

HEALTH ACT 1999

EXPLANATORY NOTES

OUTLINE OF THE EXISTING LAW

20. The following paragraphs provide a brief description of the current legislative framework for the NHS. The legislative framework for the NHS in England and Wales is mostly set out in the National Health Service Act 1977 (“the 1977 Act”). This has been amended quite substantially by various enactments, notably by the National Health Service and Community Care Act 1990 (“the 1990 Act”), the Health Authorities Act 1995 (“the 1995 Act”) and the National Health Service (Primary Care) Act 1997 (“the Primary Care Act”).
21. Under the 1977 Act, the NHS is essentially split into two different systems. The first is the system which consists primarily in the provision of health care in hospitals. It also covers those services described as “community health services”, for example, the services provided by district nurses, midwives or health visitors in clinics or individuals’ homes, and the provision of medical services to pupils in state schools. This system is the subject of Part I of the 1977 Act. The responsibility for securing the provision of these services to patients rests with the Secretary of State, although under his powers in section 13 of the 1977 Act he has delegated most of his functions to Health Authorities. Health Authorities enter into arrangements with bodies known as NHS trusts for the provision by the trusts of hospital and community health services.
22. The other main part of the NHS structure is what might be described as “the NHS in the high street”. This is dealt with under Part II of the 1977 Act which governs the arrangements made by Health Authorities for the provision of services by the following professionals: general medical practitioners (GPs), general dental practitioners (GDPs), ophthalmic opticians and ophthalmic medical practitioners (also known as optometrists), and pharmacists. They provide what are termed general medical services (GMS), general dental services (GDS), general ophthalmic services (GOS) and pharmaceutical services (PhS) respectively. The remainder of Part II contains other provisions relevant to the provision of these high street services, which are often referred to as family health services.
23. The 1990 Act and the Primary Care Act introduced a number of changes to these systems of health care. Broadly speaking these changes were as follows -
 - the 1990 Act introduced a divide between the planning and purchase of Part I services, on the one hand, and the provision of those services, on the other; and
 - the Primary Care Act in effect enabled what were previously Part II services to be delivered, not under Part II, but under a more flexible system within Part I of the 1977 Act. These changes applied only to doctors and dentists, and not the other family health services practitioners.
24. The two systems, Part I and Part II, are very different. It should be noted that despite the changes introduced by the Primary Care Act the provision of Part I services is distinct from the provision of services under Part II. The changes made by this Act will not alter this divide. What follows is a more detailed description of the two systems.

Part I system: hospital and community health services

25. The system provided for under Part I of the 1977 Act is the system under which all of the NHS, apart from family health services, is provided. The core duty to ensure the provision of a health service is laid upon the Secretary of State (section 1) in extremely broad terms, and is supplemented by the provisions of the subsequent sections.
26. [Section 2](#) confers wide-ranging powers for the Secretary of State to provide such services as are appropriate to, and to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of any duty imposed on him by the Act. [Section 3](#) sets out those general services which it is the Secretary of State's duty to provide to such extent as he considers necessary to meet all reasonable requirements. Most of the services that may be described as hospital and community health services are included under this section. [Section 4](#) imposes a specific duty on the Secretary of State to provide special hospitals for persons detained under the Mental Health Act 1983 who have dangerous, violent or criminal propensities. The services provided under this section are often referred to as "high security psychiatric services" and are presently managed outside the normal hospital system by Special Health Authorities established under [section 11](#) of the 1977 Act. Further miscellaneous powers and duties are imposed on the Secretary of State by [section 5](#).
27. Part I of the 1977 Act (as amended by the 1995 Act) goes on to provide for the setting up of statutory bodies known as Health Authorities ([section 8](#)) and Special Health Authorities ([section 11](#)). Health Authorities are established to act for the area set out in their establishment order and together cover all of England and Wales. Special Health Authorities are established for specific functional purposes which the Secretary of State directs them to perform on his behalf (e.g. the National Blood Authority).
28. Although the main functions under Part I of the 1977 Act are conferred on the Secretary of State, the Act provides a mechanism which enables the Secretary of State to devolve to Health Authorities the responsibility for performing these functions, whilst retaining the ability to control how those functions are performed. The Secretary of State may direct a Health Authority or Special Health Authority to exercise his functions on his behalf ([section 13](#)). He may also give directions about the exercise of functions by a Health Authority or Special Health Authority ([section 17](#)). The Secretary of State has exercised his powers under these sections on many occasions but the principal instrument is the [National Health Service \(Functions of Health Authorities and Administration Arrangements\) Regulations 1996 \(S.I. 1996/708\)](#). [Schedule 1](#) to those Regulations lists those "specified health service functions" of the Secretary of State that he has delegated to Health Authorities. The Secretary of State has directed Health Authorities to exercise most of his functions under Part I, in particular [sections 2, 3, and 5](#). It is these Regulations by which Health Authorities have their functions in respect of Part I services conferred upon them. There is very little further prescription in primary legislation as to what the Secretary of State must do or how he must do it in relation to the provision of Part I services.
29. Health Authorities and Special Health Authorities are funded under the provisions of [section 97](#) of the 1977 Act, as substituted by [paragraph 47](#) of [Schedule 1](#) to the 1995 Act and amended by [section 36](#) of the Primary Care Act. Health Authorities are paid money in each year under [section 97\(1\)](#) and [section 97\(3\)](#). [Section 97\(1\)](#) concerns the remuneration of persons providing Part II services and is dealt with below. [Section 97\(3\)](#) concerns Part I expenditure and administrative costs. Under [section 97\(3\)](#) a Health Authority is paid money not exceeding the amount allotted to it by the Secretary of State. This amount is allotted towards meeting its "main expenditure" which includes all expenditure attributable to the performance of its Part I functions, all its administrative costs, and certain other expenditure. The money paid in respect of Part I services is therefore cash-limited. To enforce the cash-limits set by the Secretary of State, Health Authorities have various financial duties imposed upon them by [section 97A](#) of the

1977 Act (as substituted by paragraph 48 of Schedule 1 to the 1995 Act and amended by paragraph 23 of Schedule 2 to the Primary Care Act).

