

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – The Health Service in England

##### Functions relating to mental health matters

426. These sections make a number of changes to the Mental Health Act 1983 (the 1983 Act) in the light of the abolition of PCTs and SHAs and the other proposals in White Paper *Equity and Excellence: Liberating the NHS*<sup>1</sup>.

##### *Section 38 - Approval functions*

427. This section amends the 1983 Act to provide new ways in which the Secretary of State's approval functions under that Act may be exercised. Previously, the Secretary of State's approval functions were delegated to SHAs, by means of directions given by the Secretary of State under section 7 of the NHS Act.
428. The Secretary of State has two approval functions. Under section 12 of the 1983 Act, the Secretary of State may approve doctors (section 12 doctors) as having special experience in the diagnosis or medical treatment of mental disorder. The Secretary of State is also responsible for approving doctors and other professionals as approved clinicians for the purposes of the Act.
429. Certain decisions under the 1983 Act may only be taken by people who have been approved in this way. For example, an application cannot be made to detain a patient under the Act unless it is supported by two medical recommendations, one of which is given by a section 12 doctor. Similarly, only an approved clinician can be the "responsible clinician" in overall charge of the case of a patient detained under the 1983 Act.
430. The section inserts three new sections into the 1983 Act.
431. New section 12ZA allows the Secretary of State to arrange for one or both of the approval functions to be exercised by anyone else who is willing to enter into an agreement to do so. Such an agreement may cover the approval function in general, or only to a more limited extent. For example, there may be agreements with different people in relation to different parts of the country, or (for approved clinicians) in relation to the approval of people from different professions.
432. An agreement may be for a fixed period, or may specify how decisions about the termination of the agreement will be made. However, it will not be possible for the agreement to give the other party a contractual right to go on exercising the approval function against the Secretary of State's wishes. The Secretary of State may at any time to issue an instruction requiring the other party to stop approving people (either at all, or

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<sup>1</sup> Copies are available in the Library, and from the DH website at <http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm>

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(c.7) which received Royal Assent on 27 March 2012*

to a specified extent). The agreement may include provision for the Secretary of State to pay the other party compensation if this were to happen.

433. The other party has to comply with other instructions given by the Secretary of State. It is for the Secretary of State to decide how these other instructions should be given, but they have to be published. In practice, at least for approved clinicians, these instructions may include rules about things such as the professions from which approved clinicians may be drawn, the competencies they must possess, and the training they must undertake before being approved. Previously, these matters were dealt with in directions to SHAs.<sup>2</sup>
434. Agreements under the new section 12ZA may include arrangements for Secretary of State to make payments to the other party. The Secretary of State may also make payments to other people in connection with the exercise of approval functions under the agreement. For example, the Secretary of State may agree to meet the costs of another body exercising the approval function, but also directly pay a third party to give expert advice to that body.
435. While the new section 12ZA allows for other people to exercise the approval functions by agreement, the new section 12ZB enables the Secretary of State to require the NHS Commissioning Board or any Special Health Authority to exercise those functions. The Secretary of State may require the NHS Commissioning Board or a Special Health Authority to exercise one or both of the approval functions, and (as in section 12ZA) that may apply to the function generally, or to a more limited extent.
436. It is also possible for approval functions to be exercised concurrently both by the NHS Commissioning Board or a Special Health Authority under section 12ZB and by another person under section 12ZA.
437. Like a party to an agreement under section 12ZA, the NHS Commissioning Board or Special Health Authority will have to comply with instructions given by the Secretary of State. The Secretary of State will have to publish those instructions. The Secretary of State will be able to end (or vary) the requirement on the NHS Commissioning Board or Special Health Authority at any time, which would in turn end (or vary) the Board or authority's power to approve people.
438. Where the Secretary of State requires the NHS Commissioning Board or a Special Health Authority to exercise an approval function, that function will be treated as a function under the NHS Act. That means, for example, that the Secretary of State will have to take that function into account when allocating funding to the NHS Commissioning Board or the authority. As in section 12ZA, the Secretary of State may also make payments to a third party in connection with the exercise of the approval function by the NHS Commissioning Board or a Special Health Authority.
439. New section 12ZC gives the Secretary of State and people exercising approval functions under sections 12ZA and 12ZB the power to disclose information in connection with those functions, whether or not they would otherwise have a power to do so. In addition, it allows information to be shared between those people (although not with third parties) even if that would not normally be allowed under the common law of confidentiality. Provided other legal requirements (such as data protection legislation) were complied with, this may, for example, allow one approving body to pass on to another approving body information it has received from, or about, an applicant, without having to obtain that applicant's consent.
440. Although sections 12ZA and 12ZB give the Secretary of State new ways in which to arrange for these approval functions to be exercised, there is nothing to prevent the Secretary of State deciding to exercise them directly through the Department of Health.

