

EXECUTIVE NOTE

The Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Amendment Order 2006 SSI/2006/221

The above instrument was made in exercise of the powers conferred by section 332 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). The instrument is subject to negative resolution procedure.

Policy Objectives

The Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (“the Transitional Order”) provides that certain orders made under the Mental Health (Scotland) Act 1984 (“the 1984 Act”) and the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) are treated as if made under the 2003 Act. The purpose of this instrument is to correct an omission in Article 34 of the Transitional Order, which makes provision in relation to the continuation of appeal proceedings which were commenced under the 1984 Act or the 1995 Act before 5th October 2005. Article 34 also makes provision for certain specified outcomes in such appeal proceedings to be treated as if they were outcomes under the 2003 Act.

The omission has an impact where, before 5th October 2005, a restricted patient has commenced appeal proceedings in court under section 63 of the 1984 Act to order his discharge. Article 34(1) of the Transitional Order provides that in such a case, the appeal proceedings continue until final disposal in accordance with the law in force immediately before that date.

Article 34(6) of the Transitional Order makes provision for the position where, on or after 5th October 2005, the outcome of such an appeal is that the patient is not discharged. However, there is no provision in Article 34(6) as to what is to happen where the outcome of the appeal proceedings is that the patient is conditionally discharged. Such provision is made in Article 34(7), but only in relation to an appeal that is made under section 66 of the 1984 Act. Appeals can be brought under section 66 where a patient has been recalled from conditional discharge. However, Article 34(7) does not refer to appeals under section 63 of the 1984 Act.

The effect of the omission of any reference to section 63 in Article 34(7) is that, if the court’s final disposal in such proceedings is an order of conditional discharge, the patient cannot necessarily be treated as if conditionally discharged under the 2003 Act. In these circumstances, Scottish Ministers may therefore have no power to recall the conditionally discharged patient to hospital in terms of section 202 of the 2003 Act. In order to deliver the policy objective, it is accordingly necessary to amend the Transitional Order to bring appeal proceedings commenced under section 63 of the 1984 Act within the scope of the Article 34(7).

The instrument therefore amends Article 34(7) of the Transitional Order so that it refers to an appeal under section 63 as well as an appeal under section 66 of the 1984 Act. The effect of the amendment is that, where a restricted patient has, before 5th October 2005 appealed under

section 63 of the 1984 Act to order his discharge and the outcome of the appeal is that the patient is conditionally discharged, the patient is treated as if an order had been made under section 193(7)(b) of the 2003 Act and any conditions to which the patient was subject at the disposal of the proceedings under section 63 of the 1984 Act are deemed to have been imposed under section 193(7) of the 2003 Act.

To date, there have been no cases where a patient has been conditionally discharged on or after 5th October 2005 as a result of appeal proceedings commenced before that date under section 63 of the 1984 Act.

Consultation

A formal consultation has not been carried out in respect of this instrument. Policy on the Transitional Order was consulted on informally throughout development with the Mental Welfare Commission, the Mental Health Tribunal and the Mental Health legislation Group.

Financial Effects

The instrument has no financial effects on the Scottish Executive or any other organisation.

Scottish Executive Health Department
26 April 2006