

Equality Impact Assessment – Results

**Secondary legislation
associated with the
implementation of the Mental
Health (Scotland) Act 2015**

September 2017

EQUALITY IMPACT ASSESSMENT - RESULTS

<p>Title of Policy</p>	<p>Secondary legislation associated with the implementation of the Mental Health (Scotland) Act 2015:</p> <ul style="list-style-type: none"> • The Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017 • Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017 • Mental Health (Cross-border transfer patient subject to detention requirements or otherwise in hospital (Scotland) Amendment Regulations 2017 • Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017 • The Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Amendment Rules 2017 • The Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017 • The Mental Health (Conflict of Interest) (Scotland) Regulations 2017 • The Mental Health (Certificates for Medical Treatment)(Scotland) Regulations 2017
<p>Summary of aims and desired outcomes of Policy</p>	<p>To amend the process for cross border transfers to make the system work more effectively in a way that benefits service users. To ensure that medical examinations undertaken for certain orders and reviews are independent. To improve administration of certificates for compulsory treatment. To introduce a</p>

	listed initiator ability in Mental Health Tribunal for Scotland procedure and practice and to take into account the changes to the named person role introduced by the Mental Health (Scotland) Act 2015
Directorate: Division: team	Population Health: Mental Health and Protection of Rights Division: Mental Health Law Team

Executive summary

The public sector equality duty requires the Scottish Government to assess the impact of applying a proposed new or revised policy or practice. It is a legislative requirement. Equality legislation covers the protected characteristics of: age, disability, gender reassignment, sex, pregnancy and maternity, gender including pregnancy and maternity, race, religion and belief, and sexual orientation.

This Equality Impact Assessment (EQIA) has considered the potential impacts of these instruments on each of the protected characteristics. The instruments are intended to make the mental health system work more effectively in a way that benefits services users. This means that the foremost impact will be on those covered under the protected characteristic of disability – particularly those subject to compulsory mental health treatment and detention.

Given the particular impact on those covered by the protected characteristic of disability, the Key Findings section centres on assessment of the impact of the instruments on such service users. However, where applicable, there is analysis of where the instruments are likely to impact particularly on other protected characteristics.

The analysis contained in the Key Impacts section sets out how evidence, including stakeholder reference group contributions and consultation responses were used to assess the impact on protected characteristics, take account of that impact and incorporate in policy development

Background

The Mental Health (Scotland) Act 2015 (“the 2015 Act”) received Royal Assent on August 4, 2015 following passage through the Scottish Parliament. The Act makes changes to the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) to allow service users with a mental disorder to access effective treatment quickly and easily. It also contains measures around named persons, advance statements and advocacy to enhance service users' rights and to promote service users' involvement in their treatment. It introduces a Victim Notification Scheme for victims of mentally disordered offenders. It also makes some changes to the Criminal Procedure (Scotland) Act 1995 in relation to mental health disposals in criminal cases.

The implementation of the 2015 Act is part of the Scottish Government's programme to streamline, simplify and clarify the system for efficient and effective treatment for people with a mental disorder. The 2015 Act does not seek to overhaul mental health law, simply to make those changes that are needed to improve further the operation of the 2003 Act. Provisions with regard to appeals against excessive security and a review of the arrangements for investigating deaths of mental health inpatients are already in force. The policy to be assessed in this EQIA is the secondary legislation associated with the 2015 Act at the time of the bulk of the remaining provisions coming into force in 2017.

For equalities purposes, the main people that will be affected by these instruments are mental health service users, particularly those subject to compulsory treatment measures and detention.

These instruments will contribute directly to –the National Outcomes: “We live longer, healthier lives.” and “Our public services are high quality, continually improving, efficient and responsive to local people's needs.”

The Scope of the EQIA

Service users with a longer-term mental disorder are included within the protected characteristic of disability under the 2010 Equality Act. It is therefore likely that any effects that the instruments have on service users will particularly affect the protected characteristic of disability. The EQIA also attempted to assess whether other protected characteristics were disproportionately represented within the groups most likely to be affected by the instruments (service users, particularly those subject to compulsory treatment for a mental disorder). If any protected characteristic is disproportionately represented, it is considered that any positive or negative impact of these instruments will affect either positively or negatively on people with that characteristic.

