

# MENTAL HEALTH ACT 2007

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## EXPLANATORY NOTES

### COMMENTARY

#### Part 1 – Amendments to Mental Health Act 1983

##### *Chapter 8 - Miscellaneous*

##### *Section 45: Delegation of powers of managers of NHS foundation trusts*

174. **Section 45** amends section 23 of the 1983 Act in relation to the delegation by National Health Service foundation trusts (NHSFTs) of their power to discharge patients from compulsion under the Act.
175. **Section 23** gives the managers of hospitals the power to discharge patients who are liable to be detained. (In the case of patients subject to special restrictions under Part 3 of the 1983 Act this power is only exercisable with the consent of the Secretary of State (in practice the Secretary of State for Justice).) Paragraph 10 of Schedule 3 extends the managers' powers to include a power to discharge patients subject to CTOs for whom the hospital is responsible.
176. The 1983 Act does not set out any specific procedure which hospital managers must follow when considering whether to discharge patients. But managers will generally offer to hold an oral hearing when requested to do so by patients, where patients contest the renewal of their detention by their RMO (in future their RC), or where a NR's discharge order is blocked under section 25 of the 1983 Act on the grounds that the patient is likely to act in a dangerous manner if discharged. Where renewal is not opposed, the managers may consider the case for the patient's discharge on the papers, without a hearing.
177. Section 145 of the 1983 Act provides that the managers of a NHS hospital are normally the body in which the hospital is vested. In practice, this generally means a National Health Service trust, or (in England) a primary care trust (PCT) or an NHSFT. (Section 46 below adds Local Health Boards (LHBs) in Wales to this list.)
178. These bodies do not have to take discharge decisions themselves. Section 23 of the 1983 Act allows them to delegate the exercise of their discharge power. NHS trusts may delegate this function to three or more people who are either directors of the trust (including the Chairman) or members of a committee or subcommittee of the trust, provided that the people in question are not employees of the trust. The rules for PCTs are effectively the same. In practice, these trusts usually delegate their function to a combination of non-executive directors and a panel of people specially recruited for the task. This latter group are often known as "associate hospital managers". By contrast, section 23(6) of the 1983 Act currently permits NHSFTs to delegate discharge decisions only to non-executive directors of the trust. Accordingly they cannot delegate to associate hospital managers.
179. *Subsection (1)* of this section amends section 23 of the 1983 Act to give NHSFTs greater flexibility. Specifically, it will allow them to delegate discharge decisions to

*These notes refer to the Mental Health Act 2007  
(c.12) which received Royal Assent on 19 July 2007*

any three or more people authorised by the board of the trust, provided those persons are neither executive directors nor employees of the trust. The effect is to give NHSFTs powers to delegate their discharge powers similar to those enjoyed by NHS trusts. *Subsection (2)* amends section 32 of the 1983 Act, so that the powers in that section to make regulations (which may include regulations permitting the delegation of hospital managers' functions by NHS bodies) are subject to the section 23(6) (as amended).

180. *Subsection (3)* inserts a new section 142B into the 1983 Act which provides that the constitution of an NHSFT may not permit functions under the 1983 Act to be delegated except in accordance with the Act itself or provision made under it and that paragraph 15(3) of Schedule 7 to the National Health Service Act 2006 ("the 2006 Act") is to have effect subject to that provision. Schedule 7 to the 2006 Act sets out mandatory requirements for the contents of an NHSFT's constitution. In particular, paragraph 15(2) requires the constitution to provide for the powers of the NHSFT to be exercisable by its Board. Paragraph 15(3) then provides that the constitution may allow for the Board to delegate powers to committees of directors or to individual executive directors.
181. The effect of the new section 142B is that an NHSFT's constitution may not permit its functions under the 1983 Act to be delegated to executive directors or committees of directors unless that is permitted by or under the 1983 Act itself. But the constitution may permit delegation to other people where that is allowed by or under the 1983 Act.