

A Consultation on draft proposals for a Mental Health (Scotland) Bill

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Foreword by the Minister for Public Health, Michael Matheson, MSP

The Mental Health (Care and Treatment) (Scotland) Act 2003 is well regarded by service users and their carers in Scotland and by mental health professionals.

This consultation paper seeks views on proposals for a draft Mental Health Bill. This draft Bill brings forward changes to improve the operation of the 2003 Act – notably in relation to named persons, advance statements, medical matters and suspension of detention. In addition the draft Bill makes provision for a Victim Notification Scheme for victims of Mentally Disordered Offenders.

This consultation runs until **25 March 2014** and at the end of that period we will carefully review the responses received. We plan to introduce a draft Bill to the Scottish Parliament before the 2014 summer recess, which subject to Parliamentary scrutiny, will result in a more efficient and stream-lined system for service users and practitioners alike.

A handwritten signature in black ink, appearing to read 'Michael Matheson'.

Michael Matheson MSP
Minister for Public Health

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Chapter 1 Introduction

1. The Mental Health (Care and Treatment) (Scotland) Act 2003 (the “2003 Act”) came into force in October 2005. Whilst it has been generally agreed that the 2003 Act is a significant advance on the previous Mental Health (Scotland) Act 1984, it became clear from the on-going monitoring to which the Act was subject that there were some aspects of the legislation which were not operating as efficiently and effectively as had been intended.

2. The Scottish Government (SG) instituted a limited review of the civil provisions of the 2003 Act under the chairmanship of Professor Jim McManus¹ and subsequently sought views on the Review Group’s recommendations through a public consultation exercise. The responses to that consultation helped inform the SG’s formal response² to the McManus Report which in turn has informed this consultation paper and draft Bill.

3. In addition to the Review Group recommendations, a number of matters relating to how the legislation is working in practice have been brought to the SG’s attention by service users and practitioners. The SG therefore proposes to bring forward primary legislation to amend provisions within the 2003 Act and some related provisions in the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”). These amendments will relate to advance statements, named persons, medical matters and suspension of detention, as recommended by the Review Group, as well as resolving a number of minor technical matters, raised by service users and practitioners.

4. Following a public consultation³, the SG has decided to introduce a notification scheme for victims of mentally disordered offenders (MDOs). As this will require primary legislation the SG intends to use the draft Mental Health Bill as a vehicle to implement its proposals.

5. The purpose of the attached (Annex A) draft Mental Health Bill is to bring forward amending legislation to address the matters referred to above and which are discussed in more detail in Chapters 2 to 4 of this document. The Bill’s overarching aim is to ensure that people with a mental health disorder can access effective treatment quickly and easily. Subject to the Bill successfully completing the parliamentary process, it will provide an improved legislative framework to help treat and care for people with a mental disorder whilst at the same time increasing the efficiency and effectiveness of existing procedures and processes for both the patient and practitioner alike.

¹ <http://www.scotland.gov.uk/Publications/2009/08/07143830/0>

² <http://www.scotland.gov.uk/Resource/Doc/1094/0105288.pdf>

³ <http://www.scotland.gov.uk/Publications/2010/08/27104119/0>

Chapter 2 Mental Health (Care and Treatment) (Scotland) Act 2003

Introduction

6. Part 1 of the draft Bill makes provision for amendments to the 2003 Act to implement the changes the SG said it would bring forward in relation to the advance statements, named persons, medical matters and suspension of detention provisions. The remaining draft provisions within Part 1 deal with minor technical and drafting amendments which have been drawn to the SG's attention by stakeholders (see "other amendments" below).

Advance Statements

7. An advance statement sets out the way a person wishes to be treated, or not treated, for mental disorder in the event of becoming mentally unwell and unable to make decisions about treatment.

8. Two amendments are being proposed to existing provision. Firstly a duty is being placed on Health Boards to ensure that where they receive an advance statement this must be placed in the person's medical records and a copy must be sent to the Mental Welfare Commission (the "Commission"). Secondly, the Commission will be required to maintain a central register of advance statements which will be accessible by certain persons authorised by, or acting in connection with, the person who made the statement.

Question 1: Do you have any comments on the proposed amendments to the Advance Statement provisions?

Named Person

9. The statutory framework for a named person is set out at sections 250-258 of the 2003 Act. These sections deal with appointing or identifying a named person to support and represent the interests of a patient subject to proceedings under the 2003 Act. The SG intends to bring forward a number of amendments to these provisions.

10. The SG considers that a service user should have a named person *only* if they wish to have one. Provision is therefore made in the draft Bill to allow a person to make a written and witnessed declaration that they do not wish to have a named person appointed. The SG believes that an individual should give their written consent to acting as a named person and that the giving of this consent should be witnessed. This will enable the nominated person to discuss matters with the service user and obtain information about the role and responsibilities of a named person prior to their accepting the nomination.