There was an EQIA conducted with regard to the Bill for the 2015 Act, and the report was published on 23 June 2015 . This assessment is concerned with the secondary legislation associated with the implementation of the 2015 Act, rather than revisiting the entirety of the provisions of the 2015 Act.

To assess the likely impact on service users and mentally disordered offenders, the main sources of evidence were responses to the consultation, and the work undertaken with a stakeholder reference group.

Part One of the public consultation on implementing the 2015 Act was published in March 2016. The consultation included provisions relating to named persons, advance statements, and conflict of interest regulations.

Part Two of the consultation on the implementation of the 2015 Act was published in July 2016. The consultation included regulations for cross-border transfers and for absconding patients along with the transitional and savings provisions for the 2015 Act.

Responses to Parts One and Two of the consultation contained detail of possible impacts, positive or negative, that the respondents and stakeholder group considered the instruments may have on service users and were a strong source of evidence. They also provided some evidence on how the instruments may affect people with other protected characteristics, albeit not comprehensively. The consultation also asked a specific question about equalities information although not all respondents provided an answer and many of those given were quite general.

Policy officials set up a stakeholder reference group which not only helped shape the form of the consultations but also focussed on the implementation of the Act itself. The first meeting of the group was on 18 December 2015 and further meetings took place during 2016, with a final meeting in May 2017. The reference group consists of a range of stakeholder organisations as set out on the Scottish Government mental health law webpages (for example the Mental Health Tribunal for Scotland, Mental Welfare Commission, professional groups, service providers, rights, advocacy and service user representation organisations) and has had a key role in providing advice and recommendations.

The Mental Welfare Commission's most recent Equality Monitoring Report, was used to assess whether other protected characteristics were particularly represented within the most affected groups described above. This is detailed in the key findings section. There were however, some limitations to this information and it was not identified or available for all protected characteristics or all affected groups.

Key Findings

The foremost impact of the instruments will be on those subject to compulsory mental health treatment and detention. These individuals have mental disorder as defined by the 2003 Act. Mental disorder is included in the definition of the protected characteristic of disability under the Equality Act 2010. In addition, certain protected characteristics are represented disproportionately compared with the population as a whole in certain circumstances under mental health legislation. Therefore, where an instrument changes how mental health law works in certain circumstances, it could particularly affect this group.

Men are more likely to be recorded as a formal admission (e.g. detained under mental health legislation) than women, and women are more likely to be recorded as an informal patient. Women are more likely to be subject to brief orders (including the nurse's power to detain and emergency detention certificates), whilst men are more likely to be subject to longer term civil orders and criminal procedure orders.

The Mental Welfare Commission's Equality Report for 2012-13 notes a substantially greater use of compulsory powers under mental health legislation for those who describe their ethnicity as Black African than for other groups, although this data is not uniformly gathered. In relation to compulsory treatment, although the data has some gaps, a significantly higher proportion of individuals from some other ethnic groups (including those whose ethnic identity was recorded as Asian (other) and Pakistani) than from the population as a whole, based on the figures in the Equality Report and the 2011 Census.

Aside from the particular connection to the protected characteristic of disability, none of the instruments specifically relate to protected characteristics. However, it may be noted that the two sets of cross border transfer regulations introduce parity for EU member state nationals with regard to transfer to Scotland, this may particularly affect the protected characteristic

of race. For characteristics relating to gender, age and race, there is some evidence that certain groups are represented in relation to certain aspect of mental health legislation disproportionately to their representation in the population as a whole. No statistics were found on this in relation to religion or belief, sexual orientation or gender identity. The Mental Welfare Commission monitors impacts on religion and belief as part of monitoring the 2003 Act and is satisfied that services pay attention to specific requirements; none of the instruments specifically refer or impact on religion and belief.

Overarching policy

The 2015 Act removes the default named person which has been a feature of mental health legislation since the 2003 Act came into force. This package of instruments features measures which take account of this change. The Tribunal amendment rules and both sets of cross border transfer regulations include provisions for the protection of patients who lack capacity and because of the change introduced by the 2015 Act will no longer have a default named person. Removal of the default named person will benefit service users by helping protect their confidentiality and right to privacy.

The regulations introduce an appeal right in respect of cross-border transfers, for listed persons to benefit patients with incapacity. This will ensure that a patient who lacks capacity to appeal, and has no named person, is nonetheless able to have appeals or applications made to the Tribunal in respect of their interests.

