

HEALTH ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Powers in Relation to Health Bodies

Chapter 1 – Powers in Relation to Failing NHS Bodies in England

Section 15 and Schedule 2: De-authorisation of NHS foundation trusts

196. *Section 15(1)* inserts new sections 52A to 52E into the NHS Act and section 15(2) incorporates Schedule 2 in the Act which inserts new Schedule 8A into the NHS Act. The new sections and Schedule provide for the de-authorisation of NHS foundation trusts. The provisions are in addition to the provisions for de-authorisation of NHS foundation trusts under the trust special administrator provisions of section 16 (see below).
197. New section 52A sets out the NHS foundation trusts to which new sections 52B to 52E apply. They apply to NHS foundation trusts which were authorised after an application by an NHS trust under section 33 of the NHS Act (a “section 33 foundation trust”). The provisions also apply to NHS foundation trusts which have been established under section 56 of the NHS Act (mergers between NHS foundation trusts, or between NHS trusts and foundation trusts), but only where at least one of the trusts which formed part of the merged trust was an NHS trust or a section 33 foundation trust or, where there has been a succession of mergers under section 56, only if any of those mergers involved an NHS trust or a section 33 foundation trust.
198. New section 52B allows Monitor to give the Secretary of State a written notice that an NHS foundation trust should be de-authorised. This notice can be given if Monitor is satisfied that an NHS foundation trust has contravened or failed to comply with any term of its authorisation, or any requirement in legislation, and that the breach (or breaches taken together if more than one) is sufficiently serious to justify de-authorisation. Monitor must consult with the persons or bodies listed in subsection (4) (including the trust and the local Strategic Health Authority) before giving a notice. When it gives a notice, it must also provide a report to the Secretary of State stating the reasons why it is satisfied that the conditions for de-authorisation are met. That report must be published within 7 days of the Secretary of State making an order to de-authorise the trust under new section 52D (new section 52D(8)).
199. New section 52C deals with the grounds for the de-authorisation notice. The section requires Monitor to consider the matters set out in subsection (1) when it is deciding whether a breach is sufficiently serious to justify de-authorisation and whether to give notice to the Secretary of State. In addition, Monitor must publish guidance, following consultation with the bodies and persons set out in subsection (3), on the matters (including the specific matters listed in subsection (1)) which it proposes to take into consideration.
200. New section 52D sets out the procedure for the Secretary of State to make an order de-authorising an NHS foundation trust. On such an order taking effect the trust becomes

a National Health Service trust (NHS trust). The Secretary of State must make such an order if Monitor has given notice under new section 52B. The order must specify the name of the NHS trust, the functions of the NHS trust and the number of non-executive and executive directors; if the trust has significant teaching commitments then one of the non-executive directors should be a person from a university with a medical or dental school (subsection (4)). The number of directors of the de-authorised NHS foundation trust may exceed the number permitted under the regulations governing NHS trust membership, or there may be an insufficient number and subsection (5) allows these arrangements to continue for a temporary period, specified in the order. New subsection (7) enables the Secretary of State to appoint or remove directors to meet requirements for NHS trusts.

201. New section 52E enables the Secretary of State to make a written request to Monitor to exercise its power to give a de-authorisation notice, where it appears to the Secretary of State that there are grounds on which Monitor could exercise that power.. The request must specify the NHS foundation trust to which it relates and the grounds for making the request and the request must be laid before Parliament. The request will set a period within which Monitor must either give a de-authorisation notice, or publish its reasons for not doing so (subsection (4)); that period is either 14 days or such longer period as is specified in the request (subsection (5)). If necessary, the Secretary of State may extend that period by order (subsection (6)).
202. *Section 15(2)* and *Schedule 2* insert new Schedule 8A to the NHS Act, which makes provision about de-authorised NHS foundation trusts. In particular the trust's constitution is to cease to have effect on de-authorisation (*paragraph 2*) and, subject to the other provisions of the Schedule, the trust is to be subject to the provisions of the NHS Act in relation to NHS trusts (including the provisions of Schedule 4 relating to the board of directors). Paragraph 4 provides that the number of executive and non-executive directors is to be that of the former NHS foundation trust, but this is subject to any provision made in the de-authorisation order (see section 52D(4) and (5)). In relation to finance, paragraph 7 provides that the public dividend capital (PDC) of the trust continues as public dividend capital of the NHS trust and paragraph 8 makes provision as to the trust's accounts. Paragraphs 9 to 11 provide that the trust may continue to:
- be a party to a contract entered into when the body was an NHS foundation trust,
 - hold property which the trust held as an NHS foundation trust, and
 - be a member of a body corporate (e.g. a company shareholder) of which the trust was a member as an NHS foundation trust,
- and ensure that the rights or liabilities of any third party are not affected by de-authorisation.
203. *Paragraph 12* of the new Schedule 8A clarifies that the provisions for continuity do not affect the power of the Secretary of State to direct the new NHS trust; for example, to direct them to dispose of certain property.

