

*These notes refer to the Health Act 2009 (c.21)  
which received Royal Assent on 12 November 2009*

# HEALTH ACT 2009

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## EXPLANATORY NOTES

### BACKGROUND AND SUMMARY

#### *Powers in Relation to Health Bodies*

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

#### *Trust special administrators*

31. *Developing an NHS Performance Regime*<sup>1</sup>, 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*<sup>2</sup>, which set out Government proposals and sought views on such a regime. The consultation response document<sup>3</sup> 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*<sup>4</sup>.
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

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<sup>1</sup> 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](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085215)

<sup>2</sup> 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](http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_087835)

<sup>3</sup> Department of Health (2009), *Response to Consultation on Regime for Unsustainable Providers*. Available at: [www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH\\_093261](http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_093261)

<sup>4</sup> 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](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_098525)

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 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.