11. Concerns have been expressed about the automatic entitlement of a named person to be involved in Tribunal and Court hearings relating to a patient. Provision is made in the draft Bill such that a named person will need to seek leave from the Tribunal *before* they can make certain applications to the Tribunal. Separate amendments will be made, through secondary legislation, to the Tribunal Rules

covering matters such as: the removal of the named person's automatic right to be entered as a party to any proceedings involving the patient; the provision of papers (including confidential information on the patient) to a named person or third party in relation to any hearing. A separate consultation on draft amending regulations will issue next year.

12. Section 257 (*Named person: Tribunal powers*) gives the Tribunal powers to make certain orders about named persons. Application to appoint a named person can be made to the Tribunal under section 255 and where such an application is made, it is open to the Tribunal to make an order appointing a person specified in the order as a patient's named person. The Tribunal has intimated to the SG that it has difficulty in such cases in identifying a suitable individual to act as the named person as the Tribunal has no information to hand to assist it with this task.

13. As mental health officers (MHOs) are already required under the 2003 Act to take steps to establish the identity and/or suitability of any named person, the SG considers that the MHO would be best placed to provide the Tribunal with information to assist the Tribunal in coming to a decision under section 257. The draft Bill provides for this.

Question 2: Do you have any comments on the proposed amendments to the Named Person provisions?

Medical matters

Medical examination and CTOs

14. The Act currently requires that 2 medical reports accompany the application to a Tribunal by a MHO for a Compulsory Treatment Order (CTO). Each medical examination must be carried out by an "approved medical practitioner" (AMP) except that a patient's GP is permitted to carry out the second medical examination even although not an AMP. Several problems have been identified with the provision of medical reports for applications for CTOs. These relate to the involvement of GPs, perceptions of a lack of independence between the two reports and of perceived conflicts of interest.

15. The SG proposes moving to a new system for the granting of a CTO. One medical report will require to be obtained from an AMP and the patient's GP will be able to offer a second report commenting on the report prepared by the AMP. If no GP can be identified then the patient would retain the right to instruct an independent medical report as a protection. In the scenario where there has been no information provided by the patient's GP and no independent medical report instructed by the patient then the Tribunal could instruct an independent medical report using existing powers. An MHO report will continue to be required. Provision has been made in the draft Bill to reflect this policy intention.

Question 3: Do you have any comments on the proposed amendments to the medical examination and compulsory treatment order provisions?

Suspension of detention

16. Section 127 (*Suspension of measure authorising detention*) of the 2003 Act provides that where a patient is subject to a CTO that authorises detention in hospital, the responsible medical officer (RMO) can grant a certificate suspending that detention for up to 6 months. Sub-section 127(2) places a limit on the maximum amount of time for which a RMO may grant a suspension certificate for. In effect, this limits suspension to no more than 9 months in any 12 month period.

17. The SG considers that suspension of detention is an essential tool in the treatment of MDOs. It allows patients to attend Court hearings or clinical appointments and it facilitates the gradual testing out of a patient's response to increasing freedoms and the assessment of risk associated with this and their eventual return to the community. However, concerns have been raised that the application of the 9 month limit for allowing periods of suspension is arbitrary, complicated and difficult to operate in practice. To provide the RMO with greater flexibility and to mitigate against any potential disruption to a patient's rehabilitation, the SG proposes removing the 9 month restriction in sub-section 127(2).

18. Part 13 of the 2003 Act makes provision for a patient's RMO to grant certificates suspending detention authorised by certain orders or directions in the case of MDOs for a period not exceeding 3 months. Section 221 applies to patients subject to an Assessment Order (AO). Section 224 applies to patients subject to a Treatment Order (TO), an Interim Compulsion Order (ICO), a Compulsion Order and Restriction Order (CORO), a Hospital Direction (HD) and a Transfer for Treatment to Direction (TTD). The SG proposes to add a Temporary Compulsion Order (TCO) to this list of orders.

19. Currently, these certificates suspending detention can only be granted by the RMO with the consent of the Scottish Ministers. The SG proposes that in the case of AOs, TOs, ICOs, and now TCOs the prior consent of the Scottish Ministers will no longer be required in two specific circumstances. These are: to enable a patient to attend a court hearing or a necessary medical (including dental) appointment.

20. The overall limit of 9 months suspension of detention in any 12 month period matter discussed above in relation to section 127 is also of relevance in relation to section 224 and the draft Bill amends sub-section 224(4) accordingly.

Question 4: Do you have any comments on the proposed amendments to the suspension of detention provisions?

Information about extending a CTO

21. The SG considers there should be a requirement, to submit a report to the Tribunal, placed on MHOs in cases where the RMO makes a determination under section 86 (*Responsible medical officer's duty to extend order*).