Part II system: family health services

30. The system provided for under Part II of the Act is quite different. The broad structure of the Part II system is similar for doctors, dentists, opticians, and pharmacists. For convenience, therefore, the existing system will be described as it applies to doctors. (There are significant differences in the systems for the other professions, most notably relating to pharmacists and opticians, but those differences are not relevant for the purposes of the Act.)
31. Under section 29 of the 1977 Act, it is the duty of each Health Authority in accordance with Regulations to arrange with medical practitioners to provide personal medical services for all persons in the area who wish to take advantage of the arrangements. These services are described as general medical services (GMS). A principal feature of this system as it operates in practice is that (apart from certain exceptional cases) it is not the Health Authority itself which provides the GMS; instead, it enters into separate statutory arrangements with independent practitioners for the provision of those services. GPs are therefore not employees of the HA; they are independent professionals who undertake to provide GMS in accordance with the body of Regulations governing that activity. Those Regulations are currently the [National Health Service \(General Medical Services\) Regulations 1992 \(S.I. 1992/635\)](#) as amended.
32. It is the duty of each Health Authority, in accordance with Regulations, to administer the arrangements made for the provision of GMS and the other family health services. The Health Authority must also perform such other management and other functions relating to those services as may be prescribed. In contrast to the Part I system, therefore, the duty to make the arrangements for these services is conferred directly upon Health Authorities, rather than upon the Secretary of State. Nonetheless, in exercising functions under Part II, Health Authorities may be the subject of Secretary of State directions issued under section 17 of the 1977 Act.
33. Remuneration of persons providing Part II services is for the most part not cash-limited (in other words the Secretary of State must pay whatever it has cost the Health Authority, and he cannot impose a ceiling on the expenditure). However, the Secretary of State has the power to designate some categories of Part II remuneration (e.g. reimbursement of certain expenses) as falling within cash-limited “main expenditure”. Remuneration for Part II services includes payments to pharmacists and GPs in respect of drugs dispensed to NHS patients, typically in response to prescriptions written by GPs.

The National Health Service and Community Care Act 1990

34. The 1990 Act introduced a number of changes in the systems described above.
35. Section 5 of the 1990 Act, and the immediately following provisions, provided for the setting up of bodies known as NHS trusts. These are semi-autonomous bodies set up to assume responsibility for the ownership and management of hospitals or other establishments or facilities previously managed or provided by a Health Authority; or to provide and manage hospitals or other establishments or facilities which were not previously so managed or provided. A trust’s functions are conferred by its establishment order made under section 5(1) of and by Schedule 2 to the 1990 Act. Some NHS trusts, known as “acute trusts” provide mainly hospital services. Other NHS trusts, known as “community trusts” provide mainly community services. Those which provide both hospital and community services are often known as “integrated trusts”.
36. All the NHS hospitals in the country are now run by NHS trusts. NHS trusts have no money paid to them directly by the Secretary of State, but instead obtain orders for their services placed by Health Authorities and GP fund-holders. The nature of the

arrangements between Health Authorities and trusts is, however, not that of an ordinary contract enforceable at law. Instead, the 1990 Act provided for a system of NHS contracts (section 4), which are explicitly not contracts enforceable at law (section 4(3)), but are subject to arbitration by the Secretary of State.

37. A further change introduced by the 1990 Act was the creation of fund-holding practices of GPs providing services under Part II of the 1977 Act. The fund-holding system did not essentially alter the Part II services they provide. However, the practices in question are given a sum of money known as an allotted sum with which to purchase, on behalf of their patients, from whatever provider they see fit, some of the care under Part I which would otherwise have been purchased by the local Health Authority. Thus there are two types of purchaser or commissioner of services: namely Health Authorities and fund-holding practices.

The National Health Service (Primary Care) Act 1997

38. The Primary Care Act introduced a new option for the delivery of family health services. Personal medical services (PMS) and personal dental services (PDS) may be provided under agreements known (in the initial stage at least) as “pilot schemes”. These agreements are made between the Health Authority and one or more of the persons listed in section 2(2) or section 3(2) of the Primary Care Act, which includes NHS trusts, GPs, and NHS employees. Pilot schemes allow PMS and PDS (essentially the same as GMS and GDS) to be provided under the Part I system. The Health Authority funds the services provided under a pilot scheme from its cash-limited allocation under section 97(3).
39. These provisions allow PMS and PDS to be provided otherwise than through the regulatory system of Part II of the 1977 Act. They enable Health Authorities to agree with pilot providers locally the content of the services and the conditions under which those services will be provided. The Primary Care Act also included provision for a permanent regime (under sections 28C and 28D of the 1977 Act, as inserted by section 21 of the Primary Care Act).

Wales

40. Many of the functions of the Secretary of State in relation to the NHS are exercised in Wales (from 1 July 1999) by the National Assembly for Wales (see the [National Assembly for Wales \(Transfer of Functions\) Order 1999 SI 1999/672](#)).

Scotland

41. The legislative framework for the NHS in Scotland is set out in the National Health Service (Scotland) Act 1978 (“the 1978 Act”). It is broadly similar in structure and content to the 1977 Act, being split into Parts I and II in the same way. Instead of Health Authorities, services are commissioned by Health Boards. The 1990 Act and the Primary Care Act described above made similar provisions for Scotland as for England and Wales.