



## FACTSHEET 18

# The Care Bill – Trust Special Administration

*“For the Unsustainable Provider Regime to work effectively it is important that there should be complete clarity for all concerned on how the regime will work. We believe that the [Trust Special Administrator] must be able to look more widely at a sub-regional or wider health economy in making their recommendations.”*

Foundation Trust Network and NHS Confederation; joint letter of 3 October 2013 to the Department of Health.

*This factsheet describes a series of changes contained in the Care Bill aimed at ensuring that the regime for unsustainable NHS providers is fit for purpose. It is essential that the NHS has an effective failure regime that protects patient services by dealing swiftly and effectively with failed trusts.*

**Factsheet 16** covers the proposal to extend the regime to cover providers that fail to meet quality standards, not just those that are in financial difficulty.

## What is the regime for unsustainable NHS providers?

The regime for unsustainable NHS providers, also known as the Trust Special Administrator’s regime, (the regime) is one way to take action to deal with NHS trusts and NHS foundation trusts that are unsustainable in their current configuration. The Secretary of State, or Monitor in the case of an NHS foundation trust, can appoint a trust special administrator (TSA) to make recommendations about actions to secure sustainable and high quality services where the trust providing them has been placed into administration.

The regime provides a transparent, time-limited, rules-based process for the administration of NHS trusts and NHS foundation trusts. It is only used under exceptional circumstances.

While the regime for NHS trusts and foundation trusts is broadly the same, there are differences that reflect the greater autonomy of foundation trusts.

The Secretary of State appoints a TSA to an NHS trust, whilst Monitor appoints a TSA to a foundation trust. The statutory objective of a TSA appointed to a foundation trust is to ensure the continued provision of essential NHS services.

The Secretary of State sets the objective of a TSA at an NHS trust at the time of appointment. The TSA of a foundation trust is required to seek the support of commissioners for their recommendations, whilst there is no statutory obligation on a TSA to an NHS trust. The final report on an NHS trust is submitted to the Secretary of State who decides what action to take, whilst the final report on a foundation trust is submitted to Monitor which decides whether to accept the recommendations,

with Secretary of State having the power to veto the recommendations under certain circumstances.

The key stages of the regime are:

- **Appointment.** A TSA is appointed by an order issued by the Secretary of State, or Monitor in the case of a foundation trust. A TSA has a dual role. Firstly, a TSA exercises the functions of the chair and directors of the trust (and in the case of a foundation trust, its governors), taking charge of the day to day running of the trust for the period he or she is appointed. Secondly, a TSA must carry out inquiries into the problems of the trust and make recommendations to the Secretary of State or Monitor on the action that should be taken.
- **Draft report.** A TSA must rapidly assess the issues facing the trust, engage with staff and develop recommendations on the future of the organisation and the services it provides. The TSA must publish a report including draft recommendations within 45 working days of appointment.
- **Consultation.** A 30 working day consultation on the TSA's draft recommendations then takes place.
- **Final report.** Following the consultation, the TSA is required to produce a final report with their recommendations within 15 working days. For NHS trusts, that report is submitted to the Secretary of State and for NHS foundation trusts it is submitted to Monitor.
- **Decision.** On receipt of the final report on an NHS trust, the Secretary of State

has 20 working days to decide what action to take. He or she must notify Parliament of the decision and the reasons behind it. In the case of a foundation trust, Monitor has 20 working days to accept the report. If it is satisfied with the report, it is forwarded to the Secretary of State who has 30 working days to decide if the TSA, the commissioners, and Monitor have met their legal duties and that certain other key tests are met. If Monitor or the Secretary of State is not satisfied with the TSA's report, there is a process for reconsidering the recommendations. If, ultimately, the recommendations cannot be agreed, the Secretary of State can veto the TSA's report. The Secretary of State is then required to decide within 60 working days what action to take.

