

# HEALTH ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part I - the National Health Service

##### *Section 13: Establishment orders*

151. NHS trusts are currently established under section 5 of the 1990 Act. This states that the Secretary of State may by order establish NHS trusts,
- to assume responsibility...for the ownership and management of hospitals or other establishments or facilities which were previously managed or provided by Health Authorities (section 5(1)(a)); or
  - to provide and manage hospitals or other establishments or facilities (section 5(1)(b)).
152. [Sections 5\(1\)\(a\)](#) and (b) therefore determine the functions that may be conferred on a trust. All NHS trusts were originally established under section 5(1)(a) of the 1990 Act, in recognition of the fact that they inherited property from Health Authorities or their predecessors on their establishment. Their establishment orders limited them to owning and managing property that had previously been managed by a Health Authority or its predecessors.
153. The section 5(1)(a) function has become increasingly out-dated, both in its reference to property previously managed by Health Authorities, and in its restriction of trusts to owning the property they manage. This is particularly true for trusts entering into Private Finance Initiative (PFI) contracts with private sector partners. These contracts typically involve the trust granting a long-lease on part of its property and receiving a sub-lease from the private sector partner or partners for the duration of the contract. The new public-private partnerships may also involve trusts acquiring brand new hospitals. Section 5(1)(a) does not allow a sufficiently wide power to be conferred to do either of these. It has therefore been necessary to amend individual NHS trusts' establishment orders where required, to give them powers under section 5(1)(b).
154. Subsection (1)(a) of section 13 replaces the current sections 5(1)(a) and (b). It provides for the Secretary of State to establish NHS trusts to provide goods and services for the purposes of the health service. Subsection (1)(b), by replacing the current section 5(6), enables the Secretary of State to confer in a NHS trust's establishment order a duty to provide particular goods or services at or from particular hospitals, establishments or facilities. The function of providing such goods and services includes managing such hospitals, establishments or other facilities. This enables the Secretary of State to specify a particular type of service (such as ambulance services, for example) which the trust must provide and a particular site or associated sites from which those services must be provided.
155. There has been some doubt raised as to whether the functions that may be conferred under the old section 5(1)(a) encompass all property arrangements entered into by NHS trusts to date. There has also been some doubt raised as to whether the functions

conferred under section 5(1)(a) allow trusts to acquire new hospitals or facilities not previously managed by a Health Authority. The parties concerned have entered into these arrangements in good faith, so the Government wishes to put their validity beyond doubt. Subsection (3)(b) ensures that existing establishment orders remain valid despite the amendment to section 5(1). Subsection (4) provides that NHS trusts are to be treated as never having been restricted to managing premises previously managed by Health Authorities or their predecessors. In addition subsection (5) allows for amendments to NHS trusts' establishment orders and elsewhere in legislation to be made with retrospective effect where necessary to give effect to the section in practice.