

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – NHS foundation trusts and NHS trusts

Failure

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:
- 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;

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- 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 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.

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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.