Statutory guidance for Trust Special Administrators appointed to NHS foundation trusts

5 April 2013

A core part of Monitor’s role is to support commissioners to ensure that, in the rare event of the failure of a health care provider, patients can continue to access the care that they need.

We will step in when there are warning signs that a provider is struggling financially, with the aim of encouraging the provider to return to financial sustainability. In exceptional circumstances where this is not achieved and financial failure becomes likely, there will be an ordered process – the failure regime – during which we may appoint a Trust Special Administrator to take control of the provider’s affairs and work with commissioners to ensure that patients continue to have access to the services they need. This regime complements Monitor’s regulatory regime to deal with quality failure and we also work alongside the Care Quality Commission.

This statutory guidance is intended to be referred to primarily by those organisations and individuals responsible for the execution of the duties of a Trust Special Administrator.
Executive summary

Monitor’s role

Monitor’s main duty is to protect and promote the interests of patients. We do this by promoting the provision of health care services which is effective, efficient and economic, and which maintains or improves the quality of services.

We assess NHS trusts for foundation trust status and ensure that foundation trusts are well led, in terms of quality and finances. We license foundation trusts (other eligible providers of NHS services will be licensed from April 2014) and:

- set prices for NHS-funded care in partnership with NHS England;
- enable integrated care;
- safeguard choice and prevent anti-competitive behaviour which is against the interests of patients; and
- support commissioners to protect essential health care services for patients if a provider gets into financial difficulties.

We work closely with our partners to help ensure that the providers of NHS-funded services, and the commissioners of those services, are able to make sure that the best possible care is delivered for patients.

Find out here how we work with the Care Quality Commission, NHS England, NHS Trust Development Authority and NICE for the benefit of patients.

Further information on our role can be found on our website: www.monitor.gov.uk

Supporting commissioners in maintaining service continuity

A core part of Monitor’s role is to support commissioners to ensure that, in the rare event of the failure of a health care provider, patients can continue to access the care that they need.

Commissioners, overseen by NHS England, have the primary responsibility for ensuring the continuity of services within their local areas. In the event of a provider becoming financially unstable, commissioners will identify the services to be formally designated as Location Specific Services and it will be their responsibility to ensure that decisions about which services should be designated are balanced and proportionate.

We are developing a system – our Risk Assessment Framework - that we will use to monitor the financial health of providers where it is relevant to ensuring the continuity of their services. We will step in under the Continuity of Services licence conditions when there are warning signs that a provider is struggling financially, with the aim of encouraging the provider to return to financial sustainability. Where this is not achieved, and financial failure becomes likely, there will be an ordered process – the failure regime – during which Monitor will appoint a Trust Special Administrator to take control of the provider's affairs and work
with commissioners to ensure that patients continue to have access to the services that they need.

In circumstances where providers do experience difficulties, it will be Monitor’s duty to provide a source of finance to draw upon in order to put the mechanisms in place to help the provider tackle the problems. We are currently developing our policy about how it will work in practice.

The role of Trust Special Administrators

The appointment of a Trust Special Administrator is one way in which Monitor can take decisive action to deal with foundation trusts that are, or are likely to become, unable to pay their debts.

The failure regime, to be used in exceptional circumstances, is a transparent and robust process to provide a rapid resolution to problems within a significantly challenged foundation trust. In addition to maintaining the provision of high quality and sustainable services during the time the failure regime is in place, the key objective of a Trust Special Administrator is to develop and consult locally on a draft report, before making final recommendations to Monitor and ultimately to the Secretary of State for Health in a final report. This final report should state what should happen to the organisation and the services it provides so that high quality, sustainable services continue to be delivered to the local health economy. The public and NHS staff must be fully involved if the failure regime is used.

About the guidance for Trust Special Administrators

The statutory guidance in this document is intended to be referred to primarily by those organisations and individuals responsible for the execution of the duties of a Trust Special Administrator. This regime complements Monitor’s regulatory regime to deal with quality failure and we also work alongside the Care Quality Commission.

This guidance covers how the failure regime applies to NHS foundation trusts only and does not apply to NHS trusts. The Department of Health has published separate guidance for Trust Special Administrators appointed to NHS trusts here.

There are three distinct stages that the Trust Special Administrator must complete. Each stage has a dedicated chapter in this guidance, which sets out the legal requirements placed on the Trust Special Administrator:

i. Chapter 4: Preparing the draft report
ii. Chapter 5: Consultation on the draft report
iii. Chapter 6: Preparing the final report
1. Introduction

Context

1. The Health and Social Care Act 2012 gives Monitor new powers and duties. Our main duty is to protect and promote the interests of people who use health care services. We must do this by promoting the provision of health care services which is effective, efficient and economic, and which maintains or improves the quality of services.

2. Our current role of assessing NHS trusts for foundation trust status and ensuring that NHS foundation trusts are well-led, in terms of quality and finances, continues alongside new functions, including:
   - setting prices for NHS-funded care in partnership with NHS England;
   - enabling integrated care;
   - safeguarding choice and preventing anti-competitive behaviour which is against the interests of patients; and
   - supporting commissioners to protect essential health care services for patients if a provider gets into financial difficulties.

3. We license NHS foundation trusts and other eligible providers of NHS-funded services will be licensed from April 2014. The licence is our key tool for carrying out the majority of our functions. It sets out a range of conditions that providers must meet, including obligations relating to the four functions listed above and some specific obligations for foundation trusts.

4. A core part of Monitor’s new role is to support commissioners to ensure that, in the rare event of the failure of a health care provider, patients can continue to access the care that they need. We will step in under the Continuity of Services licence conditions when there are warning signs that a provider is struggling financially, with the aim of encouraging it to return to financial sustainability. Where this is not achieved, and financial failure becomes likely, there will be an ordered process – the failure regime – during which Monitor will appoint a Trust Special Administrator to take control of the provider’s affairs and work with commissioners to ensure that patients continue to have access to the services they need.

5. The Care Quality Commission (CQC) has a vital role in regulating quality and safety in the NHS and will be a key source of clinical information for Monitor. As such, we will continue to work closely with the CQC and, in addition to consulting the foundation trust and commissioners, we will consult with the CQC before we decide to appoint a Trust Special Administrator, in accordance with section 65D of the National Health Service Act 2006 (the 2006 Act) as amended.

6. NHS England works with Clinical Commissioning Groups and plays a key role in supporting commissioners to ensure that patients receive high quality and sustainable...
services. Again, in accordance with section 65D of the 2006 Act, Monitor will consult with NHS England before we decide to appoint a Trust Special Administrator.

Who is this guidance for?

7. Trust Special Administrators appointed to NHS foundation trusts are required to have regard to this guidance in carrying out their duties under Chapter 5A of the National Health Service Act 2006, as amended by the Health and Social Care Act 2012 (the 2012 Act). This guidance has been prepared by Monitor in accordance with section 65N of the 2006 Act.

8. The Failure Regime for Unsustainable NHS Providers, as set out in Chapter 5A of the 2006 Act (the failure regime), is intended to ensure the continued provision of Location Specific Services, at such a level as the commissioners of those services determine, in the event Monitor decides to make an order authorising the appointment of a Trust Special Administrator to a foundation trust on the basis that the foundation trust is, or is likely to become, unable to pay its debts. Location Specific Services are those services which if withdrawn, and in the absence of alternative provision, are 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 on the health of such persons or a significant increase in health inequalities.

9. A Trust Special Administrator will normally only be appointed in cases where other potential solutions have been tried and have not delivered the change required, such that the organisation remains unable to pay its debts in its current form. A key element of the failure regime will be to ensure patients continue to be able to access high quality, sustainable services. How this is delivered, by whom, and from where could, however, change in the solution that is implemented after the Trust Special Administrator has made their recommendations.

10. If Monitor decided to exercise its legal power to make an order authorising the appointment of a Trust Special Administrator to an NHS foundation trust, its decision to do so would normally be informed by the use of the Risk Assessment Framework. This framework will use transparent financial and governance metrics to assess the viability and sustainability of foundation trusts. It is expected that foundation trusts scoring poorly against the framework will be more likely to warrant the appointment of a Trust Special Administrator.

11. However, it is important to emphasise that whilst the Risk Assessment Framework may inform Monitor’s decision, a Trust Special Administrator can only be appointed by Monitor if it is satisfied that the foundation trust is, or is likely to become, unable to pay its debts.

12. Monitor triggers the failure regime by making an order under section 65D of the 2006 Act authorising the appointment of a Trust Special Administrator to an NHS foundation
trust to exercise the functions of the governors, chair and directors of that trust. Monitor is also required to consult with the trust, NHS England, the CQC and appropriate commissioners before making the appointment.

The purpose of the failure regime

13. The appointment of a Trust Special Administrator is one way in which Monitor can take decisive action to deal with NHS foundation trusts that are either unsustainable in their current configuration or at serious risk of failing to deliver sustainable services. The 2006 Act (as amended by the 2012 Act) provides a power for Monitor to appoint a Trust Special Administrator to an NHS foundation trust if Monitor considers that doing so would be appropriate in the context of the foundation trust's inability to pay its debts. The Trust Special Administrator would develop recommendations for Monitor on the future of the organisation.

14. The failure regime, to be used in exceptional circumstances, is a transparent and robust process to provide a rapid resolution to problems within a significantly challenged foundation trust. In addition to maintaining the provision of high quality and sustainable services during the time the failure regime is in place, the key objective of a Trust Special Administrator appointed to a foundation trust is to develop and consult locally on a draft report, before making final recommendations to Monitor in a final report. This final report should state what action should be taken in relation to the trust and the services it provides so that high quality, sustainable services continue to be delivered to patients. Consultation including with the public and NHS staff is required as part of the failure regime, as set out in Chapter 5.

15. The failure regime is time-limited. Within a total period of 150 days:

   a. Monitor must determine whether it is satisfied that the recommended action fulfils the objectives of special administration and that the Trust Special Administrator has carried out its duties; and
   b. if Monitor is satisfied, the Secretary of State must determine whether he intends to exercise his limited grounds for veto (unless any of the time periods specified for the various parts of the process are extended by Monitor). This will avoid prolonged periods of uncertainty and clinical and/or financial underperformance.

Scope

16. This guidance covers how the failure regime applies to NHS foundation trusts only and does not apply to NHS trusts. The Department of Health has published separate guidance for Trust Special Administrators appointed to NHS trusts here.
2. The role of the Trust Special Administrator

Terms of appointment

17. The failure regime is intended to protect patients’ interests and to ensure the sustainability of services in the local health care economy.

18. The circumstances that lead to a position where an NHS foundation trust is, or is likely to become, unable to pay its debts are numerous and complex and the specific characteristics of the financial sustainability of each foundation trust will differ from case to case. Consequently, terms of appointment will be provided to each Trust Special Administrator to ensure that they recognise the individual requirements of each situation.

Appointment of an administrator to an NHS foundation trust

19. If Monitor is considering triggering the failure regime, and prior to a decision being made on whether or not to do so, it must consult first the Secretary of State and, thereafter, the NHS foundation trust in question, NHS England, the Care Quality Commission and any other person to which the foundation trust provides health services and which Monitor considers it appropriate to consult.

20. If, following consultation, Monitor considers it appropriate to appoint a Trust Special Administrator, Monitor must:

   a. make an order authorising the appointment;
   b. specify the date on which the appointment is to take effect (which must be within five working days beginning with the day on which the order is made);
   c. lay before Parliament (with the statutory instrument containing the order) a report stating the reasons for making the order;
   d. publish the name of the person appointed as the Trust Special Administrator; and
   e. appoint the Trust Special Administrator on the date specified in the order.

21. As soon as is reasonably practicable after Monitor has made an order authorising the appointment of a Trust Special Administrator, the Care Quality Commission must provide a report to Monitor on the safety and quality of the services that the NHS foundation trust provides.

22. When the appointment of the Trust Special Administrator takes effect, the NHS foundation trust’s governors, chair and executive and non-executive directors are suspended from office. However, the appointment of a Trust Special Administrator does not affect the employment of the executive directors or their ability to remain as members of any committee or sub-committee of the foundation trust.
23. Upon the appointment of the Trust Special Administrator taking effect, the Trust Special Administrator will exercise the functions of the governors, the chair and the directors of the NHS foundation trust, and the Trust Special Administrator will manage the foundation trust's affairs, business and property so as to achieve the objective set out in paragraph 31 below as quickly and efficiently as is reasonably practicable.

24. If appropriate, it is anticipated that during the administration a Trust Special Administrator will wish to continue to work closely with the Director of Finance, the Medical Director and the Director of Nursing in their capacity as employees. Other directors may be retained or consulted as appropriate as employees.

25. The Trust Special Administrator will also need to be mindful of the fact that foundation trusts in trust special administration may share facilities with third party companies or joint venture companies.

Suspended governors and directors

26. If a Trust Special Administrator is appointed to an NHS foundation trust, Monitor will send letters to the governors, chair and executive and non-executive directors to inform them of their suspension and to explain their role (if any) during the failure regime and afterwards.

Engaging with governors and directors

27. Although there is no legal requirement for the Trust Special Administrator to consult specifically with the suspended governors and directors, the Trust Special Administrator should consider how best to engage with them as they may be a valuable source of information. Any such engagement will be on an informal basis.

28. Their experience and expertise may be useful for the Trust Special Administrator as they carry out their work.

Accountability

29. All Trust Special Administrators are accountable to Monitor. Monitor must be satisfied that the Trust Special Administrator has carried out certain administration duties in accordance with s.65KA(1)(b) of the 2006 Act, which comprise:
   - duties imposed on the Trust Special Administrator under the trust special administration provisions of the 2006 Act (e.g. the duties in connection with the preparation of the draft and final reports);
   - any requirements imposed by a direction issued by Monitor under the trust special administration provisions of the 2006 Act (e.g. a direction as to whom to seek written responses from in connection with the consultation on the draft report); and
   - the Trust Special Administrator’s terms of appointment.

30. Monitor may set the terms of appointment for a Trust Special Administrator as it considers appropriate. Monitor also has powers to direct the Trust Special Administrator to perform specific duties.
Administrator under the 2006 Act about specific matters. However, these powers do not extend to amending the content of the Trust Special Administrator’s advice as the design of the failure regime ensures that this advice remains independent.

Objective of the Trust Special Administrator

31. Having assumed the functions of the governors, chair and executive and non-executive directors, the Trust Special Administrator must exercise them in furtherance of the following objective: to secure the continued provision of such of the NHS services provided by the NHS foundation trust at such levels as the commissioners of those services determine, so that it becomes unnecessary for the appointment of the Trust Special Administrator to remain in force.

32. The objective set out above applies only to the services termed Location Specific Services, the withdrawal of which would be likely to: (a) have a significant adverse impact on the health of persons in need of the service or significantly increase health inequalities; or (b) cause a failure to prevent or ameliorate either a significant adverse impact on the health of such persons or a significant increase in health inequalities.

33. Commissioners must have regard to the guidance provided by Monitor in determining which services are to be designated Location Specific Services. NHS England may make arrangements for facilitating agreement between commissioners in determining to which services the objective applies and, in the event that commissioners are unable to agree, will make a final determination.

34. The Trust Special Administrator will also be expected to evaluate options that provide for the continued provision of Location Specific Services for up to ten years following the cessation of their appointment at the trust. Options should ensure that the provision of such services satisfies the principles of effectiveness, efficiency and economy.

35. For those services which the commissioners do not believe should be designated as Location Specific Services, the commissioners should, in conjunction with the Trust Special Administrator, demonstrate that there are implementable and effective options for the continued delivery of those services to meet desired patient outcomes in the local health economy.

36. The Trust Special Administrator will, during the period of administration, continue to provide all services offered by the NHS foundation trust. This will continue until the end of the decision-making process; that is, until the Secretary of State has determined whether or not to exercise his veto over the Trust Special Administrator’s recommendations in the final report and, if this exercised once, until such time as he is satisfied with the revised report, or if exercised twice, until he has made a final decision. For the avoidance of doubt, the Trust Special Administrator should continue to run the foundation trust on a “business as usual” basis until the final recommendations are approved. In the event that specific services are identified as
clinically unsafe, the Trust Special Administrator should follow the same protocols as would apply outside of trust special administration.

37. The Trust Special Administrator will be required to present proposals for all services. For services which are not designated as Location Specific Services, it may be optimal for the foundation trust to continue to provide them where they are economically viable or impact significantly on other Location Specific Services and there is no alternative source of supply (in the latter case, they would themselves fall into the category of Location Specific Services). Alternatively, these services may be better provided by an alternative provider. In any case, no changes to or closures of services provided by a foundation trust may be made until the Secretary of State has determined whether or not to exercise his veto in relation to the Trust Special Administrator’s final proposals (see Chapter 7: “What happens next?”).

38. The Trust Special Administrator should ensure that the overall plan for Location Specific Services, and those services not designated as such, is developed within the context of the specific opportunities and constraints of the local health economy. The Trust Special Administrator’s proposals should be supported by clear clinical evidence, insofar as it is available, such that the rationale for the proposals may be understood by wider stakeholders.

39. Insofar as the Trust Special Administrator’s proposals impact on other providers, we would expect the Trust Special Administrator to make an assessment of the capabilities of those providers potentially affected.

40. The Trust Special Administrator may make recommendations relating to Location Specific Services that impact upon organisations other than the provider in trust special administration. Such recommendations should be, over the medium-term, financially sustainable and improve or maintain clinical standards, and these must be in line with clinical commissioning intentions.

41. The Trust Special Administrator should endeavour to ensure that any proposed changes are in line with current and prospective patient choice.

42. Thereafter, the Trust Special Administrator may be required to set about implementing their recommendations, as agreed by Monitor (and subject to the exercise of the veto by the Secretary of State).

Engaging with patients and the local population

43. It is important that the Trust Special Administrator has an effective communications operation in place to ensure that they can fully engage patients and the public in the work that they are doing.
44. Local residents must be able to understand what is happening and why it is necessary. The Trust Special Administrator should take steps to reassure patients that a full range of services will continue to be available for them and, as the likely structure of services becomes clear, patients should be kept informed about the implications of the new arrangement on how they access health care in their area.

45. The trust special administration process should be undertaken in partnership with and mindful of the views of the local community. The NHS Constitution states that NHS services must reflect the needs and preferences of patients, their families and their carers.

46. If people are concerned about what will happen to services or if they have objections based on a misunderstanding of the planned approach it will be more difficult for the Trust Special Administrator to gain support from commissioners and other local providers for any changes they propose.

47. Engagement with the local population should start as soon as the Trust Special Administrator takes up their post and continue throughout the process of reorganising services.

**Who to engage with and how**

48. Trust Special Administrators should plan to communicate regularly with public representatives, including local Members of Parliament, local authorities, patient representative groups and local Healthwatch. Regular communications can take place by telephone or email but significant steps should be communicated in meetings in order to gauge the views of these stakeholders and ensure that their questions are fully answered. It may be advisable to hold a public meeting early in the process to set out the work they are doing and why they are doing it. The Trust Special Administrator should consider attending meetings and events when invited.

49. The Trust Special Administrator must be prepared to speak to the local media, issuing statements when significant steps are taken and answering questions when this is appropriate. If they are regularly asked to undertake broadcast interviews they should consider taking the opportunity to explain their work and clarify any areas of confusion. The Trust Special Administrators should make sure that they are aware of developing opinion in the locality, through monitoring the local media, discussions with stakeholders and attending public meetings.

**Staff engagement**

50. The Trust Special Administrator should recognise that trust staff will know the patients and the services best and their knowledge will be invaluable for the Trust Special Administrator as they consider the re-design of services. The Trust Special Administrator should take steps to make sure that staff members are consulted from the beginning of the process.
51. The Trust Special Administrator should be aware that it is a time of uncertainty for staff working at the trust and it is important to be as transparent as possible with them so that they know what is happening and can continue to undertake their duties during the trust special administration process.

The public consultation

52. Information about how to conduct the public consultation is included later in this guidance document. The Trust Special Administrator must engage with the local population and patients on a regular basis before the public consultation stage is reached because it is important that they draw up plans with the views and concerns of patients and the local population in mind.
3. Duties and deadlines

Pre-appointment phase

53. Prior to the appointment of a Trust Special Administrator, and under normal circumstances, a Contingency Planning Team will be sent to the foundation trust which is considered to have a high probability of entering the failure regime. The Contingency Planning Team will work with local commissioners and its deployment does not necessarily mean that a Trust Special Administrator will subsequently be appointed, i.e. a solvent turnaround may still be a possibility.

54. The objective of the Contingency Planning Team is to work with local commissioners to assess the local health economy and to help commissioners identify those services to be classified as Location Specific Services. This work will not bind the Trust Special Administrator, but the Trust Special Administrator may use it to inform their own work and they will have full access to all work undertaken by the Contingency Planning Team. In appointing the Contingency Planning Team, Monitor intends to make the process as open as possible and to enable patients, staff and the public to understand how the options for the future of the foundation trust have been generated.

55. In some situations Monitor may have to appoint a Trust Special Administrator directly without the prior deployment of a Contingency Planning Team (an ‘emergency situation’). Such situations could arise where there is a clear and immediate risk of a trust becoming insolvent that occurred due to an unexpected event that was not captured in our standard monitoring framework. In this case, there would be insufficient time to appoint a Contingency Planning Team prior to the appointment of a Trust Special Administrator.

56. It is recognised that there is the potential for some overlap between the work of the Contingency Planning Team and that of the Trust Special Administrator. In having the objective to secure the provision of Location Specific Services, the Trust Special Administrator must confirm the list of such services which local commissioners or NHS England agree meets the definition of Location Specific Services as outlined in the 2006 Act. Normally, this list would be drafted in advance by the Contingency Planning Team and confirmed by the Trust Special Administrator. However, on some occasions, and particularly where the appointment of a Trust Special Administrator is made in an ‘emergency situation’, the Trust Special Administrator (rather than a Contingency Planning Team) may be responsible for helping commissioners to define these services. Each and every situation will be unique and dependent upon the foundation trust in question. However, for the avoidance of doubt, the advice of the Trust Special Administrator remains independent and they will not be obliged to accept the work of the Contingency Planning Team.

57. In any case, it will be important for the Contingency Planning Team and the Trust Special Administrator to have appropriate clinical and financial data available in order for them to begin work. Monitor will request the production of this data by the
commissioners, the foundation trust and other NHS bodies as is appropriate and relevant to the task.

Statutory timescales

58. The legal framework sets out requirements that aim to complete the failure regime within 150 working days, unless an order is made by Monitor to extend time periods or the Secretary of State chooses to exercise his veto. Monitor may extend the time periods relating to either the production of the draft or final reports or the consultation period, or both, as illustrated by the diagram below.

Trust Special Administrator Timeline:
A typical timeframe

- TSA order made authorising appointment of TSA
  - Day zero

- Within 45 working days draft report & consultation plan published
  - Day 50

- After 30 working days consultation ends
  - Day 85

- Within 5 working days TSA appointment takes effect and TSA begins work
  - Day 5

- Within 5 working days draft report consultation begins
  - Day 55

- Within 15 working days final report submitted to Monitor
  - Day 100

- Within 50 working days, Monitor and Secretary of State to respond in accordance with legal duty
  - Day 150
59. There are legal safeguards to ensure that the failure regime is transparent and credible and that there is consultation on the development of the Trust Special Administrator’s recommendations to Monitor. The Trust Special Administrator’s advice remains independent. The legal safeguards also set out a clear structure to allow parliamentary scrutiny of any decision by the Secretary of State to exercise his veto.

60. There are three distinct stages that the Trust Special Administrator must complete. Each stage has a dedicated chapter in this guidance, which sets out the legal requirements placed on the Trust Special Administrator:

   i. Chapter 4: Preparing the draft report
   ii. Chapter 5: Consultation on the draft report
   iii. Chapter 6: Preparing the final report

**Extension of time**

61. The legal framework allows Monitor to extend the 150-working day limit of the failure regime if it is considered unreasonable for the Trust Special Administrator to complete the duties within the statutory timeframe. An extension would take place in exceptional circumstances, for example, where the scale and complexity of the issues facing a foundation trust are such that it would require more time to develop options for a viable solution. In such circumstances, Monitor can make an order extending the period of time within which the Trust Special Administrator must: (a) provide a draft report; (b) consult on the draft report; or (c) provide a final report.

62. If Monitor makes an order providing for an extension of a particular time period, the Trust Special Administrator must publish a notice stating the new date on which that time period will expire.

63. The notice could be published in local newspapers, via local radio stations, on the internet or on posters placed in public spaces. A combination of these communications media is likely to be desirable.

64. Should an extension to the consultation period be provided for, then the notice must include the means by which the Trust Special Administrator will seek responses to the draft report during the new consultation period.
4. Preparing the draft report

65. This is the longest distinct stage of the failure regime, during which the Trust Special Administrator will have to assess the issues facing the organisation, engage with staff and develop recommendations on the future of the organisation and the services it provides. Some of the initial scoping work to identify potential Location Specific Services should have been completed by the Contingency Planning Team.

66. Throughout their work, the Trust Special Administrator will be required to observe equality legislation and principles and demonstrate that due regard has been paid to the equality duty of the Equality Act 2010. The equality assessment should apply to patients, public and staff. It is recommended that the assessment is undertaken early on in the failure regime to allow the Trust Special Administrator to identify, for example, groups with protected characteristics that may be affected and which their draft report can take into account.

67. The draft report by the Trust Special Administrator must produce recommendations on how to provide high quality services in a sustainable way. In developing the recommendations the Trust Special Administrator must consult the Care Quality Commission (CQC) as any changes to the provision of regulated activities will have to meet the CQC’s registration requirements.

68. Possible recommendations by the Trust Special Administrator include the reconfiguration of some or all of the services within the existing foundation trust or the dissolution of the foundation trust. Where dissolution is the recommendation, the Trust Special Administrator may recommend that the assets and liabilities of the foundation trust be merged with those of another foundation trust, or transferred to the Secretary of State, or split between another foundation trust and the Secretary of State. When considering a merger as a recommendation, it will be important for the Trust Special Administrator to consult the Office of Fair Trading. For guidance as to the status of creditors in these situations, please see the information provided by the Department of Health.

Legal requirements

69. The Trust Special Administrator must produce and publish the draft report within 45 working days of their appointment taking effect. This timeframe is set out in legislation to encourage resolution of the problems as quickly as possible so as to reduce risk to the quality and safety of the services being provided to patients. The draft report must contain recommendations as to the actions that the Trust Special Administrator believes Monitor should take in relation to the foundation trust. After receiving the draft report, Monitor must lay it before Parliament.

1 NHS trust and NHS foundation trust special administration: guide for unsecured creditors
http://www.dh.gov.uk/health/2013/03/tsa-unsecured-creditors/
70. The Trust Special Administrator must, when preparing the draft report, consult the following:

- NHS England; and
- any other person to whom the foundation trust provides services under the 2012 Act and who Monitor directs the Trust Special Administrator to consult. Such a direction will be determined on a case-by-case basis, but is likely to include all commissioners who currently commission services from the foundation trust in question.

71. However, whilst these are the only parties that must be consulted at this stage, the Trust Special Administrator must use their judgement on who else it might be appropriate to engage. For example, the Trust Special Administrator should consider engaging with staff and the public in developing their draft report as well as neighbouring NHS foundation trusts or NHS trusts.

72. The Trust Special Administrator may not provide their report to Monitor without having first obtained a statement from each commissioner that the commissioner considers that the recommendation(s) in the draft report would achieve the objective of the trust special administration. In the event that one or more commissioners do not provide such a statement, then the Trust Special Administrator may nevertheless provide their report to Monitor, providing that they have a statement from NHS England that the recommendation(s) in the draft report would achieve the objective of the trust special administration.

73. In either case, Monitor would expect the Trust Special Administrator to make a note of the reasons for any disagreement in their draft report.

74. A consultation plan must be published at the same time as the draft report. The plan must give details of: (i) how people will be able to respond to the consultation; and (ii) the dates on which the 30-working day consultation will start and end. Chapter 5 sets out the consultation process to be undertaken by the Trust Special Administrator.

**Checklist for Trust Special Administrators: preparing the draft report**

- ✓ Produce and publish the draft report within 45 working days of the initial appointment of the Trust Special Administrator and provide this report to Monitor. This report must include recommendations for Monitor in relation to the foundation trust.
- ✓ Consult with NHS England and any other persons as directed by Monitor.
- ✓ Consider the need to consult others, for example, the public, staff and the Care Quality Commission.
- ✓ Obtain a statement from all commissioners or NHS England that the recommendation(s) in the draft report would achieve the objective of the Trust Special Administration.
- ✓ Publish a consultation plan.
5. Consultation on the draft report

75. After the draft report is published, there is a 30-working day consultation. The consultation period on the draft report gives the Trust Special Administrator an important opportunity to validate and improve on the recommendation(s) in the draft report.

76. To ensure that the public has confidence in the outcome, it is vital that the consultation is credible and genuinely engages all relevant stakeholders including commissioners, the public and patients. The Trust Special Administrator should carefully consider how to engage the local population including how they might be reached, whether there are particular groups or channels they should use and what obstacles might exist to getting a full response from stakeholders.

77. The statutorily prescribed length of the consultation period is 30 working days and Monitor would only consider extending this period in exceptional circumstances.

78. There are a number of duties placed on the Trust Special Administrator during the consultation period to ensure that staff, the public and others are given the opportunity to share their views. It will also be important for the Trust Special Administrator to engage with public sector NHS providers and providers from other sectors during the failure regime, including at the consultation stage, so that they may contribute to potential solutions which ensure services for patients have a sustainable future.

Legal requirements

79. The 30-working day consultation period must begin within five working days, beginning with the day on which the draft report is published.

80. Within the first five working days of the consultation period, the Trust Special Administrator must publish two notices:
   
   i. stating that the Trust Special Administrator is seeking responses to the draft report and detailing how people can give their responses (this must include details about how responses can be given in writing, e.g. via email or postal correspondence); and
   ii. giving the date, time and venue of the public meeting(s) the Trust Special Administrator must hold.

81. The notices could be published in local newspapers, via local radio stations, on the internet or on posters placed in public spaces. A combination of these communications media is likely to be desirable.

82. The Trust Special Administrator must request written responses from NHS England and from any other person to whom the foundation trust provides goods or services. Monitor may also direct the Trust Special Administrator to request a written response and/or to meet with additional people or organisations to seek their response during
the consultation. These include local government officials or Members of Parliament. Such directions will be included in the terms of appointment or via additional communication from Monitor to the Trust Special Administrator.

83. The legal framework sets out specific meetings the Trust Special Administrator must hold during the consultation period:

- at least one meeting with staff and with those whom the Trust Special Administrator may recognise as representing staff of the trust;
- at least one public meeting to allow anyone with an interest to give their views;
- at least one meeting with NHS England, from whom the Trust Special Administrator must also request a written response;
- at least one meeting with any commissioners to whom the foundation trust provides goods or services; and
- at least one meeting with any persons from whom Monitor has directed the Trust Special Administrator to seek a written response.

84. These are the minimum legal requirements and it is expected that Trust Special Administrators will use their judgement in choosing to consult other organisations or persons. Trust Special Administrators must exercise discretion about with whom they should consult to ensure there is meaningful and effective engagement during the consultation on the draft report.

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 it and when the 30-working day consultation period will start and end.

✔ The consultation period must start within five working days of the publication of the draft report.

✔ Hold at least one public meeting during the consultation period. During the first five days of the consultation period, the Trust Special Administrator must publish a notice of a public meeting on the draft report, with the date and venue of the meeting.

✔ Hold at least one meeting with staff and union representatives during the consultation period.

✔ Request a written consultation response from NHS England, any commissioners to whom the foundation trust provides goods or services under the Act and any other persons (e.g. MPs or Local Authority representatives) if so directed by Monitor.

✔ Hold at least one meeting to seek responses from NHS England, any other persons to whom the foundation trust provides goods or services under the Act and any other persons (e.g. MPs or Local Authority representatives) if so directed by Monitor.
✓ Consider the need to consult staff and the public further, and the Care Quality Commission.

✓ Monitor may also require the Trust Special Administrator to either request a written response and/or meet with specified other persons.
6. Preparing the final report

85. After the consultation ends, the Trust Special Administrator will have to use the consultation responses to inform the final report to Monitor. To ensure transparency, the Trust Special Administrator must produce a summary of all responses to the consultation and submit it alongside the final report.

86. The Trust Special Administrator may not make an amendment to the draft report following the consultation:

   a. without having obtained from each commissioner a statement that the commissioner considers that the recommendation in the draft report as so varied would achieve the objective to secure the provision of Location Specific Services; or
   b. where the Trust Special Administrator does not obtain a statement to that effect from one or more commissioners (other than NHS England), without having obtained a statement to that effect from NHS England.

87. The Trust Special Administrator should also consider how to brief staff, the commissioners and others on the contents of the final report to ensure that staff morale and local service provision are not unduly affected. The Trust Special Administrator should also brief the suspended chair, the governors, the executive and non-executive directors and members.

Legal requirements

88. Beginning with the end of the consultation period, the Trust Special Administrator has 15 working days to produce and submit the final report and the summary of consultation responses to Monitor. This final report should state the action which the Trust Special Administrator recommends that Monitor should take in relation to the foundation trust.

89. Monitor must then publish the final report and lay it before Parliament.

Checklist for Trust Special Administrators: final report

✔️ Write the final report containing the recommendations for Monitor on the future of the organisation.

✔️ Compile a summary of all the responses received during the consultation period.

✔️ Submit the final report and consultation summary to Monitor within 15 working days beginning with the end of the consultation period.
7. What happens next?

90. After the Trust Special Administrator has submitted its final report to Monitor, there are legal requirements in place to ensure that transparency is maintained in the decision-making process and to ensure that this process is completed without undue delay.

91. Within 20 working days from the day of receipt of the final report, Monitor will determine whether it considers that the Trust Special Administrator has completed their duties satisfactorily and that the action recommended in the final report would achieve the objective of the Trust Special Administration.

92. If on receipt of this original final report Monitor is not satisfied, or it remains unsatisfied on receipt of any subsequent revised final report, it must as soon as is reasonably practicable give a notice of that decision to the Trust Special Administrator. The notice must also specify to what extent and with what modifications the process for the production of a draft report onwards (as laid out in sections 65F to 65J of the 2006 Act) is to be applied by the Trust Special Administrator in producing a revised report. Monitor must also publish the notice and lay it before Parliament as soon as is reasonably practicable. The notices could be published in local newspapers, via local radio stations, on the internet or on posters placed in public spaces. A combination of these communications media is likely to be desirable.

93. Alternatively, if Monitor is satisfied with the original final report, or it is then satisfied on receipt of any subsequent revised final report, it must as soon as is reasonably practicable provide the Secretary of State with it and with the report provided by the Care Quality Commission to Monitor.

94. Within 30 working days from the receipt of these reports, the Secretary of State must decide if he is satisfied that:
   I. the commissioners have carried out their functions for the purposes of the trust special administration;
   II. the Trust Special Administrator has carried out the administration duties;
   III. Monitor has discharged its functions for the purposes of the trust special administration;
   IV. the action recommended in the final report would secure the continued provision of Location Specific Services;
   V. the recommended action would secure the provision of services that are of sufficient safety and quality; or
   VI. the recommended action would provide good value for money.

95. If he is not satisfied then he must, as soon as is reasonably practicable, give a notice of that decision and the reasons for it to both the Trust Special Administrator and to Monitor, publish that notice and lay a copy of it before Parliament.
96. In the event that the Secretary of State provides such a notice to the Trust Special Administrator that he is not satisfied with the final report, i.e. if he exercises his veto, the Trust Special Administrator must, within 20 working days, provide to Monitor a further (amended) report so far as it is considered necessary to ensure that the Secretary of State is satisfied. If the Secretary of State considers that 20 working days is insufficient for the Trust Special Administrator to achieve this, he may by order extend the period. If this happens, the Trust Special Administrator must:

i. publish a notice stating the date on which the period will expire; and

ii. where the Trust Special Administrator is proposing to carry out consultation in response to the (new) notice, publish a statement setting out the means by which the Trust Special Administrator will consult during the extended period.

97. Within ten working days from the day of receipt of the revised final report, Monitor will determine whether it considers that the Trust Special Administrator has completed their duties satisfactorily and that the action recommended in the revised final report would achieve the objective of the trust special administration. If Monitor is thus satisfied with the revised final report, it must as soon as is reasonably practicable provide it to the Secretary of State.

98. If the Secretary of State remains unsatisfied as to the matters set out in paragraph 96 above in the revised report, he must publish a notice of this decision and the reasons for it and lay a copy of the notice before Parliament. The Secretary of State must then decide what action to take in relation to the foundation trust within 60 working days beginning with the date of publication of that notice.

Potential outcomes

99. It is the duty of the Trust Special Administrator to make final recommendations to Monitor. Possible outcomes include:

i. a restructuring of the foundation trust such that it leaves administration to continue in its restructured form. In such a case, it may be that the foundation trust remains in trust special administration for a period following acceptance of the final report by Monitor and the Secretary of State, to enable the restructuring to take place;

ii. acquisition by, or merger with another foundation trust (following consultation with and the agreement of the proposed merger partner); or

iii. the dissolution of the foundation trust in administration and the transfer of its services and staff to another foundation trust or to the Secretary of State.

Discharge of the Trust Special Administrator

100. If Monitor approves (and the Secretary of State does not veto) a recommendation not to dissolve the foundation trust in administration, or the Secretary of State after having
exercised the veto twice decides not to dissolve the foundation trust, then Monitor must make an order specifying a date when the appointment of the Trust Special Administrator, as well as the suspension of the chair, directors and governors of the foundation trust, will come to an end. Monitor may also by order terminate the office of any governor, or executive or non-executive director or appoint another person in their place.

101. If the Trust Special Administrator were to be required for this purpose, this will be discussed with the Trust Special Administrator by Monitor at the appropriate point.

**Trusts to be dissolved**

102. If Monitor approves (and the Secretary of State does not veto) a recommendation to dissolve the foundation trust, or the Secretary of State having exercised the veto twice decides to dissolve the foundation trust, Monitor must make an order dissolving it and transferring, or providing for the transfer of, the properties, rights and liabilities of the foundation trust to another foundation trust and/or to the Secretary of State.