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<sup>2</sup> The Approved Clinician (General) Directions 2008, available at [www.dh.gov.uk/en/Healthcare/Mentalhealth/InformationontheMentalHealthAct/DH\\_106657](http://www.dh.gov.uk/en/Healthcare/Mentalhealth/InformationontheMentalHealthAct/DH_106657)

441. The section also makes a number of consequential changes to the 1983 Act and other legislation to recognise the effects of the new sections 12ZA and 12ZB. In particular, it amends section 139 of the 1983 Act under which people who bring legal cases about the exercise of functions under the 1983 Act have generally to show that the person they are complaining about acted in bad faith or without reasonable care. They also generally have to obtain permission from the High Court before bringing proceedings (or, in a criminal case, the consent of the Director of Public Prosecutions). Those rules did not apply to cases against the Secretary of State, SHAs or other NHS bodies, and the effect of the amendment is that they would similarly not apply to cases against people exercising approval functions by agreement with the Secretary of State under section 12ZA. The same is true in respect of cases against the NHS Commissioning Board and Special Health Authorities as a result of a separate amendment made by this Act.
442. Nothing in this section affects the exercise of approval functions under the 1983 Act in Wales.

### **Section 39 - Discharge of patients**

443. This section amends sections 23 and 24 of the 1983 Act, which deal with the discharge of patients from detention, supervised community treatment and other compulsory measures under that Act. It removes certain powers from the Secretary of State, the Welsh Ministers and some NHS bodies in respect of patients of independent hospitals.
444. [Section 23](#) previously gave the Secretary of State the power to discharge from detention people who are detained in registered establishments (which, in effect, means independent hospitals). This power had its roots in long-abolished arrangements under which the Secretary of State was responsible for registering and regulating independent hospitals. The Secretary of State also had the power to discharge from supervised community treatment patients whose responsible hospital is a registered establishment. In both cases, the Secretary of State's power was exercisable in relation to Wales by the Welsh Ministers. Section 23 similarly allowed NHS trusts, NHS foundation trusts, Local Health Boards (in Wales), Special Health Authorities and PCTs to discharge patients of registered establishments from detention or supervised community treatment, but only where the NHS body concerned had commissioned the service the patient was receiving from that registered establishment.
445. The section removed all these powers from the Secretary of State, the Welsh Ministers and these various NHS bodies. It does not affect the powers under section 23 of other people (including the patient's responsible clinician and the managers of the registered establishment itself) to discharge patients. Nor does it affect patients' rights under Part 5 of the 1983 Act to apply to an independent Tribunal for their discharge. The section also made a number of consequential changes to the 1983 Act and other legislation to reflect the abolition of these discharge powers.

### **Section 40 - After-care**

446. This section amends section 117 of the 1983 Act. That section places a duty on PCTs (in England), Local Health Boards (in Wales) and local social services authorities (in both England and Wales) to provide after-care for people who have been detained in hospital for treatment for mental disorder under the Act. They must provide such after-care, in co-operation with relevant voluntary agencies, until such time as they are satisfied that the person is no longer in need of such services, or (where applicable) for at least as long as the person remains on supervised community treatment under the Act.
447. [Section 117](#) is a free-standing duty. Case-law<sup>3</sup> has established that after-care services required by this duty are provided under section 117 itself, not under the legislation

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3 *R. v Manchester City Council Ex p. Stennett* [2002] UKHL 34; [2002] 4 All ER 124

under which most social services and NHS services are provided. Case-law<sup>4</sup> has also established that, in most cases, the duty falls on the local social services authority and PCT (or Local Health Board) for the area in which the person was resident before being detained (whether or not that body is responsible for other aspects of the person's health or social care.). If there is no such area, the duty falls on the authorities for the area to which the person is sent on leaving hospital.

448. The main effect of this section is to transfer the duty on PCTs under section 117 to CCGs. As now, the duty will fall in the first place on the CCG for the area in which the person was resident before being detained. However, the new section 117(2E) inserted into the 1983 Act by this section would allow the Secretary of State to make regulations conferring the duty instead on another CCG or on the NHS Commissioning Board.
449. These regulations could, for example, be used to ensure that the CCG responsible for section 117 after-care for a patient was the same CCG that was responsible for commissioning other health services for the person in question under the NHS Act. (At present, the PCT responsible for section 117 after-care is not always the same as the PCT responsible for other aspects of a patient's health care, especially where the patient moves while already in receipt of after-care). These regulations could also be used to deal with cases where a person's after-care needs included services of the type that the NHS Commissioning Board, rather than CCGs, was responsible for commissioning under provisions earlier in this Act. In those cases, the regulations could say that it was the Board, rather than any individual CCG, which was responsible for commissioning such services as part of the person's after-care under section 117.
450. The effect of new subsection (2D) is to make clear that the duty on a CCG (or the NHS Commissioning Board) is to commission, rather than provide, after-care.
451. The section also includes a number of technical changes to other provisions.

