

EXPLANATORY MEMORANDUM TO
THE PRIMARY CARE TRUSTS AND NATIONAL HEALTH SERVICE TRUSTS
(MEMBERSHIP AND PROCEDURE) AMENDMENT REGULATIONS 2008

2008 No. 1269

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The purpose of these amendment regulations is to enable the Secretary of State to suspend the chairman or non-officer members of a Primary Care Trust (“PCT”) and the chairman or non-executive directors of a National Health Service trust (“NHS trust”). The regulations also provide for:

- how a suspension should be notified,
- the period of suspension,
- reviewing, revoking and extending a suspension, and
- amending the number, or maximum number, of members of PCTs and NHS trusts where a member has been suspended

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The National Health Service Health Act 2006 (c. 41) makes provision for the constitution of PCTs and NHS trusts. The Act enables regulations to be made in respect of, for example, the appointment, removal and suspension of the chairman and members of PCTs (Schedule 3) and the chairman and directors of NHS trusts (Schedule 4). Regulations have been made under these provisions in respect of PCTs (the Primary Care Trusts (Membership, Procedure and Administration Arrangements) 2000 (S.I. 2000/89) (“the PCT Regulations”). Similar Regulations have been made in respect of NHS trusts by the National Health Service Trusts (Membership and Procedure) Regulations 1990 (S.I. 1990/2024) (“the NHS trust Regulations”).

4.2 Under the PCT Regulations and the NHS Trust Regulations, the Secretary of State has power to appoint and remove certain members or directors of the trusts. The Secretary of State has directed the Appointments Commission, under section 58 of the Health Act 2006 (c. 28) to exercise his functions relating to the appointment of the chairmen and non-executives of PCTs and NHS trusts. Under section 71(2) of that Act “appointment” includes removal or suspension from office.

4.3 As mentioned in paragraph 7 below, the Appointments Commission conducted a review which concluded that there were potential circumstances, for example, where there was an allegation of impropriety, which would require that a non-executive should be suspended from office pending further investigations.

- 4.4 The Regulations currently provide for suspension in relation to officer members of PCTs or executive directors of NHS trusts. But, they do not provide for suspension of the chairman or non-officer members of PCTs, or the chairman or non-executive directors of NHS trusts, and are now to be amended for that purpose. It is intended that the Appointments Commission will also be directed to exercise the new powers of suspension.
- 4.5 The PCT Regulations provide for the maximum (and minimum) number of members (regulation 2(1)). If a member is suspended, and the member replaced, the resulting number of members could exceed the maximum. Regulation 4B is intended to ensure that replacement of members will not have that effect. Similar provision is made in respect of NHS trusts by the NHS trusts (regulation 9B). In addition, under the Act the order establishing NHS trusts must specify the number of executive directors and non-executive directors of the trust (e.g. the NHS Direct National Health Service Trust (Establishment) Order 2007, S.I. 2007/478). Regulation 9D provides for the number of non-executive directors specified in the order to be increased to allow for the replacement of the suspended directors.

5. Territorial Extent and Application

- 5.1 This instrument applies to England.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The Secretary of State has always been able to both appoint and terminate the appointment of office holders for those public appointments for which he is responsible. He has delegated both of these functions, for a number of years, to the Appointments Commission who are required to carry out their duties in line with the requirements of the Commissioner for Public Appointments.
- 7.2 In 2007, the Appointments Commission carried out a thorough review with stakeholders, of the way in which public appointments are made in the NHS. This included consultation with all non-executives in the NHS. The review report was shared across the NHS and received the support of key stakeholders and the Department of Health. One of the recommendations of the review was for the Appointments Commission to be able to suspend a non-executive from office.
- 7.3 The review concluded that there were potential circumstances when the Commission should be able to suspend someone - for example, where there was an allegation of impropriety, which would require the individual to be suspended pending further investigations, in order to protect patients or the NHS.
- 7.4 Suspension would be used as a temporary measure pending further investigations or the completion of a formal termination of appointment process.
- 7.5 The Secretary of State already has powers to suspend non-executives and other board members in a situation where he can make an intervention order (under section 66 of the National Health Service Act 2006). Before an intervention order can be made he

must be satisfied that the relevant conditions are met, i.e. that the body is currently failing to perform one or more of its functions adequately or at all, or that there are significant failings in the way the trust is being run, and that it is appropriate to intervene. However, there are a wider variety of circumstances under which it may be appropriate to suspend an individual whilst further investigations are carried out.

- 7.6 The proposed powers of suspension can be used according to the non-executives' own individual circumstances, and do not depend on whether it has been established that the relevant conditions for an intervention order are met. For example, there may be cases where there are allegations of personal misconduct, or of breach of rules as to disclosing a pecuniary interest in a matter. In these cases, it may be appropriate to suspend the individual, but an intervention order would not be appropriate as there would be no question of the body itself being in default or having failed to perform its functions adequately.
- 7.7 In proposing the new powers, a second point to consider was how it was consistent to look to the Appointments Commission to manage the suspension process with the same rigour and independence that it applies to both appointment and termination of appointment processes. Feedback from the NHS (see below) supported an integrated approach - and managed by the Commission, to removing NHS non-executives from office - either temporarily through suspension or through their resignation or the termination of their appointment.

Consultation

- 7.8 In addition to the consultation as part of the Review of public appointments that recommended the new powers to suspend, the Department also carried out further consultation on the suspension proposals. A consultation on a reformed process for removing a non-executive from office, including the new suspension function and the proposals for amendments to regulations, was carried out with key stakeholders involved in the review and SHA chairs in December 2007. Feedback from this further round of consultation was supportive. As a result of the consultations that had already taken place and the positive feedback, the Secretary of State agreed to a limited - 6 weeks, formal consultation with the NHS on proposed changes to regulations that would be required in order to introduce the new suspension function.
- 7.9 In January 2008, the Department of Health undertook a consultation with all SHAs, PCTs and NHS trusts on the proposals. The consultation concluded on 6 March 2008.
- 7.10 Replies were received from a spectrum of non-executives working in PCTs, NHS Trusts and SHAs. Thirty-one replies were received from individual organisations or office holders, one reply was sent on behalf of two organisations and a further reply on behalf of ten organisations.
- 7.11 The introduction of the new powers received wide support, as did the reformed process for handling the potential removal of an individual from office by the Appointments Commission. Most people also highlighted where they felt an element of the process could either be strengthened or better described. These comments proved very helpful in refining the process.
- 7.12 Amendments to the process have been made in light of comments received. Feedback on the consultation, including copies of the amended process and the regulations will shortly be placed on both Department of Health and Appointments Commission websites. NHS non-executives and chief executives will also be alerted

directly to ensure all parties are fully aware of the outcomes of the consultation and the new process.

8. Impact

8.1 A full Impact Assessment has not been prepared for this instrument as no impact on business, charities or voluntary bodies is foreseen.

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