22. Currently, where an RMO notifies an MHO, as they are required to do under the legislation, that they intend to make a section 86 determination, the MHO requires to carry out the duties set out at section 85 (*Mental Health Officers duties*:

extension of order). These include giving a view to the RMO as to whether or not they agree with the proposed extension and setting out the reasons for reaching such a view. When the RMO, having considered the views of the MHO, decides to make a determination under section 86 extending the CTO, the RMO must prepare a record for the Tribunal and notify the relevant parties, all as set out in section 87 (*Determination extending order: notification etc*).

23. The draft Bill therefore provides that the MHO, on receipt of the notification of the section 86 determination and the copy of the report prepared by the RMO under section 87, must submit a report to the Tribunal containing the information listed at new section 87A(4) in the draft Bill.

Question 5: Do you have any comments on the proposed amendment requiring a MHO to submit a written report to the Mental Health Tribunal

Emergency, short-term and temporary steps

24. Section 36 of the 2003 Act provides for the granting of an Emergency Detention Certificate (EDC). Any medical practitioner may grant an EDC if the conditions set out at sub-section (7) are met. Before granting an EDC, the medical practitioner must examine the patient. A patient cannot be detained under emergency procedures if, immediately before the examination is carried out, the patient was detained in hospital under any of the authorisations listed in sub-section (2) (e.g. an extension certificate).

25. The Commission has raised with the SG whether the list of specified measures in sub-section 36(2) should be extended to include a reference to sub-section 113(5). Section 113 applies to patients who fail to comply with any of the measures specified in a community-based CTO or community-based interim CTO. The patient may be taken into custody and conveyed to a hospital where the patient may be detained for a period of up to 72 hours. A similar scenario arises in relation to Short Term Detention Certificates (STDCs) and so provision has been made to amend sub-sections 36(2) and 44(2) respectively by including a reference to sub-section 113(5).

26. Section 38 (*Duties on hospital managers: examination, notification etc*) applies where a patient is detained in hospital under the authority of an EDC granted under sub-section 36(1). Sub-section 38(3)(a) requires the managers of the hospital, within 12 hours from when an EDC is granted to notify persons specified at sub-section (4) (e.g. the patient's nearest relative) that an EDC has been granted. Section 37 (*Notification by medical practitioner*) requires a medical practitioner who grants an EDC to give managers of the hospital in which the person is detained notice of certain matters. In turn there is a legislative requirement placed on the hospital managers that within 7 days of receiving the section 37 notice to, in turn, give notice of the matters in that notice to persons specified in sub-section 38(4).

27. The Commission has expressed concern to the SG that the second more detailed notification may, in some cases, be inappropriate as this notification can provide quite a lot of sensitive information including the reasons for the granting of an EDC. The SG agrees with the Commission on this matter and the draft Bill

enables hospital managers to exercise discretion as to whether notice in terms of sub-section 38(3)(b) is given to these specified persons.

28. The Commission has raised a further matter with the SG relating to the requirement placed on hospital managers to inform the Commission that an EDC has been granted. The Commission advise that this frequently amounts to no more than a message on an answer machine (given an EDC can be granted in the middle of the night) and this serves little useful purpose. In the interests of streamlining procedures, the SG agrees and the draft Bill repeals this provision.

29. Section 44 (*Short term detention in hospital*) of the 2003 Act sets out the procedure for granting a STDC. Amongst other matters this section provides that the AMP who grants the certificate is required to give the certificate to the managers of the hospital in which the patient is to be detained. Section 46 (*Hospital managers' duties: notification*) provides that the hospital managers must notify the patient, the patient's named person, any guardian of the patient and any welfare attorney of the patient of the granting of the certificate as soon as is practicable after the certificate has been produced. The SG considers that in addition to giving notice of the granting of a certificate to these persons the hospital managers should also send a copy of the STDC. The draft Bill provides for this

Question 6: Do you have any comments on the proposed changes to the emergency, short-term and temporary steps provisions?

Suspension of certain orders etc

30. Under the Act, the Tribunal can make an Interim CTO (ICTO) pending full determination of a CTO application. An ICTO can authorise any of the measures set out in sub-section 66(1) for a period of up to 28 days. The Tribunal can grant more than one interim order in respect of a patient provided the total period authorised by said orders does not exceed 56 days. Certain provisions in the 2003 Act apply to both CTOs and ICTOs, whilst others apply only to CTOs or ICTOs.

31. Section 43 sets out what happens where a patient is already subject to a CTO when an EDC is granted. Section 56 sets out what happens when a patient who is subject to a CTO is subsequently given a STDC. As it is possible for a patient subject to an ICTO to subsequently be given an EDC or a STDC, the SG considers that sections 43 and 56 should apply to both CTOs and ICTOs. The SG also considers that these sections should also apply to patients subject to Compulsion Orders (COs). The situation may arise where a community based CO is given but it becomes necessary to detain the person in hospital under a civil order to allow time to apply to the Tribunal to vary the terms of the CO. The draft Bill contains the necessary amending provisions.

