



Department of Health

*From the Rt Hon the Earl Howe P.C.
Parliamentary Under Secretary of State for Quality (Lords)*

House of Lords
Westminster
London
SW1A 0PW

*Richmond House
79 Whitehall
London
SW1A 2NS*

15 October 2013

Dear colleague,

I am today tabling a further amendment to the Care Bill. The new clause would amend powers regarding the Regime for Unsustainable NHS Providers, also known as the Trust Special Administrator's Regime (the Regime).

The NHS is facing the unprecedented challenge of an ageing population, rising costs and an increasing patient expectation that care will be delivered at a time and location that is convenient. As the pattern of provision changes from hospital based to more community care, and as better ways of providing care become available, some trusts will face challenging issues that tax their capacity to respond. For the cases where trusts are unable to evolve and adapt there needs to be an effective failure regime that ensures patients can continue to access the care that they need, whilst the process of change delivers value for money to the taxpayer.

The Regime is one way in which decisive action can be taken to deal with NHS trusts and NHS foundation trusts that are unsustainable in their current form. A failed trust can be put into special administration. A Trust Special Administrator is appointed to take charge of the trust, the trust's board of directors is suspended (and in the case of NHS foundation trusts also the governors), and the Trust Special Administrator is also required to produce a report with recommendations that will deliver clinically and financially sustainable services. I have attached an annex to this letter containing further background on the regime.

Following use of the Regime at South London Healthcare NHS Trust and Mid Staffordshire NHS foundation trust, it is clear that changes and clarifications need to be made to ensure that it is fit for purpose. I should be clear that the changes and clarifications relate to future use of the Regime, building on experience, and are in no way retrospective. My amendment would make five changes:

1. Extend the time available for the Trust Special Administrator to prepare a draft report and to consult. It is unacceptable that an NHS provider should fail (financially or in terms of service quality) for an extended period. Therefore, 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 when the Regime was first created in 2009, with a power for the Secretary of State, and since the 2012 Act for Monitor in the case of a NHS foundation trust, to agree to extend deadlines of the Regime where necessary. Experience with use of the Regime so far suggests that the deadlines written into the primary legislation would benefit from an extension for the majority of cases, particularly given the desire for the Administrator to seek the agreement of relevant commissioners to his or her recommendations. Accordingly, the amendment extends the standard deadlines for producing draft recommendations (from 45 to 65 working days) and for undertaking local consultation on them (from 30 to 40 working days). It leaves in place the power to extend the Regime's deadlines further if that is warranted in individual cases.

2. Put beyond doubt that the Trust Special Administrator has power to make recommendations, and the Secretary of State/Monitor the power to take decisions, that affect providers other than the one to which the administrator was appointed. This change would remove any doubt that a Trust Special Administrator has the power to make, and the Secretary of State or Monitor to accept, recommendations that affect other NHS trusts, NHS foundation trusts or other providers where they are necessary for and consequential on the actions recommended for the trust. This amendment does not constitute a change in policy, is not retrospective, and is intended only to remove any uncertainty for the future.



Department of Health

3. *Extend the commissioner approval requirements for the recommendations of a Trust Special Administrator appointed to an NHS foundation trust.* The changes made by the 2012 Act to the regime already require the Trust Special Administrator appointed to an NHS foundation trust to seek agreement to their recommendations from the commissioners to which the trust provides NHS services. The amendment would extend this requirement upon a Trust Special Administrator appointed to an NHS foundation trust, so they must also seek agreement from the NHS commissioners of other NHS foundation trusts or NHS trusts that commission services affected by the Trust Special Administrator's recommendations.

4. *Require guidance to be given to a Trust Special Administrator appointed to an NHS Trust.* The amendment would place a duty on the Secretary of State to produce guidance setting out new requirements on a Trust Special Administrator appointed to an NHS Trust to seek commissioner support for their recommendations, including involving NHS England. It is intended that the Guidance would specify the level of commissioner support that a Trust Special Administrator appointed to an NHS trust should seek to give assurance that the recommendations are clinically and financially robust. If the Trust Special Administrator were unable to secure the support of commissioners, it is intended that the guidance would set out arrangements for the Trust Special Administrator to seek support from NHS England for their recommendations. The Guidance could also specify what the Trust Special Administrator should do if unable to obtain local commissioner or NHS England support.

