration set out in Part 2 of the Insolvency Act 1986 (which includes provision for the powers of administrators and the process of administration) and other relevant legislation.
931. The regulations may also include provision for enabling the court to make a health special administration order if the Secretary of State presents a public interest winding-up petition in relation to a relevant provider (*subsection (3)*).
932. The regulations may make provision about the application of other corporate insolvency procedures and the enforcement of security over property, in the context of health special administration.
933. The regulations may set out requirements for Monitor to publish and maintain details of companies that are potentially within the scope of the health special administration regime (*subsection (5)*).

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934. *Subsection (6)* provides that the regulations may also set out further details about health special administration. In particular, such regulations may make provision for Monitor to issue guidance to commissioners about the exercise of their functions in determining the services which are to be subject to health special administration.
935. The regulations may require Monitor to publish such guidance, enable Monitor to revise it and require that any such guidance or revised guidance is approved by the Secretary of State and NHS Commissioning Board before it is published. The regulations may also require commissioners to have regard to any such guidance issued by Monitor. Where commissioners exercising those functions fail to reach agreement, the regulations may make provision for the NHS Commissioning Board to facilitate agreement or to exercise the commissioners' functions in order to determine the issue where agreement cannot be reached. The intention is that any such provision will apply where a relevant provider delivers services to more than one commissioner.
936. The regulations may also require a health special administrator to carry out consultation, in accordance with the regulations, on the actions they recommend in relation to a particular provider.
937. *Subsections (7) and (8)* provide that the regulations could also modify this Chapter, the Insolvency Act 1986 and any other enactment which either makes provision about what is to be done under that Act or is relevant to insolvency or administration. This ensures that the health special administration regime may be tailored to meet the needs of the health care sector.
938. *Subsection (9)* provides that further secondary legislation ('rules') may be made under section 411 of the Insolvency Act 1986 to give effect to the health special administration regime. This is consistent with other insolvency regimes, where rules provide the details needed to make the procedures workable in practice. The rules would be made in the normal way and the power to make rules in relation to Scotland is exercisable by the Secretary of State (*subsection (10)(b)*). Rules made under this provision would apply to any Scottish companies providing NHS services in England.

***Section 131 - Transfer schemes***

939. This section allows for health special administration regulations to make provision about the transfer of NHS services to another provider in order to achieve the objective of health special administration.
940. In particular, the regulations may include provision for the transfer of property, rights and liabilities, including the transfer of rights that individuals might have through their contracts of employment, to alternative providers. The regulations may also require that Monitor and relevant providers agree transfer schemes in individual cases, allow Monitor to modify a transfer scheme with the consent of the affected parties, and allow for modifications to a transfer scheme to have effect from a time specified by Monitor.

***Section 132 - Indemnities***

941. This section enables the health special administration regulations to make provision for Monitor to provide appropriate indemnities in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the health special administrator's functions. Any such indemnity would be paid out of the financial mechanisms established under Chapter 6.

***Section 133 - Modification of this Chapter under the Enterprise Act 2002***

942. This is a technical provision that would allow the Secretary of State to make consequential amendments under specified sections of the Enterprise Act 2002 to the provisions of this Chapter. This is to enable future changes to the health special

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administration regime, to keep it in line with changes in the underlying insolvency legislation.