



# Health and Social Care Act 2012

## 2012 CHAPTER 7

### PART 4

#### NHS FOUNDATION TRUSTS & NHS TRUSTS

##### *Failure*

#### **173 Repeal of de-authorisation provisions**

- (1) Omit section 52C of the National Health Service Act 2006 (guidance etc. on de-authorisation notices).
- (2) Omit sections 53 to 55 of, and Schedule 9 to, that Act (voluntary arrangements and dissolution); and in consequence of that—
  - (a) in section 57 of that Act (as amended by section 172 of this Act)—
    - (i) in subsection (3)(a), for “the persons mentioned in section 54(4)” substitute “another NHS foundation trust, an NHS trust established under section 25 or the Secretary of State”,
    - (ii) omit subsection (3)(b), and
    - (iii) in subsection (4), for “any of the bodies mentioned in section 54(4) (a) or (c)” substitute “another NHS foundation trust or an NHS trust established under section 25”,
  - (b) in section 64(4) of that Act (as amended by section 172 of this Act), omit paragraph (b), and
  - (c) omit section 18(2) to (6) and (11) of the Health Act 2009.
- (3) Omit section 65E of the National Health Service Act 2006 (NHS foundation trusts: de-authorisation and appointment of administrator).
- (4) Omit Schedule 8A to that Act (de-authorised NHS trusts and NHS foundation trusts).
- (5) Omit section 15 of the Health Act 2009 (which inserts sections 52A to 52E and Schedule 8A in the National Health Service Act 2006).

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- (6) In section 272 of the National Health Service Act 2006 (orders, regulations, rules and directions)—
  - (a) in subsection (5), omit paragraph (aa), and
  - (b) in subsection (6A), omit “52D(1), 52E(6),”.
- (7) In section 275(1) of that Act (interpretation), in the definition of “NHS trust”—
  - (a) omit “, subject to Schedule 8A,”, and
  - (b) omit “52D(1) or”.
- (8) In section 206(1) of the National Health Service (Wales) Act 2006, in the definition of “NHS trust”, omit “52D(1) or”.

#### **174 Trust special administrators**

- (1) In section 65A of the National Health Service Act 2006 (bodies to which trust special administration regime applies)—
  - (a) in subsection (1), for paragraphs (b) and (c) substitute—
    - “(b) any NHS foundation trust.”, and
  - (b) omit subsection (2).
- (2) For the title to section 65B of that Act substitute “NHS trusts: appointment of trust special administrator”.
- (3) In section 65D of that Act (NHS foundation trusts: regulator’s notice), for subsections (1) to (3) substitute—
  - “(1) This section applies if the regulator is satisfied that an NHS foundation trust is, or is likely to become, unable to pay its debts.
  - (2) The regulator may make an order authorising the appointment of a trust special administrator to exercise the functions of the governors, chairman and directors of the trust.
  - (3) As soon as reasonably practicable after the making of an order under subsection (2), the Care Quality Commission must provide to the regulator a report on the safety and quality of the services that the trust provides under this Act.”
- (4) In subsection (4) of that section—
  - (a) for “giving a notice” substitute “making an order”,
  - (b) after paragraph (a) insert—
    - “(aa) the Board,”,
  - (c) omit paragraph (b),
  - (d) in paragraph (c), omit “goods or”, and
  - (e) after paragraph (c) insert “, and
    - (d) the Care Quality Commission.”
- (5) After that subsection insert—
  - “(5) An order under subsection (2) must specify the date when the appointment is to take effect, which must be within the period of 5 working days beginning with the day on which the order is made.

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- (6) The regulator must lay before Parliament (with the statutory instrument containing the order) a report stating the reasons for making the order.
  - (7) If the regulator makes an order under subsection (2), it must—
    - (a) appoint a person as the trust special administrator with effect from the day specified in the order, and
    - (b) publish the name of the person appointed.
  - (8) A person appointed as a trust special administrator under this section holds and vacates office in accordance with the terms of the appointment.
  - (9) A person appointed as a trust special administrator under this section must manage the trust’s affairs, business and property, and exercise the trust special administrator’s functions, so as to achieve the objective set out in section 65DA as quickly and as efficiently as is reasonably practicable.
  - (10) When the appointment of a trust special administrator under this section takes effect, the trust’s governors, chairman and executive and non-executive directors are suspended from office; and Chapter 5 of this Part, in its application to the trust, is to be read accordingly.
  - (11) But subsection (10) does not affect the employment of the executive directors or their membership of any committee or sub-committee of the trust.
  - (12) The regulator may indemnify a trust special administrator appointed under this section in respect of such matters as the regulator may determine.”
- (6) For the title to that section substitute “NHS foundation trusts: appointment of trust special administrator”.
- (7) Omit the cross-heading preceding that section.

