

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 – NHS foundation trusts and NHS trusts**

#### **Governance and management**

#### *Section 151 – Governors*

995. This section makes changes to the powers of foundation trust governors as specified in Schedule 7 to the NHS Act and makes provision about their collective duties. It is intended to strengthen foundation trusts' internal governance given that the Act reduces specific oversight of foundation trusts by Monitor, with future controls operating through regulatory licensing and clinically-led NHS commissioning of all providers.
996. *Subsection (1)* formally renames the board of governors the “council of governors” in order to avoid confusion between it and the board of directors and to reflect practice.
997. The Act retains minimum requirements on the composition of the council of governors, including the existing requirement for there to be a majority of elected governors. *Subsection (2)* removes the existing requirement for the council of governors to include a member appointed by a Primary Care Trust, reflecting the abolition of Primary Care Trusts elsewhere in the Act. *Subsection (3)* provides that a foundation trust can specify in its constitution any other organisation that is entitled to appoint a member or members of the council of governors. This would enable foundation trusts to tailor their governance to local circumstances.
998. *Subsection (4)* sets out the duties of the council of governors, making explicit the duties on governors that are implicit in the NHS Act through their election by members and existing powers over non-executive directors. *Subsection (5)* provides that foundation trusts will be required to take steps to ensure that governors are equipped with the skills and knowledge they require. *Subsection (6)* gives governors an additional power to hold directors of the trust to account by enabling them to require directors to attend a meeting for the purposes of obtaining information about the performance of the trust or its directors, and to vote on issues concerning their performance. The trust is required to include any such meetings in its annual report (*subsection (8)*).
999. *Subsection (7)* amends paragraph 23(4)(c) of Schedule 7 to the NHS Act to enable the Secretary of State to decide who is eligible for appointment as auditor by a foundation trust's governors. This section moves a power currently held by Monitor to the Secretary of State. This is in line with the changes to accounting requirements described below in the Accounts sections. This power supplements paragraph 23(4)(a), which stipulates that a person may be appointed as an auditor if he is a member of one of the bodies mentioned in section 3(7)(a) to (e) of the Audit Commission Act 1998.

### **Section 152 – Directors**

1000. This section specifies some of the duties on directors of foundation trusts. *Subsection (1)*, by amending Schedule 7 to the NHS Act, places a general duty on the directors to promote the success of the trust.
1001. *Subsections (2) and (3)* set out the specific ways in which duties to avoid conflicts of interest, to declare any interest in a proposed transaction and not to accept benefits from third parties apply in relation to foundation trust directors. By virtue of their office in public sector organisations, directors are subject to certain duties that reflect administrative law principles. These are similar to specific duties on directors of other organisations, such as those on company directors which are set out in the Companies Act 2006. These general duties include, among others, a duty to act within their legal powers, a duty only to exercise their powers for the purposes of which they are conferred, a duty to exercise reasonable care, skill and diligence; and a duty to act in accordance with the constitution of the organisation. However, in relation to conflicts of interest and accepting benefits, the Act specifies the ways in which these duties apply to foundation trust directors. This creates certain exceptions to administrative law principles, for example by permitting a conflict of interest if sanctioned in accordance with the trust’s constitution.
1002. To ensure that governors of foundation trusts have the information they require to discharge their duties, *subsection (4)* requires directors to send their governors agendas for, and minutes of, their meetings. *Subsection (5)* requires the foundation trust’s constitution to provide for meetings of the board of directors to be held in public, so that governors and through them members and the public may better scrutinise the board’s decisions. Provision is also made here for the board of directors to have a closed part of the meeting for specific reasons (for example, to discuss confidential and sensitive matters).

### **Section 153 – Members**

1003. This section requires a foundation trust to take steps to ensure that the membership of any public and patient constituencies is representative of those eligible to be members. Under sections elsewhere in the Act, Monitor will lose the power to ensure this through terms of authorisation. Paragraph 3(1)(a) of Schedule 7 to the NHS Act defines a public constituency as comprising “individuals who live in any area specified in the constitution as the area for a public constituency” while paragraph 3(1)(c) of that Schedule provides that the patient constituency includes “individuals who have attended any of the corporation’s hospitals either as a patient or the carer of a patient within a period specified in the constitution”. Having specific patient constituencies for members is optional for foundation trusts.
1004. *Subsection (2)* requires a foundation trust to have regard to the population it serves in deciding on the geographic areas eligible for its public constituency and any patient constituency. For example, if a foundation trust serves patients from a wide area – if for instance it is a regional centre of expertise or a tertiary referral centre – the effect would be to require the trust to give consideration to creating a separate patient constituency if it decided against including the whole area in its public constituency.