Question 7: Do you have any comments on the proposed changes to the suspension of certain orders etc. provisions?

Removal and detention of patients

32. Sections 293 to 296 of the 2003 Act make provision to allow a MHO to apply to the sheriff for a removal order. Such an application can be made in relation to a person over 16 who has a mental disorder and where any of the circumstances in sub-section 293(2) apply (for example, the person lives alone and is unable to look after themselves). By virtue of subsection 293(3), a removal order authorises certain specified persons to enter premises for the purpose of removing the person subject to the order to a place of safety and to detain that person in that place for a period not exceeding 7 days.

33. Where a removal order is made, section 295 allows the person subject to the order, or any other person claiming an interest in the welfare of that person, to apply to the sheriff for an order recalling the removal order or varying it. The Commission has expressed its concern to the SG that it is not notified when such applications are made. This precludes the Commission from considering whether it should make a section 295 (*Recall of variation or removal order*) application to the sheriff. This absence of a duty to notify the Commission is at odds with other provisions in the 2003 Act dealing with similar situations. The draft Bill therefore imposes a duty on the MHO to notify the Commission.

34. The SG also proposes an amendment to section 299 (*Nurse's power to detain pending medical examination*) so that, where a patient is in hospital on an informal basis and is receiving treatment, the patient can be detained for up to three hours for the purpose of enabling the examination of the patient to be carried out by a medical practitioner. This three hour period of detention will apply regardless of whether a doctor is immediately available to carry out the examination.

Question 8: Do you have any comments on the proposed amendments to the removal and detention of patients provisions?

Timescales for referrals and disposals

35. Section 189 of the 2003 Act imposes a duty on the Scottish Ministers to refer a patient's case to the Tribunal two years after the making of the CORO if no reference or application has been made to the Tribunal during that period.

36. Difficulties can arise in some cases when considering whether a reference requires to be made to the Tribunal under this section if the two year time period is determined by taking account of dates when applications or references were made to the Tribunal during the preceding two years as opposed to the dates when these matters were determined by the Tribunal. For example, if a section 192 application is made by the patient the day before the anniversary of the CORO, but it takes 4 months before the Tribunal determines the case, a section 189 reference will require to be made 20 months later despite the Tribunal having reviewed the case within the previous two year period. The draft Bill provides that, in relation to section 189, the duty to refer only arises where no reference or application has been *determined* by the Tribunal in the preceding 2 year period.

37. A similar scenario arises in relation to section 213 which imposes a duty on the Scottish Ministers to refer a patient's case to the Tribunal two years after the making of the hospital direction or transfer for treatment direction if no reference or

application has been made to the Tribunal during that period. The draft Bill provides that, in relation to section 213, the duty of the reference only arises in certain specified circumstances.

38. In various places throughout the 2003 Act certain persons are given the right to apply to the Tribunal to have certain certificates or orders revoked. For example section 50 allows the patient to apply to the Tribunal for revocation of an STDC. Where such an application is made, section 50 does not require the Tribunal to hear the case within a set timescale. This is common to many similar provisions in the 2003 Act which give a right to certain persons to apply to the Tribunal for revocation of the certificate or order to which the patient is subject.

39. The SG proposes to make a number of amendments to the 2003 Act in relation to the various timescales within which the Tribunal is to hear certain applications. As can be seen from the draft Bill provisions, the framing of the timescales differs from case to case. Should the Tribunal fail to comply with a time limit in a case, it must hear that case without undue delay and also state in the record of the proceedings that the failure occurred *and* the reason for the failure.

Question 9: Do you have any comments on the proposed amendments to the timescales for referrals and disposals provisions?

Support and services

40. Section 261 covers the provision of assistance to patients with communication difficulties. Sub-section 261(2) requires that this assistance is provided to the patient at any Tribunal proceedings, any review of the patient's detention or any medical examination carried out to assess the patient's mental disorder. The SG proposes extending this provision so that in addition to applying to patients detained in hospital by virtue of the 2003 Act or the 1995 Act and to persons not detained in hospital but subject to an order or direction listed at sub-section (1)(b) (e.g. a CTO), the duty should also apply to persons who are subject to an application for such an order to be made, or in respect of whom an order or directions is being considered. The draft Bill provides for this.

41. Section 24 (*Provision of services for certain mothers with post-natal depression*) places a duty on Health Boards to provide services and accommodation for mothers with post-natal depression. The duty consists of providing such services and accommodation as are necessary to ensure the mother is able, if she wishes, to care for the child in hospital. The draft Bill makes provision to widen the scope of this provision by replacing the words "post-natal depression" with the words a "mental disorder". A consequential amendment is made to the title of the section.

Question 10: Do you agree with the proposed amendments to the support and services provisions? If you disagree please explain the reason(s) why.

