



Department
of Health

Protecting patients' interests – ensuring continuity of NHS services:

Proposals for a Health Special

Administration procedure for companies

Government Response

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ensuring continuity of NHS
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Special Administration
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Government Response

Prepared by the Provider Policy Unit, Finance and NHS Directorate,
Department of Health

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1. Introduction

- 1.1.** This document sets out the Government's response to the consultation held on proposals for a Health Special Administration (HSA) procedure for companies which was published on 1st November 2012: *'Protecting patients' interest – ensuring continuity of NHS services: A consultation on proposals for a health special administration procedure for companies'*.
- 1.2.** Special administration regimes are set out in law to secure patients' access to services where a NHS Trust or Foundation Trust goes into financial failure. However, there is currently no legal framework in place to secure access to services where an independent provider of NHS funded healthcare goes into financial failure. Were such an instance to occur, the independent provider would be subject to administration procedures as governed by the Insolvency Act 1986.
- 1.3.** The Health and Social Care Act 2012 contains a provision allowing Government to introduce secondary legislation setting out a HSA regime for the purpose of securing patients' access to 'essential' services in the event that an independent provider of those services were to become insolvent. 'Essential' services are known as 'Commissioner Requested Services' (CRS), services for which commissioners consider there would be no alternative provider, taking into account the impact on healthcare access and inequality. HSA would provide an alternative to standard corporate insolvency procedures and may not be used in every case as its intended use is only as a last resort.
- 1.4.** The 2012 Health and Social Care Act also allows Monitor to establish one or more mechanisms for providing financial assistance in cases where providers of NHS funded health services are subject special administration, to support the continued access to essential services. This mechanism (since termed a 'risk pool') could include placing a levy on providers and commissioners of CRS. The intention of a risk-pool is to fund a HSA regime as well as the Trust Special Administration regime currently in place for NHS Foundation Trusts. Under the provisions in the Health and Social Care Act 2012, a risk pool is needed in order to implement a HSA.

2. Consultation Process

- 2.1.** A public consultation was held between 1st November 2012 and 4th January 2013 on proposals for implementing a HSA regime, including draft secondary legislation setting out how the procedure would work. The consultation sought views on the proposed HSA procedure, specifically in relation to the overall design of the regime and the technical details.
- 2.2.** The consultation was conducted in line with the key consultation principles as set out by the Cabinet Office in July 2012. These principles are based on a more proportionate and targeted approach, which the department has borne in mind during this consultation, together with the need to honour the principles of the Compact between Government and the voluntary sector. Under these new principles, the Department of Health decided that a consultation period of 9 weeks was appropriate in this instance as the Department of Health undertook targeted and meaningful engagement with stakeholders both prior to and during the formal consultation.
- 2.3.** Twenty-three responses were received to the consultation and a series of meetings were held with interested parties and representative organisations, including independent sector companies and charities providing NHS services, as well as insolvency experts.
- 2.4.** Following the issues that were raised through the consultation, and given the complex nature of such a regime, Government delayed responding to this consultation until full consideration had been given to the issues raised. This included further consideration of whether such a regime or alternative provisions is needed at this point in time.

3. Summary of Government's position

- 3.1.** Following the consultation and further work undertaken in relation to some of the issues raised, the Government has decided not to proceed with its proposals to introduce a HSA regime or risk pool in April 2014. This means that if an independent provider of CRS becomes insolvent, Monitor will not be able to place them into a special administration regime in order to safeguard essential services and standard insolvency procedures will continue to apply.
- 3.2.** Since April 2013, the health care system has been through significant changes to radically reform and improve the way that health care is delivered across the country to improve the long-term sustainability of services and ensure that patients have access to quality services through increased choice and competition, as well as improved oversight of the provider market. These changes affect both public and (to a varying degree) independent providers of NHS funded services and the Government believes that adequate time should be given to allow for the full transition and assessment of these changes before introducing further change and possible complexity to the system.
- 3.3.** Further consideration may be given to the introduction of a HSA procedure or alternative provisions and the possibility of a risk pool at a later date.

4. Key themes arising from the consultation

- 4.1.** Overall, stakeholders who responded to the public consultation support the principle of safeguarding essential services, but many felt that it was too early to comment in any great detail on the specific elements of a HSA procedure due to the lack of available data on which services are likely to be subject to such a regime. A summary of the key issues raised is set out below.