### **Section 154 – Accounts: initial arrangements**

1005. This section, and the following section on variations to initial arrangements for accounts, make changes to the accounting requirements of foundation trusts. These sections amend provisions in Schedule 7 to the NHS Act and specify Monitor’s responsibilities in relation to the production of foundation trust accounts. They reflect changes to government accounting rules, allow the Secretary of State to fulfil his functions and remove an aspect of Monitor’s role which was specific to foundation trusts and is not therefore appropriate to its role as health sector regulator.

*These notes refer to the Health and Social Care Act 2012  
(c.7) which received Royal Assent on 27 March 2012*

1006. This section specifies the initial arrangements for foundation trust accounts, amending the existing provisions in paragraphs 24 and 25 of Schedule 7 to the NHS Act under which Monitor has powers to direct foundation trusts on form, content and other matters relating to foundation trust accounts.
1007. The section requires Monitor to seek the approval of the Secretary of State, rather than of HM Treasury, on foundation trust accounting matters. This enables the Secretary of State to ensure that the accounting directions issued by Monitor are in line with the accounting framework that the Department of Health must follow in preparing its accounts, set out by HM Treasury in their Financial Reporting and Accounting Manual.
1008. During the financial year 2011/12 foundation trusts moved within the Department's accounting boundary under the cross-Government "clear line of sight" initiative. The effect of this is that foundation trusts are fully consolidated into the Department's resource account. Therefore, foundation trust accounts will, need to be produced to the same standards and timescales as those of the Department and other organisations in the Department's "group". As the Department must produce its accounts in accordance with HM Treasury guidance, subject to any agreed divergence, foundation trust accounts must be consistent with HM Treasury accounting guidance.

***Section 155 – Accounts: variations to initial arrangements***

1009. This section provides that after a transitional period, the powers and duties relating to the production of foundation trust accounts will transfer from Monitor to the Secretary of State. It will not be appropriate for Monitor as the sector regulator to have an ongoing and specific role in foundation trust accounts when this will not be the case for other providers.
1010. This section will, once commenced, bring the interim accounting arrangements to an end, as stated in *subsection (7)*.
1011. This section amends paragraphs 24 and 25 of Schedule 7 to the NHS Act (as amended by the previous section) to substitute the Secretary of State for Monitor in respect of those powers and duties relating to the form, content, timing and other matters concerning the accounts of foundation trusts. The section requires the Secretary of State to seek the approval of HM Treasury on foundation trust accounting matters.

***Section 156 – Annual report and forward plan***

1012. This section specifies new requirements relating to Monitor's existing power to determine the content of foundation trusts' annual reports and provides for the transfer of powers relating to annual reports and forward plans to the Secretary of State.
1013. *Subsection (1)* requires foundation trusts to include in their annual reports information on the pay and remuneration of directors and expenses of governors and directors. This is in line with the requirements on other public sector organisations and those already set out in Monitor's current code of governance. *Subsection (2)* requires Monitor to consult before imposing significant new requirements regarding the contents of annual reports.
1014. *Subsection (3)* provides that in future the power to determine the content of foundation trusts' annual reports could move from Monitor to the Secretary of State. He would need to set out such requirements in secondary legislation, mirroring the existing requirements on charities. The timing of this change would be for the Secretary of State to decide, but it is anticipated that this would be at a time at which the requirements on the content of foundation trust annual reports had stabilised.
1015. *Subsection (4)* places a duty on foundation trusts to send their forward plans to the Secretary of State, rather than to Monitor as previously. Alongside provisions on accounts, this is to ensure the Department of Health has the information it needs to manage its financial obligations, since the spending of foundation trusts counts towards the Department's spending. The effect of *subsection (5)* is that foundation trusts'

forward plans will no longer be included on the register of foundation trusts. The public retain the right to request, free of charge, a copy of the latest information as to the forward planning of a trust from the organisation concerned, as under paragraph 22(1)(e) of Schedule 7 to the NHS Act.