Arrangements for treatment of prisoners

42. Prisoners who become mentally unwell whilst serving a sentence of imprisonment can be transferred to a hospital under the authority of a TTD made by

the Scottish Ministers under section 136 (*Transfer of prisoners for treatment for mental disorder*) of the 2003 Act. Cases may arise where the individual may still be in hospital at the expiry of their prison sentence and may need to remain subject to compulsory measures of treatment and care under the 2003 Act. In such cases a different order (a CTO) must be applied for to ensure continuity of treatment when the TTD ends.

43. The SG is proposing to make two amendments to the current legislative position. Firstly with respect to a CTO hearing, in the context of a patient subject to a TTD, to remove the obligation for the Convenor of the Tribunal Panel to be either the Tribunal President or to be selected from the Shrieval panel. This will lead to efficiencies in terms of some cost savings and the scheduling of cases. The second change relates to the process of applying for a CTO in cases where a TTD has been in place. The application and hearing for a CTO occur whilst the patient is still on a TTD. Currently the legislation does not provide that the Scottish Ministers must be notified of any such CTO application. The SG considers that would be helpful and the draft Bill makes provision for this.

44. Where it appears that a prisoner has a mental disorder and would benefit from being detained in hospital rather than prison, section 136 of the 2003 Act allows the Scottish Ministers to make a TTD authorising the transfer of the prisoner to a specified hospital, and their detention there so they can receive medical treatment. Currently there is no legislative requirement for the Scottish Ministers to consult an MHO when considering making such a direction.

45. MHOs are involved in other contexts where persons are made subject to a mental health order. For example, an MHO is heavily involved in the application process for a CTO. The SG therefore considers that the involvement of an MHO in the process for making a decision under section 136 would be beneficial and provision has been made for this in the draft Bill.

Cross border patients and absconding patients

46. Sections 289 (*Cross-border transfer: patient subject to requirement other than detention*) and 290 (*Cross-border transfer: patient subject to detention requirement or otherwise in hospital*) currently do not enable regulations made under these sections to authorise the reception of patients from out-with the UK. Provision is made in the draft Bill to extend these regulation making powers to authorise the reception of persons from other EU member states. The purpose of receiving such persons into Scotland is to provide treatment for mental disorder.

47. Sections 301 (*Absconding etc. by patients subject to CTO*) to 310 (*Regulations as to absconding by other patients*) of the 2003 Act make provision for the taking into custody and returning of patients who have absconded from the place where they are detained or required to reside. With the exception of EDCs granted under section 36 of the 2003 Act, all mental health orders made under the 2003 Act or the 1995 Act which authorise detention in hospital also allow for the giving of medical treatment in accordance with Part 16 of the 2003 Act.

48. However there is no provision to authorise the giving of treatment to patients who abscond from detention in another jurisdiction and are taken into custody in accordance with section 309 (*Patients from other jurisdictions*) of the 2003 Act and the 2008 regulations⁴. A situation could arise where a patient absconds in England and is taken into custody in Scotland and it may take a few days for the hospitals to organise transport for the return of the abscondee. If the patient was unwell and required treatment during this period, the hospital would have no authority to provide any treatment other than emergency treatment under section 243 (*Urgent medical treatment*) of the 2003 Act.

49. Sub-section 302(3) (*absconding etc, by other patients*) applies the provisions of section 303 (*taking into custody and return of absconding patients*) to patients who are subject to an ICTO, where they have absconded or otherwise failed to comply with a requirement or condition of the order or the certificate. The draft Bill amends sub-section 303(3) to ensure that a member of the staff from the establishment at which an ICTO patient is required to reside has the authority to take the person into custody and return them to the place where they absconded from.

Question 11: Do you agree with the proposed amendments to the arrangements for treatment of prisoners and cross border-and absconding patients provisions? If you disagree please explain the reason(s) why.

⁴ The Mental Health (Absconding Patients from Other Jurisdictions) (Scotland) Regulations 2008 SSI 2008/333

Chapter 3 Criminal cases

Introduction

50. Provision for the disposal by the criminal courts of persons with mental disorder involved in criminal proceedings is made principally by Part VI and section 200 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Part 8 of the 2003 Act amended the 1995 Act to provide for, amongst other matters, 2 new pre-sentencing disposals (assessment orders and treatment orders) and the replacement of interim hospital orders and hospital orders with interim compulsion orders and compulsion orders.

51. Since the commencement of the 2003 Act, a number of minor and technical refinements have been identified which will assist in providing greater clarity of meaning as well as improving operational efficiency and effectiveness. This chapter describes these technical amendments which are set out in Part 2 of the draft Bill,

Proposed Amendments

Making and effect of orders

52. The SG intends to make a minor amendment to sections 52B, 52C, 52D and, 52F which relate to AOs and to sections 52K, 52L 52M and 52P which relate to TOs. The word “remanded” will be inserted before the words “in custody” in each of these sections. The reason for these amendments is to clarify that – in the context of these sections - the references to ‘in custody’ do not include police custody.

