

SOUTH LONDON SUBJECT TO THE FAILURE REGIME



HSJ Local Briefing is our new in-depth analysis of the key issues facing the NHS's major health economies

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In brief

Issue Jeremy Hunt must decide by 1 February whether to order the downgrade of Lewisham Hospital.

Context The unsustainable provider regime was first applied to South London Healthcare Trust but has since seen its scope expanded across the region. The special administrator's subsequent recommendations to the secretary of state have prompted widespread protest.

Outcome There are some strong grounds on which opponents seem likely to bring a judicial review. This and question marks over the size of the financial savings could well see the health secretary reject the most controversial part of the recommended changes.

Special administration at South London

Health secretary Jeremy Hunt must decide whether to accept the recommendations of the trust special administrator on South London Healthcare Trust by Friday.

Matthew Kershaw, who has been assisted by a team from NHS London and McKinsey, was appointed to run the NHS's first failure regime process.

Mr Kershaw's report called for the dissolution of the trust, the merger of its constituent hospitals with neighbours, a Treasury bailout for the trust's private finance initiative projects and the cancellation of its debts, plus a detailed cost-cutting plan.

Lewisham becomes drawn in

Most controversially, Mr Kershaw recommended South London's Greenwich site be merged with neighbouring Lewisham Healthcare Trust and that Lewisham Hospital then be downgraded.

This recommendation, number five, has been received with near unanimous condemnation in Lewisham, from the borough's elected mayor, MPs, 40,000 petition signatories and the local clinical commissioning group.

Lewisham Healthcare Trust agrees with the merger but not the downgrade, saying it should be given more time to work out what kind of

services the new organisation will provide and where.

The process is seen as iconic in the NHS.

It is the first use of the act to address a trust with a monster deficit but is also seen as a test of the government's willingness, if any, to back unpopular service reconfigurations.

The financial argument

South London Healthcare Trust has three main hospital sites to the east and south of Lewisham, one in Bexley, one in Greenwich and one in Bromley.

The £447m-turnover trust has large, poor-value PFI arrangements at the latter two sites for which the special administrator has asked £552m in additional Treasury support over the lifetime of the contracts.

The PFIs are responsible for approximately a third of the deficits the trusts have run up in recent years, the last being £65m in 2011-12.

South London Healthcare Trust is predicting an overall deficit of £60m in 2012-13.

It was placed under the failure regime last July by then health secretary Andrew Lansley after long-term financial modelling found it could not set a break-even budget at

any point over the next five years.

There are full accident and emergency departments on the Greenwich and Bromley sites. The Bexley unit was closed in December 2010 following concerns about safety from the royal colleges.

The PFI deals effectively make the Bromley and Greenwich hospitals fixed points in the healthcare landscape of south London.

Mr Kershaw's report calls for Bromley to merge with King's College Hospital Foundation Trust, Bexley to become a "health campus" owned by Oxleas Foundation Trust and the hospital at Greenwich to merge with Lewisham.

The special administrator's draft report in October identified more than £70m in efficiencies at the trust, largely from the medical and nursing workforce.

But the report said even with these moves, a PFI bailout and the making of those efficiencies, the new Greenwich/Lewisham organisation would not be viable.

Mr Kershaw has said the terms of the failure regime do not allow him to set up a new organisation that cannot break even and service change is the only way to balance the books.

The ensuing process

The terms of the National Health Service Act 2006 say Jeremy Hunt must have made his decision by Friday, 1 February.

But he does not have to announce his decision then – he could wait until Monday to tell Parliament, or even longer.

The news that the Francis report into the Mid Staffordshire Foundation Trust is being released on 6 February, with Mr Hunt receiving a copy the day before, could also have a bearing on the timing, although it was rumoured an announcement could be made earlier this week.

He must accept or reject each of

the six recommendations in turn and order an alternative to any he does choose to reject.

HSJ understands the health secretary would have to have used some of the processing capability within the Department of Health if he wanted to model alternatives to Mr Kershaw's recommendations.

The trust special administrator's team insist all the recommendations need to be enacted to solve the problem, but opponents claim there is an alternative to recommendation five, the one relating to Lewisham.

Mr Hunt's decision

No one will admit to knowing what the health secretary's thoughts are on the recommendations but there are some reasons to believe the most contentious suggestion – the downgrade of Lewisham Hospital's A&E and maternity services – is likely to face judicial review.

Protesters have already argued Mr Kershaw has overstepped the bounds of his remit by including Lewisham in the proposals.

The first argument that might feature in a judicial review if Hunt does approve the plans is that the legislation does not give the special administrator the power to make recommendations involving Lewisham.

The Lewisham MPs say the terms of reference for the failure regime explicitly forbid using the rules as a "back-door approach to service reconfiguration", but that this is what is happening.

Mr Kershaw's argument is that the calculations showed there was no possible solution to South London Healthcare Trust's problem within the organisation, obliging him to consider the problem in the wider context of the South East London primary care trust cluster.