### **Section 157 – Meetings**

1016. This section requires foundation trusts to hold an annual meeting of the trust's membership. This meeting must be open to members of the public. *Subsection (1)* inserts a new paragraph 27A into Schedule 7, and gives the membership of a foundation trust a role in relation to considering the organisation's annual report and accounts. This is intended to secure the accountability of governors and directors to the members and to promote transparency about the trust's performance.
1017. *Subsection (1)* also provides that the membership of the trust, at the annual meeting, must be able to vote on constitutional amendments affecting the role of governors, similar to the scrutiny of other changes by governors.
1018. *Subsection (2)* clarifies that the existing requirement on the council of governors to hold a general meeting to consider the trust's annual accounts and report in no way prevents the governors holding a general meeting more than once a year if they wish to do so. *Subsection (3)*, inserting a new paragraph 28A, enables the trust, if it wishes, to combine the annual meeting held by the membership with a general meeting of the council of governors.

### **Section 158 – Voting**

1019. This section inserts a new paragraph 30 into Schedule 7 to the NHS Act. This gives the Secretary of State, in light of new decision-making powers for foundation trusts in subsequent sections, a regulation-making power subject to the affirmative procedure to alter the associated voting arrangements for directors, governors and members of foundation trusts provided for in this Act. This is to ensure that new voting arrangements for foundation trusts could, if necessary, be modified in light of how they work in practice.
1020. Existing voting provisions unaffected by this Act, such as the majority of governors required to remove a non-executive director, are beyond the scope of this power. In general, beyond provisions on the appointment of non-executive directors by governors, specific voting arrangements for foundation trusts have not been provided for in detail in primary legislation and this section is intended to ensure that the new voting provisions can be modified if necessary. Under this section, the Secretary of State could, for example, change the size of a majority required for approving mergers or for making changes to the constitution of a foundation trust, or specify that such a majority should be of those eligible to vote as opposed to those actually voting.
1021. *Subsection (2)* provides that any regulations made under this section would be subject to the affirmative resolution procedure.

## **Foundation trust status**

### **Section 159 – Authorisation**

1022. This section changes the nature of foundation trust authorisation to a one-off test, ahead of the repeal of the provisions on authorisation under a later section. Prior to this Act, Monitor set terms of authorisation when authorising an NHS Trust to become a foundation trust, and those terms formed the basis of Monitor's foundation trust-specific regulatory regime. Under Part 3 of this Act, Monitor will issue licences to providers with conditions attached, and all providers will be regulated on the basis of such conditions. An NHS trust wanting to become a foundation trust after implementation of Monitor's licensing regime will still need to meet the standards necessary to be authorised by

Monitor as a foundation trust, but rather than receiving ongoing terms of authorisation, would undergo a one-off test to gain authorisation.

1023. This section therefore amends the NHS Act to change the application process for NHS trusts wishing to become foundation trusts and to remove ongoing terms of authorisation. *Subsection (4)* places a new requirement on Monitor to seek confirmation from the Care Quality Commission that an applicant trust is currently complying with the requirements mentioned in section 12(2) of the Health and Social Care Act 2008 in relation to the regulated activity or activities carried out by the applicant trust, before Monitor authorises its foundation trust status. *Subsection (5)* removes Monitor's discretion to give an authorisation on particular terms, and *subsection (6)* removes Monitor's ability to vary those terms of authorisation. *Subsections (7) and (9)* make consequential changes which remove the requirement for a copy of the authorisation to be on the register and available for public inspection.
1024. *Subsection (2)* repeals the requirement in section 33(2)(a) of the NHS Act to describe the goods and services to be provided in an application for foundation trust status and for Monitor to be satisfied that an applicant can provide them. This information is currently required to set the terms of authorisation. Monitor as provider regulator will be able to use its licensing regime to require a provider to provide a particular service. The powers under which Monitor could use terms of authorisation to ensure the provision of a particular service are therefore no longer required. Monitor's previous foundation trust-specific powers to enter and inspect a foundation trust's premises are also no longer required given its proposed new functions as regulator of all providers of NHS services, so *subsection (8)* repeals section 49 of the NHS Act which enables Monitor to exercise such a power.