The instruments are in line with the Millan principle of the least restrictive alternative for service users.

The Mental Health (Conflict of interest) (Scotland) Regulations 2017

The purpose of this instrument is to specify the circumstances where it is, and is not, to be taken to be a conflict of interest in relation to certain medical examinations carried out under provisions of the 2003 Act. The policy objective is to ensure that, subject to limited exceptions, medical examination of a patient is carried out by a medical practitioner who is independent. The regulations replace similar regulations and extend the types of medical examinations covered.

Where a medical examination of a patient is required, it should not be carried out by a medical practitioner who is related in any way by blood, marriage or cohabitation to the patient or to another examining practitioner. Where two medical examinations are required, at least one of those is to be carried out by a practitioner who does not work in an NHS hospital where the patient is or may be detained. Alternatively, to take account of arrangements in rural settings, if a consultant undertakes one examination, another doctor in that hospital can carry out the other examination but there must be no supervisory relationship between them.

Where the doctor carrying out a medical examination for a review of certain orders is employed in an independent health care service in which the patient is or will be detained, there must be a second examination by a doctor not so employed.

The 2015 Act extended the circumstances in which conflict of interest regulations would apply, and this instrument replaces and extends existing restrictions on professionals carrying out examinations of people with mental disorder. Therefore, there is no impact on protected characteristics.

The Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017

The 2015 Act provision simplifying the nurses holding power is due to come into force on 30 June 2017. The power is currently available in respect of patients in hospital by virtue of a probation order with a mental health treatment requirement. This Order does not extend the power of nurses to detain patients, it simply updates the 2003 Act to reflect the introduction of the community payback order.

The 2015 Act makes the use of the nurse's holding power clearer to both service users and practitioners. It seeks to balance the flexibility needed to arrange a medical exam of benefit to the patient while maintaining the need for minimum restriction on the liberty of a patient. There is no increase in the overall maximum permitted period and the period is a maximum period of three hours, not a standard period of three hours.

This Order does not extend the reach of the nurses holding power, There is no effect on protected characteristics introduced by this Order.

The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2017

The purpose of this instrument is to amend the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 under which the Mental Health Tribunal for Scotland operates.

The 2015 Act removes those provisions in the 2003 Act which mean that where a patient does not choose their 'named person', one was appointed for them by default. The main concerns expressed about those provisions were around patients' autonomy and privacy.

To ensure that this change did not impair patients' right to make an application or appeal in relation to their detention, by leaving

those without the capacity to do this with no recourse, the 2015 Act also introduced a list of persons who may initiate an application or appeal to the Tribunal. In addition, and in relation to appeals of cross border transfers, similar provision is included in secondary legislation.

This gives the nearest relative, carer, guardian or welfare attorney the ability to apply to the Mental Health Tribunal for Scotland where there is no 'named person' and the patient does not have capacity to make the application on their own behalf.

It was important not to reintroduce the default named person by allowing the listed initiator role to extend beyond making the initial application or appeal. In order to fulfil the policy objectives of privacy and autonomy, once the appeal or application has been made by a listed initiator, that person does not become a party to the proceedings. Rather, a curator ad litem may be appointed by the Tribunal to represent the interests of the patient.

The instrument also introduces amendments to the procedure on certain notifications and written decisions in response to the Tribunal's experience and practice.

This instrument makes provision for practice and procedure around introduction of a provision of an additional safeguard for patients with no named person who lacks capacity. The role of listed initiator has been limited to making the appeal or application as set out in the 2015 Act and to making an appeal in respect of cross border transfer. Therefore, there is no adverse effect on protected characteristics introduced by these amendment rules.

Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017

These Regulations amend the Mental Health (England and Wales Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008 to take account of provisions in the 2015 Act, alongside some amendments to the regulations to improve their operation.

The 2008 regulations set out the process for the transfer of patients on community-based orders between Scotland and England or Wales.

The 2015 Act allows the regulations to extend provisions for receiving patients to Scotland to patients from other EU member states. These regulations allow the reception of patients from other UK and EU jurisdictions where the patient is subject to an order corresponding to a community-based order in Scotland. In addition, these regulations make some improvements to the operation of cross border transfers and technical changes.

The effect of these regulations on the protected characteristics of disability and race is positive. The regulations improve parity of treatment for non-UK residents with mental disorder.