## **175 Objective of trust special administration**

- (1) After section 65D of the National Health Service Act 2006 insert—

### **“65DA Objective of trust special administration**

- (1) The objective of a trust special administration is to secure—
  - (a) the continued provision of such of the services provided for the purposes of the NHS by the NHS foundation trust that is subject to an order under section 65D(2), at such level, as the commissioners of those services determine, and
  - (b) that it becomes unnecessary for the order to remain in force for that purpose.
- (2) The commissioners may determine that the objective set out in subsection (1) is to apply to a service only if they are satisfied that the criterion in subsection (3) is met.
- (3) The criterion is that ceasing to provide the service under this Act would, in the absence of alternative arrangements for its provision under this Act, be likely to—

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- (a) have a significant adverse impact on the health of persons in need of the service or significantly increase health inequalities, or
  - (b) cause a failure to prevent or ameliorate either a significant adverse impact on the health of such persons or a significant increase in health inequalities.
- (4) In determining whether that criterion is met, the commissioners must (in so far as they would not otherwise be required to do so) have regard to—
- (a) the current and future need for the provision of the service under this Act,
  - (b) whether ceasing to provide the service under this Act would significantly reduce equality between those for whom the commissioner arranges for the provision of services under this Act with respect to their ability to access services so provided, and
  - (c) such other matters as may be specified in relation to NHS foundation trusts in guidance published by the regulator.
- (5) The regulator may revise guidance under subsection (4)(c) and, if it does so, must publish the guidance as revised.
- (6) Before publishing guidance under subsection (4)(c) or (5), the regulator must obtain the approval of—
- (a) the Secretary of State;
  - (b) the Board.
- (7) The Board must make arrangements for facilitating agreement between commissioners in determining the services provided by the trust under this Act to which the objective set out in subsection (1) is to apply.
- (8) Where commissioners fail to reach agreement in pursuance of arrangements under subsection (7), the Board may make the determination (and the duty imposed by subsection (1)(a), so far as applying to the commissioners concerned, is to be regarded as discharged).
- (9) In this section—
- “commissioners” means the persons to which the trust provides services under this Act, and
  - “health inequalities” means the inequalities between persons with respect to the outcomes achieved for them by the provision of services that are provided as part of the health service.”
- (2) If, at any time before section 9 comes into force, Monitor obtains the approval of the NHS Commissioning Board Authority to publish guidance under section 65DA(4)(c) or (5) of the National Health Service Act 2006, that approval is to be treated for the purposes of subsection (6)(b) of that section as approval obtained from the National Health Service Commissioning Board.

## **176 Procedure etc.**

- (1) In section 65F of the National Health Service Act 2006 (administrator’s draft report), in subsection (2)—
- (a) before paragraph (a) insert—
    - “(za) the Board,” and

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- (b) omit paragraph (a) (but not the following “and”).
- (2) At the end of that section insert—
- “(4) For the purposes of this section in its application to the case of an NHS foundation trust, the references to the Secretary of State are to be read as references to the regulator.
  - (5) In the case of an NHS foundation trust, the administrator may not provide the draft report to the regulator under subsection (1)—
    - (a) without having obtained from each commissioner a statement that the commissioner considers that the recommendation in the draft report would achieve the objective set out in section 65DA, or
    - (b) where the administrator does not obtain a statement to that effect from one or more commissioners (other than the Board), without having obtained a statement to that effect from the Board.
  - (6) Where the Board decides not to provide to the administrator a statement to that effect, the Board must—
    - (a) give a notice of the reasons for its decision to the administrator and to the regulator;
    - (b) publish the notice;
    - (c) lay a copy of it before Parliament.
  - (7) In subsection (5), “commissioner” means a person to which the trust provides services under this Act.”
- (3) At the end of section 65G of that Act (consultation plan) insert—
- “(4) In the case of an NHS foundation trust, the administrator may not make a variation to the draft report following the consultation period—
    - (a) without having obtained from each commissioner a statement that the commissioner considers that the recommendation in the draft report as so varied would achieve the objective set out in section 65DA, or
    - (b) where the administrator does not obtain a statement to that effect from one or more commissioners (other than the Board), without having obtained a statement to that effect from the Board.
  - (5) Where the Board decides not to provide to the administrator a statement to that effect, the Board must—
    - (a) give a notice of the reasons for its decision to the administrator and to the regulator;
    - (b) publish the notice;
    - (c) lay a copy of it before Parliament.
  - (6) In subsection (4), “commissioner” means a person to which the trust provides services under this Act.”
- (4) In section 65H of that Act (consultation requirements), in subsection (7)—
- (a) before paragraph (a) insert—
    - “(za) the Board,”
  - (b) omit paragraph (a),
  - (c) in paragraph (b), omit “, if required by directions given by the Secretary of State”, and

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- (d) after paragraph (c) insert “;
  - (d) any other person specified in a direction given by the Secretary of State.”
- (5) In subsection (8) of that section, omit paragraphs (a) to (d).
- (6) In subsection (9) of that section—
  - (a) after “representatives of” insert “the Board and”, and
  - (b) for “(7)(a) or (b)” substitute “(7)(b), (c) or (d)”.
- (7) At the end of that section insert—
  - “(12) For the purposes of this section in its application to the case of an NHS foundation trust—
    - (a) in subsection (7)(b), the words “goods or” are to be ignored, and
    - (b) in subsections (7)(c) and (d) and (10), the references to the Secretary of State are to be read as references to the regulator.
  - (13) In the case of an NHS foundation trust, the Secretary of State may direct the regulator as to persons from whom it should direct the administrator under subsection (10) to request or seek a response.”
- (8) At the end of section 65I of that Act (administrator’s final report) insert—
  - “(4) For the purposes of this section in its application to the case of an NHS foundation trust, the references to the Secretary of State are to be read as references to the regulator.”
- (9) At the end of section 65J of that Act (power to extend time limits for preparing reports and carrying out consultation) insert—
  - “(5) For the purposes of this section in its application to the case of an NHS foundation trust, the references to the Secretary of State are to be read as references to the regulator.”

## **177 Action following final report**

- (1) In section 65K of the National Health Service Act 2006 (Secretary of State’s decision on what action to take), in subsection (1), after “a final report under section 65I” insert “relating to an NHS trust”; and in consequence of that, for the title to that section substitute “Secretary of State’s decision in case of NHS trust”.
- (2) After that section insert—

### **“65KA Regulator’s decision in case of NHS foundation trust**

- (1) Within the period of 20 working days beginning with the day on which the regulator receives a final report under section 65I relating to an NHS foundation trust, the regulator must decide whether it is satisfied—
  - (a) that the action recommended in the final report would achieve the objective set out in section 65DA, and
  - (b) that the trust special administrator has carried out the administration duties.

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- (2) In subsection (1)(b), “administration duties” means the duties imposed on the administrator by—
  - (a) this Chapter,
  - (b) a direction under this Chapter, or
  - (c) the administrator’s terms of appointment.
- (3) If the regulator is satisfied as mentioned in subsection (1), it must as soon as reasonably practicable provide to the Secretary of State—
  - (a) the final report, and
  - (b) the report provided to the regulator by the Care Quality Commission under section 65D(3).
- (4) If the regulator is not satisfied as mentioned in subsection (1), it must as soon as reasonably practicable give a notice of that decision to the administrator.
- (5) Where the regulator gives a notice under subsection (4), sections 65F to 65J apply in relation to the trust to such extent, and with such modifications, as the regulator may specify in the notice.
- (6) The regulator must as soon as reasonably practicable after giving a notice under subsection (4)—
  - (a) publish the notice;
  - (b) lay a copy of it before Parliament.

#### **65KB Secretary of State’s response to regulator’s decision**

- (1) Within the period of 30 working days beginning with the day on which the Secretary of State receives the reports referred to in section 65KA(3), the Secretary of State must decide whether the Secretary of State is satisfied—
  - (a) that the persons to which the NHS foundation trust in question provides services under this Act have discharged their functions for the purposes of this Chapter,
  - (b) that the trust special administrator has carried out the administration duties (within the meaning of section 65KA(1)(b)),
  - (c) that the regulator has discharged its functions for the purposes of this Chapter,
  - (d) that the action recommended in the final report would secure the continued provision of the services provided by the trust to which the objective set out in section 65DA applies,
  - (e) that the recommended action would secure the provision of services that are of sufficient safety and quality to be provided under this Act, and
  - (f) that the recommended action would provide good value for money.
- (2) If the Secretary of State is not satisfied as mentioned in subsection (1), the Secretary of State must as soon as reasonably practicable—
  - (a) give the trust special administrator a notice of the decision and of the reasons for it;
  - (b) give a copy of the notice to the regulator;
  - (c) publish the notice;
  - (d) lay a copy of it before Parliament.