5. *Clarify consultation requirements.* 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 Trust Special Administrator process. This amendment would reflect the disapplication provisions which exist in relation to the same consultation obligations of NHS trusts and NHS foundation trusts. In addition, to clarify that the disapplication provisions, whether the existing ones in

respect of NHS foundation trusts and NHS trusts or in respect of clinical commissioning groups and NHS England, apply whether the Trust Special Administrator process relates to a failing NHS foundation trust or failing NHS Trust. The consultation requirements placed on clinical commissioning groups and NHS England for local reconfigurations of services are inconsistent with the accelerated consultation process that forms part of the Regime.

In addition there are necessary and consequential technical amendments that will be needed when NHS trusts are abolished.

I hope that you find the information provided in this letter useful in advance of our debate on the amendment.

A handwritten signature in dark ink, appearing to read 'Earl Howe', with a stylized flourish at the end.

EARL HOWE

Annex A- Background on the Trust Special Administrator's Regime

The Regime was introduced by the last Government under the Health Act 2009. The Regime for NHS foundation trusts was amended in the 2012 Act, to make it compatible with the extended regulatory role given to Monitor to operate the new licensing regime. That licensing regime applies to NHS providers including NHS foundation trusts, but not NHS trusts.

The Regime has been used twice. The Secretary of State appointed a Trust Special Administrator at South London Healthcare NHS Trust in July 2012, and Monitor appointed a Trust Special Administrator at Mid Staffordshire NHS Foundation Trust in April this year.

The Regimes for NHS trusts and NHS foundation trusts are similar, but there are differences that reflect the greater autonomy of NHS foundation trusts. The Secretary of State appoints a Trust Special Administrator to an NHS trust, whilst Monitor appoints a Trust Special Administrator to an NHS foundation trust. The statutory objective of a Trust Special Administrator appointed to an NHS foundation trust is to ensure the continued provision of essential NHS services; the Secretary of State sets the objective of a Trust Special Administrator at an NHS trust at the time of appointment. The Trust Special Administrator of an NHS foundation trust is required by the Act to seek the support of commissioners for their recommendations, whereas there is no statutory obligation on an Administrator to an NHS trust to seek commissioners' support. 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 an NHS foundation trust is submitted to Monitor which decides whether to accept the recommendations, with Secretary of State having the power to veto the recommendations if he is not satisfied in accordance with various specified criteria.

Stages of a Trust Special Administration

There are five stages to the Regime, listed below.

Appointment. A Trust Special Administrator is appointed by an order issued by the Secretary of State, or Monitor in the case of an NHS foundation trust. A Trust Special Administrator has a dual role. Firstly, a Trust Special Administrator exercises the functions of the chair and

directors of the trust (and in the case of an NHS Foundation Trust, its governors), taking charge of the day to day running of the trust for the period he is appointed. Secondly, a Trust Special Administrator must carry out inquiries into the problems of the trust and make recommendations in relation to the action the Secretary of State or Monitor should take.

Draft Report. A Trust Special Administrator is required to 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 Trust Special Administrator must publish a report with draft recommendations within 45 working days of appointment.

Consultation. There is then a 30 working day local consultation on the Trust Special Administrator's draft recommendations.

Final Report. Following the consultation, the Trust Special Administrator 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; 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. The Secretary of State must notify Parliament of his decision and the reasons behind it. In the case of a report on an NHS foundation trust, Monitor has 20 working days to accept the report. If Monitor is satisfied with the report, it is forwarded to the Secretary of State who has 30 working days to decide if the Administrator, the commissioners, and Monitor have met their legal duties and certain other key tests are met. If Monitor or the Secretary of State is not satisfied with the Administrator's report, there is a process for re-considering the recommendations. If, ultimately, the recommendations cannot be agreed, the Secretary of State can veto the report. The Secretary of State would then be required within 60 working days to decide what action to take.