

HEALTH ACT 2009

EXPLANATORY NOTES

BACKGROUND AND SUMMARY

Powers in Relation to Health Bodies

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

De-authorisation of NHS foundation trusts

26. NHS foundation trusts are public benefit corporations, usually former NHS trusts, authorised under Chapter 5 of Part 2 of the National Health Service Act 2006 (the NHS Act) and are regulated by the Independent Regulator of NHS Foundation Trusts (Monitor). NHS foundation trusts must comply with the terms of the authorisation given by Monitor under the NHS Act. Monitor has powers to require a failing trust to do specified things or to remove its directors (section 52 of the NHS Act) and to require it to enter into a voluntary arrangement with creditors (section 53). If a trust fails to comply and Monitor considers that the further exercise of its powers would not be likely to secure the provision of the goods or services which the authorisation required the trust to provide, the Secretary of State may make an order to dissolve the trust, transfer property or liabilities to other NHS bodies and apply the provisions of insolvency legislation relating to the winding up of companies to the trust, in order to deal with outstanding liabilities, etc (section 54). But those provisions do not give either Monitor or the Secretary of State the power to de-authorise a foundation trust, or return it to ordinary NHS trust status.
27. [Section 15](#) deals with de-authorisation of NHS foundation trusts without the appointment of a trust special administrator. Section 16 deals with the appointment of trust special administrators in respect of NHS trusts and NHS foundation trusts. It also deals with de-authorisation of NHS foundation trusts in the context of the appointment of the trust special administrator. So in effect there are two regimes for de-authorisation of NHS foundation trusts. One without the appointment of a trust special administrator dealt with in section 15 where the regulator must be satisfied that the trust in question is contravening or failing to comply with, or has contravened or failed to comply with, any term of its authorisation or any requirement imposed on it under any enactment and the seriousness of the contravention or failure, or if there has been more than one of any taken together, is such that it would justify the Secretary of State making an order de-authorisation order (section 52B of the NHS Act).
28. The section 16 procedure on the other hand requires the regulator to trigger the regime if satisfied that an NHS foundation trust is failing to comply with a notice under section 52 of the NHS Act (failing NHS foundation trust) and further exercise of the powers conferred by section 52 of the 2006 Act would not be likely to secure the provision of the goods and services which the trust's authorisation requires to provide (section 65D(1) of the NHS Act). So in effect the test for the trigger the regime under section 16 is more stringent than that under section 15. Where the Secretary of State makes a de-authorisation order under section 16 he must also make an order authorising

the appointment of a trust special administrator in relation to the trust (section 65E(6) of the NHS Act).

29. In July 2009 the Government published its consultation document on de-authorisation of foundation trusts where the Government sought views on the proposals to de-authorise NHS foundation trusts where a foundation trust had significantly contravened or failed to comply with the terms of its authorisation.¹
30. Following publication of the consultation response in October 2009 one substantial amendment (adding section 15) and seventeen consequential amendments were made to the Bill for the Act at Commons Report Stage.

Trust special administrators

31. *Developing an NHS Performance Regime*², published in June 2008, announced the Government's intention to—

“establish a failure regime for state-owned providers that reflects the Government's obligations to ensure service continuity and protect public assets.
32. It detailed the steps that would be taken if an NHS organisation failed, either for clinical or organisational reasons.
33. In September 2008, the Government published the *Consultation on a regime for unsustainable NHS providers*³, which set out Government proposals and sought views on such a regime. The consultation response document⁴ was published in January 2009, alongside the Bill for the Act.
34. Further detail on how the wider performance framework will work for NHS trusts was published in April 2009 and is included in *The NHS Performance Framework: Implementation Guide*⁵.
35. Chapter 1 of Part 2 of the Act amends the NHS Act to make provision for the appointment of trust special administrators (TSAs) for NHS trusts, NHS foundation trusts and PCTs in England. These NHS bodies are established under the NHS Act. The new provisions are intended to form part of a wider process for dealing with the poor performance and failure of such NHS bodies. The appointment of a TSA will be the final stage in this process, where earlier attempts to improve performance using existing powers have failed and the continuation of the body in its present situation is not considered to be in the interests of the health service.
36. Under the existing provisions of the NHS Act, there are various means to address poor performance of NHS trusts and PCTs. Strategic Health Authorities are responsible for the performance management of PCTs and NHS trusts; and the arrangements between NHS trusts and PCTs may include provisions relating to performance. The Secretary of State has power to give directions to NHS trusts and PCTs about their exercise of functions (section 7 of the NHS Act) and has powers to remove the chairs and non-executive directors (regulations made under Schedules 3 and 4 to the NHS Act). If the Secretary of State considers that a trust is not performing its functions adequately or at all, or that there are significant failings in the way the body is being run, and considers it appropriate to intervene the Secretary of State may make an intervention order under

1 Department of Health (2009), Consultation on de-authorisation of NHS foundation trusts, Department of Health, London. Available at: http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_103359

2 Department of Health (2008). Developing an NHS performance Regime, Department of Health, London. Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085215

3 Department of Health (2008). *Consultation on a regime for unsustainable NHS providers*. Department of Health, London Available at: http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_087835

4 Department of Health (2009), Response to Consultation on Regime for Unsustainable Providers. Available at: www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_093261

5 Department of Health (2009), NHS Performance Framework: Implementation Guidance, Department of Health, London. Available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_098525

sections 66 and 67. Finally, the Secretary of State may dissolve a PCT or an NHS trust (section 18(2) of, and paragraph 28 of Schedule 4 to, the NHS Act).

