

Reforming Mental Health Law

Scottish Executive Newsletter 2 – November 2003

Welcome to the second edition of the Scottish Executive's newsletter, 'Reforming Mental Health Law'.

The purpose of this newsletter is to keep you in touch with work to implement the new Mental Health (Care and Treatment) (Scotland) Act 2003, which received Royal Assent on 25 April.

In the first edition of this newsletter we asked for your views on when the Act should come into effect.

From the formal responses we received and from our continuing discussions about the Act, it appears that April 2005 would be acceptable to most people. Ministers have now agreed the early introduction from October 2004 of the provisions enabling appointment of Named Person and drawing up Advance Statements to allow users to prepare these in time for introduction of the Act. All other provisions will come into effect on 4 April 2005 except the right of appeal against excessive security will be implemented on 1 May 2006.

This newsletter

- announces the publication of 'An Introduction to the Act';
- gives more detail about the work the Scottish Executive is doing or supporting to implement the Act; and
- gives answers to some of the questions we are frequently asked about the Act.

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An Introduction to the Act

We have prepared a booklet entitled 'An Introduction to the Act', which sets out the main features of the Act and describes some of its provisions. It details the roles of the main professionals and highlights the duties on Health Boards and local authorities. The guide also includes a glossary of some of the commonly-used terms in the Act.

This booklet is being issued to everyone on our main distribution list and is being placed on the Mental Health Law section of the Scottish Executive website.

If you would like a paper copy please contact us by e-mail at mentalhealthlaw@scotland.gsi.gov.uk or by phone to Ryan Stewart on 0131 244 2591.



Implementing the new Act

There are a number of strands to implementing the Act:

- completing the legislative framework;
- making arrangements for guidance, training and information;
- making arrangements for monitoring, assessment and research;
- supporting the development of services; and
- establishing the Tribunal system.

Completing the legislative framework

Some provisions of the Act give Ministers powers to make 'regulations'. Some of the powers are there to allow for flexibility in the light of experience. But some are there to allow Ministers to fill in the legal detail on a particular subject, where it would not have been necessary or appropriate to have it in primary legislation. An example of this is cross-border transfers.

It will also be necessary to consider in detail how orders which are in effect under the 1984 Act and the 1995 Act will be dealt with on introduction of the 2003 Act.

- We will develop and consult on statements of policy on which draft Regulations will be based. We will also consult on transitional provision, that is how existing orders under the 1984 Act will be dealt with when the 2003 Act is introduced.

Guidance, training and information

It is vital that all those who play a part in the system of mental health law have a clear understanding of what the Act provides, and how it is intended to work. Those who are discharging functions under the Act, and those who more generally provide services to people with mental health problems, need to be clear about what their roles and responsibilities are and how they should carry them out. Users and carers need to know what their rights are, and what support exists to help make sure those rights are observed.

- We will develop and consult on a 'Code of Practice' for the Act. This will primarily be aimed at professionals discharging functions under the Act, but will be accessible to others. The Code will both explain what the Act provides, and set out how professionals should discharge functions under the Act in accordance with the principles of the Act. Over time, it will serve as a ongoing vehicle for disseminating good practice in relation to the Act.
- As part of this work, we will develop and consult on statutory forms in relation to the various procedures under the Act. The forms themselves will be designed so as to assist and guide professional practice.
- We will work with interested parties including professional and training bodies to develop a strategy for training for professionals who will be discharging functions under the Act. We will support the development of a range of training materials to support the delivery of this training to professionals and others who are involved in the operation of the Act.
- We will work with a range of organisations to develop and disseminate a range of materials providing information for service users and carers about the Act, and their rights under it to increase awareness of the Act in the months before its implementation.

Monitoring, assessment and research

Monitoring, assessment and research – or, to put it another way, knowing what is going on, and understanding why – is critical to the ongoing success of Scotland’s system of mental health law. If the system is to improve itself continually, it needs to know how it is working. Moreover, our assessment of how the system is working needs to be based on a positive view of what the system is trying to achieve, including the extent to which the principles set out in the Act are being observed. The Mental Welfare Commission will have a key role to play in future arrangements for monitoring, assessment and research, as will the Information Services Division of the Common Services Agency. We will work closely with both these organisations, as well as others with an interest in the subject.