Section 16 and Schedule 2: Trust special administrators: NHS trusts and NHS foundation trusts

204. *Section 16* inserts a new Chapter 5A into the NHS Act (sections 65A to 65O). The new sections provide for the Secretary of State to appoint Trust Special Administrators (TSAs) to NHS trusts and NHS foundation trusts; for the de-authorisation of NHS foundation trusts; and for the functions of the TSA during the period of appointment. In particular, provision is made for consultation by the TSA, the preparation of a draft report making recommendations to the Secretary of State and a final decision by the Secretary of State in relation to the trust. Section 16 and Schedule 2 make further provision for de-authorised NHS foundation trusts.

Application

205. New section 65A applies the new provisions to English NHS trusts only (those trusts all or most of whose hospitals, establishments or facilities are situated in England), and to NHS foundation trusts which were authorised after an application by an NHS trust under section 33 of the Act (a “section 33 foundation trust”). The provisions also apply to NHS foundation trusts which have been established under section 56 of the Act (mergers between NHS foundation trusts, or between NHS trusts and foundation trusts), but only where at least one of the trusts which formed part of the merged trust was an NHS trust or a section 33 foundation trust or, where there has been a succession of mergers under section 56, only if any of those mergers involved an NHS trust or a section 33 foundation trust.

Appointment

206. New section 65B gives the Secretary of State the power to make an order authorising the appointment of a TSA to run an NHS trust, after consulting the trust, any Strategic Health Authority in whose area the trust has hospitals, establishments or facilities, and any other person who commissions services from the trust, for example a Strategic Health Authority or a PCT, where the Secretary of State considers it appropriate. The Secretary of State must be satisfied that the appointment of the TSA to the trust is in the interests of the health service (*subsection (2)*). An example where this might occur is if a key service provided by a small trust has to stop because of new clinical guidance about 24 hour cover and relatively small patient numbers mean that the trust can only provide such cover at a financial loss. Stopping this service may result in the organisation becoming unsustainable. A TSA is only likely to be appointed after previous performance interventions have been unsuccessful. The TSA would be appointed by the Secretary of State (*subsection (6)*) and would hold and vacate office in accordance with the terms of his or her appointment (*subsection (7)*). Under new section 65C, when the TSA’s appointment takes effect the members of the trust’s board of directors, including the chair, executive directors (for example, the Chief Executive) and non-executive directors, would be suspended from performing their duties as members of the board. Although suspended from the board, the executive directors would remain employed in their post with the trust (for example, as Chief Executive, Medical Director or Director of Finance).

De-authorisation of NHS foundation trusts

207. New sections 65D and 65E make specific provision for NHS foundation trusts. New section 65D enables Monitor to give a notice to the Secretary of State which has the effect that the Secretary of State must make an order under new section 65E providing for the trust to cease to be a foundation trust and instead become an NHS trust (described as “de-authorisation”) and an order under new section 65B appointing a TSA for the trust. Monitor would be able to give such a notice only where it was satisfied that the trust had failed to comply with a notice under section 52 and that a further notice would be unlikely to secure the provision of services which the trust is required by its authorisation to provide (new section 65D(1)). This is similar to the existing statutory test for the dissolution of an NHS foundation trust under section 54 of the NHS Act. A notice under section 52 of the NHS Act requires a specified trust, the directors or board governors of the trust to do, or not to do, specified things within a specified period.
208. The provisions of new Schedule 8A to the NHS Act (inserted by Schedule 2 to the Act) apply in relation to trusts de-authorised by an order under new section 65E(1) as well as to trusts de-authorised under new section 52D(1) – see paragraphs 202 and 203 above for an explanation of the provisions of Schedule 8A, and see the commentary on section 15 above in relation to section 52D. The only difference is that paragraph 5 of Schedule 8A, which does not apply to trusts de-authorised under section 52D, applies to trusts de-authorised under the trust special administrator provisions (section 65E). Paragraph 5 provides that the trust retains its name except for the substitution of the

