



Department
of Health

Statutory guidance for Trust Special Administrators appointed to NHS Trusts

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<p>Contact details: Shaleel Kesavan, Provider Policy Unit, Finance and NHS Directorate, Department of Health, Richmond House, London SW1A 2NS</p>

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Executive Summary

The NHS exists to provide patients with the highest levels of care free at the point of use. It also has a responsibility to ensure that services are sustainable and, as a publicly funded institution, provide value for money. However, the NHS must become more adaptable and innovative to meet the challenges of the future.

NHS provider Trusts are expected to deliver high-quality, safe services that are clinically and financially sustainable for the long term. Occasionally, it may become impossible to improve the performance of an NHS Trust or NHS Foundation Trust to secure adequate quality of care within sustainable resources. It is in these most serious of circumstances that the Trust Special Administrator's Regime could be used, ultimately to protect the interests of patients and the public, and the taxpayer.

The Regime is a time-limited, clear and transparent way of enabling a solution to be found for intractable problems within a significantly challenged NHS provider Trust. This would be where previous efforts by that Trust and its commissioners to develop a model of sustainable and good healthcare have failed. The duty of a Trust Special Administrator is to produce recommendations in a report about the future of the Trust and its services so that high-quality, safe and sustainable services are delivered to patients and service users in that local health economy. If the Regime is used, then the public, patients, staff and commissioners must be involved in the development of the recommendations.

This guidance is for Trust Special Administrators appointed to NHS Trusts only. It sets out the legal requirements and expectations placed on them and has been informed by lessons learned from the two uses of the Regime so far. There are three distinct stages that a Trust Special Administrator must complete (preparing a draft report, formal consultation on that report and preparing a final report) and each one has a dedicated chapter. Monitor has produced separate guidance for Trust Special Administrators appointed to NHS Foundation Trusts.

The Trust Special Administrator's Regime was first introduced by the Health Act 2009 and set out under Chapter 5A of the NHS Act 2006. Changes made to the 2006 Act by section 120 of the Care Act 2014 help deliver an effective Regime and greater local input, including:

- enabling a Trust Special Administrator to take a view of the local health economy and, where it is necessary for and consequential upon action recommended at the Trust in administration, permitting the Trust Special Administrator to make recommendations which may affect services at other Trusts;
- matching the Trust Special Administrator's widened legal remit with a requirement to consult those other Trusts, their staff and their commissioners who would be affected by his or her recommendations;
- strengthening the representation of patients and local populations through a requirement on the Trust Special Administrator to consult Local Authorities and Local Healthwatch organisations during the public consultation on the recommendations; and,
- giving the Trust Special Administrator more time to develop draft recommendations and more time to consult formally on them.

As required by amendments under section 120 of the Care Act 2014, this guidance also sets out the arrangements for a Trust Special Administrator at an NHS Trust to seek support from commissioners for his or her recommendations and on involving NHS England. These replicate the substance of the statutory provisions in the Regime for Foundation Trusts. It means that a Trust Special Administrator at an NHS Trust should ensure the involvement of local commissioners of all affected Trusts, and take fully into account the need to protect essential NHS services of the NHS Trust in administration and of any other potentially affected Trust.

The Trust Special Administrator's regime is a measure of last resort to address urgent issues affecting the ability of an NHS provider Trust to deliver patient care, whether for clinical or financial reasons, or both. It ensures that the essential services of a Trust in administration will continue to be available to patients and that there are lasting improvements for them, rather than ignoring the problems or bailing out failing and unsafe services. There are other measures aimed at mitigating risk, supporting recovery and preventing failure in NHS provider Trusts. However, it remains that the Trust Special Administrator's Regime is available to address those rare but very significant failures in the health service in a swift and effective way, ultimately, for the protection of NHS patients and the public, and NHS staff who would otherwise suffer.

Chapter 1: Introduction

Who is this Guidance for?

1. This document comprises statutory guidance from the Secretary of State for Health for Trust Special Administrators appointed to NHS Trusts, to which they must have regard in carrying out their duties under Chapter 5A of the National Health Service Act 2006 (the NHS Act 2006), known as the Trust Special Administrator's Regime (referred to in this guidance as the 'Regime').
2. The guidance has been produced in accordance with section 65N of the NHS 2006 Act and replaces the version published on 5 July 2012. It is intended to be referred to by those organisations and individuals responsible for the execution of the duties of a Trust Special Administrator appointed to an NHS Trust.

Scope

3. The guidance covers how the Regime applies to NHS Trusts in England only, including why and when the Regime might be used. The legislation¹ requires this document to include guidance on various aspects of the Regime including;
 - seeking support from commissioners and on involving NHS England in relation to the Trust Special Administrator's draft and final reports;
 - in relation to the preparation of the Trust Special Administrator's draft report, including persons to be consulted and factors to be taken into account.
4. Although the Regimes as applied to NHS Trusts and Foundation Trusts are similar, there are differences. Monitor has, also in accordance with section 65N of the 2006 Act, published revised guidance in respect of Foundation Trusts entitled *Statutory guidance for Trust Special Administrators appointed to NHS foundation trusts*²

¹ Section 65N of the NHS Act 2006.

² <https://www.gov.uk/government/publications/trust-special-administrators-of-nhs-foundation-trusts-statutory-guide>

Context

5. The Trust Special Administrator's Regime (sometimes known as the Regime for Unsustainable NHS Providers) is a bespoke, time-limited process to provide a solution to intractable problems in an unsustainable NHS Trust or Foundation Trust. These problems could be due to clinical or financial reasons or both.
6. The Regime could be used when other suitable interventions have not resolved significant financial or service quality problems which could increasingly impact on a Trust's ability to provide clinical services of the required standard. A Trust Special Administrator would be appointed to manage the Trust and work with relevant key stakeholders to develop recommendations in a report in relation to that organisation and its services so that high-quality, safe and financially sustainable NHS services are delivered in the local health economy. The emphasis of the Regime is on transparency and objectivity, with the involvement of the public and staff built into the process. The intended outcome is to protect NHS patients and the public from failing or unsafe services and to safeguard taxpayer funding.
7. The Regime was first introduced by the Health Act 2009 and set out under Chapter 5A of the NHS Act 2006. The Health and Social Care Act 2012 modified the way it applies to Foundation Trusts to reflect their greater autonomy and to make it compatible with the extended regulatory role given to Monitor to operate its licensing regime. Amendments made to the NHS Act 2006 by the Care Act 2014 make further changes to the application of the Regime for NHS Trusts and Foundation Trusts to ensure it is effective and fit for purpose.
8. The policy underpinning the Regime is for it to be used as a measure of last resort and under specific circumstances. Consequently, the Regime is likely to be used sparingly and has so far been used twice since it was introduced in 2009. There are a range of other measures which can be applied before the Regime is considered. Examples are given at Annex A and were highlighted in Parliament by the Parliamentary Under-Secretary of State, Lord Howe, on 7 May 2014³.

³ Hansard, 7 May 2014, Column 1495.

9. The legislation ensures that the Regime is credible and transparent, including Parliamentary scrutiny of the Secretary of State's decision to use the Regime and of his final decision about the future of an NHS Trust in administration, as well as public consultation on the draft recommendations of the Trust Special Administrator.
10. Administration under NHS legislation is not the same as administration under insolvency legislation. Although a possible outcome of the Regime can include dissolution of a Trust under administration and the transfer of services and staff to another Trust, the purpose of the Regime is to ensure the continued delivery of clinically and financially sustainable services which are essential to the local population.

Summary of the Regime

11. The Regime is time-bound at 146 working days for an NHS Trust (unless an Order is made by the Secretary of State to extend certain time periods) with five stages as summarised below:

- i. **Appointment.** The Trust Special Administrator is appointed to an NHS Trust by an Order made by the Secretary of State. He or she has a dual role; (i) to exercise the functions of the chair and directors of the Trust (who are suspended by the legislation upon the Trust Special Administrator's appointment taking effect), taking charge of the day-to-day running of the Trust for the period of his or her appointment and securing the provision of services for people who use its health services, and (ii) to develop recommendations in relation to the action the Secretary of State should take to secure the provision of high-quality, safe and sustainable services for the local population;

- ii. **Draft Report.** The Trust Special Administrator must assess the issues facing the NHS Trust in the context of its local health economy, engage with key stakeholders such as commissioners, other providers, NHS staff, patients, the public and the Care Quality Commission and develop draft recommendations about the future of the Trust and its services. The Trust Special Administrator must publish a draft report with those recommendations within 65 working days

of his or her appointment taking effect⁴. The Secretary of State must lay a copy of the report before Parliament;

iii. **Consultation on Draft Report.** There is a statutory consultation period on the draft report, including with the wider public and NHS staff. This must run for 40 working days⁵ which is eight weeks;

iv. **Final Report.** Following the consultation, and within 15 working days, the Trust Special Administrator must produce a final report with his or her recommendations about the NHS Trust in administration and its services and submit it to the Secretary of State. The Secretary of State must lay the report before Parliament and publish it; and,

v. **Decision.** On receipt of the final report, the Secretary of State has 20 working days to decide what action to take about the future of the NHS Trust in administration and its services. The Secretary of State must publish a notice of his decision and the reasons behind it and lay the notice before Parliament.

12. The Regime has a number of advantages. For example;

- it establishes clear lines of responsibility, accountability and decision-making for the Trust in administration and its future;
- it can bring together the perspectives of the local community, local bodies (for example commissioners and providers) and national bodies (for example Royal Colleges, the NHS Trust Development Authority, NHS England and Monitor) in assisting with the solution for the Trust in administration; and,
- the time-bound nature of the Regime avoids prolonged periods of uncertainty by producing a timely solution for the Trust in administration and brings pace, focus

⁴ Extended from 45 working days under section 65F(1) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁵ Extended from 30 working days under section 65G(2) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

and momentum in addressing long standing problems that have not been resolved through NHS processes⁶.

⁶ The timetable of the Regime does not take into account the implementation of the Trust Special Administrator's recommendations which begins after a decision about those recommendations is made.

Chapter 2: Appointment, Objective & Role of the Trust Special Administrator

Recommendation to use the Regime

13. The NHS Trust Development Authority (NHS TDA) oversees all aspects of planning and delivery by NHS Trusts, supporting them to provide safe, high quality services and secure a sustainable future.
14. Specifically, the NHS TDA is responsible for oversight of clinical quality, performance and finance, for developing capacity and capability in NHS Trusts and ensuring they can meet relevant standards. The NHS TDA operates in accordance with the directions issued to it by the Secretary of State. As NHS Trusts are legally accountable to the Secretary of State, the NHS TDA is able to exercise a wide range of intervention powers on behalf of the Secretary of State to support NHS Trusts to make sustainable improvements where required.
15. If the NHS TDA believes it is in the interests of the health service for an NHS Trust to be placed into the Regime, it is directed by the Secretary of State to produce a report with that recommendation for the Secretary of State⁷. The report should provide the evidential basis to support the recommendation, and could include a recommendation about who should be appointed as the Trust Special Administrator. The directions to the NHS TDA further require that it works closely with the Care Quality Commission to discuss and agree whether a recommendation should be made by the NHS TDA to use the Regime in cases of serious failure in quality. However, the decision about whether or not to trigger the Regime is ultimately for the Secretary of State to make in all cases⁸.
16. The emphasis for addressing the difficulties facing seriously challenged NHS Trusts is on pre-emptive action and ensuring there is a good understanding of why they get into financial or clinical difficulties in the first place. There are a number of interventions available to the

⁷ Direction 4A(1) of *The National Health Service Trust Development Authority Directions 2013*, as amended by the *National Health Service Trust Development Authority (Amendment) Directions 2014*.

⁸ Section 65B(1) of the NHS Act 2006.

NHS TDA and the Care Quality Commission that can be used proportionately and in a timely manner to secure necessary improvements in performance. It is anticipated that such actions should in most cases prevent an NHS Trust from moving into an intractable position where the Trust Special Administrator's Regime is required. An NHS Trust which is placed in the Regime is likely to have been subject to prior performance interventions and greater scrutiny, and may also have been placed into special measures⁹. Therefore, staff at the organisation should be aware of the performance problems and associated circumstances that led it to becoming unsustainable.

Pre-appointment phase

17. Once the NHS TDA has made a recommendation to use the Regime, planning for resourcing a prospective Trust Special Administrator will need to take place between the NHS TDA and the Department of Health, pending the decision by the Secretary of State. Discussions are likely to include what level of support a prospective Trust Special Administrator should receive to fulfil his or her duties, such as full-time staff and external advisers. Effective use of the pre-appointment phase in this way will support discussions for setting the Trust Special Administrator's budget.