Mental Health (Cross-border transfer: patient subject to detention requirements or otherwise in hospital) (Scotland) Amendment Regulations 2017

These Regulations amend the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 to take account of provisions in the 2015 Act, alongside some amendments to the regulations to improve their operation. The 2005 regulations set out the process for transferring a patient who is detained under either the 2003 Act or the relevant provisions of the Criminal Procedure (Scotland) Act 1995 from Scotland; transferring a patient who is not detained but who is in hospital for treatment

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for a mental disorder from Scotland to outwith the UK; and the reception of patients into Scotland from other UK jurisdictions who are detained on a corresponding order.

The 2015 Act makes amendments to the appeal rights that require to be included within the regulations under section 290. The instrument introduces a right of appeal for named persons against a decision to transfer the patient from Scotland and, where there is no named person and the person does not have capacity, for the welfare guardian, welfare attorney, primary carer, or nearest relative. This is in line with the new provisions in section 25 of the 2015 Act, as well as allowing for an onward appeal against the Tribunal's decision. It also extends the process for receiving a patient on a corresponding order to those transferring from another EU member state.

To further improve the process for service users, it introduces the ability to make a fast-track transfer where the service user agrees to the transfer and wishes it to happen quickly and expands certain appeal rights for those transferring to Scotland. These changes were based in recommendations from external stakeholders as to how the processes could be improved for service users.

The effect of these regulations on the protected characteristics of disability and race is positive. The regulations improve parity of treatment for non-UK residents with mental disorder.

Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017

The Regulations make provision in connection with escorted mental health patients who visit Scotland while on leave of absence under the law of a European Union member State. The effect of these regulations on the protected characteristics of disability and race is positive. The regulations improve parity of treatment for non-UK residents with mental disorder.

The Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017

This instrument revokes and replaces the existing regulations to take into account changes made by the 2015 Act. Firstly, the 2015 Act requires a person nominated as named person to agree in writing to take on that role and for this agreement to be witnessed by a prescribed person. The 2015 Act also allows a patient to make a declaration (and withdraw such a declaration) precluding their nearest relative or carer from initiating certain applications or appeals on their behalf if they have no named person and they are incapable of doing so on their own behalf; the 2015 Act introduces this ability for the nearest relative or carer. Any such declaration or withdrawal must be witnessed by a prescribed person.

Unlike the 2004 regulations, this instrument does not prescribe classes of persons who can witness a declaration by the patient that a person should not be the patient's named person, as this section is repealed by the 2015 Act.

The instrument also adds independent advocates, speech and language therapists, physiotherapists, arts therapists and dieticians to the list of prescribed persons.

There is no adverse effect to protected characteristics in relation to these regulations. Responses to the consultation indicated support for the proposal for new regulations and suggested additional practitioners who could be included as prescribed persons. The regulations make provision to support the process of active nomination and acceptance of the role of named person and allow a wider range of practitioners who might work with the patient and be supporting them in their decision about representation to witness the documents described. This will therefore have a positive impact for service users.

The Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2017

The 2003 Act makes provision at section 325 to prescribe statutory forms. The 2003 Act requires a certificate to be given by the responsible medical officer or other medical practitioner under certain circumstances. Under section 245(2) and 246(1) a certificate shall contain such particulars as prescribed in regulations.

Revision to these prescribed forms is required as part of a package of changes to forms used to administer certain processes under the 2003 Act. There is no effect on protected characteristics introduced by these regulations .

Conclusion

Policy proposals for these instruments have been developed with the impact on service users in mind and in consultation with stakeholders. As a result, potential negative impact on service users has been minimised as described in the section above.

Overall, the aim of the policy is to improve the mental health system for people with a mental disorder, many of whom will come under the protected characteristic of disability.

The Mental Welfare Commission produces regular equality monitoring reports of the 2003 Act and changes brought in to the Act by these instruments will be monitored as part of that work.

Anyone with a duty under the 2003 Act must have regard to the statutory Code of Practice which is under revision as part of the implementation of the 2015 Act. The Code of Practice sets out best practice in relation to carrying out functions under the 2003 Act. The Code should therefore promote the protection of rights and interests of service users under the 2003 Act. The same principle applies to any other associated guidance which derives from the 2003 Act, the 2015 Act or this related secondary legislation.

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