

HEALTH ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 Chapter 3

Protection of Nhs from Fraud and Other Unlawful Activities

Section 44: Compulsory disclosure of documents for purposes of counter fraud or security management functions

223. *Subsection (1)* sets out the general purpose of Chapter 3, which is to confer power to require the production of documents in connection with the appropriate national authority's counter fraud functions and the Secretary of State's security management functions. The appropriate national authority is defined in section 82 as the Secretary of State in relation to England and the National Assembly for Wales in relation to Wales.
224. *Subsection (2)* explains that the appropriate national authority's "counter fraud functions", which are derived from section 2(b) of the NHS Act 1977 ("the 1977 Act"), include the power to take action to prevent, detect or investigate fraud and corruption affecting the NHS in England or Wales.
225. *Subsection (3)* explains that the Secretary of State's "security management functions", which are also derived from section 2(b) of the 1977 Act, mean his powers to take action to protect and improve the security of the persons, property and information listed in paragraphs (a) to (f).

Section 45: Meaning of "NHS body" etc.

226. *Section 45* provides definitions of those who are subject to the powers in this Chapter.
227. *Subsection (7)* provides that the appropriate national authority may make changes to *subsections (2) to (6)* of this section, and if they do this they may also make any consequential amendments to this Chapter. Any such order is subject to the affirmative parliamentary procedure under section 79(4)(d).

Section 46: Notice requiring production of documents

228. *Section 46* sets out when the appropriate national authority may serve a notice requesting production of documents relevant to the exercise of their counter fraud functions (defined in section 44) and where the Secretary of State may serve a notice requesting production of documents relevant to the exercise of his security management functions (also defined in section 44). They may do so where they have reasonable grounds to suspect that such documents are in the possession or under the control of an NHS body, statutory health body, health service provider, or NHS contractor and that a member, officer, director or manager of the body or provider or an employee of that organisation (or where a health service provider is an individual, that person) is accountable for the documents.

These notes refer to the Health Act 2006 (c.28) which received Royal Assent on 19 July 2006

- 229. *Subsection (4)* requires the notice to identify either specifically or by a general description, the documents which are required.
- 230. *Subsection (5)* sets out that the notice may require when, where and how the documents will need to be produced.
- 231. *Subsections (8) and (9)* state that the deadline for producing the documents requested may be altered by an authorised officer by agreement with the person on whom the notice was served. If the notice is varied that variation must be put in writing.
- 232. *Subsection (10)* provides for a person to be regarded as accountable for the documents if he has either day-to-day, or overall, responsibility for managing the documents required.

Section 47: Production of documents

- 233. **Section 47** applies once a notice has been given under section 46 by the appropriate national authority.
- 234. *Subsection (2)* makes it clear that an authorised officer may: take away any documents produced under the notice; take copies of the whole or specific parts of those documents; and ask the person producing those documents to explain them. An authorised officer is defined in section 55 as an officer authorised by the appropriate national authority or where these functions are to be exercised by a Special Health Authority, an appropriately authorised officer of that body.
- 235. *Subsection (3)* makes it clear that, if a person produces a document for the authorised officer to take away and he makes a request to the officer for a copy of that document, and the officer considers that request reasonable, the officer must as soon as is reasonably practicable give him a copy of the document.
- 236. *Subsection (4)* states that documents may be kept by the appropriate national authority for as long as it considers it necessary to retain them (rather than copies of them) in connection with the exercise of functions of the authority to which this Chapter applies.
- 237. *Subsection (5)* allows any of the produced documents that are relevant to any legal proceedings to be kept until the completion of any legal proceedings if the appropriate national authority believes that they might otherwise not be available for those proceedings.
- 238. *Subsection (6)* provides that if a person fails to produce the requested documents, as stated in the notice, he may be required by the authorised officer to state where those documents are.
- 239. *Subsection (7)* states that a person is only required to produce documents, or state to the best of his knowledge and belief where he believes the documents to be, to those who show appropriate evidence of authority.
- 240. *Subsection (8)* states that a person may not be required to produce documents or disclose any information which is subject to legal professional privilege.

Section 48: Delegation of functions

- 241. **Section 48** sets out that the appropriate national authority may direct a Special Health Authority to carry out its functions of serving and executing notices for the production of documents.
- 242. *Subsection (3)* provides that any such directions must be given in regulations.
- 243. *Subsection (4)* makes it clear that regulations may make further provision in connection with the Special Health Authority's exercise of functions which have been delegated to it under *subsection (1)*.

244. *Subsection (5)* explains that the regulations may, as well as making general provision about how the Special Health Authority is to exercise delegated functions, require authorised officers investigating fraud and security incidents or breaches to be appropriately trained. The regulations may also make provision for authorised officers investigating fraud and security breaches or incidents to seek specific authorisation before personal information is required.
245. *Subsection (6)* sets out that any direction under subsection (1) is to be treated as if it had been made under section 16D of the 1977 Act.

