

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – NHS foundation trusts and NHS trusts

Failure

Section 173 – Repeal of de-authorisation provisions

1062. Under existing legislation, it is possible for unsustainable foundation trusts to be ‘de-authorised’. De-authorisation would cause a foundation trust to become an NHS trust, an outcome which would not be consistent with the policy that all NHS trusts are to become foundation trusts. This section repeals provision of the NHS Act which provides for the de-authorisation of foundation trusts. The effect of this is that an unsustainable foundation trust could continue to exist, as a foundation trust, during a period of special administration under this Act.
1063. This section removes the existing (and non-operational) arrangements regarding unsustainable foundation trusts set out in sections 53 to 55 of the NHS Act and removes references to these sections in other provisions of the Act.
1064. The section also removes references to NHS trusts created through de-authorisation of a foundation trust in section 206(1) of the National Health Service (Wales) Act 2006, and section 15 of the Health Act 2009.

Section 174 – Trust special administrators

1065. This section, and subsequent sections, amend the trust special administration provisions in Chapter 5A of Part 2 of the NHS Act (as amended by the Health Act 2009), provisions which have yet to be applied in practice. The amendments provide for a new role for Monitor to appoint a trust special administrator to oversee an unsustainable foundation trust, on Monitor’s behalf, to secure continuity of NHS services in line with the requirements determined by commissioners. The Act provides specific grounds for the Secretary of State to exercise a right to veto the action recommended for a foundation trust by the trust special administrator in individual cases.
1066. This section provides for the trust special administration provisions to apply to NHS trusts separately from foundation trusts. In the case of an NHS trust the process would remain unchanged from the previous legislation.
1067. The section amends Section 65D of the NHS Act to:
- Allow Monitor to appoint a trust special administrator to take control of a foundation trust’s affairs, on Monitor’s behalf, and to work with commissioners to secure continuity of NHS services without the foundation trust being de-authorised;
 - Changes the statutory test that would trigger trust special administration for a foundation trust to a test based on whether the trust is clinically and/or financially sustainable in its current form; and

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- Provide for the trust special administrator to carry out the functions of the council of governors and the board of directors, who would be suspended whilst the trust special administrator is in post. This suspension would not affect the employment of the executive directors and their membership of any committee or sub-committee of the trust. Monitor may indemnify the trust special administrator as it considers appropriate. This is to allow the administrator to retain certain essential personnel, such as the Medical Director, to help him or her manage the foundation trust.
1068. The effect of this section is that if Monitor is satisfied that a foundation trust has become, or is likely to become, clinically or financially unsustainable such that it would be unable to meet current liabilities, the process is as follows:
- Monitor makes an order appointing a trust special administrator to exercise the functions of the chairman, directors and governors of the trust and publishes a report setting out its reason for doing so. Before making such an order, Monitor must consult the Secretary of State. They must then consult the trust, the NHS Commissioning Board, the Care Quality Commission and commissioners of NHS services provided by the foundation trust as they consider appropriate. The appointment of the trust special administrator takes effect within 5 working days of the date on which the order is made;
 - After the order is made, the Care Quality Commission must provide Monitor with a report on the quality and safety of the services provided by the trust;
 - The administrator appointed manages the foundation trust's affairs, business and property, and exercises their functions in order to secure the continuity of NHS services, as required by commissioners, until these requirements are met.

Section 175 – Objective of trust special administration

1069. This section introduces an objective for trust special administration: to secure the continued provision of NHS services, as determined by commissioners, having regard to the criteria in *subsection (3)*.
1070. That criterion is whether, in the absence of alternative arrangements, ceasing to provide a particular service would either have a significant adverse impact on the health of persons in need of health care services, or on health inequalities, or cause a failure to prevent or ameliorate a significant adverse impact on the health of such persons, or on health inequalities.
1071. *Subsection (4)* specifies that when determining whether the criterion is met commissioners must have regard to current and future need for the provision of the service and whether ceasing provision of services would significantly reduce equality of access to health care services, as well as such other matters as may be specified in guidance by Monitor on the application of the criteria.
1072. Monitor would be required to develop such guidance. Before publishing the guidance or re-publishing revised guidance, Monitor would have to obtain the approval of the Secretary of State and the NHS Commissioning Board.
1073. *Subsections (7) and (8)* set out the role of the NHS Commissioning Board, which is to be responsible for facilitating agreement between CCGs in determining requirements for securing continued access to NHS services to meet the needs of their communities. Where agreement cannot be reached, the Board would make the decision.