#### ***Section 160 – Bodies which may apply for foundation trust status***

1025. This section removes the ability for organisations other than NHS trusts to apply for foundation trust status using section 34 of the NHS Act. There is little prospect of any organisation other than an NHS trust applying to become a foundation trust (no other type of organisation has ever applied using section 34) and section 34 is therefore unnecessary. Section 34 will be repealed when Monitor's licensing regime is implemented. The section also makes consequential amendments to the NHS Act, for example removing powers for Monitor to authorise foundation trusts. If an organisation were to submit an application prior to the repeal of section 34, *subsections (4) to (7)* enable Monitor to consider the application and authorise the organisation as a foundation trust.

#### ***Section 161 – Amendment of constitution***

1026. This section gives foundation trusts powers to amend their constitutions without seeking external permission. The Act retains the existing requirement on foundation trusts to have a constitution and continues to require trusts' constitutions to include certain information. This section transfers responsibility for approving changes to a foundation trust's constitution from Monitor to the council of governors and board of directors of the foundation trust. *Subsection (2)*, among other things, requires that foundation trusts inform Monitor of any amendments they decide to make to their constitutions, since Monitor will continue to act as the registrar of foundation trusts, so will be responsible for maintaining on the foundation trust register the constitutions of such organisations.

#### ***Section 162 – Panel for advising governors***

1027. This section inserts a new section into the NHS Act giving Monitor the power to establish a panel to consider questions brought by governors about the appropriateness of actions taken by their foundation trust. Such a panel could provide a source of independent advice to governors which, at present, they receive informally from Monitor. Its purpose in providing advice is to help governors to fulfil their role of



holding non-executive directors to account for the performance of the board. *Subsection (2)* provides that questions can be referred to the panel only if more than half of the members of the council of governors of the trust voting agree. Decisions of the panel will not be binding on the trust, but a court or tribunal could take the panel's determination into account if considering a question previously considered by the panel. *Subsections (3) and (4)* enable the panel to regulate its own procedures in order to ensure its independence from Monitor. However, the Secretary of State will have the power, under *subsection (10)*, to make regulations about the membership of the panel in the event that the arrangements made by the panel proved problematic in practice or to ensure the panel's independence from Monitor. For example, if the panel decided to appoint members for life, this power will allow the Secretary of State *to introduce term limits*.

## **Finance**

### ***Section 163 - Financial powers etc.***

1028. This section amends powers relating to the financial matters of foundation trusts.
1029. The key changes are, firstly, that the taxpayer's investment in foundation trusts will be managed more explicitly through terms applied to loans, public dividend capital and guarantees of payments under externally financed development agreements. Secondly, that the financing the Secretary of State provides to foundation trusts will be subject to detailed transparency requirements. Thirdly, it updates powers on protecting property and fees in light of changes in Part 3.
1030. The first and second changes support the management of both the taxpayer investment in foundation trusts and the provision of new financing to foundation trusts under a transparent and rules-based regime. This provides an explicit and transparent way of protecting the taxpayer investment in foundation trusts from material increases in risk that may arise as a result of such events as deteriorating financial performance or significant structural changes. The conditions on finance will be set to trigger only in exceptional circumstances so that they do not affect the operational freedoms of foundation trusts.
1031. *Subsection (1)* amends section 40 of the NHS Act to require the Secretary of State to publish an annual report detailing all loans outstanding, loan transactions during the year and the terms under which those loans were let. The subsection also requires publication of similar information on other forms of finance (public dividend capital, grants and other payments) issued during the year and on public dividend capital held by foundation trusts at the year-end.
1032. Terms on the taxpayer investment in a foundation trust could include limits on borrowing to reduce risk to the taxpayer investment. Monitor can also, in its role as health sector regulator, set conditions on financial risk which restrict borrowing, in order to ensure that a provider is financially stable to fulfil its role in ensuring continuity of NHS services. This means the statutory prudential borrowing code and the borrowing limits that are calculated using that code are no longer be required so *subsections (2) and (8)* remove the relevant powers.
1033. *Subsection (6)* requires the Secretary of State to produce guidance on his powers to issue finance or guarantees and set terms conferred under sections 40 and 42 of the NHS Act as amended by this Act. The guidance will set out criteria to be applied when setting the terms and conditions of financing issued under section 40 and those that will be applied to public dividend capital under section 42(3) of the NHS Act.
1034. The guidance will cover terms and conditions for loans, public dividend capital and guarantees of payment that fall into two categories. Firstly, it will cover those terms and conditions that relate directly to the financing itself, for example the interest or dividend payable by foundation trusts on the financing, or the requirement to repay

public dividend capital. Secondly, it will cover those conditions that do not directly apply to the financing, which will be designed to highlight material changes in the risks to the taxpayer investment and will be consistent with the terms that any lender would apply to financing. These may include the following and similar conditions:

- achievement of financial metrics, such as debt service cover, to give confidence of a foundation trust's ongoing ability to service debt;
  - limits on additional indebtedness or preferring other creditors;
  - restrictions on the use of assets to secure debt;
  - restrictions on the disposal of assets;
  - restrictions on material structural changes, for example, mergers, separations and acquisitions;
  - restrictions on material change of business; and
  - restrictions on investments or giving of guarantees.
1035. *Subsection (5)* of this section sets out the terms that the Secretary of State may attach to public dividend capital issued to a foundation trust in order to protect the value of the taxpayer's investment. These terms could limit a foundation trust's ability to provide goods or services, borrow or invest money, provide financial assistance, apply for dissolution, and apply to acquire another body.
1036. *Subsection (7)* repeals Monitor's existing powers to protect foundation trust property. Currently, a foundation trust may not dispose of any protected property without the approval of Monitor. Monitor may designate property as protected if it considers it is needed to provide services to the NHS. In future, under Part 3, Monitor as health sector regulator, could set licence conditions that will enable it to protect property required for the delivery of NHS services.
1037. *Subsection (9)* amends section 50 of the NHS Act to repeal Monitor's current power to require a foundation trust to pay an annual fee to the regulator. Instead this subsection will give Monitor a more specific and constrained ability to require foundation trusts to pay Monitor fees associated with Monitor's two permanent foundation trust-specific functions. These are: maintaining the foundation trust register and, if it decides to do so, establishing an advice panel for governors. Monitor's fee charging powers in respect of its functions as health sector regulator are addressed in the explanatory notes on Part 3.

## **Functions**

### ***Section 164 – Goods and services***

1038. This section amends section 43 of the NHS Act on authorised services to remove references to ongoing terms of authorisation, since terms of authorisation will no longer exist under changes proposed by the earlier section on foundation trust authorisation.
1039. *Subsection (1)* retains the position that the principal purpose of a foundation trust is to provide goods and services for the health service in England and that a foundation trust may provide goods and services for any purposes related to the provision of health care. It provides that the effect of the principal purpose is that a foundation trust must raise the majority of its income from the provisions of goods and services for the health service in England. This covers services commissioned by and for the health service in England, as well as the publicly funded public health services commissioned by local authorities.
1040. *Subsection (3)* requires every foundation trust to explain in their annual reports the impact that non-NHS income earned has had on their NHS service provision. It also places a duty on the directors to detail their proposals to earn non-NHS income

in the foundation trust's forward plan and the income they expect to receive from those activities. *Subsection (3)* also requires governors to consider the forward plan and to satisfy themselves that any proposal to increase non-NHS income would not significantly interfere with the fulfilment by the foundation trust of its principal purpose or the performance of its other functions. Any proposal by the directors to increase the proportion of total income earned from non-NHS work by five percentage points or more requires agreement by more than half of the members of the council of governors of the trust voting. For example, the governors will be required to vote where a foundation trust plans to increase its non-NHS income from 2% to 7% or more of the trust's total income.

### ***Section 165 - Private health care***

1041. This section repeals the restriction on the amount of income a foundation trust can derive from private charges, otherwise known as the "private patient income cap".
1042. The cap, which was introduced in 2003, had the effect that a foundation trust cannot earn in any financial year a higher proportion of its total income from private charges than it derived from private charges in the financial year 2002-03 (the year before the first foundation trusts were authorised). For example, as no mental health foundation trust derived income from private charges in 2002-03, their cap was 0%. The cap on mental health foundation trusts' income derived from private charges was increased to 1.5% by section 33 of the Health Act 2009. This Act does not repeal the provisions of section 44 of the NHS Act which allow foundation trusts to charge NHS patients for the provision of accommodation, such as a private room, and additional services, such as an ancillary service like the provision of a television.