- Working with a range of organisations, we will develop joint arrangements for the future monitoring and assessment of and research into the operation of mental health law in Scotland.
- We will make sure that statutory forms developed for use under the Act provide the information necessary to monitor and assess the operation of mental health law, subject to constraints of confidentiality and data protection.
- We will develop an ‘assessment framework’ for mental health law later this year. This framework will set out the roles and responsibilities of the Scottish Executive and its monitoring and assessment partners, allowing us to develop together a strategic approach to mental health data collection, analysis and feedback, with the aim of improving outcomes.
- We will develop and publish an ongoing programme of research into mental health law. We are analysing the responses to the public consultation exercise on the research priorities and will be publishing the research programme later this year.

Supporting service development

Those providing mental health services, and those who plan and commission the provision of such services, are crucial to the effective operation of mental health law. The Act has a number of implications for the delivery of services, both in terms of the pattern of service provision, and in terms of the increased workload that services will face.

An assessment of current mental health services has been carried out under the leadership of Dr Sandra Grant. Dr Grant and her team have visited widely and gathered a lot of information in carrying out this assessment. It has therefore taken a little longer to produce her report than originally envisaged. However, Dr Grant will be providing Ministers with an interim report shortly.

Establishing the Tribunal system

The new Mental Health Tribunal for Scotland will be an extremely significant addition to the system of mental health law in Scotland. Collectively, the members of the Tribunal will need to be expert on both mental health law and on the provision of services for people with mental disorder. The administrative operation of the Tribunal will also need to be highly efficient and effective, to deal with its anticipated caseload of around 3,000 cases each year. Each case will need to be dealt with promptly, and with significant and meaningful participation of those with an interest in the case through hearings conducted on as local a basis as possible.

- We will complete the development an ‘Operational Plan’ for the Tribunal, which will serve as a blueprint for its practical establishment.
- We will establish a location for the national office of the Tribunal and recruit its administrative support staff.
- We will develop and consult on draft Rules of Procedure for the Tribunal.
- We will appoint a President and members of the Tribunal.

Information on the current situation with regard to all these strands of work is, and will continue to be, made available on the Executive website (see Keeping In Touch, on the last page).

Frequently Asked Questions – and their answers!

We are often asked questions about the operation of the new Act and its impact on services users and carers and professionals. We have set out here some of the most frequently asked questions with their answers.

We are happy to make this a regular feature – so if you have general questions on the Act or its implementation e-mail them to us and we will answer them in forthcoming newsletters (as well as sending you a personal response).

Is it likely that more people will be detained against their will under the new Act than under the 1984 Act?

This is impossible to predict. However, the new Act puts in place a range of measures to protect the patient's rights and interests. For example:

- the criteria which must be met before someone can be detained have been set out with greater precision and clarity;
- a 28-day short-term detention certificate can only be granted if a mental health officer has given his agreement; and
- the patient's named person and advocate have been given a much greater role in making sure the patient's voice is heard and listened to at all times.

What is a compulsory treatment order (CTO)?

This replaces what became known as a 'section 18' under the 1984 Act. Like a section 18, it lasts for 6 months unless extended.

Who grants a CTO?

A CTO can only be granted by the Mental Health Tribunal. The sheriff court will no longer be the forum in which applications for long-term compulsion are decided.

What does a CTO authorise?

A person who is subject to a compulsory treatment order can be detained in hospital for treatment. Alternatively, a person subject to a CTO can remain living in the community but be obliged to abide by certain conditions set out in the order: for example, they could be obliged to live at a particular address or to attend a particular place for treatment at a particular time every week.

Are the criteria which must be met before a CTO can be granted different from those under the 1984 Act?

Yes. The criteria for detention are set out with greater clarity and precision in the new Act. The criteria which must be met before a CTO can be granted are that:

- the patient has a mental disorder;
- because of that mental disorder, the patient's ability to make decisions about the medical treatment for that mental disorder is significantly impaired;
- medical treatment is available which would be likely to prevent the disorder worsening or to alleviate the symptoms of the disorder;
- there would be a significant risk to the patient's health, safety or welfare or that of another person if that medical treatment were not provided; and
- the making of the compulsory treatment order is necessary (i.e. the treatment cannot be provided with the agreement of the patient).

Are the criteria for the compulsory detention of a mentally disordered offender the same as those for a patient who is detained under a CTO?

No. The forensic criteria differ in one respect – the patient's ability to make decisions about the proposed treatment does not need to be significantly impaired.

What will happen to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 when the new Act comes into force?

It will be repealed but its effect has been retained in the new Act – the Tribunal will not be able to instruct the discharge of a restricted patient whose mental disorder means that they pose a serious risk to public safety.

Where is the principle of reciprocity in the new Act?

