EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE TRUST DEVELOPMENT AUTHORITY (DIRECTIONS AND MISCELLANEOUS AMENDMENTS ETC.) REGULATIONS 2016

2016 No. 214

1. Introduction

1.1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. The purpose of the National Health Service Trust Development Authority (Directions and Miscellaneous Amendments etc.) Regulations 2016 ("the 2016 Regulations") is to:

- direct the NHS Trust Development Authority (NHS TDA) to exercise the functions of the National Health Service Commissioning Board (known as and referred to in this Explanatory Memorandum as "NHS England") relating to the safety of services which are specified in section 13R of the National Health Service Act 2006 (the Act)[1];
- transfer staff, property and liabilities from NHS England in connection to the safety of services function (also referred to as national safety function) and including staff undertaking improvement related activities, to the NHS TDA;
- enable an increase in the number of Members (both non-executive and executive) on the NHS TDA Board if so desired by that Board;
- remove the disqualifying provision for persons who are members of, and contributing to the NHS Pension Schemes established under the Superannuation Act 1972 from sitting on the NHS TDA Board.
- provide that NHS TDA's arrangements for the exercise of its functions may include collaborative arrangements with Monitor and Monitor's committees and sub-committees; and
- makes provisions to ensure continuity in respect of the NHS TDA exercising NHS England's safety functions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

Other matters of interest to the House of Commons

3.2. As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

[1] http://www.legislation.gov.uk/ukpga/2006/41/pdfs/ukpga_20060041_en.pdf

4. Legislative Context

4.1. The NHS TDA is a Special Health Authority, established by the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 (S.I. 2012/901)[2]. The NHS TDA was established to exercise functions in connection with the management of the performance of English NHS trusts, supporting improvements in clinical quality, governance, and management of risk in English NHS trusts and the development of the performance of English NHS trusts with the objective of assisting them to become sustainable organisations. The NHS TDA has additional functions in connection with appointments relating to NHS trust boards and special trustees and any such other functions as the Secretary of State may direct.

4.2. The National Health Service Development Authority Directions 2013[3] as amended by the National Health Service Trusts Development Authority (Amendment) Directions 2014[4] and the National Health Service Trusts Development Authority (Amendment) Directions 2015[5] further directs the NHS TDA in respect of them exercising Secretary of State's functions. These Directions are being revoked and consolidated with amendments – further details are set out in paragraph 7.3.

4.3. Changes to legislation governing the NHS TDA are required as a consequence of the policy relating to the closer working together of Monitor[6] and NHS TDA under a single leadership and operating model[7], to be known as NHS Improvement[8]. The policy rationale set out in paragraph 7 explains the background and intention behind bringing together Monitor and the NHS TDA.

4.4. As part of this rationale, the NHS TDA is being directed by the Secretary of State to exercise NHS England's functions relating to safety[9] as specified by section 13R of the Act. Amendments are required to the constitution of the NHS TDA regarding governance arrangements and to make provision for the transfer of staff, property, and liabilities related to the safety function and teams undertaking improvement related work currently carried out by NHS England. Furthermore, amendments are required to the National Health Service Trust Development Authority Regulations 2012 (S.I. 2012/922)[10] to make provision relating to membership and procedure of the NHS TDA.

5. Extent and Territorial Application

5.1. This entire instrument extends only to England.

5.2. This entire instrument applies only to England.

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[2] http://www.legislation.gov.uk/uksi/2012/901/pdfs/uksi_20120901_en.pdf
[3] https://www.gov.uk/government/publications/nhs-trust-development-authority-directions-2013
[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386054/Directions.pdf
[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461411/TDA_Amendment_Directions_2015.pdf
[6] Section 61 of the Health and Social Care Act 2012 (c.7) continued the existence of the Independent Regulator of NHS Foundation Trusts - that body is known as Monitor
[7] https://www.gov.uk/government/news/government-announces-monitor-and-trust-development-authority-move-to-single-leadership-to-deliver-increased-support-to-hospitals
[8] https://www.gov.uk/government/speeches/making-healthcare-more-human-centred-and-not-system-centred
[9] Secretary of State is required to make regulations when directing the NHS TDA to exercise the functions of another person, in this case the functions of NHS England see section 273(4)(b)(zi) of the National Health Service Act 2006.
[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216536/dh_134469.pdf

6. European Convention on Human Rights

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1. NHS TDA is a special health authority established by the National Health Service Development Authority (Establishment and Constitution) Order 2012 (S.I.2012/901).

7.2. The NHS TDA was established to exercise functions in connection with the management of the performance of English NHS trusts, supporting improvements in clinical quality, governance, and management of risk in English NHS trusts and the development of the performance of English NHS trusts with the objective of assisting them to become sustainable organisations. The NHS TDA has additional functions in connection with appointments relating to NHS trust boards and special trustees and any such other functions as the Secretary of State may direct.

7.3. The National Health Service Trust Development Authority Directions 2013, as amended by the National Health Service Trusts Development Authority (Amendment) Directions 2014 and the National Health Service Trusts Development Authority (Amendment) Directions 2015, further directs the NHS TDA in respect of its functions. These Directions are being revoked and consolidated with amendments by the National Health Service Trust Development Authority Directions 2016 – a copy of the near final draft of these Directions will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

7.4. Section 61 of the Health and Social Care Act 2012 (c.7) continued the existence of the Independent Regulator of NHS Foundation Trusts - that body is known as Monitor. Monitor regulates providers of NHS services and in particular oversees the governance of NHS Foundation Trusts. Both the NHS TDA and Monitor are therefore responsible for overseeing and, where necessary, improving the performance of their respective cohort of providers; NHS Trusts and Foundation Trusts.

7.5. In recent years, the NHS TDA and Monitor have been working more closely together and are increasingly utilising similar interventions with their respective cohorts, whilst retaining distinct and separate modes of oversight and management. However, it has become clear that NHS Trusts and Foundation Trusts face the same challenges and the need to drive improvements in operational performance and the quality of patient care affects all NHS providers equally, regardless their organisational form. All NHS providers should have access to the same kinds of support and be subject to the same kind of intervention, and there has been growing consensus for some time that this should be reflected in how they are managed and regulated at a national level.

7.6. For these reasons, it was announced on 11 June 2015 that the NHS TDA and Monitor would come together under a single leadership and operating model[11], in order to achieve a significant improvement in the oversight, support and interventions for NHS Trusts and NHS Foundation Trusts. As part of these arrangements, it was also announced that NHS TDA and Monitor should share a single leadership team comprising of a chief executive, chair, and a joint board.

[11] https://www.gov.uk/government/news/government-announces-monitor-and-trust-development-authority-move-to-single-leadership-to-deliver-increased-support-to-hospitals

7.7. On 16 July, it was announced that Monitor and the NHS TDA would be known by the operational name NHS Improvement. At this time, the Secretary of State also emphasised how safety and quality would be key components of this new arrangement, and as part of this the national safety function[12], as specified by section 13R of the Act and as currently exercised by NHS England, would in the future be exercised by the NHS TDA.

7.8. The national safety function, as specified in section 13R of the Act, includes a key system leadership role across the NHS, in particular supporting the NHS to identify, understand, and manage risks to the safety of patients. This includes:

- advice and guidance to the healthcare system on patient safety;
- the maintenance and development of the National Reporting and Learning System (NRLS) that collects data reported by NHS organisations on patient safety incidents and is used to inform guidance (the NRLS is currently hosted and run by Imperial College Healthcare NHS Trust on behalf of NHS England);
- the publication of patient safety data, other information and any related improvement activity; and
- leading specific initiatives to support safety improvement across the health system, including the national patient safety collaborative programme.

7.9. As NHS Improvement is not a legal body or entity in its own right it is considered that the NHS TDA is best placed to exercise the safety function and will work collaboratively with Monitor to do so.

7.10. Since the announcements set out above, the NHS TDA and Monitor have been working to lay the foundations for coming together as NHS Improvement and a single shared leadership team is now in place. Ed Smith was appointed as Chair of Monitor on 16 July and following the removal of an exemption over membership[13], on 1 December he was also appointed Chair of the NHS TDA. In addition to this, Jim Mackey commenced his role as Chief Executive of both the NHS TDA and Monitor on 1 November 2015. Work to develop a single executive team and a single operating model and approach to supporting providers continues.

7.11. In addition to directing the NHS TDA to exercise the national safety functions specified in section13R, to realise the wider policy intentions of this new arrangement, the NHS TDA will receive two teams from NHS England that exercise the Secretary of States functions in respect of improvement across the health system. These teams are:

- The Advancing Change Team (ACT), which provides expertise in change management and capability development, and supports NHS staff in the delivery of change; and
- The Intensive Support Teams (ISTs) which specialise in improving performance in urgent and emergency care, elective care and cancer services.

7.12. Separate directions – the National Health Service Trust Development Authority Directions 2016 – are being prepared in respect of the work carried out by the teams referred to above and to direct the NHS TDA to exercise the Secretary of State's existing functions in respect of improvement in the health system and to work

[12] https://www.gov.uk/government/speeches/making-healthcare-more-human-centred-and-not-system-centred
[13] http://www.legislation.gov.uk/uksi/2015/1559/pdfs/uksi_20151559_en.pdf

collaboratively with Monitor in these activities. A copy of the near final draft of these Directions will be published alongside the Explanatory Memorandum on the legislation.gov.uk website..

7.13. Furthermore, the NHS TDA will also be directed in relation to the exercise of the Secretary of State's functions under the 2006 Act, to establish a new service, the Healthcare Safety Investigation Branch, to investigate patient safety issues. Again, separate directions will cover this work.

7.14. The policy intentions outlined in paragraphs 7.8 – 7.10 will be realised through this Instrument as follows:

- **Part 2 of the 2016 Regulations makes provision in relation to the national safety functions.** Regulation 2(1) specifies the functions which NHS TDA are to exercise and regulation 2(2) directs the NHS TDA to exercise safety functions which NHS England currently exercise, with the objective of securing and improving the safety of services. These are the functions that will enable the work referred above at paragraph 7.9 to be continued and built on by NHS TDA, working together with Monitor as NHS Improvement.
- **Part 3 amends the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 (S.I. 2012/901)[14] .** Regulation 4 enables the NHS TDA to increase the number of non-executive and executive officers in order to allow for changes to the structure to the board such that it can be constituted in a way that is appropriate for its new operational form. This is with reference to working jointly with Monitor and governance arrangements for functions transferred from NHS England. Under arrangements for a joint board between the NHS TDA and Monitor, the intention is for all non-executive and executive officers to be jointly appointed to both organisations. The Secretary of State has a role in the appointment of non-executive members for both the NHS TDA and Monitor, as well as consenting to the appointment of Monitor executives. As such, it is not envisaged that the lack of provision limiting the number of executive and non-executive members introduced here will an issue, as all appointments are joint and subject to consent from the Secretary of State. This will be kept under review.
- As a consequence of directing the NHS TDA to exercise safety functions and as it is receiving the ACT and ISTs, it is necessary to transfer property, staff, and liabilities relating to this work. In respect of the safety function, this includes staff carrying out work on the National Reporting and Learning System (NRLS) that is currently hosted and run by Imperial College Healthcare NHS Trust, on behalf of NHS England. Regulation 5 therefore provides for the transfer to the NHS TDA of property necessary for the NHS TDA to carry out the safety functions of NHS England and the work of the ACT and ISTs that it is being directed to carry out. Whilst regulation 6 transfers staff that are currently employed in respect of safety functions to the NHS TDA, as well as staff currently employed in the ACT and ISTs.
- **Part 4 amends the National Health Service Trust Development Authority Regulations 2012 (S.I. 2012/922).** Regulation 7(3) removes a disqualification provision to enable a person who is in and is contributing to one of the NHS

[14] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216536/dh_134469.pdf

Pensions Schemes, made under the Superannuation Act 1972, to be a member of the NHS TDA Board. This will enable the TDA to benefit from having persons with clinical and frontline NHS expertise as non-officer members. This minor amendment supports the move to a single joint board with Monitor, to whom these exemptions do not apply. The experience and capability offered by those with current clinical and frontline NHS expertise will be key to the work NHS TDA will undertake with Monitor to support improvement and transformation across the health system.

- In respect of exercising its functions, regulation 7(4) makes it clear that the NHS TDA may enter into arrangements to work collaboratively with Monitor and any of its committees or subcommittees or person exercising functions on behalf of Monitor. This provision will assist them in working together under the umbrella of NHS Improvement; and
- Regulation 8 is a consequence of the direction to the NHS TDA to exercise safety functions of NHS England, and the transfer into it of property, staff, and liabilities. To ensure a smooth transfer, regulation 8 makes provision to ensure continuity in respect of such matters from 1 April 2016 - the date the NHS TDA is to begin to exercise the functions of NHS England.

7.15. There are no plans to consolidate the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 or the National Health Service Trust Development Authority Regulations 2012, but this will be kept under review.

8. Consultation outcome

8.1. The Department, working together with NHS England, the NHS TDA, and Monitor in relation to safety, concluded that the function should transfer as detailed above. These discussions formed the consultation for the purposes of section 7(1B) of the Act.

8.2. The Department has also worked closely with the NHS TDA, NHS England, and Monitor on the other changes proposed in this Instrument and the separate Directions to the NHS TDA. This work continues to ensure the smooth transfer of the work related to the functions.

8.3. Representatives of staff that will be affected by the transfer of functions and resources have been consulted, in line with section 28 of the Act. The consultation letter was issued on 24 November, with comments requested by 22 December 2015. No responses to the consultation were received from representatives of staff.

8.4. The NHS TDA and Monitor have been engaging with staff and representatives of staff (including those based in NHS England and Imperial) on coming together as NHS Improvement for several months. Furthermore, with specific reference to the transfer of staff, a consultation on the measures envisaged by the transfer was held between Monday 11 January and Friday 5 February 2016. No representations that have an impact on the transfer have been received. NHS TDA, Monitor, and NHS England continue to engage with staff on the transfer.

8.5. In relation to the changes related to pensions and appointment, the policy view is that the disqualifying provision around the NHS Pension Scheme is a barrier to recruitment and removal is welcomed by NHS TDA and Monitor.

8.6. In conclusion, all bodies affected have been engaged and continue to work closely together on the changes proposed in this Instrument and wider policy intentions in order to come together as NHS Improvement.

9. Guidance

9.1. There is currently no intention to issue guidance in respect of this instrument. The NHS TDA, Monitor, and NHS England have been closely involved in the policy development and are working collaboratively together. The Secretary of State is not planning to issue guidance to the NHS TDA in respect of the exercise of safety functions or the National Health Service Trust Development Directions 2016. This will be kept under review.

10. Impact

10.1. There is no impact on business, charities, or voluntary bodies.

10.2. There is no significant impact on the public sector.

10.3. There will be a small impact on the NHS TDA, as it will be taking on additional functions and responsibilities and will be working operationally with Monitor in a different way. The NHS TDA will receive funding for the functions and teams that are transferred from NHS England, this does not breech the monetary threshold to trigger an impact assessment.

10.4. We can find no evidence to suggest that this instrument will have an impact on the Public Sector Equality Duty. We will continue to keep this under review.

10.5. An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1. The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1. The Department of Health will monitor the changes introduced by this Instrument and the new working arrangements between the NHS TDA and Monitor. This will be done in the course of regular contact between the Department and the NHS TDA and Monitor.

13. Contact

13.1. Cariad Hazard at the Department of Health Telephone: 0207 210 5213or email: cariad.hazard@dh.gsi.gov.uk can answer any queries regarding the instrument.