Uncertainty around CRS market

- 4.2.** A HSA regime is designed to apply only to those services that are designated by commissioners as CRS. For independent providers of NHS services, commissioners will start to formally designate which, if any, services they provide are CRS from 1st April 2014. This is also the date from which all eligible providers of NHS funded health care services must be licensed by Monitor, the sector regulator.
- 4.3.** It has been difficult to make an accurate estimate of which or how many services will be designated as CRS, or how many of these services are currently being delivered by independent providers. This data will start to emerge from April 2014 and will evolve over the next 1-2 years as CRS designations become fully operational, during which time we can develop a more informed understanding of the CRS market. This information will prove valuable in not only informing how a HSA regime might operate, but also in assessing whether the legislative regime is needed.

Proportionality

- 4.4.** Government's proposals for a HSA regime meant that where an independent provider of CRS was subject to the regime, the HSA procedure would apply to the whole of the company, and not just to the CRS service which they deliver. There was a strong consensus amongst many stakeholders that taking a whole company into special administration where only a small proportion of its overall business is NHS funded CRS, would be disproportionate and could have a negative impact on the rights of creditors.
- 4.5.** Consideration has therefore been given to the possibility of ring-fencing NHS funded CRS from the rest of the provider's business. However, in practice, this is unlikely to work as companies are not structured in a way that will facilitate the separation of CRS from other NHS and privately funded business, as companies often use the same premises and assets to deliver a range of services. Furthermore, it would be extremely difficult and costly to completely separate these out and implement a regime that only applied to part of the business, especially if standard insolvency procedures are being applied to the rest of the organisation. Implementing two separate administration

regimes at the same time to one company could be conflicting and would not only compromise service continuity, but also the rights of creditors. It is difficult to fully reconcile these concerns without a better understanding of how much CRS independent providers are likely to be delivering. CRS designations could change over time, which would make separation even more complex.

Cross-subsidisation and Value for Money

- 4.6.** In order to secure service continuity under the proposed regime, it may be necessary to subsidise non-NHS elements of an independent provider's business. Subsidising independent companies in this way was considered by many as not the best use of taxpayers' money and could potentially signal the wrong message to the market about the way Government deals with failing providers.
- 4.7.** In addition to this, the estimated cost of implementing a HSA regime is not yet known, so it is difficult to assess whether such a regime would represent value for money.

Potential impact on competition

- 4.8.** The consultation process highlighted the potential impact that the proposed HSA regime could have on competition. Some respondents expressed concerns that the proposed HSA regime could have a negative impact on market entry and sector investment, by increasing costs of capital. There were also suggestions that a HSA would unduly impact on the ordinary rights of creditors, including secured creditors, and may leave creditors worse off than under standard insolvency procedures.
- 4.9.** Creating a competitive market is not only a key element of the recent reforms to the NHS, but is also important in helping to secure service provision. Where a service is designated a CRS, it is considered to be very hard to replace as there is lack of alternative provision due to not enough providers in the market operating within that locality. If potential providers are then deterred from providing these services, the service is likely to remain CRS until such that other providers do enter the market.

Fairness

- 4.10.** Although the consultation did not seek views on the concept and operation of a risk pool, engagement with stakeholders has shown that there are concerns around how a risk pool could be operated in a way that is fair to all providers as well as commissioners. In particular, whether it is fair for low risk providers to subsidise the failure of higher risk providers and that this would potentially send out the wrong

message to those providers who perform well. There is a risk that commissioners of services in rural areas, where there is likely to be less alternative providers, may end up paying more into a risk pool that could be used to secure services elsewhere. Furthermore, it was not yet clear how potential charges on commissioners and providers would be set in a way that was proportionate, fair and straightforward to operate.

5. Oversight of provider market and identifying early signs of financial distress

- 5.1.** As part of the reforms to the NHS set out in the Health and Social Care Act 2012, all providers of NHS funded health care services (except those where exemptions apply) will require a provider licence from Monitor from April 2014. The NHS provider licence is Monitor's main tool for regulating providers of NHS services. The licence is designed to protect and promote the interests of patients, whilst allowing providers to operate flexibly. In addition to this, the Health and Social Care Act 2012 requires Monitor to maintain an assessment of the risk of providers of CRS becoming unsustainable, with Monitor able to intervene if the risk gets too high.
- 5.2.** The licence includes special 'Continuity of Service' conditions, which will apply to providers of CRS. Monitor will track financial performance at CRS providers and use its proposed Risk Assessment Framework to assess whether there is a significant financial risk to the delivery of CRS by a provider. Using the licence conditions Monitor can intervene accordingly in order to try, where possible, to safeguard those services delivered by the provider that are designated as CRS.
- 5.3.** The NHS provider licence and Risk Assessment Framework have been developed to work together to provide a level of oversight of independent providers of certain services. Monitor's oversight framework aims to identify early warning signs, and where possible, safeguard services before the point of insolvency.