The principle of reciprocity appears under several guises in the Act. For example, it is described directly in section 1(6) even though it is not mentioned by name. It is also given effect in other ways. For example, an application for a compulsory treatment order must be accompanied by a 'proposed care plan' which sets out the care, treatment and services which it is proposed to provide to the patient if the compulsory treatment order is granted. Furthermore, if the Tribunal does grant the CTO, then it can explicitly state that certain services, forms of treatments, etc. are essential to the patient's care. These essential items are called 'recorded matters'. If it turns out that one or more of these recorded matters is not being provided to the patient, the patient's RMO or the Mental Welfare Commission can refer the patient's case back to the Tribunal. At this point, a new hearing may be convened.

Why are there no provisions in the Act relating to 'leave of absence'?

There are provisions relating to leave of absence. However, leave of absence is now referred to as suspension of detention. Emergency and short-term detention certificates, as well as compulsory treatment orders, can all be suspended temporarily (see sections 41, 53, 127).

What is a named person for?

Any person with mental disorder whether treated informally or compulsorily, whether in hospital or in the community – including mentally disordered offenders – is entitled to nominate a named person. The named person is chosen by the patient or appointed by the Tribunal and is consulted, notified and given information about the patient at certain times. The named person also has rights to make applications or to appeal to the Tribunal on the patient's behalf, to consent to certain medical examinations being carried out, to request an assessment of needs by a local authority or health board, and to give their view as to whether a cross-border transfer is in the patient's best interests. In most situations the named person will replace the nearest relative.

Can anyone have an advocate?

Yes. The Act requires Local Authorities and health boards to ensure all people with a mental disorder can access independent advocacy services. An advocate helps a person speak up and express their views on their treatment and care.

Can I have a say about my medical care if I needed compulsory treatment in future?

Yes. You can make an advance statement in writing when you are well setting out how you would prefer to be treated (or not treated) if you were to become ill later. The Tribunal and any doctor treating you must have regard to the advance statement. If the doctor's decision conflicts with what is expressed in the advance statement there is a requirement to record the reasons for making the decision in writing and to copy them to certain parties as well as placing that decision in the patient's medical records. This applies to the Tribunal also. You should be kept informed of, and consulted about, treatment decisions which affect you. Even if you have not made an advance statement the doctor and other people caring for you must have regard to your views and those of your named person and any carer when exercising powers under the Act.

Can I be given ECT without my consent?

Electro-convulsive therapy, neuro-surgery for mental disorder and other medical treatments have special safeguards under the Act. If you are able to take a treatment decision (capable) you must consent in writing before the treatment can be given. If you are capable and refuse ECT then you cannot be given it, even in an emergency. If you are unable to make a treatment decision due to your illness, an independent doctor must examine you and agree that the treatment would be to your benefit.

Will I have to respond to out-of-hours emergencies under the new Act?

The new Act contains similar provisions to the 1984 Act for emergency and short-term detention but with some important additional safeguards for patients. However, the practical operation of these is unlikely to differ from the situation under the current Act.

Where will the Mental Health Tribunal for Scotland be located?

There will be a national office, with an announcement on its location being made by Scottish Ministers by the end of 2003. The announcement of the location of the national office will allow us to recruit the Tribunal President and staff.

Where will hearings be held?

Hearings will be held in the hospital where the person, subject to the Act, is an in-patient. If the person is not an in-patient of a hospital the hearing will take place as near as possible to where that person resides.

What type of accommodation will be used for hearings?

The Act places a duty on Health Boards, State Hospitals Board for Scotland and Local Authorities to provide accommodation for the holding of hearings by the Tribunal where reasonably practicable to do so.

Will there be regional offices?

A decision on the final operational and administrative structure has not yet been made. But hearings will be heard as close to the applicant's location as possible and not in the Tribunal's Offices.

Who will sit at a Tribunal Hearing?

There will be three panels consisting of legal, medical, and general members. Each hearing will consist of a legal member, who will be the convener, a medical member and a general member. The exception to this will be hearings involving restricted patients. In restricted patient cases the convener will be selected from a separate panel consisting of sheriffs.

Keeping in Touch

To comment on this newsletter, to send us a new question for our question-and-answer page, or any other aspect of implementing the new Act, please contact:

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To order paper copies of this newsletter or the new document, 'An Introduction to the Act', please contact us by e-mail at mentalhealthlaw@scotland.gsi.gov.uk or by phone to Ryan Stewart on 0131 244 2591.

What's next?

Initial guidance for mental health service providers will confirm the target date for coming-into-effect, and set out milestones for the planning and development of services up to that date. More detailed guidance will follow the first stage report of the national assessment led by Dr Sandra Grant.

Explanatory Notes on the Act will be formally published by TSO later this year.