#### ***Section 41 - Provision of pocket money for in-patients***

452. This section abolishes the power of the Secretary of State in section 122 of the 1983 Act to make payments to in-patients in mental health hospitals in respect of their occasional personal expenses, where they cannot meet those expenses themselves. In England, this power was previously delegated to PCTs by means of regulations. It is primarily used to provide small personal allowances for patients who have been transferred from prison to hospital under section 47 of the 1983 Act and who are therefore not eligible for social security benefits.
453. CCGs and the NHS Commissioning Board would still be able to arrange for such payments to be made to NHS patients under the NHS Act. And the Secretary of State would be able to make regulations requiring such payments to be made, using the power to make "standing rules" introduced in section 20.
454. The section also removes this power entirely in Scotland (where it has no practical significance). This change does not affect the powers of the Scottish Ministers to make pocket-money payments under Scottish mental health legislation. This section does not affect the position in Wales, where the Secretary of State's powers are exercisable by the Welsh Ministers. Indeed, it amends section 122 to confer the power directly on the Welsh Ministers.

#### ***Section 42 - Transfers to and from special hospitals***

455. This section abolishes the power of the Secretary of State (and the power of Welsh Ministers) under section 123 of the Act to direct that a patient detained in a high secure psychiatric hospital be transferred to another high secure hospital, or to any other hospital. This power was rarely used. This change would not affect the power of

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<sup>4</sup> *R. v Mental Health Tribunal, Ex p. Hall* [1999] 3 All ER 132

the managers of high secure hospitals themselves to arrange the transfer of patients by agreement with the managers of the receiving hospital.

456. The section also removes references to section 123 elsewhere in the 1983 Act and in the Health Act 1999. But it says that the repeal of section 123 does not affect the validity of the detention of anyone who has previously been transferred under section 123, nor prevent the recapture of anyone who escaped from custody while being transferred under that section.

### ***Section 43 - Independent mental health advocates***

457. This section transfers from the Secretary of State to local authorities the duty to arrange independent mental health advocate (IMHA) services. IMHAs provide help and support for people subject to the 1983 Act.
458. Previously, section 130A of the 1983 Act placed a duty on the Secretary of State to make arrangements to enable qualifying patients to have access to an IMHA. Qualifying patients are defined in section 130C. They include most of those liable to be detained under the 1983 Act, all patients on supervised community treatment, all patients subject to guardianship and a few others who are being considered for certain specified treatments for a mental disorder.
459. The Secretary of State previously delegated the duty to commission IMHA services to PCTs, by means of directions under section 7 of the NHS Act. This section places the duty on local social services authorities instead. It inserts a new subsection into section 130C of the 1983 Act setting out the rules for deciding which local social services authority is responsible for which qualifying patients.
460. The section also amends Schedule 1 to the Local Authority Social Services Act 1970 to make local social services authorities' new role in respect of IMHAs a social services function for the purposes of that Act. In particular, that allows the Secretary of State to issue directions and statutory guidance to local social services authorities about the exercise of this function.
461. IMHA arrangements in Wales are a devolved matter, and in 2010 the National Assembly for Wales passed legislation amending the provisions in the 1983 Act which deal with IMHA services in Wales. In doing so, the Assembly also made some consequential amendments to the provisions as they apply in England. The changes made by this section are to sections 130A and 130C of the 1983 Act as amended by the Mental Health (Wales) Measure 2010, which received Royal Approval on 15 December 2010.

### ***Section 44 - Patients' correspondence***

462. This section amends section 134 of the 1983 Act, which deals with the correspondence of patients detained in hospital under that Act. Section 134(1)(a) allows the managers of a hospital to refuse to put a detained patient's correspondence in the post if the intended recipient has made a written request not to receive correspondence from the patient in question. It amends that section so that it is no longer possible for such a request to be made to the Secretary of State (or, therefore, to the Welsh Ministers). It continues to be possible for requests to be made to the managers of the hospital in which the patient is detained or to the approved clinician in overall charge of the patient's case.
463. Although the Department of Health cannot recall having received any such request in recent years, the section ensures that any request made to the Secretary of State (or the Welsh Ministers) before this change takes effect remains valid.

### ***Section 45 - Notification of hospitals having arrangements for special cases***

464. This section amends section 140 of the 1983 Act, which requires PCTs to notify local social services authorities in their area of the hospitals at which arrangements are

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in place for mental health patients to be admitted urgently, or for the provision of accommodation designed to be especially suitable for mental health patients under the age of 18.

465. This section transfers that duty from PCTs to CCGs.