### ***Section 166 - Information***

1043. This section transfers from Monitor to the Secretary of State the power to require information from foundation trusts necessary for the Secretary of State to exercise his functions effectively. Whilst foundation trusts sit within the Department of Health accounting and budgeting boundaries the Department needs information from foundation trusts in order to carry out its functions. These functions include financial management against Parliamentary estimates, Departmental Expenditure Limits and other controls, financial reporting to HM Treasury and those wider reporting requirements made of all Government Departments for both financial and non-financial matters.
1044. This information was previously collected and provided to the Department by Monitor under the terms of authorisation of foundation trusts. Given Monitor's new remit, it is no longer appropriate for it to continue to collect information on behalf of the Department when it does not have a similar role for other healthcare providers. Therefore, this section requires foundation trusts to provide the required information directly to the Department.

### ***Section 167 – Significant transactions***

1045. This section inserts a new section 51A into the NHS Act which provides that a foundation trust may designate in its constitution certain transactions as "significant transactions" which cannot proceed unless a majority of governors agree to them. Foundation trusts will be able to decide which transactions they want to designate as significant, for example, they could provide that this included any contract valued over a certain amount or over a particular percentage of the trust's turnover. As the definition of a "significant transaction" needs to be specified in the constitution of the trust, it would have to be agreed by a majority of the council of governors and of the board of directors. Trusts could choose not to specify any transactions as "significant transactions", but this will need to be stated in the constitution, ensuring the agreement of the governors.



## **Mergers, acquisitions, separations and dissolution**

### ***Section 168 – Mergers***

1046. This section, and the subsequent sections enabling other types of organisational change, make the regime for foundation trusts more flexible, in line with legislation on other types of organisations. They also give foundation trust governors a role in decisions on these organisational changes.
1047. The section removes the specific discretion that Monitor had in relation to mergers involving foundation trusts and some of the information requirements needed alongside an application. Monitor's licensing powers under Part 3 will allow it to protect patient and public interests by setting licence conditions giving it a role in any organisational changes which impacted on the provision of essential services.
1048. A foundation trust planning to merge will still have to make an application to Monitor, but *subsection (5)* provides that Monitor's foundation trust-specific role in relation to such mergers will be limited to ensuring the necessary steps in the process have been followed, which now include the approval of the council of governors. If satisfied on this point, Monitor is required to grant the application to effect the change. *Subsection (3)* retains the need for Secretary of State to support the application if one of the parties is an NHS trust, to ensure that the interests of the public are properly taken into account.
1049. The section also clarifies that references to NHS trusts in this context relate only to English NHS trusts, which are those established under section 25 of the NHS Act.

### ***Section 169 – Acquisitions***

1050. This section inserts a new section 56A into the NHS Act which makes explicit provision for a foundation trust to acquire another foundation trust or an NHS trust in England.
1051. The general powers under section 47 of the NHS Act enable a foundation trust to acquire property of an NHS trust. However, a foundation trust cannot currently acquire another foundation trust: the general powers under section 47 cannot be used as there are currently no powers to dissolve the foundation trust being acquired unless it is in failure or being merged, which would also require the dissolution of the acquiring foundation trust.
1052. The foundation trust proposing to make the acquisition, and the foundation trust or NHS trust to be acquired, would make a joint application to Monitor. Monitor's role is limited to ensuring that the process prescribed by statute has been followed. Subsection (4) of new section 56A provides that Monitor must grant the application if it is satisfied that the necessary steps have been taken.
1053. Subsection (2) of new section 56A requires that an application for an acquisition could be made only with the approval of the majority of the governors of each of the foundation trusts involved. Subsection (3)(a) provides that an NHS trust must obtain the support of the Secretary of State before it can be acquired by a foundation trust, which is in line with requirements already in place for mergers.
1054. The provision for a foundation trust to be able to acquire an English NHS trust will be removed when the relevant NHS trust legislation is repealed.

### ***Section 170 – Separations***

1055. This section inserts a new section 57A into the NHS Act which makes explicit provision for a foundation trust to separate into two or more new foundation trusts. This may be necessary, for example, if following a merger a foundation trust was too large to manage itself effectively. This section would allow it to take action to address this.

