

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 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.