18. Before the potential appointment of a Trust Special Administrator, the NHS TDA and Department of Health are likely to undertake a review of what information and data relating to the clinical and/or financial problems underlying the unsustainability of the NHS Trust he or she would require. Relevant information will be available as the recommendation made to the Secretary of State would happen only after the NHS TDA has undertaken a full assessment of the reasons for the unsustainability of the NHS Trust and where appropriate, in conjunction with the Care Quality Commission. Ensuring a Trust Special Administrator has a clear understanding of the reasons underlying the unsustainability of the NHS Trust, access to supporting information and data, and adequate resources will facilitate his or her work during the Regime. However, the provision of information will not in any way seek to prejudice the

⁹ Special measures are a set of specific interventions that apply to NHS Trusts and NHS Foundation Trusts that primarily have serious failures in quality of care and where there are concerns that existing management cannot make the necessary improvements without support. More details are available *A Guide to Special Measures* available at <https://www.gov.uk/government/publications/special-measures-a-guide-for-nhs-trusts-and-foundation-trusts>

development of recommendations by the Trust Special Administrator and therefore the independence of his or her process.

Appointment of the Trust Special Administrator

19. The Secretary of State may trigger the Regime for an NHS Trust by making an Order to authorise the appointment of a Trust Special Administrator if he considers it appropriate in the interests of the health service¹⁰. This could include situations of serious failure in financial performance or in quality of care, or a combination of both. In certain circumstances, more than one Trust Special Administrator could be appointed.

20. Before making the Order, the Secretary of State must consult the failing NHS Trust and those of its commissioners which he considers it appropriate to consult¹¹. The Secretary of State may also choose to consult national bodies such as the Care Quality Commission and NHS England. The nature of the Regime and the potential need to invoke it quickly means that the Secretary of State's consultation is likely to be a short process.

21. The Secretary of State could decide to trigger the Regime soon after his consultation. Ultimately, the decision is a judgement for the Secretary of State taking into account all relevant factors. If, after having reasonably considered responses to the consultation, the Secretary of State considers it appropriate to appoint a Trust Special Administrator, the Secretary of State must carry out the following actions¹²:

- i. make an Order authorising the appointment, with the date on which the appointment must take effect (which must be within five working days beginning with the day on which the Order is made);
- ii. lay before Parliament (with the statutory instrument containing the Order) a report stating the reasons for making the Order;
- iii. publish the name of the person(s) to be appointed as the Trust Special Administrator; and,
- iv. appoint the Trust Special Administrator on the date specified in the Order.

¹⁰ Section 65B(2) of the NHS Act 2006.

¹¹ Section 65B(2) of the NHS Act 2006.

¹² Section 65B(5) and (6) of the NHS Act 2006.

22. The Secretary of State will decide who should be appointed as the Trust Special Administrator. It could be a senior figure or figures within the public or private sector. The demands of the role will vary depending on the specific circumstances of each case and the skill set needed will be a key consideration. For example, it may be desirable to appoint a Trust Special Administrator with senior leadership experience within the NHS, and with a pre-existing understanding of the local health economy and/or experience of conducting service reconfigurations.

Terms of Appointment

23. On appointment of a Trust Special Administrator, the Secretary of State will issue an appointment letter, which will append terms of appointment and a Code of Conduct as a public office holder.

24. The circumstances that lead to unsustainability of an NHS Trust can be numerous and complex. Their specific characteristics will differ from case to case. Consequently, the terms of appointment may be used to ensure that a Trust Special Administrator can recognise the individual requirements of each situation. The Secretary of State will set the terms of appointment as is considered appropriate.

25. The Secretary of State may pay remuneration and expenses to the Trust Special Administrator¹³. The appointment letter and terms of appointment will include the Trust Special Administrator's rate of remuneration.

26. Expenses, if agreed as appropriate, could include persons assisting the Trust Special Administrator with his or her duties. This could include full-time staff. It could also include external advisers who, for example, may provide good value in undertaking the detailed financial analysis of the Trust Special Administrator's recommendations.

27. The cost of administering the Regime will vary from case to case. The size and type of team needed to support the process will need to be decided for each occasion. From appointment to appointment, a different balance of internal and external capacity in the Trust Special Administrator's team may be needed. For example, a Trust Special Administrator may reasonably choose to establish advisory and working groups to

¹³ Section 65B(8) of the NHS Act 2006.

support his or her work in areas such as clinical standards, patient and public involvement, finance, estates and communications and engagement.

28. The rate of remuneration and any expenses will be agreed by the Secretary of State. The arrangements for funding a Trust Special Administrator will need to be discussed and agreed with the Department of Health. The Department is likely to set conditions to limit overall expenditure on expenses by the Trust Special Administrator and his or her support team. This could mean placing limitations on the Trust Special Administrator from appointing additional staff or external advisers during the Regime.

29. If the appointment of the Trust Special Administrator is not terminated, and he or she does not resign, the appointment will terminate on (i) the date of the dissolution of the NHS Trust by Order if the Secretary of State decides on this action¹⁴, or (ii) the date specified in an Order if the Secretary of State decides not to dissolve the NHS Trust¹⁵. As a minimum, the terms of appointment must contain:

- details of how the Trust Special Administrator will hold and vacate office¹⁶; and,
- the grounds on which the Secretary of State may terminate the appointment. This could happen if the Trust Special Administrator acted in a manner which in the Secretary of State's opinion is not in the interests of the NHS Trust or of the health service, or if he or she has committed a material breach of obligations in the legislation or terms of appointment.

Removing & replacing the Trust Special Administrator

30. A Trust Special Administrator appointed to an NHS Trust holds and vacates office in accordance with the terms of appointment from the Secretary of State. He or she can therefore be instructed to vacate office by the Secretary of State in the circumstances set out in those terms.

¹⁴ Part 3 of Schedule 4 to the NHS Act 2006 makes provision for the dissolution of NHS Trusts.

¹⁵ Section 65L(2) of the NHS Act 2006.

¹⁶ Section 65B(7) of the NHS Act 2006.

31. The Secretary of State must appoint a new Trust Special Administrator if the existing Trust Special Administrator ceases to hold office for any reason during the period of appointment, for example, due to serious illness or because the Secretary of State otherwise decided to remove him or her in accordance with the terms of appointment.
32. Where a replacement Trust Special Administrator is appointed, anything done by or in relation to the previous Trust Special Administrator has effect as if done by or in relation to the new appointee¹⁷. This allows a new Trust Special Administrator to pick up where the previous appointee left off. The exception to this is where the Secretary of State directs otherwise, for example, where it may be considered desirable that the new Trust Special Administrator starts the process from some earlier stage, as appropriate. The most suitable approach will depend on individual circumstances.

Suspension of the Board & Service Continuity

33. At the point at which the appointment of the Trust Special Administrator takes effect, he or she will assume full control of the NHS Trust. The Trust Special Administrator will take over the functions of the board and assume the role of the Accountable Officer responsible for discharging the duties of the NHS Trust. Therefore, the Trust Special Administrator will, during the period of his or her appointment, be responsible for the provision of all services offered by the NHS Trust. For the avoidance of doubt, the Trust Special Administrator should run the organisation on a “business as usual” basis whilst in post. This may involve the Trust Special Administrator taking decisions about matters such as staff recruitment or investments necessary for the continuity of service provision.
34. The Trust Special Administrator should prepare for significant challenges to the quality of service provision. This could include, but is not limited to, staff leaving the NHS Trust during his or her appointment. Therefore, the Trust Special Administrator should ensure anticipatory plans and monitoring arrangements are in place. The Care Quality Commission will continue to expect, and if necessary enforce, full compliance by the NHS Trust in administration with legal requirements for service quality. The Trust Special Administrator should seek assurance from the Care Quality Commission and commissioners of the NHS Trust in administration that the services are of sufficient safety and quality. In the event that

¹⁷ Section 65M(2) of the NHS 2006 Act

specific services are identified as clinically unsafe, the Trust Special Administrator should follow the same protocols as would apply outside of the Regime.

35. When the appointment of the Trust Special Administrator takes effect and pending the outcome of the Regime, the chair, non-executive directors and executive directors of the Trust are suspended from office and their board governance responsibilities¹⁸ (the Secretary of State or a member of the Senior Civil Service at the Department of Health will confirm this by letter on the day the Trust Special Administrator's appointment takes effect, with prior notification before letters are issued). However, unlike the chair and non-executive directors whose sole functions relate to board governance, executive directors have responsibilities for a significant portfolio of work and a leadership role in delivering the Trust's day-to-day business. During the regime, it is critical that staff maintain business as usual and remain responsible for the delivery of patient services. Therefore, the legislation protects the employment status of the executive directors as their work in running the operations of the Trust is expected to continue¹⁹.

36. Close collaboration between the Trust Special Administrator and executive directors in their capacity as employees is vital to the success of the Regime. It may also be useful for the Trust Special Administrator to speak with non-executive directors and previous directors who may have useful knowledge to impart. It is anticipated that during the Regime the Trust Special Administrator will wish to work particularly closely with the Director of Finance, the Medical Director and the Director of Nursing and consult other directors as appropriate. Without this type of engagement, a Trust Special Administrator could miss the opportunity to access important expertise and corporate memory and may duplicate efforts and actions previously undertaken. On appointment, the Trust Special Administrator should plan to have an early conversation with executive directors about matters such as:

- how the Trust Special Administrator should become involved in the day-to-day running of the Trust;
- the changes to the directors' roles and the implications in terms of their responsibility, accountability and leadership functions;
- how decisions should be made in the absence of the board;

¹⁸ Section 65C of the NHS 2006 Act.

¹⁹ Section 65C(2) of the 2006 Act

- the need for directors to demonstrate leadership, support staff morale and maintain a focus on the quality and safety of services during those periods that the Trust Special Administrator is unable to spend at the Trust, for example when attending public consultation events; and,
- whether directors would be expected to input into the strategic work of the Trust Special Administrator.

37. The Trust Special Administrator is expected to establish clear governance arrangements to manage the day-to-day running and service provision of the NHS Trust in administration. This should include ensuring that there is clarity and accountability around decisions regarding day-to-day operations at ward level and ensuring that wards are adequately staffed.

Meetings

38. The NHS Trusts (Membership and Procedure) Regulations 1990²⁰ provide that the normal rules about the meetings and proceedings of an NHS Trust do not apply where a Trust Special Administrator has been appointed²¹.

39. Therefore, from the point at which the Trust Special Administrator's post takes effect and for the duration of the appointment, there can be no board meetings nor an Annual General Meeting (assuming it is a board meeting) of the NHS Trust as all board members are suspended from their board duties.

40. The legislation permits the Chief Executive and other executive directors to remain on any committees or sub-committees of the NHS Trust and those meetings could go ahead as normal²². The 1990 Regulations also enable the Trust Special Administrator to make arrangements for any of the NHS Trust's functions to be exercised by a committee or sub-committee subject to restrictions or conditions as he or she sees fit. Therefore, the Trust Special Administrator could set up new committees or sub-committees. These may consist of anyone, including the Chief Executive and other executive directors but not the

²⁰ S.I. 1990/2024

²¹ Regulation 19(1A) of the *NHS Trusts (Membership and Procedure) Regulations 1990*.

²² Section 65C(2) of the 2006 Act.

suspended chair and non-executive directors in their capacity as such, to undertake particular activities of the NHS Trust.

41. The suspended Chair and non-executive directors may wish to support the work of the Trust Special Administrator. The Trust Special Administrator could, for example, ask them to consider working as lay individuals during the preparation of his or her draft recommendations. There are other opportunities for the non-executive directors to engage in the Regime if they so wished, for example by responding to the Trust Special Administrator's statutory consultation on the draft report or by attending public meetings during that consultation.

Accountability

42. A Trust Special Administrator appointed to an NHS Trust is accountable to the Secretary of State. However he or she must work independently of the Secretary of State, Department of Health and any other government entity in completing his or her duties. The Secretary of State and officials at the Department of Health will not bring pressure to bear on the solution for the NHS Trust in administration. The Trust Special Administrator may, however, choose to make use of the information and expertise available at national organisations. For example, he or she may engage or have meetings with the Department of Health to help him or her assess the future financial position of the local health economy and with NHS England to develop his or her financial assessments.

43. Although the Secretary of State has very limited powers to direct the Trust Special Administrator about specific matters in relation to his or her statutory consultation (see paragraph 146 viii)²³, these do not extend to amending the content of the draft or final reports including their recommendations.