words “NHS trust” for “NHS foundation trust”, and that its functions are the provision of goods or services for the purposes of the NHS in England.

Consultation and report

209. New section 65F requires that, within 45 working days of appointment, the TSA must produce for the Secretary of State and publish a draft report, outlining the action which he or she recommends that the Secretary of State should take in relation to the trust. The Secretary of State must lay this report before Parliament. The TSA must set out, in a published statement, how he or she plans to consult on the draft report (new section 65G(1)). The consultation period will last for 30 working days (new section 65G(2)).
- “210. New section 65H specifies the duties which apply during the consultation period. In particular, it specifies that the TSA must publish a notice stating that the TSA is seeking responses to the draft report and describing how people can give their responses (*subsection (2)*). *Subsections (4) and (5)* provide that the TSA must hold meetings with the public and the staff of the trust and staff representatives. Staff for these purposes includes staff employed by contractors and volunteers working for the trust (*subsection (11)*). Section 65H also requires the TSA to seek written responses from and meet with any Strategic Health Authority in whose area the trust has hospitals, establishments or facilities, and any person to which the trust provides goods and services which the Secretary of State directs the TSA to consult, (in practice likely to be persons who commission goods and services from the trust) (*subsections (7)(a) and (b) and (9)*). The TSA is also required to request a written response from such of the persons named in *subsection (8)* as the Secretary of State directs. In addition, the Secretary of State may, through directions, impose additional requirements to hold meetings or seek written responses; this may include, for example the local university medical school, if the organisation has a training role (*subsection (10)*).
211. New section 65I provides that within 15 working days of the consultation closing, the TSA must provide the Secretary of State with a report containing final recommendations for the trust. The TSA must attach to the report a summary of all oral and written responses to the consultation received during the consultation process. The Secretary of State must publish this report and lay it before Parliament (*subsection (3)*).
212. New section 65J enables the Secretary of State to make an order extending any of the time periods for preparing the draft report, conducting the consultation or providing the final report. The power will be exercisable only where it would not be reasonable to expect the administrator to complete the relevant activity in the specified period and it is envisaged that the power will only be used in exceptional circumstances; for example, where the TSA was seriously ill or if the organisation had to deal with a significant unplanned event, for example a SARS (severe acute respiratory syndrome) outbreak. Where the time is extended, the TSA must publish a notice stating the date when the revised period expires (*subsections (3) and (4)*).

Action by the Secretary of State

213. New section 65K requires the Secretary of State to decide what action to take in relation to the trust within 20 working days of receiving the final report. The decision and the reasons for it must be laid before Parliament as well as published.
214. If the Secretary of State decides to take any action in relation to the trust (for example, to dissolve the trust and merge it with another trust, or to direct it to close or transfer particular establishments or services), the Secretary of State will exercise existing powers under the NHS Act to take that action. If the Secretary of State decides not to dissolve the trust, however, new section 65L provides for the Secretary of State to make an order specifying when the appointment of the TSA and the suspension of the chairman and directors of the trust will come to an end (*subsection (2)*). If the trust is a de-authorised NHS foundation trust, an order must be made specifying

the name of the NHS trust, the functions of the NHS trust and the number of non-executive and executive directors. If the trust has significant teaching commitments then one of the non-executive directors should be a person from a university with a medical or dental school (*subsection (4)*). In the case of a de-authorised NHS foundation trust, the number of suspended directors may exceed the number permitted under the regulations governing NHS trust membership, or there may be an insufficient number. New *subsection (5)* therefore enables the Secretary of State to remove directors or appoint new directors to meet requirements for NHS trusts.

Supplementary

215. New section 65M provides that if the TSA ceases to hold office either before the Secretary of State has dissolved the trust or before the Secretary of State has reinstated the chairman and directors to the trust, the Secretary of State must appoint another TSA and publish his or her name. At this point the new TSA takes over at the same stage in the process, unless the Secretary of State directs that the new TSA should start from a different point (for example to start at the beginning of the process) (*subsection (2)*).
216. New section 65N requires the Secretary of State to publish guidance for TSAs, which must include guidance in relation to the publication of notices relating to consultation and extensions of time and also the preparation of the draft report.

Section 17: Trust Special Administrators: Primary Care Trusts

217. *Section 17* inserts a new Chapter 5B into the NHS Act (new sections 65P to 65Z3). The new sections provide the Secretary of State with powers to direct a PCT to appoint a TSA to exercise specified “provider” functions of the PCT. The new sections also set out the functions of the TSA during the period of appointment which will apply if the direction-making power is exercised. In particular, provision is made for consultation by the TSA, the preparation of a draft report making recommendations to the Secretary of State and a final decision by the Secretary of State.

Appointment

218. New section 65P gives the Secretary of State the power to give directions requiring a PCT to appoint a TSA to exercise certain “provider” functions of the PCT on its behalf (*subsection (1)*). A “provider” function is any function which (i) involves the provision of goods and services, but only where that function is exercised by the PCT by means of direct provision (for example not by the making of commissioning arrangements with other persons) and (ii) is not a function of providing goods and services but which may be exercised for that purpose (e.g. employing staff) (*subsection (10)*). Precisely which functions are to be exercised by the TSA will be specified in the directions; that may differ in each case. The Secretary of State may only exercise the direction-making power if the Secretary of State considers it appropriate in the interests of the health service to do so (*subsection (2)*) and only after consulting the PCT, any Strategic Health Authority whose area includes any part of the PCT’s area, and any other person which commissions services from the PCT, where the Secretary of State considers it appropriate (*subsection (4)*). The TSA holds and vacates office in accordance with the terms of his or her appointment (*subsection (7)*) and the Secretary of State can require in the directions that the terms of appointment contain specified terms, for example provision could be included to ensure that the Board of the PCT cannot interfere in the exercise of the TSA’s functions (*subsection (8)*). New section 65Q provides that when the TSA’s appointment takes effect, the relevant functions (meaning those exercisable by the TSA) will no longer be exercisable by any committee, subcommittee or officer of the PCT, but that provision will not affect the employment of any PCT employee (*subsection (2)*).

Consultation and report

219. New section 65R requires that, within 45 working days of appointment, the TSA must produce and publish a draft report, recommending the action that the Secretary of State should take in relation to the performance of the relevant functions. The Secretary of State must lay this report before Parliament (*subsection (3)*). The TSA must set out, in a published statement, how he or she plans to consult on the draft report (new section 65S(1)). The consultation period will last for 30 working days (new section 65S(2)).
220. New section 65T specifies the duties which apply during the consultation period. In particular, it specifies that the TSA must publish a notice stating that the TSA is seeking responses to the draft report and describing how people can give their response (*subsection (2)*). It provides that the TSA must hold meetings with the public and staff of the PCT and staff representatives (*subsections (4) and (5)*). Staff for these purposes only includes staff who are employed in connection with the relevant functions (i.e. the provider functions which are being exercised by the TSA) and it includes staff employed by contractors and volunteers working for the PCT (*subsection (10)*). The TSA is required to seek written responses from and meet any Strategic Health Authority in whose area any part of the PCT's area falls, and any person to which the trust provides goods and services which the Secretary of State directs the TSA to consult (in practice likely to be persons who commission goods and services from the trust) (*subsections (7)(a) and (b) and (8)*). The TSA is also required to request a written response from such persons within section 65H(8) as the Secretary of State may direct (*subsection (7)(c)*). The Secretary of State may also direct the TSA to seek written responses from or hold meetings with additional persons specified in the directions (*subsection (9)*).
221. New section 65U provides that within 15 working days of the end of the consultation period, the TSA must give the Secretary of State a report containing his or her recommendations. The TSA must attach to the report a summary of all oral and written responses to the consultation received during the consultation process. The Secretary of State must publish the TSA's report and lay it before Parliament (*subsection (3)*).
222. New section 65V enables the Secretary of State to make an order extending any of the time periods for preparing the draft report, conducting the consultation or providing the final report. The power will be exercisable only where it would not be reasonable to expect the administrator to complete the relevant activity in the specified period and the Government envisages that the power will only be used in exceptional circumstances; for example, where the TSA was seriously ill or if the organisation had to deal with a significant unplanned event, for example a SARS (severe acute respiratory syndrome) outbreak. Where the time is extended, the TSA must publish a notice stating the date when the revised period expires (*subsections (2) and (3)*).