53. The SG proposes to make a number of minor drafting amendments relating to the calculation of the time periods for AOs, TOs, ICOs, COs and HDs. For example, an assessment order authorises the removal to, and detention in, a specific hospital for up to 28 days with the 28 day period beginning on the day that the order is issued. The SG understands that this approach to calculating a period of detention, i.e. from the day of the relevant event, rather than the day after, appears to differ from the general rule applicable to the computation of time periods in the criminal court.

54. Scottish Court Service personnel have intimated that this can cause difficulties in the programming of criminal business particularly in the case of smaller courts and more remote courts where criminal business may only be heard one day a fortnight or less, but is held consistently on the same day of the week. To resolve this issue, clerks in smaller courts have to reduce the period of adjournment by one or more weeks to ensure the case calls again prior to the 28th day, which restricts the period of assessment available to the medical practitioners.

55. To assist in the smooth running of court business and to ensure that practitioners have the maximum time possible to carry out assessments or prepare reports etc. the SG proposes to bring forward a number of amendments to the provisions in the 1995 Act relating to the time periods applicable for these specific orders.

56. The SG proposes a more substantive amendment in relation to the extension of an AO. Where an AO is made by the Court under sections 52D or 52E of the 1995 Act, the period of detention in hospital authorised by the order is 28 days. Before the end of this period the patient's RMO must submit a report to the Court in accordance with section 52G. Currently, if following receipt of that report, the Court thinks that further time is required to complete the assessment then the Court may extend the AO, on one occasion only, for a further period of 7 days.

57. The SG considers that given the vagaries of situations that may be met within the criminal justice system and to ensure that the Court has all the relevant information it needs to deal with the person appropriately, an extension of 7 days does not provide sufficient flexibility. Provision is therefore made in the draft Bill for the Court to extend the AO for a period of up to 21 rather than 7 days, on one occasion only.

Question 12: Do you have any comments on any of the proposed amendments relating to the "making and effect of orders" provisions?

Variations of certain orders etc.

58. A court can make an ICO under section 53 of the 1995 Act after conviction and before final disposal. This order is intended to be used in cases where the offender may present a high risk to the public and a CORO or HD is in prospect. The assessment of the offender's mental disorder will include a full risk assessment, which would detail how any risk presented is related to the mental disorder and what final disposal may be appropriate.

59. It would be open to the RMO to state in their report to the Court that the treatment that the patient requires is no longer available in the hospital specified in the order and to recommend a change of hospital. However, it would appear that section 53B does not allow a Court to facilitate such a recommendation. The absence of a power to vary an ICO by way of changing the hospital specified in the order can lead to patients having to remain in a hospital which cannot manage them appropriately. This can lead to difficulties especially given that the period of detention authorised by an ICO is long compared to other orders (up to 12 months made up of individual periods of up to 12 weeks). To resolve this matter, the SG proposes to amend section 53B to provide the Court with a specific power to vary the hospital specified in the ICO.

60. The SG considers it prudent to make provision to enable an RMO, subject to the consent of the Scottish Ministers, to move a patient within the first seven days of that patient having been admitted to the hospital specified in the order. The order in question may be an AO, TO or an ICO. The rationale behind this is that the first seven day period is the time when a patient is being fully assessed. It may become apparent very quickly in that assessment process that the hospital specified in the order is not the most suitable environment for the patient to be in. Any delay, for example in court processes, in being able to move the patient could potentially be very damaging to both the patient's short and longer term health.

61. The SG does not envisage this power being used very often but when things go wrong for a patient at this stage of the process, experience has shown that the tendency is for them to go very wrong. The SG wishes to do what it can to mitigate against this happening, hence the need for the proposed new section 61A (*Transfer of person to different hospital*) set out in Part 2 of the draft Bill.

Question 13: Do you have any comments on the proposed amendments to the “variation of certain orders” provisions?

Related provisions in the 2003 Act

62. Section 157 places a duty on the RMO, where the officer intends to apply to the Tribunal for the extension and variation of a compulsion order, to notify the persons listed in that section before making the application. The Commission is one of the parties that the RMO requires to notify. Section 160 places a duty on the RMO to notify the persons listed in section 157 before making an application to the Tribunal for the variation of a compulsion order. The Commission has indicated to the SG that these are unnecessary notifications on which the Commission takes no action. The SG has agreed to make the necessary amendments to sections 157 and 160.

Chapter 4 Victims' Rights

Introduction

63. Sections 16 (*Victim's right to receive information concerning release etc. of offender*) and 17 (*Release on licence: right of victim to receive information and make representations*) of the Criminal Justice (Scotland) Act 2003 make statutory provision for the current Criminal Justice Victim Notification Scheme (CJVNS). This scheme does not extend to the victims of mentally disordered offenders (MDOs).

64. The SG publicly consulted⁵ on whether a VNS scheme akin to the CJVNS should be introduced for victims of MDOs. The majority of respondents were in favour of such a scheme being introduced. This chapter sets out the SG proposals in this regard and provision is made in the draft Bill to reflect said proposals.