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### **65KC Action following Secretary of State’s rejection of final report**

- (1) Within the period of 20 working days beginning with the day on which the trust special administrator receives a notice under section 65KB(2), the administrator must provide to the regulator the final report varied so far as the administrator considers necessary to secure that the Secretary of State is satisfied as mentioned in section 65KB(1).
- (2) Where the administrator provides to the regulator a final report under subsection (1), section 65KA applies in relation to the report as it applies in relation to a final report under section 65I; and for that purpose, that section has effect as if—
  - (a) in subsection (1), for “20 working days” there were substituted “10 working days”, and
  - (b) subsection (3)(b) were omitted.
- (3) If the Secretary of State thinks that, in the circumstances, it is not reasonable for the administrator to be required to carry out the duty under subsection (1) within the period mentioned in that subsection, the Secretary of State may by order extend the period.
- (4) If an order is made under subsection (3), the administrator must—
  - (a) publish a notice stating the date on which the period will expire, and
  - (b) where the administrator is proposing to carry out consultation in response to the notice under section 65KB(2), publish a statement setting out the means by which the administrator will consult during the extended period.

### **65KD Secretary of State’s response to re-submitted final report**

- (1) Within the period of 30 working days beginning with the day on which the Secretary of State receives a final report under section 65KA(3) as applied by section 65KC(2), the Secretary of State must decide whether the Secretary of State is, in relation to the report, satisfied as to the matters in section 65KB(1) (a) to (f).
- (2) If the Secretary of State is not satisfied as mentioned in subsection (1), the Secretary of State must as soon as reasonably practicable—
  - (a) publish a notice of the decision and the reasons for it;
  - (b) lay a copy of the notice before Parliament.
- (3) Where the Secretary of State publishes a notice under subsection (2)(a), subsections (4) to (8) apply.
- (4) If the notice states that the Board has failed to discharge a function—
  - (a) the Board is to be treated for the purposes of this Act as having failed to discharge the function, and
  - (b) the failure is to be treated for those purposes as significant (and section 13Z2 applies accordingly).
- (5) If the notice states that a clinical commissioning group has failed to discharge a function—



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- (a) the group is to be treated for the purposes of this Act as having failed to discharge the function,
    - (b) the Secretary of State may exercise the functions of the Board under section 14Z21(2), (3)(a) and (8)(a), and
    - (c) the Board may not exercise any of its functions under section 14Z21.
  - (6) Where, by virtue of subsection (5)(b), the Secretary of State exercises the function of the Board under subsection (3)(a) of section 14Z21, subsection (9)(a) of that section applies but with the substitution for the references to the Board of references to the Secretary of State.
  - (7) If the notice states that the trust special administrator has failed to discharge the administration duties (within the meaning of section 65KA(1)(b))—
    - (a) the administration duties are to be treated for the purposes of this Act as functions of the regulator,
    - (b) the regulator is to be treated for the purposes of this Act as having failed to discharge those functions, and
    - (c) the failure is to be treated for those purposes as significant (and section 71 of the Health and Social Care Act 2012 applies accordingly, but with the omission of subsection (3)).
  - (8) If the notice states that the regulator has failed to discharge a function—
    - (a) the regulator is to be treated for the purposes of this Act as having failed to discharge the function, and
    - (b) the failure is to be treated for those purposes as significant (and section 71 of the Health and Social Care Act 2012 applies accordingly, but with the omission of subsection (3)).
  - (9) Within the period of 60 working days beginning with the day on which the Secretary of State publishes a notice under subsection (2)(a), the Secretary of State must decide what action to take in relation to the trust.
  - (10) The Secretary of State must as soon as reasonably practicable—
    - (a) publish a notice of the decision and the reasons for it;
    - (b) lay a copy of the notice before Parliament.”
- (3) In section 65L of that Act (trusts coming out of administration), after subsection (2) insert—
- “(2A) For the purposes of subsection (1) in its application to the case of an NHS foundation trust, the reference to section 65K is to be read as a reference to section 65KD(9); and this section also applies in the case of an NHS foundation trust if—
- (a) the Secretary of State is satisfied as mentioned in section 65KB(1) or 65KD(1) in relation to the trust, and
  - (b) the action recommended in the final report is to do something other than dissolve the trust.
- (2B) For the purposes of subsection (2) in its application to the case of an NHS foundation trust—
- (a) the reference to the Secretary of State is to be read as a reference to the regulator, and

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- (b) the reference to the chairman and directors of the trust is to be read as including a reference to the governors.”
- (4) Omit subsections (3) to (5) of that section.
- (5) At the end of that section insert—
  - “(6) Subsection (7) applies in the case of an NHS foundation trust.
  - (7) If it appears to the regulator to be necessary in order to comply with Schedule 7, the regulator may by order—
    - (a) terminate the office of any governor or of any executive or non-executive director of the trust;
    - (b) appoint a person to be a governor or an executive or non-executive director of the trust.”
- (6) After that section insert—