Section 176 – Procedure etc.

1074. This section amends the process of trust special administration in relation to foundation trusts in order to give Monitor the role in overseeing the work of the trust special administrator under sections 65F (producing a draft report), 65H (consultation

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requirements), 65I (producing the final report) and 65J (the power to extend the deadline) of the NHS Act.

1075. *Subsection (2)* amends section 65F of the NHS Act so as to require the trust special administrator to provide Monitor with a draft report stating the action which he or she recommends Monitor (rather than the Secretary of State) should take in relation to the foundation trust.
1076. Subsections (2) and (3) amend sections 65F and 65G of the NHS Act so that the trust special administrator must not provide the draft report to Monitor, or make changes to the report following consultation, without securing the agreement of the commissioners, or where the commissioners cannot agree this, the agreement of the Board. Where the Board does not agree the draft report, or the change to the draft report, it must publish its reasons and notify the trust special administrator and Monitor.
1077. *Subsections (4), (5), (6), (7) and (9)* amend sections 65H and 65J of the NHS Act to establish Monitor's role in relation to unsustainable foundation trusts and the process of trust special administration. The amendments require the trust special administrator to obtain a written consultation response from and to hold a meeting with the NHS Commissioning Board and local commissioners, and allow Monitor to direct the trust special administrator to obtain a written consultation response from or to hold a meeting with any other persons (section 65H), as well as allowing Monitor to extend the deadlines in producing the draft report, the consultation stage or producing the final report (section 65J).
1078. *Subsection (8)* amends section 65I of the NHS Act so that Monitor would receive the trust special administrator's final report and recommendations in individual cases.

Section 177 – Action following final report

1079. This section sets out Monitor's role after receiving the final report and the process for Secretary of State to exercise rights of veto over the administrator's recommendation, including specific grounds for exercise of such a veto.
1080. *Subsection (1)* amends section 65K of the NHS Act, so that it only relates to the final decision on reports on NHS Trusts. *Subsection (2)* sets out the process for foundation trusts by inserting new sections 65KA to 65KD.
1081. New section 65KA sets out the process Monitor must undertake when it has received a report from the trust special administrator.
1082. Subsection (1) of new section 65KA provides that, upon receipt of the report, Monitor must determine whether it is satisfied that the recommendations would achieve the objective of the trust special administration (to secure continued access to services in line with requirements determined by the commissioner) such that the order would no longer need to remain in force, and that the trust special administrator has carried out his duties. Monitor has 20 working days to make this decision.
1083. If Monitor is satisfied, it must submit the recommendations and a copy of the Care Quality Commission's report on the safety and quality of existing services to the Secretary of State as soon as practically possible (subsection (3)). If Monitor is not satisfied, it must inform the trust special administrator of this decision (subsection (4)). In this case, the trust special administrator would start work on a new set of recommendations as directed by Monitor (subsection (5)).
1084. New section 65KB sets out the Secretary of State's role upon receipt of a report from Monitor under section 65KA(3).
1085. Subsection (1) provides that the Secretary of State has 30 working days from receipt of the report to determine whether or not he is satisfied that:

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- a) the commissioners have carried out their duties correctly in accordance with Chapter 5A of Part 2 of the NHS Act;
 - b) the administrator has carried out his or her duties correctly;
 - c) Monitor, in accepting the recommendations, has discharged its duties correctly;
 - d) the administrator's recommendations would achieve the commissioners' objective to secure continued access to NHS services;
 - e) the recommendations would secure services of required quality and safety at the trust; and
 - f) the recommendations represent good value for money.
1086. If the Secretary of State is not satisfied on any of these points, he must publish a statement setting out his decision and the reasons for it (that is which of the points have not been met and evidence to show this is the case), and notify this to the administrator and to Monitor. A copy of the statement must also be laid before both Houses of Parliament.
1087. New section 65KC sets out the process to be followed by the trust special administrator if the Secretary of State vetoes the final report.
1088. On rejection of the trust special administrator's final report by the Secretary of State, the administrator will have 20 working days to make the changes to the recommendations in order to address the failures identified by the Secretary of State.
1089. The administrator would send the revised report to Monitor, who would have 10 days to consider it in the same way that it considered the original report. Monitor would not need to ask the Care Quality Commission for a further report on the trust's safety and quality, however, as the report should still be accurate.
1090. The Secretary of State may extend the 20 working day limit for the administrator's report by order. Where this power has been used, the administrator must publish the new deadline for the revised final report and when, if relevant, the consultation on this change would be undertaken.
1091. New section 65KD sets out the Secretary of State's role in responding to a re-submitted report. Subsection (1) states that within 30 working days of receipt of the revised report, the Secretary of State must decide whether he is satisfied as to the matters set out in section 65KB(1)(a) to (f)
1092. Where the Secretary of State is unsatisfied on any of these specific grounds he must, as soon as practically possible, publish a statement setting out his decision and the reasons for it and lay this before both Houses of Parliament.
1093. If the reason for rejecting the final report is that the NHS Commissioning Board has failed in its duties, it will be considered a failure of the Board to discharge the function, and section 13Z1 will apply. The Secretary of State may direct the Board to perform those functions. If the Board fails to comply with this direction, the Secretary of State may perform these functions himself or direct another person to do so.
1094. If the reason for rejecting the final report is that a clinical commissioning group has failed to discharge a functions, this will be considered a failure of the clinical commissioning group to discharge its functions. The Secretary of State may exercise the functions of the Board outlined in sections 14Z19(2), (3) and (8)(a) to exercise functions of a clinical commissioning group and the NHS Commissioning Board cannot exercise those functions in the particular case.
1095. Where the Secretary of State has taken on the NHS Commissioning Board's functions under subsection (5)(b), any references to the Board in subsection (9) would instead

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be read as references to the Secretary of State. The Secretary of State would be able to direct a CCG to perform or cease to perform any functions and CCGs would have to comply with the Secretary of State directions. If a CCG failed to comply with the directions, the Secretary of State could perform the function himself.

1096. If the reason for rejecting the revised report is that the trust special administrator or Monitor has failed in its duties, that failure is to be regarded as a failure by Monitor and section 67 of the Act applies, with the omission of subsection (3). If Monitor has failed to perform its functions, the Secretary of State can direct it to perform the functions.
1097. New section 65KD also sets out how the Secretary of State would decide what action should be taken in relation to the trust after rejecting the revised final report from the special administrator.
1098. Where the Secretary of State has taken on the function of the NHS Commissioning Board, a clinical commissioning group, the trust special administrator or Monitor, he has 60 working days to decide what action to take.
1099. The Secretary of State must publish a notice of the decision and the reasons for it, and lay this before Parliament.
1100. *Subsections (3) and (4)* of this section amend section 65L of the NHS Act to set out a different approach to a foundation trust coming out of administration to allow Monitor, rather than the Secretary of State, to bring a foundation trust out of administration and to reflect the process for Secretary of State's decisions as regards his right of veto.
1101. The amendments to section 65L also enable Monitor to appoint or remove any governor or director in order to ensure that the foundation trust coming out of administration was legally constituted as set out in Schedule 7 to the NHS Act.
1102. This section also inserts a new section 65LA which sets out the process for dissolving a foundation trust, should the Secretary of State not veto plans to do so under value for money grounds under new section 65KB or 65KD, or should the Secretary of State decide to dissolve the trust when intervening under section 65KD. Monitor would then be able to make an order dissolving the foundation trust and transferring, or providing for the transfer of, staff, property and liabilities to another foundation trust or the Secretary of State or between another foundation trust and the Secretary of State.

Section 178 – Sections 174 to 177: supplementary

1103. This section amends sections 65M and 65N of the NHS Act so that, for foundation trusts only, it would be Monitor, rather than the Secretary of State, that would be able to replace a trust special administrator and issue guidance to the trust special administrator on how the regime applies to foundation trusts.
1104. The section also amends section 39 of the NHS Act to require Monitor in its foundation trust registrar role to file all relevant orders, notices and publications in relation to this regime with the papers relating to the foundation trust in administration.
1105. The section also includes a number of consequential amendments to references to these provisions in other legislation.