General Approach

65. In essence the SG is proposing to introduce a statutory scheme allowing for the disclosure of information about MDOs to their victims or their relatives in certain circumstances. Provision will also be made to allow victims to make representations prior to any decision being taken with regard to the patient's discharge into the community or the conditions to which the patient will be subject to on discharge.

66. The approach taken to achieve this policy intent is to deal with offenders, convicted and sentenced to imprisonment in one scheme and to deal with offenders made subject to a compulsion order (whether or not a restriction order is also made) in another scheme.

67. The CJVNS presently covers offenders sentenced to imprisonment, but it loses track of them if they are made subject to an HD or TTD, and thereby enter the mental health system. The SG proposes extending the range of information to be given under the CJVNS so that the information under it includes information about offenders who, having been convicted and sentenced enter the mental health system. Part 3 of the draft Bill reflects this policy intention by containing a provision which amends section 16 of the Criminal Justice (Scotland) Act 2003.

68. The SG considers that extending the existing scheme in this manner, as opposed to having a completely separate scheme covering imprisoned offenders who enter the mental health system, means there will be no overlapping statutory requirement to give certain information about an offender. And a victim will not need to intimate a wish to receive information under two schemes if they want to keep track of an offender who moves from prison to hospital or hospital to prison.

69. The SG proposes that offenders subject to compulsion orders on indictment should be dealt with in a new scheme. As can be seen, from the draft Bill, provision is made for this by inserting a new section – section 16A *Right to receive information: offender subject to a compulsion order* – after section 16 of the Criminal Justice (Scotland) Act. 2003. Section 16 A mirrors some of the section 16 provisions.

⁵ <http://www.scotland.gov.uk/Publications/2010/08/27104119/0>

Question 14: Do you agree with the proposed approach for the notification element of this VNS? If not, please explain why not and please outline what your preferred approach would be.

70. The second element of this proposed VNS covers representations from victims. The SG's intention here is to ensure that any representations made relate to the conditions or measures which might be applied to the MDO on release or conditional discharge and how this might affect the victim. For example a requirement in a compulsion order to reside at a particular address.

71. Proposed new section 17B (*mentally – disordered offender: victim's right to make representations*) is to give effect to the policy intention to confer on a victim a right to make representations before certain decisions are taken. The SG proposes that "decision makers" be placed under a requirement to have regard to any representations received. Under certain provisions of the Mental Health Act and the Mental Health Tribunal Rules⁶, the Tribunal is already permitted to have regard to representations from certain people whom they consider to have an interest in the proceedings.

72. As the Mental Health Act already contains express requirements about matters that have to be taken into account Schedule 1 to the draft Bill builds into the Mental Health Act at various places, the requirements to have regard to victims' representations. As we are giving victims a specific right to make representations in relation to certain decisions relating to the MDO, we are minded to restrict the ability of victims to make representations via the existing general powers of the Tribunal in the Mental Health Act and the Tribunal Rules.

Question 15: Do you agree that victims should be prevented from making representations under the existing mental health legislative provisions once they have the right to do so under the proposed Victim Notification Scheme? Please provide reasons for your answer.

73. Proposed new section 17C (*Making representations under section 17B*) sets out how the representations may be made. New section 17C (*Right to information after section 17B decision*) sets out a victim's right to receive information on the decision made where they made representations.

Question 16: Do you agree with the proposed approach for the representation element of a Victim Notification Scheme relating to Mentally Disordered Offenders? If not, please explain why not and please outline what your preferred approach would be.

⁶ The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 SSI 2005/519

Chapter 5 Assessing Impact

Equality

74. The public sector equality duty requires the SG to pay due regard to the need to:

- eliminate discrimination, victimisation, harassment or other unlawful conduct that is prohibited under the Equality Act 2010;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a relevant protected characteristic.

75. These three requirements apply across the "protected characteristics" of age; disability; gender reassignment; pregnancy and maternity; race; religion and belief; sex and sexual orientation.

Question 17: Please tell us about any potential impacts, either positive or negative, you feel any of the proposals for the Bill may have on particular groups of people, with reference to the "protected characteristics" listed above.

76. The comments received will be used to complete a full Equality Impact Assessment and to determine if any further work in this area is needed.

Business and Regulation

77. The Business and Regulatory Impact Assessment analyses whether a policy is likely to increase or reduce the costs and burdens placed on businesses, the public sector and voluntary and community organisations.

Question 18: Please tell us about any potential costs or savings that may occur as a result of the proposals for the Bill, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.

Chapter 6 How to respond

Written comments

78. We are inviting written responses to this consultation paper by e-mail or by post by **25 March 2014**. Please send your response, along with the completed Respondent Information Form (see 'Handling your Response' below) by email to:

mentalhealthlaw@scotland.gsi.gov.uk

If need be, you can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

If you wish to send a hard copy of your response, please send it to:

John Williamson
Scottish Government Health Directorate
Mental Health and Protection of Rights Division
Mental Health Law Team
3-ER St Andrews House
Regent Road
Edinburgh
EH1 3DG

79. We would be grateful if you would use the consultation questionnaire provided or would clearly indicate in your response which questions or parts of this paper you are responding to, as this will aid our analysis of the responses received.

Handling your response

80. We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please ensure that you send a copy of your respondent information form see Chapter 7 with any responses so that we have your details and know if you are happy for your response to be made publicly available.

81. If you ask for your response not to be published, we will regard it as confidential and treat it accordingly. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps

82. If you tell us we can make your response public, we will put it in the Scottish Government Library and on the Scottish Government web pages. We will check all responses where agreement to publish has been given for any wording that might be harmful to others before putting them in the library or on the website. If you would like to see the responses please contact the Scottish Government Library on 0131

244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

83. The SG will consider its proposals for a draft Bill in light of the responses received to this consultation, and then, in the Summer 2014, introduce a Bill for the Scottish Parliament's consideration.

Comments and complaints

84. If you have any comments about how this consultation exercise has been conducted, please send them to:

Carol Sibbald
Head of Mental Health Law Team,
Mental Health and Protection of Rights Division,
Scottish Government,
Area 3-ER St Andrews House,
Regent Road,
Edinburgh EH1 3DG

Scottish Government consultations

85. This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at:

www.scotland.gov.uk/consultations

86. The Scottish Government has an e-mail alert system for consultations. This system, called SEconsult, allows individuals and organisations to register and receive a weekly email with details of all new consultations (including web links). SEconsult complements, but in no way replaces, Scottish Government distribution lists. It is designed to allow people with an interest to keep up to date with all Scottish Government consultation activity. You can register at SEconsult:

<http://www.scotland.gov.uk/consultations/seconsult.aspx>

Chapter 7 Respondent Information Form and a list of consultation questions

A list of all the **consultation questions** is provided below.

Question 1: Do you have any comments on the proposed amendments to the Advance Statement provisions? (Chapter 2)

Comment

Question 2: Do you have any comments on the proposed amendments to the Named Person provisions? (Chapter 2)

Comment

Question 3: Do you have any comments on the proposed amendments to the medical examination and compulsory treatment order provisions? (Chapter 2)

Comment

Question 4: Do you have any comments on the proposed amendments to the suspension of detention provisions? (Chapter 2)

Comment

Question 5: Do you have any comments on the proposed amendment requiring a MHO to submit a written report to the Mental Health Tribunal? (Chapter 2)

Comment

Question 6: Do you have any comments on the proposed changes to the emergency, short-term and temporary steps provisions? (Chapter 2)

Comment

Question 7: Do you have comments on the proposed changes to the suspension of certain orders etc. provisions? (Chapter 2)

Comment

Question 8: Do you have any comments on the proposed amendments to the removal and detention of patients provisions? (Chapter 2)

Comment

Question 9: Do you have any comments on the proposed amendments to the timescales for referrals and disposals provisions? (Chapter 2)

Comment

Question 10: Do you agree with the proposed amendments to the support and services provisions? If you disagree please explain the reason(s) why. (Chapter 2)

Comment

Question 11: Do you agree with the proposed amendments to the arrangements for treatment of prisoners and cross border-and absconding patients provisions? If you disagree please explain the reason(s) why. (Chapter 2)

Comment

Question 12: Do you have any comments on any of the proposed amendments relating to the “making and effect of orders” provisions? (Chapter 3)

Comment

Question 13: Do you have any comments on the proposed amendments to the “variation of certain orders” provisions? (Chapter 3)

Comment

Question 14: Do you agree with the proposed approach for the notification element of this VNS? If not, please explain why not and please outline what your preferred approach would be. (Chapter 4)

Question 15: Do you agree that victims should be prevented from making representations under the existing mental health legislative provisions once they have the right to do so under the proposed Victim Notification Scheme? Please provide reasons for your answer. (Chapter 4)

Comment

Question 16: Do you agree with the proposed approach for the representation element of a Victim Notification Scheme relating to Mentally Disordered Offenders? If not, please explain why not and please outline what your preferred approach would be. (Chapter 4)

Comment

Question 17: Please tell us about any potential impacts, either positive or negative, you feel any of the proposals for the Bill may have on particular groups of people, with reference to the "protected characteristics". (Chapter 5)

Comments:

Question 18: Please tell us about any potential costs or savings that may occur as a result of the proposals for the Bill, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible. (Chapter 5).

Comments:

CONSULTATION ON A MENTAL HEALTH BILL

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately



1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode

Phone

Email

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response,
name and address all
available

or

Yes, make my response
available, but not my
name and address

or

Yes, make my response
and name available, but
not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No



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