**“65LA Trusts to be dissolved**

- (1) This section applies if—
  - (a) the Secretary of State is satisfied as mentioned in section 65KB(1) or 65KD(1), and
  - (b) the action recommended in the final report is to dissolve the NHS foundation trust in question.
- (2) This section also applies if the Secretary of State decides under section 65KD(9) to dissolve the NHS foundation trust in question.
- (3) The regulator may make an order—
  - (a) dissolving the trust, and
  - (b) transferring, or providing for the transfer of, the property and liabilities of the trust—
    - (i) to another NHS foundation trust or the Secretary of State, or
    - (ii) between another NHS foundation trust and the Secretary of State.
- (4) An order under subsection (3) may include provision for the transfer of employees of the trust.
- (5) The liabilities that may be transferred to an NHS foundation trust by virtue of subsection (3)(b) include criminal liabilities.”
- (7) For the cross-heading preceding section 65K substitute “Action by the Secretary of State and the regulator”.

**178 Sections 174 to 177: supplementary**

- (1) At the end of section 65M of the National Health Service Act 2006 (replacement of trust special administrator) insert—
  - “(3) For the purposes of this section in its application to the case of an NHS foundation trust, the references to the Secretary of State are to be read as references to the regulator.”

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- (2) In section 65N of that Act (power to issue guidance), after subsection (2) insert—
- “(2A) It must include guidance about the publication of—
- (a) notices under section 65KC(4)(a);
  - (b) statements under section 65KC(4)(b).”
- (3) At the end of that section insert—
- “(4) For the purposes of this section in its application to cases of NHS foundation trusts, the reference in subsection (1) to the Secretary of State is to be read as a reference to the regulator.”
- (4) In section 65O of that Act (interpretation of Chapter 5A), in the definition of “trust special administrator”, after “65B(6)(a)” insert “, section 65D(2)”.
- (5) In section 39 of that Act (register of NHS foundation trusts), in subsection (2), at the end insert “,
- (g) a copy of any order made under section 65D, 65J, 65KC, 65L or 65LA,
  - (h) a copy of any report laid under section 65D,
  - (i) a copy of any information published under section 65D,
  - (j) a copy of any draft report published under section 65F,
  - (k) a copy of any statement provided under section 65F,
  - (l) a copy of any notice published under section 65F, 65G, 65H, 65J, 65KA, 65KB, 65KC or 65KD,
  - (m) a copy of any statement published or provided under section 65G,
  - (n) a copy of any final report published under section 65I,
  - (o) a copy of any statement published under section 65J or 65KC,
  - (p) a copy of any information published under section 65M.”
- (6) In section 272 of that Act (orders etc.), in subsection (5), in paragraph (ab)—
- (a) after “65B(1),” insert “65D(2),”,
  - (b) omit “65E(1),”,
  - (c) after “65J(2),” insert “65KC(3),”, and
  - (d) for “65L(2), (4) or (5)” substitute “65L(2) or (7), 65LA(3)”.
- (7) After subsection (6) insert—
- “(6ZA) The Statutory Instruments Act 1946 applies in relation to the power of the regulator to make an order under Chapter 5A as if the regulator were a Minister of the Crown.”
- (8) In subsection (6A) of that section—
- (a) after “65B(1),” insert “65D(2),”,
  - (b) omit “65E(1),”,
  - (c) after “65J(2),” insert “65KC(3),”,
  - (d) after “65L(2) or (4)” insert “, 65LA(3)”, and
  - (e) for “(4)” substitute “(7)”.
- (9) In section 275(1) of that Act (interpretation), in the definition of “NHS trust”, omit the words from “and” to the end.

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- (10) In paragraph 22(1) of Schedule 7 to that Act (documents which must be made available to the public free of charge), at the end insert “,
- (g) a copy of any order made under section 65D, 65J, 65KC, 65L or 65LA,
  - (h) a copy of any report laid under section 65D,
  - (i) a copy of any information published under section 65D,
  - (j) a copy of any draft report published under section 65F,
  - (k) a copy of any statement provided under section 65F,
  - (l) a copy of any notice published under section 65F, 65G, 65H, 65J, 65KA, 65KB, 65KC or 65KD,
  - (m) a copy of any statement published or provided under section 65G,
  - (n) a copy of any final report published under section 65I,
  - (o) a copy of any statement published under section 65J or 65KC,
  - (p) a copy of any information published under section 65M.”
- (11) In section 206(1) of the National Health Service (Wales) Act 2006, in the definition of “NHS trust”, omit the words from “(including” to the end.