

POLICY NOTE

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) (NO. 2) AMENDMENT RULES 2017

SSI 2017/172

The above instrument was made in exercise of the powers conferred by sections 21(4), 326 and paragraph 10 of schedule 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). The instrument is subject to negative procedure.

Policy Objectives

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

The listed initiator

The Mental Health (Scotland) Act 2015 (“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 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 legislation¹. 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.

This instrument amends the 2005 Rules to set out the requirements for such an application or appeal which ensures that the listed initiator conditions have been met.

The requirements include a statement by the person making the application or appeal which sets out:

- what category they fall within (nearest relative, carer, guardian or welfare attorney);
- that they have not been precluded from using the ability by the patient; and
- that the patient is over 16 and has no named person.

In addition, the application must be accompanied by a statement by an approved medical practitioner (which in practice will ordinarily be the patient’s responsible medical officer) that the patient is incapable of initiating an 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.

¹ This is by way of amendments to S.S.I.2005/467 and S.S.I. 2008/356.

Compulsory treatment

There was a practical issue where two sets of notification could have been required in relation to Tribunal proceedings concerning compulsory treatment (one in relation to the making of an interim compulsory treatment order and one in relation to the making of a compulsory treatment order). The 2005 Rules are amended to clarify that when the persons specified in rule 6 of the 2005 Rules are being given notice and invited to make representations or lead or produce evidence etc., that is in relation to the making of a compulsory treatment order, or an interim compulsory treatment order.

Decisions

The Tribunal sends notice of the decision to the parties and such other relevant person as the Tribunal may direct. A difficulty in practice has arisen because on occasion persons who have a right of appeal against the decision of the Tribunal do not have a statutory right to obtain a copy of the decision, as they are not a party to the case and have not returned a notice of response or sought to be added as a party or relevant person. The 2005 Rules are amended to ensure that the patient's responsible medical officer and mental health officer will always receive a copy of the decision of the Tribunal.

Consultation

The amendments to the 2005 Rules are in response to the changes introduced by the 2015 Act and taking account of experience and practice of the Mental Health Tribunal for Scotland in operating the 2005 Rules.

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 2015 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 for Scotland, professional groups, service providers, rights, advocacy and service user representation organisations) and has had a key role in providing advice and recommendations.

Impact Assessments

This SSI is part of a package of SSIs to come into force on 30 June 2017. Impact assessment reports including a Privacy Impact Assessment (PIA) and Equality Impact Assessment (EQIA) will be published in June 2017. The 2005 Rules affect only persons with a mental disorder. Mental disorder is included in the definition of the protected characteristic of disability under the Equality Act 2010. Therefore it is likely that any effects that the SSI provisions have on service users will particularly impact the protected characteristic of disability. However, the effects of this SSI will not have an adverse impact on this protected characteristic.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) report will be published in June 2017. The impact of this policy on business is that a new category of person will have the ability to make appeals and applications to the Tribunal. However, they only have this ability when an

existing category of person, the named person, is not involved. Therefore, there is no financial effect.

Scottish Government
Population Health Directorate

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