

MENTAL HEALTH ACT 2007

EXPLANATORY NOTES

COMMENTARY

Part 1 – Amendments to Mental Health Act 1983

Chapter 8 - Miscellaneous

Section 42: Offence of ill-treatment: increase in maximum penalty on conviction on indictment

170. **Section 42** increases the maximum penalty for imprisonment on conviction on indictment for the offence of ill treatment of patients in section 127 in the 1983 Act. The maximum penalty on imprisonment on summary conviction for the same offence will increase from six months to one year on the commencement of sections 154 and 282 of the Criminal Justice Act 2003. The maximum penalties on summary conviction for the offences at sections 126 (forgery, false statements etc) and 128 (assisting patients to absent themselves without leave etc) of the 1983 Act will also increase on the commencement of those provisions of the 2003 Act.

Section 43: Informal admission of patients aged 16 or 17

171. **Section 43** amends section 131 (Informal admission of patients) of the 1983 Act so that in the case of patients aged 16 or 17 years who have the capacity to consent to the making of arrangements for their admittance to hospital or registered establishment for treatment for mental disorder on an informal basis, they may consent (or may not consent) to such arrangements and their decision cannot be overridden by a person with parental responsibility for them.
172. If the patient consents to the making of arrangements they can be informally admitted to hospital and their consent cannot be overridden by a person with parental responsibility for them. If the patient does not consent to the making of arrangements they cannot be informally admitted on the basis of consent from a person with parental responsibility for them but they could be admitted to hospital for compulsory treatment under the 1983 Act if they meet the relevant criteria.

Section 44: Places of safety

173. Under section 135(1) of the 1983 Act, the police can, on the authority of a magistrate, enter premises and remove to a place of safety a person who is thought to have a mental disorder and who has been or is being ill-treated or neglected or, if living alone, is unable to care for himself. Under section 136 of the 1983 Act, the police can remove from a public place to a place of safety a person who appears to have a mental disorder and to need immediate help. In both instances, the person can be detained at the place of safety for up to 72 hours. Section 44 amends sections 135 and 136 of the 1983 Act to enable a person detained at a place of safety to be transferred to another one, subject to the overall time limit for detention of 72 hours. A place of safety for this purpose

is defined in section 135(6) of the 1983 Act and includes a hospital, a care home and a police station.

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 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.

Section 46: Local Health Boards

182. **Section 46** adds a reference to LHBs to the definition of "the managers" of hospitals in section 145(1) of the 1983 Act. Hospital managers have a variety of functions under the 1983 Act and the definition of "the managers" identifies the body or people who are the managers of each hospital, depending on who owns or runs it.
183. LHBs are statutory NHS bodies established by Welsh Ministers under section 11 of the National Health Service (Wales) Act 2006.
184. Most hospitals in Wales are vested in NHS trusts, but in Powys they are vested in the LHB established for that area. In the 1983 Act, LHBs are not specifically mentioned in the definition of "the managers". *Subsection (1)* of section 46 accordingly provides that, for the purposes of the 1983 Act, LHBs are the managers of hospitals vested in those Boards.
185. *Subsection (2)* makes an equivalent addition to section 19(3) of the 1983 Act clarifying that LHBs may also move such patients liable to be detained in one of their hospitals to another.

Section 47: Welsh Ministers: procedure for instruments

186. **Section 47** amends the provisions in section 143 of the 1983 Act which make provision in relation to the exercise of regulation, order and rule making powers. In particular it provides the procedure to be applied when such powers are exercised by the Welsh Ministers.