6. Conclusions

Government's decision on a Health Special Administration procedure

- 6.1.** The consultation showed us that there is a consensus in terms of safeguarding (CRS) services so that patients have access to the services they need. However, there is not sufficient data that allows us to establish an accurate picture of what the CRS market looks like, so we are unable to estimate how many current independent providers of CRS exist at present, what proportion of their business is CRS, as well what proportion of total CRS is being delivered by independent providers. Accurate data of the CRS market will start to emerge from April 2014, and we expect it to take 1-2 years to build up a full picture of what the market looks like. We believe that this information is essential in informing whether a HSA regime is in fact needed, how it might operate in practice, or whether alternative provision are needed in the absence of a HSA.
- 6.2.** As set out earlier, from April this year, Monitor will commence assessing financial risk at independent providers of CRS. Under current proposals, this new system will require providers of certain services to disclose certain financial information, with the intention of creating an early warning system for financial failure at these providers. Where these providers are deemed to be at risk of financial failure and consequently being unable to deliver those services, Monitor will seek to use its powers to protect those services in conjunction with, if necessary, other parties. We think that there is merit in seeing how well this system of oversight works in safeguarding services before introducing any legislative HSA measures or alternative provisions.
- 6.3.** The Government has therefore decided that it will not introduce a HSA regime through secondary legislation at this point in time, as proposed in the consultation 'Protecting patients' interest – ensuring continuity of NHS services: A consultation on proposals for a health special administration procedure for companies'. Given the current uncertainty around the make-up of the independent sector CRS market, we do not intend to introduce alternative measures in the absence of a HSA regime.
- 6.4.** On the whole, provider failure has in the past generally been managed by the market through the orderly exit of providers from the market and the transfer of services to new providers with little or minimum disruption to services and without the need for Government intervention. Instances of where an independent provider of a public service has become insolvent and entered into administration under the Insolvency Act 1986 whilst delivering a public service have been extremely rare. Previous instances of provider distress have been dealt with early enough through collaboration between various parties (such as provider, Government and creditors) to secure a viable solution and safeguard service provision before a company exits the market or becomes insolvent.

- 6.5.** HSA is designed as a last resort option that would only be appropriate in limited circumstances where a company becomes insolvent and all other options for securing service continuity have been exhausted. Government considers the risks associated with not having a HSA regime in place at this time to be manageable.
- 6.6.** Once we have established a better understanding of the CRS market and are able to assess the effectiveness of Monitor's improved oversight of the provider market, we may consider whether it is necessary to further explore the possibility of a HSA or alternative provision.
- 6.7.** Should an independent provider of CRS become insolvent, this will be dealt with on an individual case-by-case basis, taking into account the specific circumstances surrounding the failure. Safeguarding quality services for patients will always remain a priority, Monitor and where necessary, the Department of Health, will seek to work with the provider and relevant organisations as appropriate to determine the right solution and ensure that patients have access to the services that they need.

Government's decision on funding of special administration regimes

- 6.8.** Further work has been undertaken to explore how a risk pool might operate in practice. This work identified various operational and policy concerns with implementing a risk pool that we are unable to resolve without sufficient information on which services would be designated as CRS. We believe that a better picture of what is likely to be designated as CRS is needed to inform the implementation of a risk pool and associated charges, including how they could be set in a way that is fair. For example, charges based on various aspects of the actual CRS rather than simply applying a flat rate charge.
- 6.9.** It has proved difficult to fully assess the complexity, impact on incentives and distributional consequences of different types of commissioner charging options at this stage, in the absence of more detailed information on likely CRS designations.
- 6.10.** As with a HSA regime, we do not believe that now is the right time to introduce a risk pool as there is merit in letting CRS designations become fully operational so that we have a better picture of what really is CRS. This will enable any policy, practical and operational issues associated with a risk-pool to be fully considered and inform any decision that is taken in relation to implementing a risk-pool. We believe that implementing a risk pool at this point in time could potentially add a level of complexity as the transition into the new system set out by the Health and Social Act 2012 continues to take effect.
- 6.11.** In the absence of a risk pool, there will be no changes to the funding arrangements for the existing special administration regime for Foundation Trusts. Currently, the

Secretary of State is able to provide financing if a trust enters special administration to ensure the continued provision of services during the special administration process. Following the administration process, the Secretary of State may agree to provide Public Dividend Capital (PDC) to restructure a trust's balance sheet as part of a wider restructuring plan. Finance, in the form of loans or public dividend capital, may also be provided to deliver capital investment or restructuring after special administration.

- 6.12.** We may review the implementation of a risk pool position alongside a HSA regime at a later date once we have developed a better understanding of the CRS market.