

EXPLANATORY MEMORANDUM TO
THE HEALTH ACT 2009 (POWERS IN RELATION TO NHS BODIES—
CONSEQUENTIAL AMENDMENTS) REGULATIONS 2010

2010 No. 720

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These regulations are being introduced to make consequential amendments to the National Health Service Trusts (Membership and Procedure) Regulations 1990 (the 1990 Regulations) and the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 (the 2002 Regulations) to allow commencement of the Trust Special Administrator (TSA) provisions in the Health Act 2009.

2.2 The 1990 Regulations are being amended to (i) allow the suspended Board of a de-authorised foundation trust to be maintained, when it reverts to being an NHS trust (as it is possible for the Board to be reinstated once the trust special administrator has published the report, should the Secretary of State decide that the organisation continues in some form); and (ii) to allow the TSA to carry out the functions of the Board.

2.3 The 2002 Regulations are being amended to disapply the Overview and Scrutiny Committees powers to scrutinise changes to health services when a TSA is in post. Provisions have been made directly in the Health Act 2009 for the Overview and Scrutiny Committee to input into the TSA's consultation.

3. Matters of special interest to the [Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments]

3.1 None

4. Legislative Context

4.1 These Regulations make consequential amendments to the 1990 Regulations and the 2002 Regulations following the enactment of the Health Act 2009.

4.2 Chapter 1 of Part 2 of the Health Act 2009 amends the NHS Act to make provision for the appointment of TSAs to NHS trusts, NHS foundation trusts and Primary Care Trusts in England. These NHS bodies are established under the National Health Service Act 2006 (the 2006 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 is likely to be the final stage in this process, where earlier attempts to improve performance have failed and the continuation of the body in its present situation is not considered to be in the interests of the health service.

4.3 In the case of NHS foundation trusts, it is for the regulator (known as Monitor) to initiate the process by giving a notice to the Secretary of State in accordance with the new provisions under the 2006 Act. 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 appoint a TSA.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 ‘Developing an NHS Performance Regime’ 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.”

7.2 It detailed the steps that would be taken if an NHS organisation failed, either for clinical or organisational reasons. ‘Developing an NHS Performance Regime’ is available at

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085215.

7.3 In September 2008, the Government published the Consultation on a regime for unsustainable NHS providers, which set out Government proposals and sought views on such a regime. The consultation response document was published in January 2009, alongside the Bill for the Act. The consultation documents for the regime for unsustainable providers are available at

http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_087835.

7.4 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. This document is available at

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_098525.

- ***Consolidation***

7.5 There are no plans to consolidate any of the legislation being amended by these Regulations.

8. Consultation outcome

8.1 There are no formal requirements to consult on these Regulations.

9. Guidance

9.1 No guidance will be prepared in consequence of these Regulations. However, Statutory Guidance for Trust Special Administrators will be published on the Department of Health website.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument. However, an Impact Assessment has been published for the policy and it was part of the Health Act 2009 Impact Assessment and is available at www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_093305

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The impact of the changes will be subject to on-going internal review and will be formally reviewed after 12 months and the legislation may be amended accordingly.

13. Contact

James Vallance at the Department of Health email: James.Vallance@dh.gsi.gov.uk can answer any queries regarding the instrument.