

CARE ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Health

Chapter 4 – Trust Special Administration

Section 120 – Powers of administrator etc.

727. This section further amends provisions relating to the functions of Trust Special Administrators (TSAs). Appointment of a TSA is one way in which action can be taken in exceptional circumstances to deal with NHS trusts and NHS foundation trusts which are operating unsustainably in their current form. On a TSA's appointment, an NHS trust's board of directors, and for an NHS foundation trust its council of governors also, is suspended. The TSA must produce a report stating the action the TSA recommends should be taken by the Secretary of State (in relation to NHS trusts) or Monitor (in relation to NHS foundation trusts).
728. The provisions for the Trust Special Administration regime were first introduced in the Health Act 2009, and provisions in the Health and Social Care Act 2012 amended them in relation to NHS foundation trusts. Although the arrangements for NHS trusts and NHS foundation trusts are similar, there are differences that reflect the greater autonomy of NHS foundation trusts. The Secretary of State appoints a TSA to an NHS trust, whilst Monitor appoints a TSA to an NHS foundation trust. The statutory objective of the trust special administration when a TSA is appointed to an NHS foundation trust is to ensure the continued provision of essential NHS services provided by that failing trust, whereas the Secretary of State sets the objective of the trust special administration at an NHS trust at the time of appointment of the TSA. The TSA of an NHS foundation trust is required by statute to seek the support of commissioners for their recommendations, whereas current expectations of a TSA of an NHS trust are set out in statutory Guidance. The final report on an NHS trust is submitted to the Secretary of State who decides what action to take, whilst the final report on an NHS foundation trust is submitted to Monitor which decides whether to accept the recommendations, with the Secretary of State having power to veto the recommendations if he is not satisfied, in accordance with various specified criteria.
729. This section amends the parts of the NHS Act 2006 and the Health and Social Care Act 2012, relating to the TSA's functions and special administration arrangements, to make six changes.
730. *Subsection (1)* provides that a TSA appointed to a failing NHS trust or NHS foundation trust has power to make recommendations, and Monitor/the Secretary of State has the power to take decisions, that go wider than the trust under administration. This includes where the action affects other NHS trusts and NHS foundation trusts, and action which is "necessary for and consequential on" action taken in relation to the failing trust. These powers are not to be applied retrospectively.
731. *Subsections (2)* and *(5)* will give the TSA more time to complete two stages in their work. *Subsection (2)* increases the time period for the TSA to produce the draft report

from 45 to 65 working days. Subsection (5) increases the period for the TSA to carry out the statutory consultation from 30 to 40 working days. The Secretary of State and Monitor's powers to extend the statutory deadlines of the regime remain in place.

732. *Subsections (3), (4), (6) and (7)* amend the provisions relating to commissioner agreement to the recommendations of a TSA appointed to an NHS foundation trust, by requiring agreement to be sought from commissioners of other NHS trusts or NHS foundation trusts affected by the recommendations, in addition to commissioners of the trust under administration. This applies in relation to the TSA's draft report, under subsections (3) and (4), and before any variation can be made to the draft report when producing the final report after the TSA's consultation, under subsections (6) and (7).
733. Each commissioner must agree that the objective of the TSA has been achieved by the recommendations. In addition, each commissioner who commissions services from other trusts which the TSA's recommendations affect, must also agree that the recommendations do not harm essential services at those other trusts which they commission. Essential services are defined at subsections (4) and (7) by reference to the same criteria as are applied originally when setting the objective of the TSA for the trust under administration. If any commissioner does not give a statement of their agreement, then the NHS Commissioning Board has to decide whether to give a statement of its agreement to the TSA's recommendations or lay a copy of its reasons why not before Parliament. The Board will consider whether the objective of the TSA has been achieved, whether affected services at other trusts are essential and if so whether they are harmed, taking into account the views of all the local commissioners.
734. *Subsections (8), (9) and (11)* add to a TSA's obligations to consult (including by holding meetings) by requiring a TSA to consult: (i) other NHS trusts and NHS foundation trusts affected by wider recommendations, their staff and their commissioners; (ii) any local authority in whose area the trust in administration and other affected trusts provide goods and services; and (iii) any Local Healthwatch organisation in the area of any such local authority. "Affected trust" is defined, and what is meant by the reference to a local authority is described, in *subsection (12)*. *Subsections (10) and (13)* make consequential and technical amendments.
735. *Subsection (14)* requires the Secretary of State to include in the statutory guidance for a TSA appointed to an NHS trust, guidance on seeking commissioner support and involving the NHS Commissioning Board in relation to finalising the draft and final report.
736. *Subsections (15), (16) and (17)* clarify that specific statutory consultation requirements on commissioners, NHS Commissioning Board and NHS trusts and foundation trusts that apply elsewhere in the NHS Act 2006 where those bodies plan and make service change, do not apply in respect of the special administration procedure and requirements arising from it. In the context of a trust special administration, section 65H of the 2006 Act requires the TSA to consult the public and certain other specified parties before finalising the draft report setting out his or her recommendations. These amendments avoid the need for duplicatory parallel consultation by these bodies.
737. *Subsection (18)* makes consequential amendments to Schedule 14 to the Health and Social Care Act 2012 in relation to these six changes.