Action by the Secretary of State

223. New section 65W requires the Secretary of State to decide what action to take in relation to the performance of the relevant provider functions within 20 working days of receiving the final report. The decision and the reasons for it must be laid before Parliament as well as published.
224. If the Secretary of State decides to take any action in relation to the relevant provider function (for example, the Secretary of State may decide that the PCT should stop providing services itself and commission them from elsewhere) he or she will exercise existing powers under the NHS Act to take that action.
225. New section 65X allows the Secretary of State to give directions to the PCT and the TSA, requiring that the TSA is removed with effect from a specified day.

Supplementary

226. New section 65Y provides that if the TSA ceases to hold office before the Secretary of State has published his or her decision, the Secretary of State must appoint a new TSA and publish his or her name. The new TSA takes over at the same stage in the process, unless the Secretary of State directs that the new TSA should start from a different point (for example to start at the beginning of the process) (*subsection (3)*).
227. New section 65Z allows the Secretary of State to give further directions to the TSA about the exercise of the TSA's functions.
228. New section 65Z1 requires the Secretary of State to publish guidance for TSAs, which must include guidance in relation to the publication of notices relating to consultation and extensions of time and also the preparation of the draft report.
229. New section 65Z2 requires the following directions to be laid before Parliament: the initial directions requiring the appointment of a TSA and specifying which functions are to be exercised by the TSA on the PCT's behalf; additional directions about the TSA's exercise of functions; directions bringing the appointment of the TSA to an end.

Section 18 Trust special administrators: consequential amendments

230. *Section 18* makes amendments to the NHS Act consequential on the amendments made by section 15 (de-authorisation of NHS foundation trusts) and sections 16 and 17 (trust special administrators). In particular, subsections (2) to (6) amend sections 53 and 54 of the NHS Act so that the existing provisions for voluntary arrangements and the dissolution of NHS foundation trusts apply only to NHS foundation trusts to which the new regime does not apply (meaning those authorised on an application by a body other than an NHS trust under section 34 of the Act, or those established under section 56 which are not within section 65A(2)).
231. *Subsection (5)* amends section 53(4) of the NHS Act, to ensure that the existing provisions for voluntary arrangements and the dissolution of NHS foundation trusts apply only to NHS foundation trusts to which the new de-authorisation provisions in new sections 52A to 52E and the trust special administrators regime (Chapter 5A inserted by section 16) do not apply.
232. *Subsection (7)* amends section 242 of the NHS Act (public involvement and consultation), so that PCTs, NHS trusts and NHS foundation trusts will not be obliged to consult, or make other arrangements for involvement, in relation to matters to which the draft report or final report relates as relevant consultation will be undertaken by the TSA under the new sections.
233. *Subsection (8)* amends section 272 of the NHS Act (orders, regulations, rules and directions) to make provision about the procedure which is to apply to the orders made under new sections 52A to 52E (de-authorisation of NHS foundation trusts) and 65A to 65Z (trust special administrators).
234. *Subsections (9) and (12)* provide for the definition of 'NHS trust' in section 275(1) of the NHS Act 2006 and section 206(1) of the NHS (Wales) Act 2006 to include a body that becomes a NHS trust by virtue of an order for de-authorisation of an NHS foundation trust made under new section 52D(1) or 65E(1).