HSJ understands Hunt's legal advice was that the trust special

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administrator did not overstep his remit, but given this is the first time the powers have been used a judicial review on this point is possible.

The four tests

Another legacy of Andrew Lansley that Mr Hunt must deal with is the four tests.

These are the conditions that the former health secretary said must be satisfied before significant reconfigurations were authorised.

They say proposed changes must demonstrate a clinical evidence base and public and patient engagement while promoting patient choice.

The fourth test, and one which HSJ understands a judicial review could easily be lodged on, is that a proposal must, in Mr Lansley's words, have "demonstrable support from commissioners".

The current health secretary has already said he will abide by the four tests. However, Lewisham Clinical Commissioning Group is opposing recommendation five.

But of the six CCGs involved in the process, only Lewisham is outright against the recommendation. Greenwich has expressed reservations but not outright disagreement.

An alternative interpretation of the four tests might be that the recommendations had the support of the majority of GP commissioners in south-east London, even though the GPs of Bexley, Lambeth and Southwark could not claim the downgrade would have a significant effect on their patients.

The special administrator's final report said: "It is on the basis of the broad support of the clinical commissioning groups in southeast London that the application of the new test should be gauged."

The opposition of one CCG would be a significant matter for the health secretary to discount.

The reconfiguration which saw the downgrading of Chase Farm Hospital in north London was judged to have satisfied the same test in September 2011 because the majority of GPs in the borough of Enfield did not object, and CCGs did not exist in the same form then to express a consensus view.

Money

The Lewisham MPs, Heidi Alexander, Jim Dowd and Joan Ruddock – all Labour – make the point that recommendation five should be rejected because the downgrading of Lewisham Hospital does not appear to save much money.

The trust special administrator's projection shows a deficit of £75m at the South London Healthcare Trust hospitals by the end of 2015-16, plus a £600,000 deficit at Lewisham Healthcare Trust.

Lewisham East MP Heidi Alexander pointed out that of the total savings attributable to the six recommendations in 2015-16, only £11.2m came from recommendation five.

The total savings without it come to £73.9m, leaving only a gap of £1.6m to make both viable.

The MPs say that if Lewisham CCG wants to subsidise the non-implementation of recommendation five by using £1.6m of its £549.4m budget it should be allowed to do so.

The trust special administrator's team disputed the £1.7m figure, saying the difference in cost between a Lewisham/Greenwich trust in which both A&Es were maintained and one with only a Greenwich A&E was £10.5m a year.

A spokesman said: "The estimated deficit of £1.7m is purely theoretical in that it is dependent on all the other recommendations being delivered. The report is clear that the recommendations interlock and that organisational change is a

consequent recommendation to [the other five]. It is the means of delivery.

"The incentive to deliver challenging cost improvements will be significantly diminished, if a whole solution is not found, given the new trust will be in deficit each year and therefore reliant on financial support in any case."

The wider context

Senior figures in the NHS and London expect Lewisham council to start judicial review proceedings if recommendation five is approved by the health secretary.

One told HSJ: "Is it outside the remit of the special administrator? Does it fail the four tests? These sound like exactly the kind of things a judicial review would look at."

If Lewisham does bring legal action it would mean that by the end of March NHS London will have wound down with a legacy of two judicial reviews – everyone HSJ spoke to expects there to be another one relating to the North West London reconfiguration proposals.

There the plans would see downgrades of Ealing, Central Middlesex and Charing Cross hospitals. Ealing Council is widely expected to bring a judicial review. Unlike Lewisham, which is a solid Labour area, it has marginal parliamentary seats.

The north west London joint committee of primary care trusts is expected to approve those proposals on 19 February.

No-one has forgotten NHS chief executive Sir David Nicholson's statement that there was an 18-month window of opportunity to complete reconfiguration projects before proximity to the general election meant it was politically impossible to get anything signed off. The window shuts in May.

A parliamentary debate last week

saw two Conservative MPs in the south London/Kent borders express misgivings.

Bob Stewart, member for Beckenham, told health minister Anna Soubry: "Frankly, GPs should be in support of these changes, that is a requirement. If, in Lewisham, they are not, that is a big problem."

Dartford MP Gareth Johnson said the closure of Lewisham would have "serious repercussions" in his own area, which "has its own capacity issues".

Some unanswered questions

Senior figures in south east London questioned why a full sell-off of the Bexley site was not considered.

Part of the trust's land there is being sold but one senior figure told HSJ the politicians in Bexley would not allow a total shutdown of services.

Another question for the wider NHS is whether the NHS Trust Development Authority will intervene in reconfiguration disputes in the same way strategic health authorities have.

Lewisham Healthcare Trust's foundation trust application was effectively suspended while the trust special administrator process was going on, and Mr Kershaw's proposals would have been unenforceable if the trust had achieved foundation trust status.