1056. An application may be made by the foundation trust to Monitor for the separation. Monitor is required to grant the application effecting the change if it is satisfied that the necessary preparatory steps had been taken. Subsection (2) of new section 56B requires that such an application may be made only with the approval of the majority of the governors of the foundation trust.

### ***Section 171 – Dissolution***

1057. This section inserts a new section 57A into the NHS Act which makes provision for a foundation trust, with no remaining liabilities, to dissolve.
1058. An application may be made by the foundation trust to Monitor which is required to grant the application, and make the order to effect the administration of the dissolution, if it is satisfied that the foundation trust has no liabilities and that the necessary preparatory steps have been taken. Subsection (2) of the new section 57A requires that such an application may be made only with the approval of the majority of the governors of the foundation trust involved.

### ***Section 172 – Supplementary***

1059. This section extends the supplementary provisions in the NHS Act relating to mergers involving foundation trusts, so that they now cover mergers, acquisitions, separations and dissolutions.
1060. The section makes provision for Monitor to make an order to dissolve a foundation trust and to effect mergers and separations in which a new foundation trust is (or trusts are) created. The section requires that such orders must specify the properties and liabilities to be transferred, and to whom they are to be transferred.
1061. This section provides that sections 52A to 52E of, and Schedule 8A to the NHS Act (which would have been inserted by the Health Act 2009) will not come fully into force. These sections would have provided for the de-authorisation of foundation trusts. The effect of de-authorisation would be to revert a foundation trust to being an NHS trust, which will no longer be appropriate given the intention that all NHS trusts are to become foundation trusts and the associated repeal of the NHS trust model. The section also removes references to sections 52A to 52E, in force only for certain purposes, and Schedule 8A to the NHS Act from other parts of the NHS Act.

## **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-authorized;
  - 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
  - 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 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.

*These notes refer to the Health and Social Care Act 2012  
(c.7) which received Royal Assent on 27 March 2012*

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:
- 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,



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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 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.

**Abolition of NHS trusts**

***Section 179 – Abolition of NHS trusts in England***

1106. This section repeals the legal framework that establishes NHS trusts in England. All NHS trusts should become foundation trusts as soon as clinically feasible. *Subsection (1)* therefore abolishes NHS trusts established under section 25 of the NHS Act and *subsection (2)* repeals Chapter 3 of Part 2 of the NHS Act. The section is to be commenced by order made by the Secretary of State.
1107. There is one circumstance under which an organisation could remain as an NHS trust after the NHS trust legislation is repealed. Under what is described as a franchise agreement (which is defined under this section), a franchisee assumes many of the risks and rewards of ownership. It will be required to deliver agreed outcomes as part of the franchise contract. Under the proposed terms of the contract, the trust will retain its NHS trust status. *Subsection (5)* provides the legislative basis that will enable an NHS trust whose functions are exercised under a franchise agreement to remain an NHS trust after the repeal of the NHS trust legislation. A trust could also retain its NHS trust status for up to three years after the franchise contract had ended in order for it to be authorised as a foundation trust, or for an alternative solution to be found.
1108. [Schedule 14](#) to this Act (abolition of NHS trusts in England: consequential amendments) makes the necessary consequential amendments to the NHS Act, and other relevant Acts.

***Section 180 – Repeal of provisions on authorisation for NHS foundation trusts***

1109. *Subsections (1) and (2)* of this section repeal sections 33 and 35 of the NHS Act (which enable an NHS trust to apply to become, and be authorised as, a foundation trust) which will no longer be needed once all NHS trusts have become foundation trusts. It also makes associated changes.
1110. *Subsection (3)* repeals relevant provisions of section 36 of the NHS Act about the effect of authorisation, as the provisions will not be needed when all NHS trusts are foundation trusts.
1111. It also repeals provisions about the automatic grant of a licence under Part 3 of this Act to a foundation trust, as set out in section 88, once the NHS trust legislation is repealed. The section also amends the title of section 36 from “effect of authorisation” to “Status etc of NHS foundation trusts”, recognising that organisations will not be authorised as new foundation trusts following the repeal of section 33. *Subsection (7)* provides the savings provisions necessary to enable NHS trusts in franchise agreements to apply for foundation trust status and to be granted a licence under section 88 after the legislation relating to NHS trusts has been repealed.