44. The Secretary of State will want to be satisfied, in taking a final decision about the NHS Trust in administration, that the Trust Special Administrator has carried out his or her administrative and other duties in accordance with the legislation and terms of appointment, and has shown clear regard for this guidance. This includes being assured that:

²³ Section 65H(c) and (d) of the NHS Act 2006.

- there has been consensus around the clinical case for service change and strong clinical leadership during the Regime;
- the statutory consultation has been conducted reasonably and that responses, including concerns and objections, have been properly considered;
- the recommendations in the final report would secure the continued provision of essential NHS services of the NHS Trust in administration of sufficient safety and quality, and not harm essential NHS services of any other affected Trusts;
- the recommendations in the final report would provide good value for money;
- commissioners have discharged their functions in connection with the Regime;
- requirements imposed by any direction from the Secretary of State about from whom to seek written responses during the statutory consultation²⁴ have been complied with; and,
- the Trust Special Administrator has complied with any request from the Secretary of State, for example in his or her terms of appointment. This could include that he or she has analysed their process and recommendations against the general principles underpinning the Secretary of State's four tests for reconfiguration in developing proposed reforms for service change.

45. The NHS Trust in administration remains accountable to the NHS TDA and the Care Quality Commission in respect of its business as usual activities.

Objective of the Trust Special Administration & Essential Services

46. Unlike the Regime as it applies to NHS Foundation Trusts, the objective of the trust special administration for an NHS Trust is not set out in legislation, although the Secretary of State may set the objective in the Trust Special Administrator's terms of appointment.

47. Subject to what is set out in the Terms of Appointment, the Secretary of State's expectation is that a Trust Special Administrator appointed to an NHS Trust should secure the same objectives of the trust special administration as a Trust Special Administrator appointed to a Foundation Trust is required to secure in relation to that

²⁴ As footnote 23.

Trust²⁵ (to the extent that this depends on commissioners identifying essential NHS services, paragraphs 48 to 55 set out how the Trust Special Administrator is expected to establish and address those).

48. Therefore, after assuming the functions of the board of the NHS Trust in administration, the Trust Special Administrator should prepare recommendations according to the following policy objectives of the trust special administration:

- i. to secure the continued provision of the essential NHS services provided by the NHS Trust under administration at such levels as the commissioners of those services determine;
- ii. that these services are of sufficient safety and quality; and,
- iii. that it becomes unnecessary for the appointment of the Trust Special Administrator to remain in force.

49. The policy objectives apply to essential NHS services whose withdrawal, in the absence of alternative local provision, would be likely to:

- have a significant adverse impact on the health of persons in need of the service or significantly increase health inequalities; or,
- cause a failure to prevent or ameliorate either a significant adverse impact of the health of such persons or a significant increase in health inequalities²⁶.

50. Commissioners of the NHS Trust in administration are responsible for determining at the beginning of the Trust Special Administrator's process which NHS services should fall into the category of being designated as essential. Monitor has published guidance to support commissioners in this respect²⁷.

²⁵ i.e. to follow the principles under section 65DA of the NHS Act 2006 as if they applied to an NHS Trust.

²⁶ Both points under paragraph 49 follow the principles for TSAs appointed to NHS Foundation Trusts, as set out in section 65DA(3) of the NHS Act 2006.

²⁷ *Guidance for commissioners on designating commissioner requested services and location specific services*, by Monitor (2013), available at: <https://www.gov.uk/government/publications/guidance-for-commissioners-ensuring-the-continuity-of-healthcare-services>

51. Where the Trust Special Administrator considers that action may be needed in relation to the NHS Trust under administration which affects services of other Trusts (Foundation Trusts or NHS Trusts; see Chapter 4: “Preparing the Draft Report”), the Trust Special Administrator should consult commissioners of such other affected services and ask them to identify what they consider to be the essential services they commission from those other potentially affected Trusts.
52. Although there is no statutory obligation to do so, NHS England may choose to facilitate agreement between commissioners as to which services provided by an NHS Trust in administration are deemed essential.
53. Individual commissioners operate within finite financial resources and the implications for affordability of securing essential NHS services are their responsibility. It is also their responsibility to ensure that their financial resources and expenditure plans are used to deliver the highest positive impact for their local population. While it is for commissioners to decide upon the essential NHS services of the NHS Trust in administration, the Secretary of State expects a Trust Special Administrator to work closely with commissioners, including providing access where requested to analyses in relation to his or her recommendations.
54. Spending money on financially inefficient services deprives other parts of the local health economy from funding that could be used more effectively at meeting the outcomes set by commissioners. It is envisaged that, in working in conjunction with NHS England and the Trust Special Administrator, commissioners of the NHS Trust in administration will wish to ensure that their designation of NHS services which are essential is affordable, realistic and justifiable, and not over-stated.
55. Once the essential NHS services at the Trust under administration have been determined, the Trust Special Administrator should explore how those services could be retained. The Trust Special Administrator should aim to evaluate options that provide for the continued provision of the essential NHS services of the NHS Trust in administration for up to ten years following the cessation of his or her appointment. Options should ensure that the provision of such services satisfies the principles of effectiveness, efficiency and economy. Ultimately, the Trust Special Administrator should endeavour to deliver the

most complete solution for securing the clinical and financial sustainability of the services of the NHS Trust in administration.

Services not designated as essential

56. The Trust Special Administrator should present proposals for all services in his or her reports. For services which are not designated as essential NHS services, it may be optimal for the NHS Trust to continue to provide them because it would be prudent financially or clinically. Alternatively, if it would be better that other providers deliver these services, local commissioners will need to reach an agreement with those other providers to ensure that they continue to be available to patients.
57. Unless it becomes clinically unsafe to continue services (for example, the Care Quality Commission has statutory powers to suspend registration or vary the conditions of registration of services where any person will or may be at risk of harm), the expectation is that no changes to or closures of non-essential services provided by an NHS Trust in administration or of any other Trust affected by the Trust Special Administrator's recommendations should be made until after the Secretary of State has taken a final decision (see Chapter 7: "What Happens Next?"). In the event of recommending service change or closures, the Trust Special Administrator should endeavour to explain how patients' needs will be met in future or how quality and safety will be safeguarded.

Considerations when developing Recommendations

58. The Trust Special Administrator should ensure that the overall plan for essential NHS services, and those services not designated as such, of the NHS Trust and other potentially affected Trusts is developed within the context of the specific opportunities and constraints of the local health economy. The Trust Special Administrator's recommendations should be supported by clinical evidence, which will help to ensure that the rationale for them is understood by wider stakeholders.
59. In so far as the Trust Special Administrator's recommendations may impact on other Trusts, he or she is expected to make an assessment of the capacity and capabilities of those providers potentially affected. There are various types of potential impacts upon other Trusts. For example, it may be recommended that other Trusts acquire sites or services of the NHS Trust in administration upon its dissolution, and that those Trusts

expand their capacity to deliver particular services or reduce some of their services. The Trust Special Administrator should aim to make recommendations that may impact only upon services which the commissioners of those Trusts do not identify as essential NHS services. Such recommendations should be financially sustainable and improve or maintain clinical standards, and as far as possible be in line with clinical commissioning intentions.

60. Specialised services are a significant part of overall NHS expenditure. Where it is likely that the recommendations of a Trust Special Administrator will have an impact on the provision of these services, he or she should consult with NHS England as commissioner of these services.

61. The commissioning arrangements which are relevant for the Trust Special Administrator's task are those entered into under the NHS Act 2006. In some situations, there may be some form of cross-border commissioning arrangement which could be affected by his or her recommendations. The Trust Special Administrator will be expected to consider impacts in such cases too. Conceivably, depending on local cross-border arrangements this may mean some consultation with commissioners in England in relation to services provided to patients across the border in other parts of the UK outside of England. Where patients from across the border are treated at affected NHS Trusts and Foundation Trusts in England, they would be consulted alongside English resident patients.

62. In instances of serious financial failure, the Trust Special Administrator is expected to develop recommendations for the Trust's services which will deliver a substantial reduction in their annual running costs and which will reduce the Trust's forecast deficit to zero or bring it to surplus, while representing overall value for money for taxpayers. In formalising the recommendations, it is expected that the Trust Special Administrator will have due regard to potential financing arrangements. In instances of a serious failure by an NHS Trust to provide services of sufficient quality, the Trust Special Administrator is expected to develop a solution which will ensure local access to essential, high-quality and clinically safe NHS services and demonstrate value for money for the taxpayer. In all cases, the Trust Special Administrator's recommendations should aim to provide the best balance between clinical sustainability of service provision and realistic financial savings, whilst maintaining access to essential, high-quality and safe services. When making

recommendations to address quality or financial failure, the Trust Special Administrator should ensure that, if the solution necessitates financial support, he or she considers all rules based financing²⁸.

Engaging with the Public & other Key Stakeholders

63. Explaining organisational and service change takes effort and energy, and securing support for the Trust Special Administrator's recommendations can be challenging. Upon his or her appointment, the Trust Special Administrator should therefore consider developing a strategy about how to communicate and engage with the public and other relevant key stakeholders, including marginalised or hard-to-reach groups. Strong communication and effective engagement are essential in supporting good relationships and collaborative working. Whilst communication and engagement are inter-changeable as one can influence the other, the Trust Special Administrator should recognise the differences between them in order to enhance his or her planning of engagement and communication activity. Communication is based upon an understanding of stakeholders and the sharing of information with them to enable engagement. Engagement entails the sharing of information and also listening to and learning from stakeholders in a variety of ways. Consultation then allows views to be sought by various methods to inform an outcome or decision where this has not already been made. The guiding principles for communication, engagement and consultation should be openness and transparency, honesty and inclusiveness. To support these principles, the Trust Special Administrator should aim to provide high-quality information, use plain English and deliver communications and engagement that are accessible to all audiences, including tailoring these activities according to audience need.

64. While all the recommendations may not prove non-controversial and have universal support, the strongest proposals are those developed through open and transparent discussions and in collaboration with relevant key stakeholders. The process of the Trust

²⁸ The following publications can provide further guidance: (1) "Secretary of State's Guidance under section 42A of the National Health Service Act 2006" available at <https://www.gov.uk/government/publications/guidance-on-financing-available-to-nhs-trusts-and-foundation-trusts>, and (2) "NHS providers and commissioners: submit locally determined prices to Monitor" by Monitor and NHS England available at <http://www.gov.uk/nhs-providers-and-commissioners-submit-locally-determined-prices-to-monitor>

Special Administrator should be aimed at commanding their confidence. This must include the public and patients, commissioners, providers, NHS staff including clinicians, local NHS leaders who ultimately may be required to play a role in implementing the recommendations, and national bodies such as the Care Quality Commission. Ultimately, a Trust Special Administrator should try to ensure that relevant key stakeholders can have confidence in the outcome of the Regime.

65. Consultation during the Regime should be meaningful and be conducted not only during the Trust Special Administrator's statutory consultation period (see Chapter 5: "Consultation on the Draft Report") but at any period when it is meaningful. The Trust Special Administrator should begin engagement with relevant key stakeholders as soon as he or she takes up the post to ensure that they can influence decisions and contribute to the development of the draft recommendations, including being consulted when the draft report is being prepared. Key stakeholders include:

- ***the public and patients*** - the Trust Special Administrator should draw up plans and recommendations with the views and concerns of the local population and patients in mind;
- ***the leadership team and other staff of the NHS Trust in administration*** - their knowledge will be invaluable as the Trust Special Administrator considers any proposed service change;
- ***clinical experts*** - to ensure that patient safety and clinical quality are priorities in any proposed service change;
- ***commissioners of the NHS Trust in administration and those of other NHS provider Trusts who could be affected by the Trust Special Administrator's recommendations, and NHS England*** - to support the development and commissioning of any proposed service change;
- ***those other potentially affected NHS Trusts and Foundation Trusts;***
- ***independent providers, and primary and community care providers where relevant;***
- ***Care Quality Commission*** - to ensure that any proposed service change meets with its registration requirements and are of sufficient safety and quality;
- ***NHS Trust Development Authority;***
- ***Monitor;*** and,

- ***Healthwatch England and Local Healthwatch organisations.***

66. The involvement of other potentially affected Trusts and their staff is particularly important. Other Trusts may be experiencing challenges of their own and therefore delivering recommendations for sustainable services will require cooperation with them. For example, the Trust Special Administrator may need to consider the potential impact on another Trust of it taking on local provision of services that may no longer be provided by the NHS Trust in administration. The Trust Special Administrator would be expected to be in discussion with that other Trust in this situation, and consider mitigating the potential impact of such changes on that organisation. As such, the Trust Special Administrator should be in regular contact with the leaders and staff of other potentially affected providers in the local health economy during the Regime.
67. The involvement of the public and patients is critical, and all communications with them should be as clear and comprehensive as possible. The Trust Special Administrator should seek to develop his or her recommendations in partnership with them as partners rather than as passive recipients. Local residents must be able to understand what is happening and why it is necessary. The Trust Special Administrator should consider developing a communications strategy to ensure that the public and patients, and all other relevant key stakeholders, can understand the process the Trust Special Administrator is following and how the draft recommendations are being developed. Early and ongoing engagement will help to build public support for the recommendations and ensure they are shaped around the needs of the public and patients. The Trust Special Administrator may choose to use a spectrum of involvement activity. This may include holding public meetings during the development of the draft recommendations and using communications and engagement specialists so that the quality of engagement during the meetings, including those during the Trust Special Administrator's statutory consultation, is strong.
68. The Trust Special Administrator should, where appropriate, secure the views of cross-border patients who use the English NHS and ensure that they are taken into account in his or her recommendations.

69. The Trust Special Administrator should take steps to reassure the public and patients that the range of essential NHS services provided by the NHS Trust in administration will continue to be available for them. As the likely structure of services becomes clear through emerging recommendations, the public and patients should be kept informed about the implications of potential new arrangements on how they access health care in the area. If local people are concerned about what will happen to services or if they have objections based on a misunderstanding or misinformation of the planned approach, it could be more difficult for the Trust Special Administrator to gain support from commissioners for any changes he or she proposes.

70. The involvement of relevant commissioners is also critical. The Trust Special Administrator should engage closely and regularly with them in developing draft and final recommendations because of their responsibility for ensuring high quality health services based on the needs of their local populations. This will help to ensure that the clinical models that underpin any proposed service delivery models are aligned with the essential NHS services which they designate and their broader commissioning intentions. Strong leadership and a collaborative approach will help to ensure that commissioners feel able to support the recommendations.

71. The Trust Special Administrator should also communicate regularly and adopt a collaborative approach with public representatives during the development of his or her draft recommendations including:

- Local Healthwatch organisations;
- Health and Wellbeing Boards;
- local Members of Parliament;
- Local Authorities;
- patient groups and patient leaders;
- the voluntary and community sector.

72. The Trust Special Administrator should consider attending meetings when invited. He or she should also be prepared to speak to the local media, issuing statements when significant steps are taken and responding to queries where appropriate. If the Trust Special Administrator is asked to undertake broadcast interviews, he or she should

consider accepting the opportunity to explain and clarify his or her work. The Trust Special Administrator should ensure that he or she is aware of developing opinion across the locality, for example, through monitoring local and social media, discussions with stakeholders and holding public meetings.

73. Publication of the Trust Special Administrator's draft and final reports are critical milestones in the Regime. In addition to explaining the reports to staff at the NHS Trust in administration and other potentially affected Trusts prior to or on the day of publication (see following section entitled "Staff & Union engagement"), the Trust Special Administrator should consider dedicated communications with others including:

- patients and the public;
- the media;
- Local Healthwatch organisations and other relevant groups representing patients;
- relevant Local Authorities;
- local Members of Parliament;
- the suspended Chair and non-executive Directors.

Staff & Union engagement

74. On appointment, the Trust Special Administrator is expected to take steps to ensure that members of staff at the NHS Trust in administration are consulted from the beginning of the Regime. The Trust Special Administrator should recognise that the staff will have a good understanding of patients and the services they receive. Their knowledge will be invaluable as the Trust Special Administrator goes about his or her work.

75. The Trust Special Administrator should recognise that it is a time of uncertainty for staff working at the NHS Trust in administration. It will be important to be as transparent as possible with them so that they understand what is happening and can continue to undertake their duties normally during the Regime. Media coverage and interest from other organisations may exacerbate staff anxieties and reduce morale which can have an impact on service delivery. Staff may feel concerned about the implications of the Regime in relation to their future employment. Therefore, supporting staff morale and retaining the necessary staff within the NHS Trust in administration will be crucial.

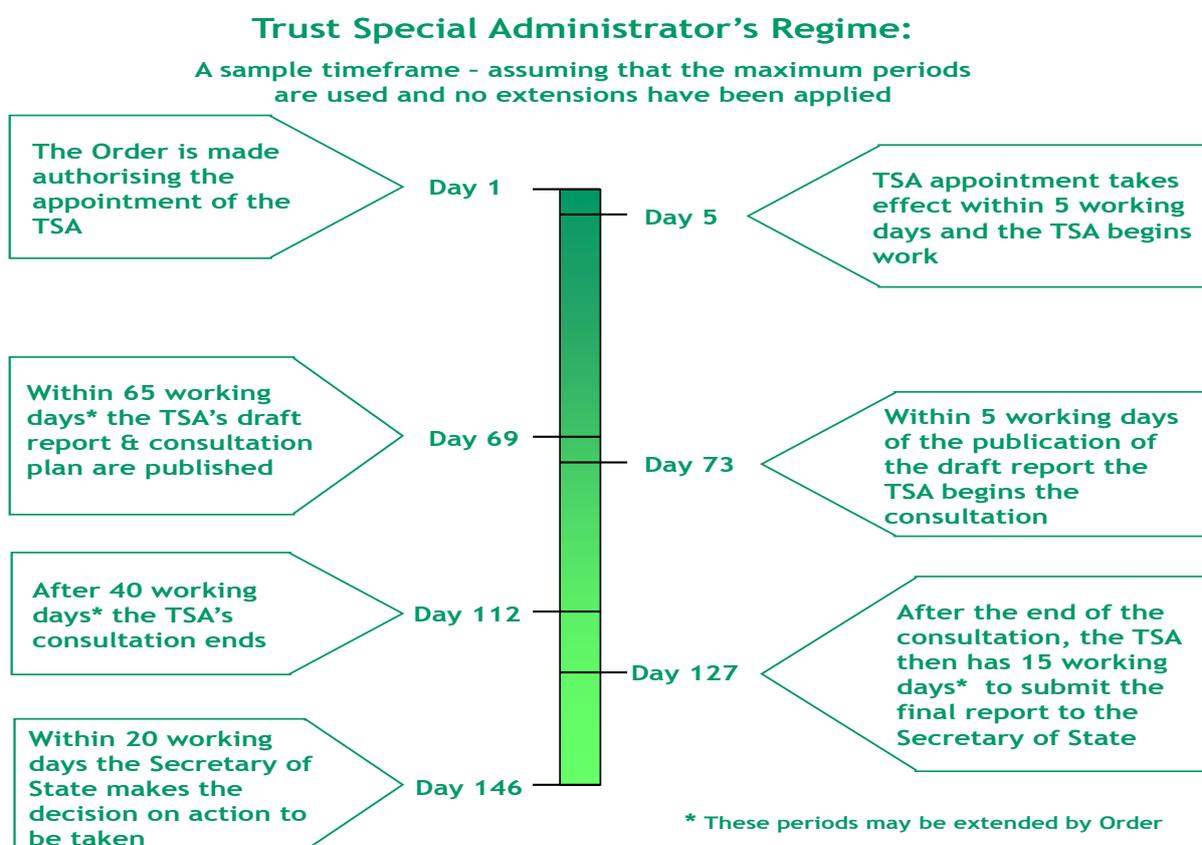
76. To explain the work of the Trust Special Administrator and to secure an improved understanding of the strengths and challenges facing the NHS Trust, he or she should consider holding open staff meetings, attending staff management meetings and holding one-to-one meetings with clinicians, and others such as staff representatives.
77. During the Trust Special Administrator's statutory consultation (see Chapter 5: "Consultation on the Draft Report"), he or she must hold at least one meeting with staff of the NHS Trust in administration (including with persons representing staff such as union representatives). However, publication of the draft report prior to the statutory consultation period and of the Trust Special Administrator's final report is also likely to impact on staff. The Trust Special Administrator should consider increasing engagement with staff just prior to or on the day these reports are published so that he or she can explain the recommendations.
78. Where a Trust Special Administrator's draft recommendations have implications for and affect other providers, the challenges around staff engagement will be even greater. The Trust Special Administrator should consider how to engage with staff at those providers, such as NHS Trusts and Foundation Trusts. Although the Trust Special Administrator must, during the statutory consultation, hold at least one meeting with staff (including with persons representing staff such as union representatives) at any other Trusts affected by his or her draft recommendations, he or she should consider what other engagement will be necessary with them. This is particularly when the draft and final reports are about to be or are published, and to agree the approaches with the management of those organisations.
79. The Trust Special Administrator should consider working with union representatives and others representing the staff of the NHS Trust in administration and other potentially affected Trusts as they can provide useful insights into the workforce implications of special administration and the range of possible recommendations the Trust Special Administrator may make. This includes useful insights into the views and concerns of staff.

Chapter 3: Timescales

Statutory timescales

80. Every case where an NHS Trust becomes unsustainable will be different due to differing local circumstances. The principal benefit of the Trust Special Administrator’s Regime arises from having a time-limited process for arriving at a solution to the clinical and/or financial difficulties underlying the unsustainability of that Trust.

81. For an NHS Trust, the legislation requires the Secretary of State to make the final decision about the future of the Trust and its services within 146 working days²⁹ of the Trust Special Administrator’s appointment taking effect (unless the Secretary of State’s power to extend certain stages of the Regime’s timetable by Order has been exercised). The legislation sets out specific time limits for each of its stages of the Regime as shown below:



²⁹ Extended from 116 working days by amendments made to Chapter 5A of the NHS Act 2006 by section 120 of Care Act 2004.

82. The deadlines in the Regime ensure that momentum is not lost, which could present further risk to the quality and safety of the services being provided to patients. The three distinct stages that the Trust Special Administrator must complete each have a dedicated chapter in this guidance:

- Chapter 4: Preparing the Draft Report;
- Chapter 5: Consultation on the Draft Report;
- Chapter 6: Preparing the Final Report.

Extension of time

83. The legislative framework allows the Secretary of State to extend the 146 working day limit of the Regime only if he thinks it would be unreasonable in the circumstances to expect the Trust Special Administrator to complete the relevant activities within the statutory timeframe. The Secretary of State can, by Order, extend each of the following periods:

- the period during which time the Trust Special Administrator must prepare the draft report (which without an extension must be completed within 65 working days);
- the statutory consultation period on the draft report (which without an extension must last 40 working days); and,
- the period during which the Trust Special Administrator must develop and send his or her final report to the Secretary of State (which without an extension must be done within 15 working days).

84. There is no scope to extend the timeframe within which a final decision about the NHS Trust must be taken by the Secretary of State, which must be within 20 working days from receipt of the Trust Special Administrator's final report.

85. Where the Secretary of State makes an Order to extend the draft report or final report stages, the legislation requires the Trust Special Administrator to publish a notice detailing the new date on which the extended time period will expire³⁰. If the extension relates to

³⁰ Section 65J(3) of the NHS Act 2006

the statutory consultation period, the notice must set out the new date on which the period will expire and the means by which the Trust Special Administrator will seek responses to his or her draft report during that extended period³¹.

Parliamentary recess

86. Certain key reports produced during the Regime must be laid before Parliament. This applies to the report produced by the Secretary of State to justify using the Regime (see paragraph 21(ii)) and the duty of the Secretary of State to lay the draft and final reports of the Trust Special Administrator³². The reports cannot be laid during Parliamentary recess and the Trust Special Administrator and the Department of Health will need to discuss publication where this falls in or close to recess.

³¹ Section 65J(4) of the NHS Act 2006.

³² Sections 65F(3) and 65I(3) of the NHS Act 2006 respectively.

Chapter 4: Preparing the Draft Report

Context

87. The Trust Special Administrator must produce, in a draft report, recommendations on how essential services of the NHS Trust in administration can be delivered in the future in a high-quality, safe and sustainable way. Ultimately, he or she should endeavour to develop a complete solution for the NHS Trust in administration in the interests of resolving the situation for the health service.
88. This chapter sets out the duties of a Trust Special Administrator in relation to developing the draft report. The deadline by which time the Trust Special Administrator must produce the report is 65 working days³³ (extended from 45 working days by amendments in the Care Act 2014), which is thirteen weeks. The extended draft report phase provides the opportunity for the Trust Special Administrator to establish stronger relationships with local NHS organisations and communities and should help him or her to develop a strong plan for the statutory consultation.
89. The draft report phase is the longest distinct stage of the Regime, during which time the Trust Special Administrator must assess the issues facing the NHS Trust in administration, engage with its staff, the public and other key stakeholders, and develop draft recommendations about its future and services. The draft report should set out the process, conclusions and rationale that informed its recommendations. In developing the recommendations, the Trust Special Administrator must consult the Care Quality Commission as any changes to the provision of regulated activities will have to meet the Commission's registration requirements.
90. As set out in Chapter 2, a policy objective of the trust special administration is to secure the continued provision of the essential NHS services of the NHS Trust in administration. These should also be of sufficient safety and quality. These objectives may also be set out in the terms of appointment for the Trust Special Administrator. Essential NHS services are the services identified by commissioners of the NHS Trust in administration as those that are essential to be retained in the local health economy. This is a critical part of the

³³ Section 65F(1) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

process. It is the responsibility of these commissioners to identify the essential services at the outset of the Regime. The commissioners concerned will necessarily be mindful of the need to operate within their budget. It is envisaged that commissioners would not expect to approach identification of essential services for the purposes of the Regime any differently from when they are commissioning these services.

Remit of the Trust Special Administrator

91. Experience has shown that a Trust Special Administrator may need to propose changes more widely within the local health economy in order to make effective recommendations in relation to an unsustainable NHS provider Trust. Recommendations affecting providers other than the NHS Trust in administration may be necessary because of the complexity of health system inter-relationships. Clinical and financial problems often cross organisational boundaries and a Trust with intractable difficulties may sit within an unbalanced local health economy where there is too much capacity. These difficulties are therefore experienced not in isolation but across the whole health economy and beyond.
92. The Trust Special Administrator's remit is to make, and respectively the Secretary of State (or Monitor, in the case of a Foundation Trust) to accept, recommendations that may apply to NHS Trusts or Foundation Trusts and their services beyond the Trust under administration³⁴. Wider recommendations must be "necessary for and consequential on" the action recommended for the Trust in administration³⁵ and would be in the context of the circumstances faced by the Trust Special Administrator in any given special administration.
93. For example, in trying to meet the policy objectives under paragraph 48, the Trust Special Administrator may find there is no solution which focusses on the reconfiguration of services which will reduce the Trust's forecast deficit to zero and allow it to operate on a financially sustainable basis, even if realistic financial support were to be provided. Consequently, the Trust Special Administrator may propose a system approach where the NHS Trust would be dissolved and its sites and services acquired by other neighbouring Trusts. Further, recommendations affecting services at those Trusts may be necessary

³⁴ Section 65O of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

³⁵ Section 65O(2) and (3) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

for and consequential on the primary recommendations about the NHS Trust in administration if, for example, the problem is over-capacity in the local health system. The aim is to deliver a solution for the NHS Trust in administration and its services, and a clinically and financially sustainable and safe service model for that local health economy; it may be necessary and consequential to make proposals that affect other Trusts if, for example, not doing so would place that other Trust or Trusts in a financially unsustainable position.

94. At the outset of the Trust Special Administrator's process, he or she should be clear to the public and patients and all other relevant stakeholders about the scope of his or her legal remit. This could be achieved through a public announcement. At the outset, the Trust Special Administrator cannot anticipate which other Trusts and commissioners may be affected by his or her draft recommendations. Nonetheless, the Trust Special Administrator should engage with other providers and their commissioners in the wider area to develop an improved understanding of the local health economy, including its influences upon the NHS Trust in administration and the impact that any changes proposed for that organisation will have on other organisations within that local health economy. It is only where the Trust Special Administrator cannot find an internal solution for the Trust in administration that he or she can consider wider recommendations potentially affecting other providers. If the Trust Special Administrator considers that such recommendations are needed, he or she should take active steps at that point not only to inform those organisations so that they can prepare to engage with the Trust Special Administrator but to know what the affected commissioners of those other potentially affected Trusts' services reasonably identify as being essential NHS services. Essential services would be defined according to the same criteria and guidelines that apply to commissioners of the NHS Trust in administration as set out in Chapter 2.

95. The legislation also extends the scope of the Trust Special Administrator's remit to allow him or her to make wider recommendations that may apply to non-Trust providers, again where the recommended action is "necessary for and consequential on" the actions recommended for the Trust under administration³⁶. For example, a Trust Special Administrator may need to look more creatively at service delivery beyond those delivered by NHS Trusts or Foundation Trusts, such as primary and community services.

³⁶ Section 65O of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

96. The Trust Special Administrator is expected to gain the confidence of other potentially affected providers and their commissioners that his or her wider draft recommendations are “necessary for and consequential on” any action recommended in relation to the NHS Trust in administration.
97. Delivering high-quality, safe and sustainable services in a local health economy requires strong collaboration and cooperation between the Trust Special Administrator and local commissioners and providers. Securing their support is one of the most critical activities during the Regime, particularly as the Trust Special Administrator’s recommendations could lead to changes in service configuration.
98. Commissioners should be given the opportunity to input into, plan for and adapt to any recommended pattern of service change. The government has given a commitment that this guidance will replicate as far as possible the key principle in the regime for NHS Foundation Trusts of parity as between all affected commissioners in protecting the essential services they commission³⁷. As such, the Secretary of State expects a Trust Special Administrator appointed to an NHS Trust to secure the support of commissioners of that Trust’s services that his or her draft recommendations, and, if varied, final recommendations would meet the policy objective of the trust special administration of securing continuity of the essential services of that Trust. He or she should also secure the support of commissioners of affected services of other Trusts that the draft recommendations and, if varied, final recommendations would meet that policy objective and do so without harming essential NHS services at the other affected Trusts. The aim is that the Trust Special Administrator should take fully into account the need to protect essential NHS services under the Regime irrespective of where they are provided.
99. A Trust Special Administrator will want to consider all options about how the NHS Trust in administration and its services could be made sustainable. This will include taking a broad strategic view in developing recommendations for the draft report. In considering the most appropriate organisational solutions to deliver sustainable services for the population, the Trust Special Administrator may wish to conduct a transparent market engagement

³⁷ Hansard, 7 May 2014, Column 1497.

process to identify potential providers of services that may be interested in being part of one or more of his or her proposed solutions.

Choice & Competition Considerations

100. The Trust Special Administrator and commissioners should work together to ensure that the Trust Special Administrator's recommendations are consistent with commissioners' obligations under the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.
101. It is expected that the Trust Special Administrator will only recommend a transaction if it does not have an adverse effect on patients arising from a loss of competition, or if the benefits of the transaction are likely to outweigh these adverse effects. Where a Trust Special Administrator recommends a merger, acquisition or other transaction that would be a relevant merger situation under the Enterprise Act 2002, it is recommended that he or she engages early with Monitor and/or the Competition and Markets Authority.

Reconfiguration Tests

102. Recognising that an NHS Trust is placed into the Regime under exceptional and time-limited circumstances, the Secretary of State's four tests for reconfiguration were not designed to apply under these circumstances. The tests are key principles designed for local service reconfigurations; a process that is led by commissioners locally. However, the Trust Special Administrator should, if requested to do so by the Secretary of State, analyse in his or her reports the proposed reforms and process against the general principles underpinning the tests. This would allow the Secretary of State to understand how the substance of the tests has been considered, if the approach is thought to be appropriate.
103. The views of each commissioner whose patients will be affected by the Trust Special Administrator's recommendations are relevant when looking at the test on support from GP commissioners, in other words whether or not they consider that the proposals benefit their patients and whether or not they support the proposals. However, the NHS services which commissioners think are locally essential, either at the Trust under administration or other affected Trusts, are services to which the Trust Special Administrator has to pay particular regard. In addition, the view of NHS England, with the overview it holds of the

local health economy and the wider interest of the health service, is determinative for the Trust Special Administrator in the event of disagreement between local commissioners (see paragraphs 117 and 118).

Clinical Guidance

104. The Trust Special Administrator's recommendations should mean that local populations will have access to high-quality, clinically sustainable healthcare services. His or her recommendations should be supported by available clinical standards which wherever possible are evidence-based.
105. The Trust Special Administrator should engage senior clinical expertise at an early stage to ensure that the development of recommendations routinely draws upon this expertise.
106. He or she may choose to establish a clinical advisory group comprising local and national medical and nursing experts (including from the Royal Colleges and professional bodies) to assess the clinical sustainability of emerging recommendations. This could include advice about evidence-based standards and current practice nationally for ensuring the safety and quality of clinical services. Where very specialist clinical expertise is required, for example on the safety of particular models of care, this may need to be sought from national experts rather than local clinicians. Significantly, representation by relevant Clinical Commissioning Groups will ensure local perspectives and priorities are understood, including the clinical basis for their designation of essential services, and may assist the Trust Special Administrator in securing their support for his or her recommendations. The Trust Special Administrator should ensure that appointments to any clinical advisory group are suitably representative and authoritative.
107. While there is a balance to be struck between investing in engagement activities and progressing work to complete the draft report by the deadline, activities such as clinical workshops can also provide an opportunity to engage with a wide range of local clinicians and commissioners on options for service change.
108. Successful clinical participation in the Regime will help the Trust Special Administrator to better achieve his or her aims, and he or she is expected to engage with clinicians so that their views can be represented. The Trust Special Administrator is expected to develop recommendations that are likely to improve clinical standards and outcomes or

to maintain them where it is felt that standards and outcomes do not require improvement. It is for the Trust Special Administrator to use his or her own judgement about which clinical standards and guidelines should be used to shape the recommendations, taking advice from both local and national clinicians.

Equalities

109. The Trust Special Administrator must undertake an equality impact assessment, observing equality legislation and principles, and demonstrating that due regard has been paid to the Public Sector Equality Duty under the Equality Act 2010 to:
- eliminate discrimination, harassment and victimisation and any other conduct prohibited under the 2010 Act;
 - advance equality of opportunity between people who share a protected characteristic and those who do not; and,
 - foster good relations between people who share a protected characteristic and those who do not.
110. The Trust Special Administrator should also have in mind the statutory requirements imposed upon the Secretary of State and the need therefore for the Secretary of State to have demonstrated due regard to the overarching statutory duties imposed under Part 1 of the NHS Act 2006 as amended by the 2012 Act, including the health inequality duty, when considering and making his decision following the Trust Special Administrator's final report. When considering the final report, the Secretary of State will need to take account of all the evidence, including consideration of the Trust Special Administrator's equality impact assessment as well as considering the evidence that may relate to the overarching duties set out in part 1 of the NHS Act 2006. Therefore, the Trust Special Administrator should include in his or her evidence an assessment of the wider impact on the health service and equality. The Trust Special Administrator may wish to establish a steering group to help develop the health and equality impact assessment, including representation from patients and the public.
111. The equality impact assessment itself should apply in particular to patients, public and staff. It is recommended that the development of a draft equality assessment should begin early in the Regime to allow the Trust Special Administrator to identify, for

example, groups with protected characteristics that may be affected and which the Trust Special Administrator's draft report may take into account. A Trust Special Administrator may wish to publish a draft equality impact assessment alongside his or her consultation document, and consider the feedback from the statutory consultation process to refine the equality analysis as a way of informing the development of his or her final recommendations.

112. In taking his final decision about the NHS Trust in administration, the Secretary of State must satisfy his Public Sector Equality Duty and assess the equality impact assessment in the final report as being satisfactory and playing a role in influencing the Trust Special Administrator's final recommendations. Therefore, in making his final decision about the NHS Trust, the Secretary of State would be doing so having taken account of the equality impacts which he considers are factored into his decision. It is recommended that the Trust Special Administrator's final report should therefore trace how he or she considered the equality impact assessment when making the final recommendations.

Commissioner support

113. Local service change can be a very effective means of delivering higher quality care, better health outcomes and improved health for the population across a wider health economy. Under the exceptional and difficult circumstances where a Trust Special Administrator is appointed, the Secretary of State and NHS England anticipate that Clinical Commissioning Groups will work closely and constructively with the Trust Special Administrator in view of their responsibility to act consistently with the discharge by the Secretary of State and NHS England of their duty to promote a comprehensive health service³⁸. This will avoid parochial decision-making and allow Clinical Commissioning Groups to take into account broader considerations for the delivery of publicly funded services in the interests of patients and the taxpayer. This might for example require a Clinical Commissioning Group to accept a proposed reduction in non-essential NHS services where this is in the wider interest.
114. Service and organisational change is often complex. A Trust Special Administrator at an NHS Trust must show excellent leadership, close collaborative working and extensive

³⁸ Under the NHS Act 2006, Clinical Commissioning Groups have a duty to act consistently with the duty of Secretary of State and NHS England to promote a comprehensive health service for the people of England.

and comprehensive engagement with Clinical Commissioning Groups in developing his or her recommendations.

115. The Trust Special Administrator is expected to seek the support for his or her recommendations both from Clinical Commissioning Groups that commission services from the NHS Trust in administration and from those that may be affected by recommendations affecting other Trusts. It is a key expectation in this guidance that (subject to what is said in paragraphs 117 and 118) the Trust Special Administrator should not provide his or her draft report to the Secretary of State without having first established commissioner support. This means, in the case of each commissioner of services provided by the NHS Trust in administration and each commissioner of services provided by other NHS Trusts or by other Foundation Trusts *where those services would be affected* by the Trust Special Administrator's recommendations, that they consider the recommendations in the draft report would achieve the policy objective of the trust special administration set out in paragraph 48(i) ie. to secure the continued provision of the essential NHS services provided by the NHS Trust in administration. This means that the Trust Special Administrator is expected to secure support for his or her recommendations from commissioners of services at the NHS Trust in administration, and from each commissioner of services at other Trusts *where those services would be affected* by the recommendations, to the extent that those recommendations would impact on the continued provision of the failing NHS Trust's essential services. As such, the commissioners in question would not be expected to withdraw support for the whole set of recommendations in the draft report purely because they did not favour one or more recommendation affecting only non-essential services, for example. In addition, the Trust Special Administrator should establish from the commissioners of services at other Trusts where those services would be affected by the recommendations that they believe the recommendations meet the policy objective without harming essential NHS services at the other affected trusts.
116. The intended effect is that the Trust Special Administrator can make recommendations about the services of the NHS Trust in administration and of other Trusts but not recommendations that would harm NHS services that are determined by their commissioners to be locally essential.

117. In the event that support is not established from one or more commissioners (other than NHS England), the Trust Special Administrator may provide his or her draft report to the Secretary of State, providing he or she is able to establish from NHS England (which commissions some Trust services itself and has a guidance and oversight role in relation to commissioning by Clinical Commissioning Groups) that the recommendations in that report would achieve the policy objective of the trust special administration of securing the continued provision of the essential services provided by the NHS Trust in administration. The expectation placed on the Trust Special Administrator is that he or she will also obtain the support of NHS England in respect of whether the Trust Special Administrator's recommendations would harm essential services at other affected Trusts. In looking at this, NHS England is able to consider if the essential services at other Trusts are suitably identified by commissioners as essential and, whether such services would be harmed. NHS England would be able to take into account the views of the commissioners who felt the recommendations would harm the essential services they commission, and decide if the argument was convincing or otherwise.
118. In either case, the Secretary of State would expect the Trust Special Administrator to make a note of the reasons for any disagreement in their draft report.

Care Quality Commission support

119. The Trust Special Administrator should not provide his or her draft report to the Secretary of State without having established that the Care Quality Commission considers that the recommendations would achieve the policy objective of the trust special administration under paragraph 48(ii) in relation to securing services that are of sufficient safety and quality.

Legal requirements

120. In preparing the draft report, the Trust Special Administrator must consult the following organisations³⁹:

- NHS England;
- the Care Quality Commission; and,

³⁹ Section 65F(2) of the NHS Act 2006

- any commissioner that commissions services from the NHS Trust in administration, if directed by the Secretary of State.

121. These are minimum legal requirements and Chapter 2 sets out expectations in relation to consultation on the development of the draft recommendations and during the preparation of the draft report.

122. Within a period of 65 working days beginning with the day on which the Trust Special Administrator's appointment takes effect, the Trust Special Administrator must provide to the Secretary of State and publish the draft report stating the action which he or she recommends the Secretary of State should take in relation to the NHS Trust in administration⁴⁰. After receiving the report, the Secretary of State must lay it before Parliament⁴¹. Parliamentary procedure requires that the report must be laid before Parliament before it is published. The Trust Special Administrator must publish a statement at the same time as the draft report is published⁴² that gives details on (i) the dates that the 40 working day consultation will start and end, and (ii) how people will be able to respond. Chapter 5 sets out the consultation process to be undertaken by the Trust Special Administrator.

Checklist for Trust Special Administrators: Preparing the Draft Report

- ✓ Consult, when preparing the draft report, NHS England, the Care Quality Commission and, if directed to do so by the Secretary of State, any commissioner that commissions services from the NHS Trust in administration⁴³.
- ✓ Consider the need to engage with other key stakeholders on the development of the draft recommendations and consult them during the preparation of the draft report as set out under Chapter 2.

⁴⁰ Section 65F(1) of the NHS Act 2006.

⁴¹ Section 65F(3) of the NHS Act 2006.

⁴² Section 65G(1) and (2) of the NHS Act 2006.

⁴³ Section 65F(2) of the NHS Act 2006.

- ✓ The draft report should be accurate and must be produced and submitted to the Secretary of State, and published within 65 working days from the date the Trust Special Administrator's appointment takes effect.
- ✓ Establish with each commissioner of the NHS Trust in administration and any other affected commissioner that it considers the recommendations in the report would achieve the policy objective of the trust special administration to secure the continued provision of the essential NHS services provided by the NHS Trust in administration. This should include establishing from the commissioners of other Trusts' services affected by the Trust Special Administrator's recommendations that they believe this objective would be met without harming essential NHS services at those other Trusts.
- ✓ Establish that the Care Quality Commission considers that the recommendations in the draft report would achieve the policy objective of the trust special administration in relation to securing services that are of sufficient safety and quality.
- ✓ A statement must be published alongside the draft report, setting out the means by which the Trust Special Administrator will seek responses to the report and when the 40 working day consultation period will start and end⁴⁴.

⁴⁴ Section 65G(1) and (2), NHS Act 2006.

Chapter 5: Consultation on the Draft Report

Context

123. After the draft report is published, there follows a statutory consultation process on that report and its recommendations about the future of the NHS Trust in administration and its services.
124. The consultation period must last for 40 working days (extended from 30 working days by amendments in the Care Act 2014), which is eight weeks⁴⁵.
125. To ensure that the consultation complements the extended scope of the Trust Special Administrator's remit set out in Chapter 4, minimum legal requirements for the consultation include the requirement to consult other Trusts (NHS Trusts and Foundation Trusts) whose services would be affected by the recommendations, their staff (including persons representing staff such as their union representatives), and the commissioners of their affected services⁴⁶. This will help to ensure that the Trust Special Administrator's final recommendations are informed by a full evidence base and a good understanding of the issues facing the entire local health system.
126. The Trust Special Administrator is required to consult the public⁴⁷. The legislation allows anyone with an interest to provide views on the Trust Special Administrator's draft recommendations. It does not confine or constrain this requirement for public consultation, for example, to the geographical area served by the NHS Trust in administration. To further ensure that final recommendations are developed with the interests of local communities at the forefront, the Trust Special Administrator must also consult with Local Authorities in whose area the NHS Trust in administration and other affected Trusts provide services and also Local Healthwatch organisations in those areas⁴⁸.

⁴⁵ Section 65G(2) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁴⁶ Section 65H of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁴⁷ Section 65H(5) of the NHS Act 2006.

⁴⁸ Section 65H of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

127. Beyond these and other minimum legal requirements (set out in the section of this chapter entitled “Legal requirements”), the Trust Special Administrator should use his or her judgement about which other organisations or persons he or she should consult.
128. It is recommended that the Trust Special Administrator develops a consultation plan for reaching all stakeholders and groups who are likely to be interested in his or her recommendations. The period for producing the draft report (extended to 65 working days by amendments in the Care Act 2014) and the potential five working days between the publication of that report and the start of the statutory consultation (see paragraph 144) could be used to help the Trust Special Administrator ensure that the consultation plan is complete and robust, and that organisations or persons in the various categories that he or she must consult are identified, as well as allowing time to prepare for the timely delivery of all consultation materials. This five-day period allows flexibility to plan the consultation but is a statutory maximum period. The key issues are that the statutory consultation should be well conducted and well planned. It is quite possible that the Trust Special Administrator may consider that his or her consultation could begin sooner than five working days. If any feedback is offered in response to the published draft report before the start of the statutory consultation, the Trust Special Administrator should treat that feedback as if it had been provided during the consultation.
129. The Trust Special Administrator should make every effort to consider carefully how to engage the local population including different ways in which they might be reached, whether there are particular groups or channels he or she should use and what obstacles might exist to securing a response from all relevant stakeholders, including marginalised or hard-to-reach groups. It is vital there is meaningful and effective engagement with local populations affected by the Trust Special Administrator’s recommendations during the statutory consultation. For example, the Trust Special Administrator may wish to engage with providers from other sectors, including when the draft report is being developed, so that they may shape and contribute to the draft recommendations to ensure services for patients have a sustainable future.

Processes that do not apply

130. The Regime was designed to allow decisions to be made in a time-limited way about how services should be configured under a specific set of circumstances (in contrast to the more usual local NHS reconfiguration process led by NHS commissioners). For this reason, in relation to NHS Trusts under special administration, the usual statutory processes for consultation by Trusts, NHS England and commissioners on services, including service reconfiguration, are disapplied until the Secretary of State's decision is made about what action to take following the recommendations in the final report of the Trust Special Administrator⁴⁹.
131. The time-limiting function of the Regime is also reflected in regulations providing that recommendations in a Trust Special Administrator's report are excluded from a Local Authority's powers to refer contested service change proposals to the Secretary of State⁵⁰. These timescales are not compatible with those of the Regime. However, the extension of the Trust Special Administrator's statutory consultation to eight weeks gives more time to engage with all key stakeholders and allows them to ask questions about the Trust Special Administrator's draft recommendations.

Objectives & Methods of Consultation

132. Successful consultation requires identifiable stakeholders with whom to hold meaningful dialogues on a relevant subject or relevant proposals. The Secretary of State expects a Trust Special Administrator to pursue the following objectives in relation to his or her statutory consultation:

⁴⁹ See the following sections in the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014: sections 13Q(4) in relation to the Board's consultation duties, 14Z2(7) in relation to CCGs' consultation duties and 242(6) in relation to Trusts' consultation duties.

⁵⁰ See regulation 23 of *the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013* (SI 2013/218) and regulation 24, which provides exemptions in relation to proposals contained in a Trust Special Administrator's draft or final report.

- The Trust Special Administrator should gather views and feedback, and validate and improve, where necessary, his or her recommendations in the draft report in light of this;
- The Trust Special Administrator should engage in a meaningful way all key stakeholders, including patients, the public and staff, whose views will need to be considered; and,
- The Trust Special Administrator should ensure that the launch of the consultation does not come as a surprise to the local population and other key stakeholders.

133. The methods of communication during the statutory consultation include written and face-to-face communications. Communicating and engaging with patients, the public and other relevant key stakeholders will help to develop their confidence in the Trust Special Administrator's process. A meaningful consultation process will help to ensure they can contribute to the final recommended solution for the failing NHS Trust and have confidence in the outcome of the regime. The Trust Special Administrator may wish to refer to other guidance in relation to involving patients and the public on plans for changes to health services⁵¹.

134. The Trust Special Administrator should encourage consultees to submit a formal response in the way he or she prescribes. This means that the Trust Special Administrator would not be obliged to consider responses offered in other ways such as published statements or petitions.

135. The NHS is accountable to the public, communities and patients that it serves. It has a responsibility to involve them in relation to any plans to change how their services are delivered. The success of the Regime can be undermined if there is not a solid base of public understanding and/or support for the Trust Special Administrator's recommendations. The Trust Special Administrator should therefore ensure that he or she benefits from continual good levels of communication and engagement with the public and other relevant stakeholders, not just during the statutory consultation but

⁵¹ For example, *Transforming Participation in Health and Care* by NHS England (2013), and *Planning and delivering service changes for patients* by NHS England (2013).

from the outset. The Trust Special Administrator's final recommendations to the Secretary of State should ideally have been influenced, to an extent, by the public response to the consultation and that process should therefore be transparent.

136. Issuing a consultation document and holding public meetings do not by themselves make an effective consultation. The widest possible group of people likely to be affected by the draft recommendations must be able to understand them given their likely complex nature. Ultimately, the intended audience of the consultation is the general public. The draft recommendations should therefore include the rationale and evidence to support them, and be communicated clearly during public meetings and in the consultation document. Questions presented in the consultation document should be customised to respondents for the NHS Trust in administration and any other affected provider. The Trust Special Administrator should also consider producing an easy-to-read version of the consultation document. Other formats such as braille could also be provided on request.
137. In addition to traditional written consultation documents and leaflets (for distribution across the local health economy including at GP practices, hospitals, town halls and libraries) and public meetings, the Trust Special Administrator may wish to consider using a website for publishing materials such as the consultation document, the draft report, bulletins, briefings with "Frequently asked Questions and Answers" and audio recordings of the public meetings. This may reduce the volume of documents that need to be printed. The Trust Special Administrator may also wish to consider using modern digital communications such as social media, which provide opportunities to have interactive dialogues with different groups of service users. Social media could be used to promote the consultation and receive responses to it.
138. If requested, the Trust Special Administrator should be able to share data and methods used in developing his or her draft recommendations and take time to explain the recommendations to patients, the public and other relevant stakeholders. They must be able to understand the basis for the recommendations and feel they have sufficient information to make a well-informed response, including any objections, to the Trust Special Administrator.

139. Any material produced by a Trust Special Administrator for the consultation should contain relevant, clear and compelling information in relation to his or her draft recommendations. The Trust Special Administrator is expected to use plain English, keeping his or her style as simple and direct as possible and ensuring meanings are clear. Documentation and public meetings, for which an independent chair could be appointed, should address known or likely public concerns and perceptions, such as that the recommendations are financially driven, issues relating to the patient experience such as having to make long and expensive journeys, or that emergency services will be too far away.
140. Consultees will need to understand that the statutory consultation is not the same in nature as the consultation process for local NHS reconfigurations. The Trust Special Administrator should also be clear that the statutory consultation is not a poll on whether to go ahead with the recommendations but a means of allowing him or her to improve the recommendations for the Secretary of State.

Analysis of responses

141. The Trust Special Administrator should be responsive to consultation evidence and other feedback received from consultees and reflect his or her analysis of them in the final report. He or she must be satisfied that, having properly considered the full range of responses, there is a proper evidential basis for him or her to decide whether or not to revise the draft recommendations for the final report.
142. While it may not be possible for all of the final recommendations to be fully supported by the public, the expectation of the Secretary of State is that public and patient engagement in the consultation and preceding draft report stage should mean that the public voice is heard.
143. The Trust Special Administrator is likely to need to start analysing consultation responses alongside the consultation itself. Analysis of the responses could be demanding and early planning should be undertaken for the consultation stage, including an assessment of the required level of resourcing to support the Trust Special Administrator.

Legal requirements

144. The 40 working day statutory consultation must begin within five working days from the publication of the draft report⁵². This period allows flexibility to plan the consultation but is a maximum period.

145. Within the first five working days of the consultation period, the Trust Special Administrator must publish two notices⁵³:

- i. stating that the Trust Special Administrator is seeking responses to the draft report and detailing how people can give their responses (this should include details about how responses can be given in writing, for example, via email or postal correspondence); and,
- ii. giving the date, time and venue of the public meeting(s) the Trust Special Administrator must hold, as specified under paragraph 147(iii).

The form and extent of these public notices is a matter for the Trust Special Administrator. They could, for example, be published on the internet and in local newspapers, or advertised via local radio stations or on posters placed in public spaces. A combination of these communications media may be desirable.

146. The Trust Special Administrator must request written responses during the statutory consultation period from those bodies and individuals listed below⁵⁴ and it is recommended that he or she should publish these:

- i. NHS England;
- ii. the Care Quality Commission;
- iii. any commissioner that commissions services from the NHS Trust in administration;

⁵² Section 65G(3) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁵³ Section 65H(2),(3),(5) and (6) of the NHS Act 2006.

⁵⁴ Section 65H(7) and (8) of the NHS Act 2006.

- iv. any other NHS Trust or Foundation Trust that would be affected by the action recommended in the Trust Special Administrator's draft report;
- v. any commissioner that commissions services from any other NHS Trust or Foundation Trust that would be affected by the action recommended in the Trust Special Administrator's draft report;
- vi. any Local Authority in whose area the NHS Trust in administration and any other affected NHS Trust or Foundation Trust provide services;
- vii. any Local Healthwatch organisation in the areas referred to in paragraph 146(vi); and,
- viii. any Members of Parliament or other person, if directed by the Secretary of State. Such directions will be included in the Trust Special Administrator's terms of appointment or through further communication from the Secretary of State to the Trust Special Administrator.

147. The Trust Special Administrator must also hold specific meetings to seek responses during the consultation period, including from the organisations from whom the Trust Special Administrator must seek a written response as follows:

- i. at least one meeting with staff and with those whom the Trust Special Administrator may recognise as representing staff of the NHS Trust in administration⁵⁵;
- ii. in the case of each of any other affected NHS Trust or Foundation Trust (i.e. affected by the recommendations in the draft report), at least one meeting with staff and with those whom the Trust Special Administrator may recognise as representing staff of each such Trust⁵⁶;
- iii. at least one public meeting to allow anyone who wishes to attend to give their views⁵⁷;

⁵⁵ Section 65H(4)(a) of the NHS Act 2006.

⁵⁶ Section 65H(4)(b) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁵⁷ Section 65H(5) of the NHS Act 2006.

- iv. at least one meeting with representatives of NHS England, the Care Quality Commission, any commissioner that commissions services from the NHS Trust in administration, and any commissioner of any other NHS Trust or Foundation Trust services that would be affected by the action recommended in the Trust Special Administrator's draft report, and, if directed by the Secretary of State, any Member of Parliament or any other person⁵⁸;
- v. at least one meeting with representatives of any other NHS Trust or Foundation Trust that would be affected by the action recommended in the Trust Special Administrator's draft report⁵⁹; and,
- vi. at least one meeting with representatives of any Local Authority in whose area the NHS Trust in administration and any other affected NHS Trust or Foundation Trust provide services, and of any Local Healthwatch organisation in those areas⁶⁰.

Checklist for Trust Special Administrators: Consultation

- ✓ A statement must be published alongside the draft report, setting out the means by which the Trust Special Administrator will seek responses to the draft report and when the 40 working day consultation period will start and end⁶¹.
- ✓ The 40 working day consultation period must start within 5 working days of the publication of the draft report⁶².
- ✓ Publish, within the first five working days of the consultation period, a notice stating that the Trust Special Administrator is seeking responses to the draft report and describing how people can give their responses, including how they can be given in writing⁶³

⁵⁸ Section 65H(9)(a) of the NHS Act 2006 Act, as amended most recently by section 120 of the Care Act 2014.

⁵⁹ Section 65H(9)(b) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁶⁰ Section 65H(9)(c) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

⁶¹ Section 65G(1) and (2) of the NHS Act 2006.

⁶² Section 65G(3) of the NHS Act 2006.

⁶³ Section 65H(2),(3) and (6) of the NHS Act 2006.

- ✓ Publish, within the first five working days of the consultation period, a notice giving the date, time and venue of the public meeting(s) the Trust Special Administrator must hold⁶⁴.
- ✓ Hold at least one public meeting⁶⁵ but consider the need to hold more of such meetings.
- ✓ Hold at least one meeting with staff and those whom the Trust Special Administrator may recognise as representing staff of the NHS Trust in administration⁶⁶, and hold at least one meeting with staff and those whom the Trust Special Administrator may recognise as representing staff at each other affected Trust i.e. NHS Trusts or Foundation Trusts that would be affected by the action recommended in the Trust Special Administrator's draft report⁶⁷. Consider holding more of such meetings.
- ✓ Request a written response from the organisations and persons referred to in paragraph 146.
- ✓ Hold at least one meeting with representatives of the organisations and persons stated in paragraph 147(iv).
- ✓ Hold at least one meeting with representatives of the organisations stated in paragraph 147(v).
- ✓ Hold at least one meeting with representatives of the organisations stated in paragraph 147(vi).
- ✓ Consider involving and seeking written responses from other persons or organisations within the local health system.

⁶⁴ Section 65H(5) and (6) of the NHS Act 2006.

⁶⁵ Section 65H(5) of the NHS Act 2006.

⁶⁶ Section 65H(4)(a) of the NHS Act 2006

⁶⁷ Section 65H(4)(b) of the NHS Act 2006, as amended most recently by section 120 of the Care Act 2014.

Chapter 6: Preparing the Final Report

Context

148. After the statutory consultation period ends, the Trust Special Administrator should use the consultation responses to inform his or her final report to the Secretary of State. To ensure transparency, the Trust Special Administrator is required by statute to produce a summary of all responses to the consultation and provide it with the final report.
149. The final report must contain the Trust Special Administrator's recommendations about what should happen to the Trust in administration and its services so that high-quality, safe and financially sustainable services can be delivered to the local health economy, and should also contain an implementation plan (see paragraphs 167 and 168). As with the draft recommendations, the Trust Special Administrator's final recommendations must be his or her own, taking into account the views of the organisations and persons consulted during the Regime.
150. A Trust Special Administrator should plan carefully for this period and consider the support needed to produce the final report. Although the final report cannot be completed until all the consultation responses have been analysed, key themes or concerns are likely to emerge early on during the statutory consultation. The Trust Special Administrator should therefore consider how the final recommendations could address them while that consultation is under way.
151. After the statutory consultation, the Trust Special Administrator should not make an amendment to the draft report without securing support from commissioners on the same basis as set out in Chapter 4 (see in particular paragraphs 115 and 116). In the event that support is not established from one or more commissioners (other than NHS England), the Trust Special Administrator may provide his or her final report to the Secretary of State, providing he or she is able to establish agreement from NHS England that the recommendations in that report would achieve the policy objective of the trust special administration referred to in paragraph 48(i). The support of NHS England should also be obtained in respect of whether the Trust Special Administrator's recommendations harm essential services at other affected Trusts.

152. Following the statutory consultation, the Trust Special Administrator should also establish, before amending the draft report, that the Care Quality Commission considers that the recommendations for the final report would achieve the policy objective of the trust special administration in paragraph 48(ii) in relation to securing services that are of sufficient safety and quality.

153. As set out in Chapter 2, to ensure there are no surprises for stakeholders and to maintain relationships, the Trust Special Administrator should consider briefing staff and other key stakeholders just before or on the day the final report is submitted. This should make clear that the Trust Special Administrator's role in terms of preparing recommendations has reached an end and that the final recommendations would be subject to a decision by the Secretary of State.

Potential Outcomes

154. It is the duty of the Trust Special Administrator to make final recommendations to the Secretary of State about the NHS Trust in administration. Possible recommendations are not limited to but may include the following possibilities:

- dissolution of the NHS Trust in administration by way of an acquisition or merger with another NHS Trust or Foundation Trust, with accompanying service change within its hospitals or those of other Trusts;
- dissolution of the NHS Trust in administration and the transfer of services, staff, assets and liabilities to a number of Trusts⁶⁸, with accompanying service change within the hospitals of the NHS Trust in administration or those of other Trusts;
- keeping the NHS Trust going, but in a restructured form by removing some services from it and building up those services elsewhere; and,
- keeping the NHS Trust going, perhaps under a new management arrangement or under an alternative operating model.

⁶⁸ With respect to guidance as to the status of creditors in such situations, refer to “*NHS trust and NHS foundation trust special administration: guide for unsecured creditors*” which is available at <http://www.dh.gov.uk/health/2013/03/tsa-unsecured-creditors/>

Costs

155. The Secretary of State will expect the Trust Special Administrator's final report to reflect a detailed assessment of the financial investment requirements necessary to support the implementation of its final recommendations. It should demonstrate a good understanding of the costs and assumptions which underpin them for implementing the recommendations.
156. The Secretary of State's expectation is that the Trust Special Administrator and a range of stakeholders, including providers, commissioners and national bodies will have worked closely and collaboratively to refine the financial evaluation of the Trust Special Administrator's draft recommendations and agreed the appropriate methods of funding needed to deliver the final recommendations. This would allow the Secretary of State⁶⁹ or bodies who are providing the finance to implement the recommendations to set terms and conditions and principles as to how they are to provide it. Consequently, the Secretary of State's expectation is for a robust assessment and agreement of the financial requirements for implementing the final recommendations. This should reduce later effort and opportunity for variance or renegotiation of funding during the implementation phase.

Legal Requirements

157. Beginning with the end of the consultation period, the Trust Special Administrator has 15 working days to produce and submit to the Secretary of State the final report stating the action he or she recommends that the Secretary of State should take in relation to the NHS Trust in administration⁷⁰. The final report must attach a summary of the responses received during the statutory consultation period⁷¹. The summary is expected to set out how responses were given consideration.

⁶⁹ The ability of the Secretary of State to provide finance to help implement the TSA's report is set out in "*Secretary of State's Guidance under section 42A of the National Health Service Act 2006*" which is available at <https://www.gov.uk/government/publications/guidance-on-financing-available-to-nhs-trusts-and-foundation-trusts>

⁷⁰ Section 65I(1) of the NHS Act 2006.

⁷¹ Section 65I(2) of the NHS Act 2006.

158. After receiving the Trust Special Administrator’s final report, the Secretary of State must publish the report and lay it before Parliament⁷². Parliamentary procedure requires that the report must be laid before Parliament before it is published.

Checklist for Trust Special Administrators: Preparing the Final Report

- ✓ Produce a summary of all the responses received during the statutory consultation period⁷³.
- ✓ Write the final report containing the recommendations for the Secretary of State on the future of the NHS Trust in administration and its services, and include an implementation plan (see paragraphs 167 and 168 of Chapter 7 “What Happens Next?”);
- ✓ Submit the final report, including the summary of consultation responses, to the Secretary of State within 15 working days beginning with the end of the 40 working day consultation⁷⁴.
- ✓ In the circumstance that the final report is amended after publication of the draft report and following the statutory consultation, establish with each commissioner of the NHS Trust in administration and any other affected commissioner that it considers the recommendations in the report would achieve the policy objective of the trust special administration to secure the continued provision of the essential NHS services provided by the NHS Trust in administration. This should include establishing from the commissioners of other Trusts’ services affected by the Trust Special Administrator’s recommendations that they believe this objective would be met without harming essential NHS services at those other affected Trusts.
- ✓ In the circumstance that the final report is amended after publication of the draft report and following the statutory consultation, establish that the Care Quality Commission considers that the recommendations in the report would achieve the policy objective of the trust special administration in relation to securing services that are of sufficient safety and quality.

⁷² Section 65I(3) of the NHS Act 2006.

⁷³ Section 65I(2) of the NHS Act 2006.

⁷⁴ Section 65I(1) of the NHS Act 2006.

Chapter 7: What Happens Next?

Context

159. It is for the Secretary of State to make a final decision about what action to take in relation to the NHS Trust in administration and its services once the Trust Special Administrator has submitted his or her final report to him. The Secretary of State may take his own advice in evaluating the clinical, financial and other considerations of a Trust Special Administrator's recommendations.
160. In making his decision, the Secretary of State is likely to consider in particular whether he is satisfied that the following criteria have been met:
- that commissioners have discharged their functions in connection with the Regime;
 - that the Trust Special Administrator has carried out his or her administrative and other duties as set out in the legislation and terms of appointment, and has clearly shown regard for this guidance;
 - that the recommendations in the final report would secure the continued provision of essential NHS services of the NHS Trust in administration of sufficient safety and quality, and not harm essential services of any other affected Trusts; and,
 - that the recommendations would provide good value for money.
161. In making his decision, the Secretary of State will also consider the Trust Special Administrator's assessment of the wider impact of his or her recommendations on health and equality in satisfying his (the Secretary of State's) Public Sector Equality Duty and demonstrating that he has had due regard to his duties under Part 1 of the National Health Service Act 2006.
162. The Secretary of State's decision is final with no right of appeal. There is no statutory appeal available under the legislation and the Secretary of State will be accountable to Parliament for that decision. Transparency is maintained at this stage through the Secretary of State being required to publish his decision and lay it before Parliament.

163. The Secretary of State may decide to:

- accept the recommendations; or,
- adopt an approach that differs from some or all of the recommendations.

The Secretary of State's decision would need to be made on the basis of good reason and evidence, for example if the Secretary of State considered that some of the recommendations were not in the interests of the health service.

164. There is no statutory provision for further consultation at the Secretary of State's decision making stage and he would not anticipate consulting at this stage. The Secretary of State will have the summary from the Trust Special Administrator's consultation and will consider local and other consultee views when deciding what action to take.

Legal Requirements

165. After receiving the Trust Special Administrator's final report, the Secretary of State has up to 20 working days to make a final decision about the action to take in relation to the NHS Trust in administration⁷⁵. The Secretary of State must publish his decision and lay before Parliament a notice containing the final decision and the reasons for it⁷⁶. Parliamentary procedure requires that the notice must be laid before Parliament before it is published.

End of Special Administration

166. The administration for an NHS Trust comes to an end when the Secretary of State dissolves the Trust by Order, or where the decision is not to dissolve the Trust, when the Secretary of State makes an Order specifying the date when the appointment of the Trust Special Administrator and the suspension of the chair and directors is to come to

⁷⁵ Section 65K(1) of the NHS Act 2006.

⁷⁶ Section 65I(3) of the NHS Act 2006.

an end⁷⁷. The nature of the Secretary of State's final decision and other considerations will determine how quickly either of these two actions will happen.

Implementation

167. The recommendations of the Trust Special Administrator and the decisions taken in relation to them are likely to be complex. Consequently, it must be expected that they will take time to implement. The Trust Special Administrator should include an implementation plan in his or her final report, incorporating information relating to;
- the costs of the transition; and,
 - key risks to delivery and high-level mitigating actions.
168. The plan should aim to ensure for the continuing provision of safe clinical services to patients during the implementation phase, and that clinical and financial sustainability are achieved following this as soon as possible. The Secretary of State's expectation of a Trust Special Administrator is that he or she should have established a consensus about the plan with key stakeholders responsible for the implementation of the recommendations, such as commissioners.
169. The Trust Special Administrator's appointment continues past the delivery of the final report and the Secretary of State's final decision until such date as is specified in the Orders referred to in paragraph 166. It means that the Trust Special Administrator may assist in implementing that decision, for example, for an interim period until the Department of Health or the NHS TDA agree governance arrangements to oversee the local health system's implementation of the Secretary of State's final decision. Implementing the decision will require strong leadership so that the intended clinical and financial benefits can be achieved.
170. During the implementation phase, there should be transparency on the progress of implementation, including with staff, the public and patients. It will be important to monitor the quality and safety of the services during the implementation of changes as well as to deliver the expected benefits of the Secretary of State's final decision.

⁷⁷ Section 65L(2) of the NHS Act 2006

Annex A - Measures which could be applied before use of the Trust Special Administrator's Regime is considered

These can include:

- For minor concerns at an NHS provider Trust, the Care Quality Commission will use its inspection reports and ratings to highlight concerns and call for improvement;
- Breaches of fundamental standards could lead to the Care Quality Commission prosecuting the trust or issuing a penalty notice in lieu of prosecution;
- Where patients are at immediate risk of harm, the Care Quality Commission can take urgent action to shut down unsafe hospital wards or clinical services;
- Where there are serious failings in the quality of care, such as systemic failures to meet fundamental standards, from 1 April 2015 the Care Quality Commission will be able to issue a warning notice requiring the Trust to make significant improvement within a specified time;
- The NHS TDA and Monitor also have a range of intervention powers where Trusts have significant delivery issues. For example, intervention by the NHS TDA may mean NHS Trusts may be subject to capability reviews, board-to-board meetings, potential loss of autonomy and further directions as needed. As from 1 April 2015, intervention by Monitor can mean imposing licence conditions following a warning notice from the Care Quality Commission, and if the Foundation Trust fails to comply with such a condition, Monitor is able by notice to require the Trust to remove, suspend or disqualify its governors or directors and appoint interim directors or governors. If a person fails or is failing to comply with such a notice, Monitor may remove, suspend or disqualify governors or directors or appoint interim directors or governors.

- NHS TDA and Monitor can place Trusts into special measures. This can involve giving directions to NHS Trusts and extra licence conditions for Foundation Trusts, and provides a package of support to help the Trust to improve. This might include partnering with a high performing hospital, requiring regular publication of improvement plans and implementing a full leadership review.
- Trusts and their commissioners are expected to review the way local clinical services are configured in the best interests of patients and in the context of quality and financial challenges. While a locally led service reconfiguration cannot always be the solution for all the challenges facing a trust, the Government would expect options for service reconfiguration to have been rigorously assessed.

Glossary

Care Quality Commission (CQC): the independent regulator of health and adult social care providers in England. It has a key responsibility in the overall assurance of safety and quality of health and adult social care services. Established as a Non-Departmental Public Body by the Health and Social Care Act 2008, all providers of regulated activities have to register with CQC and meet a set of requirements of safety and quality. The CQC regulates, inspects and reviews all health and adult social care services registered with it in the public, private and voluntary sectors (including those of NHS and independent sector hospitals, care homes, and dental and GP surgeries).

Clinical Commissioning Group (CCG): a clinically-led statutory NHS body as provided for in section 1 of the NHS Act 2006, comprising general practitioners. A CCG is responsible for planning and commissioning health care services for its local population (except where NHS England is responsible for commissioning those services). CCGs are established under section 14D of the NHS Act 2006, as inserted by section 25 of the Health and Social Care Act 2012.

Commissioner: any organisation which is responsible for planning and arranging for the provision of services as part of the health service, including Clinical Commissioning Groups and NHS England.

Department of Health: the Department of State of the Secretary of State responsible for providing strategic leadership for the NHS, public health and social care to ensure they operate effectively as a whole to meet the needs of people and communities in England.

Healthwatch: the purpose of Healthwatch is to ensure there are bodies which can gather and represent patients', service users' and the public's views on health and social care in England. It has a national and local presence and takes two forms: Healthwatch England (established in October 2012) under the Health and Social Care Act 2008 as amended by section 181 of the Health and Social Care Act 2012 ("the 2012 Act"), and Local Healthwatch organisations (commissioned by local authorities from April 2013), as referred to in the Local Government and Public Involvement in

Health Act 2007, as amended, in particular by sections 182 and 183 of the 2012 Act. Healthwatch England is a statutory committee of the CQC. Although it is not a regulator and has no direct responsibility to change practices, it has a statutory role to collate information on reports of service shortfalls nationally and to ensure regulators (CQC and Monitor), NHS England, local authorities and the Secretary of State are aware of these to allow them to respond accordingly. Local Healthwatch organisations' main role is to use the views and experiences of local people, with other evidence, to make reports and recommendations to commissioners and providers, amongst others, about how local services could or should be improved.

Local Authority: an administrative body in local government responsible for maintaining many services in the area it covers. Many parts of England have two tiers of local government; county councils and district, borough or city councils. Each top tier and unitary authority will have its own Health and Wellbeing Board, established by section 194 of the Health and Social Care Act 2012.

Local health economy: a general term describing the NHS organisations involved in the commissioning, development and provision of health services in a particular locality, including health commissioners, healthcare providers, social care providers and public health programmes that seek to positively influence, manage and treat the health and care needs of a local population.

Monitor: a Non-Departmental Public Body that acts as the sector regulator for health services in England. Its responsibilities are to work with commissioners to secure continuity of essential NHS services where necessary, to work with NHS England to provide independent regulation of pricing of NHS services, to protect patients' interests and address anti-competitive behaviour which is against patients' interests and to approve NHS Foundation Trusts and ensure that they are well led. Monitor was first established in 2004 by the Health and Social Care Act 2003 as the independent regulator of NHS Foundation Trusts. It acquired its additional responsibilities through the Health and Social Care Act 2012.

NHS Act 2006: the National Health Service Act 2006 (c.41), as amended.

NHS England: a Non-Departmental Public Body established by section 1H of the NHS Act 2006 (inserted by section 9 of the Health and Social Care Act 2012). It is responsible for delivering improved health outcomes for England through oversight and assurance of Clinical Commissioning Groups, and by directly commissioning a range of services. It operates through national, regional and sub-regional teams to discharge these responsibilities. Its statutory name is the National Health Service Commissioning Board.

NHS Foundation Trust: a public benefit corporation, constituted in accordance with section 30 and Schedule 7 to the NHS Act 2006 for the provision of goods and services for the purposes of the health service in England (the legislative provisions appear originally in the Health and Social Care Act 2003 which created Foundation Trusts). Foundation Trusts are authorised and regulated by Monitor. They are constituted differently from NHS Trusts. Their boards of directors have more autonomy to make financial and strategic decisions. They also have a framework of local accountability through members and a board of governors, which replaced central control from the Secretary of State for Health.

NHS Trust: a body corporate run by a board of directors and established in accordance with section 25 and Schedule 4 to the NHS Act 2006 for the provision of goods and services for the purposes of the health service in England (the legislative provisions appear originally in the NHS and Community Care Act 1990 which created NHS Trusts).

NHS Trust Development Authority (NHS TDA): a Special Health Authority established in 2012 by the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 (S.I. 2012/901). It is responsible for overseeing the performance and governance of NHS Trusts, including clinical quality, so that they provide high quality sustainable services. The NHS TDA provides guidance and support for NHS Trusts towards acquiring NHS Foundation Trust status.

Secretary of State for Health: has overall responsibility for the promotion of a comprehensive health service in England, and retains ministerial responsibility to Parliament for the provision of the health service in England.

Trust Special Administrator (TSA): on appointment by the Secretary of State (in relation to NHS Trusts) and Monitor (in relation to Foundation Trusts) exercises the functions of the chairman and directors of a NHS Trust or Foundation Trust which has been placed into the Trust Special Administrator's Regime (provisions for which are under Chapter 5A of the NHS Act 2006). The Trust Special Administrator develops recommendations to ensure that patients have access to high-quality, sustainable services.