Section 49: Code of practice relating to delegated functions

246. *Subsections (1) and (2)* state that the appropriate national authority may publish a code of practice relating to the exercise of delegated functions by a Special Health Authority and to the procedures to be followed for the disclosure of information obtained through the use of these powers. The appropriate national authority must keep the code under review and may amend it as and when appropriate.
247. *Subsections (3) and (4)* provide that where the appropriate national authority decides to issue a code of practice, it must prepare a draft of that code and must consult persons or bodies which it considers appropriate before publishing the code. Similar provisions as to the publication of and consultation on a draft apply where any revisions are proposed and the changes would be substantial. *Subsection (8)* allows consultation for these purposes to have taken place before the commencement of this section.
248. *Subsection (6)* makes clear that no criminal or civil liability attaches to a failure to follow the code.
249. *Subsection (7)* provides that the code may be used in criminal or civil proceedings.

Section 50: Disclosure of information

250. **Section 50** relates to the disclosure of information. It relates to information held by, or on behalf of, the appropriate national authority which has been acquired under this Chapter. The information can only be disclosed in the circumstances set out in *subsection (3)* unless the person to whom the information relates has given his consent (see *subsection (7)*).
251. *Subsection (5)* states that where information is disclosed in accordance with subsection (3) the information cannot be used or disclosed to another person unless this is for purposes connected with the functions, investigation or proceedings for the purpose of which it was initially disclosed, or in accordance with legislation or an order of a court or a tribunal.
252. *Subsection (6)* makes clear that information may be disclosed under subsection (3) despite any obligation of confidence that would otherwise apply.

Section 51: Protection of personal information disclosed for purposes of proceedings

253. **Section 51** provides special protection in relation to proceedings for information obtained from personal records (as defined in the Police and Criminal Evidence Act 1984) in compliance with a notice served under section 46 where either
- the identity of an individual can be ascertained from that information alone; or
 - the discloser has reasonable cause to believe that any person who may receive the information, either directly or indirectly, will be able to identify an individual by using that information and other information obtained by the appropriate national authority through the use of powers under this Chapter and disclosed by or on behalf of that national authority.

This information is referred to as ‘protected information’

254. If a person discloses protected information for the purposes of any civil, criminal or relevant disciplinary proceedings they must take all reasonable steps to ensure that information is not further disclosed to any person who does not need to have that information for the purposes of the proceedings.
255. *Subsection (4)* requires the appropriate national authority to make provision through the code of practice under section 49 or otherwise to require the disclosing officer to ensure that the information is clearly identified as protected information, either by using a distinguishing mark or in some other way.
256. *Subsection (5)* provides that protected information must not be disclosed during proceedings unless the proceedings are held in private or the court or tribunal, having considered an application under *subsection (6)*, grant permission.
257. *Subsections (6) to (9)* set out the procedure to be followed by a court or tribunal on an application by a party for protected information to be disclosed. If the court or tribunal considers it necessary in the interests of justice, then it can give permission for the information to be adduced as evidence with any conditions it thinks necessary, and it must consider whether the whole or part of the proceedings should be held in private.

Section 52 Offences in connection with production of documents

258. **Section 52** creates offences of failing to comply with section 46 or 47.
259. *Subsections (1) to (3)* provide that a person commits an offence if they fail to comply with section 46 or 47 by failing to produce documents that are requested or failing to provide explanations of those documents or to state where they believe they may be found. If found guilty a person could be sentenced to a maximum of 51 weeks imprisonment (3 months until the relevant provisions of the Criminal Justice Act 2003 are commenced – see section 78) or fined, or both. Further offences are committed if a person fails to produce documents after conviction and a continuing fine applies.
260. *Subsections (4) and (5)* state that it is an offence if a person makes a false or misleading statement in answer to questions put to them under section 46. If found guilty after a trial or indictment, a person could be sentenced to a maximum of 2 years’ imprisonment or fined, or both. (see section 78 for the transitional modification of the summary penalty).

Section 53: Offences relating to disclosure or use of information

261. **Section 53** relates to the offences in connection with disclosure of information obtained under this Chapter.
262. *Subsection (1)* states that a person commits an offence if he fails to comply with the provisions of section 50(2) or (5) relating to the disclosure of information or section 51(2), which relates to safeguards protecting personal information.
263. *Subsection (3)* states that if a person is charged with an offence in respect of the disclosure of information, it is a defence if he can prove (on the balance of probabilities) that he reasonably believed:
- that sharing the information was lawful; or
 - that the information had already been lawfully made available to the public, or
 - that the disclosure was necessary or expedient for the purpose of protecting the welfare of any individual; or
 - that the disclosure was made in a way that ensured personal anonymity.

These notes refer to the Health Act 2006 (c.28) which received Royal Assent on 19 July 2006

264. *Subsection (2)* provides that on conviction on indictment the penalty is a maximum of 2 years' imprisonment, a fine or both (see section 78 for the transitional modification of the summary penalty).

Section 54: Manner in which disclosure notice may be served

265. [Section 54](#) explains the procedures associated with serving a notice requiring the production of documents.
266. *Subsection (2)* states that a notice may be delivered to a person, left at his proper address or sent to him by post.

Section 55: Interpretation

267. [Section 55](#) defines the terms used in this Chapter.