37. As explained in paragraph 26 above, NHS foundation trusts are regulated by Monitor and are subject to its various powers to deal with failing trusts (sections 52 to 54). In particular, if a trust fails to comply with a notice under section 52 or 53 and Monitor considers that the further exercise of its powers would not be likely to secure the provision of the goods or services which the authorisation required the trust to provide, the Secretary of State may make an order to dissolve the trust, transfer property or liabilities to other NHS bodies and apply the provisions of insolvency legislation relating to the winding up of companies to the trust, in order to deal with outstanding liabilities, etc (section 54).
38. Historically, before the Act, failing NHS trusts had been dealt with in a relatively *ad hoc* way. The policy intention behind the Bill for the Act was to provide for a regime in legislation which would ensure clarity and transparency and ensure that key processes of the regime were applied systematically. As indicated, for NHS foundation trusts, the provisions of the Health and Social Care (Community Health and Standards) Act 2003, now consolidated in the NHS Act, provide for a regime in which a trust being dissolved by order could be subject to insolvency procedures under the order applying and modifying the statutory provisions for the winding up of companies (Part 4 of the Insolvency Act 1986), but there was discussion about how such procedures would be modified and applied. The Department concluded that it was not appropriate to apply insolvency procedures to most NHS foundation trusts and instead the new provisions inserted by sections 15 to 17 of the Act will apply. *Consultation on a regime for unsustainable providers*, September 2008 and *The Regime for Unsustainable NHS Providers: response to consultation*, January 2009 provide further background and set out more detail on the policy.
39. The provisions introduced by sections 16 and 17 in Chapter 1 of Part 2 of the Act enable the Secretary of State to appoint, or in the case of a PCT, require a body to appoint a TSA to take control of the body for a temporary period, during which the TSA will be responsible for ensuring that the body continues to exercise its functions (for example, in the case of an NHS trust, that it continues to provide services in accordance with its NHS contracts). During the period of appointment, the TSA must produce a report stating the action which the TSA recommends the Secretary of State should take in relation to the trust. The TSA will be obliged to consult various persons before finalising the report. The Secretary of State will be obliged to make a decision as to what action to take in the light of the final report, within 20 working days of receiving the report. In the case of NHS foundation trusts, it is for Monitor to initiate the regime, by giving a notice to the Secretary of State in accordance with the provisions. On receiving such a notice, the Secretary of State will be obliged to make an order providing that the trust ceases to be a foundation trust and instead becomes an NHS trust (described as “de-authorisation”), and appointing a TSA. A de-authorised NHS foundation trust will become an NHS trust and be subject to the other provisions of the Chapter relating to such trusts.

Chapter 2 –Suspension

40. The Healthcare Commission report in October 2007 on outbreaks of *Clostridium difficile* at Maidstone and Tunbridge Wells NHS trust⁶ highlighted the need for swift action, in extreme cases, to suspend chairs and members of NHS boards. A Review of NHS public appointments processes carried out with the NHS and published in January 2008, recommended that the Secretary of State should have powers to suspend those whom the Secretary of State appoints and that powers to suspend should, as with powers to appoint, be delegated to the Appointments Commission.

⁶ Healthcare Commission (2007) Investigation into outbreaks of *Clostridium difficile* at Maidstone and Tunbridge Wells NHS trusts, Commission for Healthcare Audit and Inspection

41. The Government consulted on proposals to introduce new powers of suspension for chairs and other non-executives of PCTs and NHS trusts between January and March 2008⁷. The Government stated during the consultation that the Government's intention was to introduce the same powers for chairs and non-executives of Strategic Health Authorities and national bodies established by the Department of Health in a second phase of legislation to follow later in 2008/09. The proposals for local trusts and PCTs received full support from the NHS and, following amendments to regulations,⁸ the Appointments Commission was provided with the new powers on 16 June 2008.
42. A Government consultation document,⁹ published in July 2008, considered proposals to introduce powers of suspension and a single approach to the removal of chairs and non-executives of the second group of bodies – Strategic Health Authorities, national health sector bodies and arms length bodies. The consultation concluded on 9 October 2009 and, as with the previous local consultation, it was supportive of introducing new suspension proposals.
43. Chapter 2 of Part 2 of the Act introduces Schedule 3 providing for new powers of suspension of chairs and other members of NHS and other health bodies. The provisions in the Schedule amend the relevant legislation dealing with appointments to Strategic Health Authorities, Special Health Authorities, Monitor, standing advisory committees (committees which advise the Secretary of State pursuant to section 250 of the NHS Act, such as the Joint Committee on Vaccination and Immunisation), community health councils in Wales, the Human Tissue Authority, the Health Protection Agency, the Human Fertilisation and Embryology Authority, bodies established under the Medicines Act 1968, the Alcohol Education and Research Council and the Appointments Commission itself. The provisions also ensure that appropriate procedures are or could be put in place for notification of suspension, review on request after a given period and for temporary replacement of a suspended chair.

⁷ Department of Health (2008). *Removing or suspending chairs & non-executives from PCTs and NHS trusts: Consultation on introducing powers of suspension*. Department of Health, London.

⁸ [The Primary Care Trusts and National Health Service Trusts \(Membership and Procedure\) Amendment Regulations 2008 \(SI 2008/1269\)](#)

⁹ Department of Health (2008). *Removing or suspending chairs & non-executives of Health Bodies – Consultation on introducing new powers of suspension*. Department of Health, London.
Available at: http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_086308