## How often is the regime used?

Since the regime was established in 2009, it has been used twice: first in July 2012 at South London Healthcare NHS Trust, and again in April 2013 at Mid Staffordshire NHS Foundation Trust. The administration at Mid Staffordshire is on-going.

## What does the Bill do?

Following the use of the regime in South London and Mid-Staffordshire, it is clear that changes need to be made to the statutory provisions to ensure the regime is fit for purpose. The clause introduced by the Government in the Care Bill makes five changes:

- To extend the time available for the TSA to prepare a draft report and to consult on it.* It has always been the intention that the regime should be applied to a tight timeline, and

deadlines for particular steps in the process were written into the primary legislation in 2009. There is a power for the Secretary of State, and for Monitor in the case of an NHS foundation trust, to agree to extend deadlines where necessary in specific cases. Experience with use of the regime so far suggests that the deadlines would benefit from an extension in the majority of cases, particularly given the desirability of the TSA seeking support from relevant commissioners to his or her recommendations. Accordingly, the clause in the Care Bill extends the standard deadlines for producing draft recommendations from 45 to 65 working days and for undertaking a local consultation from 30 to 40 working days. This does not affect the powers available to the Secretary of State or Monitor to extend deadlines further.

- ii. *To provide for the TSA to have power to make recommendations, and the Secretary of State/Monitor the power to accept recommendations, that affect providers other than the trust to which the administrator was appointed.* This change would mean a TSA could recommend action in relation to other NHS trusts, foundation trusts or other providers, where it is necessary for, and consequential upon, the action required to address the issues at the trust in administration. This is not retrospective, and is intended only to ensure that the regime is fit for purpose for the future.
- iii. *To extend the commissioner approval requirements for the recommendations of a TSA appointed to a foundation trust.* Under existing legislation, a TSA

appointed to a foundation trust is required to seek support from the NHS commissioners of the trust in administration before the draft report is put out to consultation, and also before the draft report is amended following consultation. The clause in the Care Bill would require a TSA also to seek agreement from the commissioners of other trusts' services, where those other trusts are affected by his or her recommendations. Where the TSA does not achieve unanimous support from the relevant commissioners, NHS England may instead provide the necessary support. If NHS England decides not to support the TSA's recommendations, it must give notice of its reasons for disagreeing with them and lay that notice before Parliament.

- iv. *To place a duty on the Secretary of State to include in the statutory guidance for TSAs appointed to NHS trusts guidance about seeking commissioner support for the TSA's proposals and about involving NHS England in finalising the final or draft report.* The guidance will set out how a TSA should seek support from NHS England for their recommendations if he or she is unable to secure the support of commissioners affected by those recommendations.
- v. *To clarify that the statutory obligations of the commissioners (NHS England and Clinical Commissioning Groups) to involve and consult patients and the public in planning and making service change do not apply in respect of the regime.* There are various statutory requirements in primary legislation for NHS England, Clinical Commissioning

Groups, NHS trusts and foundation trusts to undertake consultation with patients and the public in planning and making service change. Under the Care Bill these consultation requirements would no longer apply to NHS England and Clinical Commissioning Groups during the TSA progress. Such requirements are already dis-applied for NHS trusts and FTs. If this change was not made, it could lead to parallel consultations by commissioners that are inconsistent with the accelerated consultation process of a TSA. The change does not mean that the public will not get a proper say on a TSA's draft recommendations. A TSA will remain under a legal duty to consult the public to allow anyone with an interest to give

their views and help improve a TSA's recommendations.

#### FURTHER INFORMATION

- Statutory Guidance for Trust Special Administrators appointed to NHS Trusts (Department of Health, July 2012) <https://www.gov.uk/government/publications/statutory-guidance-for-trust-special-administrators-appointed-to-nhs-trusts>
- Statutory Guidance for Trust Special Administrators appointed to NHS foundation trusts (Monitor, April 2013) <http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishFinalTSAGuidanceApril2013.pdf>