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Lessons Learned from the First Use of the Trust Special Administrator Legislation

Key points

- **The Regime for Unsustainable Providers was first used at South London Healthcare NHS Trust**
- **It made proposals for change at University Hospital Lewisham which were successfully challenged through judicial review**
- **The first use of the legislation has revealed major issues with basing the legislation on the company administration model**
- **The NHS cannot use the Unsustainable Provider Regime to avoid the local politics involved in major changes to NHS provision**
- **The tight timetable in the legislation almost guarantees problems with achieving acceptance of recommendations**
- **The regime needs amending if it is to provide workable solutions to the many systems problems facing the NHS currently**

Unsustainable Provider Regime

The NHS Act 2006 included provision for a "Regime for Unsustainable Providers", although the first use of the powers did not occur until 2012. The legislation was created to deal with providers seen as unsustainable for clinical, performance and/or financial reasons. When the regime is put in place for a trust, the Secretary of State appoints a Trust Special Administrator (TSA) who exercises the powers of the trust's Board of Directors. However, as well as giving the TSA powers, the legislation also requires him to propose a solution to the unsustainability of the trust to the Secretary of State. The Secretary of State is required to make a final decision on the future of the trust within 120 working days of the appointment of the TSA unless the timetable is specifically extended. This gives the TSA a very short period in which to understand the underlying problems at the trust, develop solutions and get local support, particularly given that the TSA is deliberately appointed from outside of the local area to ensure an objective view. It is worth noting that this very constrained timetable has no precedent in the private sector – administrators decide how long they need to resolve the issues presented to them.

The timetable set out in the legislation is:

- Day 0: TSA order made
- Day 5: TSA appointment takes effect and TSA starts work
- Day 50: Draft report and consultation plan published
- Day 55: Consultation on draft report begins
- Day 85: Consultation ends
- Day 100: Final report submitted to Secretary of State
- Day 120: Secretary of State decides on course of action

The guidance on the application[1] of the regime also requires the TSA to have regard for the "four key tests" for service change. These are:

- local reconfiguration plans must demonstrate support from GP commissioners
- strengthened public and patient engagement
- clarity on the clinical evidence base
- support for patient choice

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212850/statutory-guidance-trust-special-administrators.pdf

What happened at South London Healthcare NHS Trust

South London Healthcare NHS Trust (SLHT) was formed on 1st April 2009 from a merger of three hospitals – Queen Elizabeth Hospital Woolwich, Princess Royal Hospital Bromley and Queen Mary's Hospital Sidcup. The three predecessor hospitals had long-standing financial issues and it was felt that the merged organisation would be able to streamline services and tackle these. However, the planned savings were not made. In 2011/12, the trust's in-year deficit was £65 million.

On 16th July 2012, the Secretary of State appointed a TSA for South London Healthcare NHS Trust. The statutory timetable was slightly extended to reflect the amount of work the TSA needed to carry out:

- the TSA's draft recommendations were published on 29th October 2012
- the consultation lasted from November 6th to December 13th (the statutory 30 working days)
- the finalised report was published on 8th January 2013
- the Secretary of State announced his decisions on 31st January

However, the report released for consultation was not complete – for example the Equality Impact Assessment was not available until after the consultation closed – and the TSA team continued to work on the proposals during the period of the consultation. The draft report recommended that SLHT be dissolved and the constituent hospitals be merged with other local providers, notably King's College Hospital NHS Foundation Trust and Lewisham Healthcare NHS Trust. However, the recommendations in the draft report looked wider than the hospitals in SLHT for a solution, and proposed major changes at neighbouring University Hospital Lewisham, including:

- reducing A&E services
- removal of some paediatric and most maternity services
- the construction of a major elective care "factory" on the Lewisham site which was intended to draw work from across a wide swathe of south east London

The Lewisham proposals proved to be very controversial. There was an uprising of local feeling and a "Save Lewisham Hospital" campaign was set up. The campaign involved some high profile local residents and also quite a few of the clinicians at University Hospital Lewisham who did not agree with the analysis in the TSA report. The campaign held demonstrations such as joining hands around the Lewisham site which got national publicity.

The London Borough of Lewisham was also concerned about the impact of the proposals on the people of Lewisham. The council commissioned two reports, one into the legal basis of the TSA's decision, and one into the feasibility of the TSA's recommendations (carried out by Frontline).

Our report found a lack of support for changes by the local GPs, suggesting that the four key tests had not been fulfilled. We also noted concerns about the accuracy of the information used when making the recommendations for University Hospital Lewisham. The council submitted these reports to the consultation process. When the TSA published the finalised version of the report on 8th January 2013, he noted that "there was significant opposition to the draft recommendation that University Hospital Lewisham should no longer have an admitting emergency department", but that "on the basis of the full clinical and financial evaluation of options and after taking into account the consultation responses, including the fact that no viable alternative option was suggested"[2], no changes to the recommendations were made.

[2] http://www.tsa.nhs.uk/sites/default/files/documents/APPENDIX%20J%20-%20TSA%20Response%20to%20Consultation%20Feedback.pdf

Reflecting the public campaign, the Secretary of State asked the NHS's Medical Director Bruce Keogh to review the proposals for Lewisham. This did lead to some minor concessions. However, it did not satisfy the council and Save Lewisham Hospital, who brought separate judicial review actions against the Secretary of State. These were combined into one court action, and the judgement received on 30th July found that the Secretary of State had exceeded his powers in requiring the downgrade of services at University Hospital Lewisham. The judge also said that the report did not demonstrate that the four key tests had been passed. The Secretary of State also lost a subsequent appeal and the TSA's recommendations for University Hospital Lewisham will not be implemented, although the other recommendations, including the dissolution of SLHT, are being taken forward.

Lessons learned

There are a number of lessons which can be learned from this first use of the Unsustainable Provider Regime.

Dissolving a trust is not like putting a firm in administration. The legislation is based on a private sector model of administration, where an administrator steps in to run a company with money problems, and has sweeping powers to set aside existing contracts, sack staff, sell on the business or close it down. But this assumes a competitive market where any gap left in provision will be filled by other firms if the demand is there. This is not true in the NHS – gap-filling takes specific planning and time to implement. In addition, the public sector gets its 'authorisation' from the will of the population, and should be answerable to the people, while firms are only answerable to their shareholders. What we see here is a clash of trying to shoehorn what is a shareholder value model into an environment where public sector organisations are tasked with delivering public value.

Don't get over-ambitious. The clear outcome of the judicial review is that unless an organisation is named as being in the TSA's remit, it cannot be brought into the scope by fiat, and any major change of service outside the TSA's remit will require full public consultation and be subject to all the other safeguards which apply in these cases. This lesson also brings out the danger of applying a business model – that allows firms to fail – to the public sector, where the complexity of system inter-relationships must be taken into account.

The problem is unlikely to be focused on one trust. In this case, the TSA felt that part of South London Healthcare's problem was due to too much capacity across south east London generally, which is why his recommendations took in University Hospital Lewisham. It is likely that any trust with intractable difficulties will be within an unbalanced local health economy, but as the previous point shows, the legislation is focused on the trust named in the Secretary of State's appointment of a TSA, and excludes surrounding organisations. This means that any solutions proposed by the TSA are unlikely to tackle the underlying wider imbalances. So the TSA did in reality have the right idea to take a system approach, but he was not empowered to do so. In the absence of the TSA having such powers, who has this role?

The timetable in the legislation is too tight. In SLHT's case, the Secretary of State allowed the TSA to extend the investigation phase of the work, and even so the TSA went out to consultation without completing the process of generating evidence, with his report containing inaccuracies which were challenged by local clinicians. Given that the proposed changes in this kind of case are going to cause controversy anyway, it seems perverse to have to fit within a process which undermines support. The impact of missing and inaccurate information is to make the TSA look unreliable, or pre-decided at best, and incompetent as worst. This will lose any trust that the local population and stakeholders might have had in the process, and increases the likelihood that judicial review challenges will be brought – and be successful. In addition, the requirements to meet the Secretary of State's four tests add to the time pressure as they require extensive consultation.

Consultation has to be more than lip-service. The Unsustainable Provider Regime legislation requires the TSA "to have regard" to the results of the consultation. However, he attempted to gloss over the lack of GP support in Lewisham by pointing to support in other areas (highlighted in the Judicial Review judgement). The local professional and public voice must be listened to, even if it does not fit the TSA's agenda. The process followed by the TSA therefore reinforces the perception among communities and the public that the NHS does not listen, which is exactly the opposite of much work over the past decade to have meaningful public and patient engagement.

Continuity of service is likely to be a problem. Legally the TSA takes responsibility for running the trust on appointment, and he needs to ensure continuity of services. However, his focus is very much on the short-term requirement to produce the report and make recommendations, and operational decisions are likely to suffer. If decisions on staff recruitment and investments are delayed, then continuity of provision may suffer. This reinforces the contradiction that is inherent in the legislation, namely attempting to work in the manner of the private sector, but also to ensure that the public sector provides public value, a key element of which is the sustainability of services.

You can't take the politics out of the process. The initial impetus for the legislation may have been to take politics out of the process, but the requirement to fulfil the four key tests means that the local voice cannot be ignored. And bringing in the local voice immediately brings in the politics. This reinforces the contrast of decision-making between local government and the NHS, between elected representatives and appointed ones.

What this tells us

The legislation setting up the Trust Special Administrator regime failed to work on its first application at South London Healthcare NHS Trust, and the process highlighted a number of areas where the regime needs amending if it is going to be useful in the future:

- the legislation needs to take the authorising environment of government into account, i.e. to allow for proper consideration of the views of the local population and service commissioners (NHS and local authority)
- it needs to work within a realistic timetable which allows the TSA sufficient time to thoroughly understand the issues, and to work with local stakeholders, including the population, to develop a solution
- the regime needs to be able to take a system view where appropriate – but this must not override the need for proper consideration of local views

Amendments to the Unsustainable Provider Regime are currently being debated – it is hoped that any changes will benefit from the lessons from South London.

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