

POLICY NOTE

THE MENTAL HEALTH (SCOTLAND) ACT 2015 (COMMENCEMENT NO. 4 AND TRANSITIONAL AND SAVINGS PROVISIONS) ORDER 2017

SSI 2017/197 (C.17)

The above instrument is made under sections 61(2) and (3) of the Mental Health (Scotland) Act 2015 (“the Act”). It is not subject to any parliamentary procedure.

Policy Objectives

The Act makes various amendments to the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) and the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) at Parts 1 and 2¹. The 2003 Act establishes the statutory regime for dealing with the treatment of persons with mental disorder where compulsory measures are necessary. It includes disposals in the criminal courts, civil orders, appeals, reviews, rights of representation and the roles of medical professionals. The 2003 Act made amendments to the 1995 Act to include provision for certain criminal disposals and provisions regarding the treatment of offenders. The amendments in the Act then span the 2003 Act system and make further provision in the 1995 Act; they include changes in respect of the calculation of the duration of certain orders for detention and certificates of suspension and new provisions for named persons and patient representation in specified circumstances.

The Order specifies two commencement dates, 30th June 2017 and 30th September 2017, for those provisions listed in the Schedule of the Order (with the dates listed in column 3). The provisions which are being commenced are Parts 1 and 2 of the Act in so far as they are not already in force (with exceptions discussed further below).

Part 3 of the Act makes provision regarding the victim notification scheme established under the Criminal Justice (Scotland) Act 2003 and its extension to certain cases where offenders are subject to compulsion and restriction orders. Those provisions will be brought into force on 30th September 2017 in a separate Commencement Order.

Parts 1 and 2 of the Act make amendments to the 2003 and 1995 Acts and are brought into force on 30th June 2017 and 30th September 2017 for sections 40 to 45. There are two exceptions: section 1 of the Act and new section 250(2A) of the 2003 Act. Section 1 makes amendments to the calculation of periods of detention for compulsory treatment orders and interim compulsory treatment orders. New subsection (2A) of section 250 of the 2003 Act introduces new signing requirements for the nomination of a named person. That new provision is not commenced in so far as it applies to new section 257A (ability to act if no named person) as anyone precluded from acting by a declaration under new section 257A(7)

¹ Part 3 of the Act amends the Criminal Justice (Scotland) Act 2003 which makes provision for the victim notification scheme.

and (8) does not need to consent to being precluded from acting in order for the declaration to have.

Articles 3 to 25 of the Order make transitional and savings provision. The 2003 and 1995 Acts create processes for dealing with persons who require medical treatment for mental disorders. As at 30th June 2017 (and 30th September 2017 for sections 40 to 45) there will be cases where those processes are already underway. The intention behind the transitional and savings measures in this Order is to ensure that the new provisions do not create complications or difficulties when a process is live on the relevant commencement date. The result is that, in some cases, transitional provisions are needed to disapply amendments where certain steps have been taken before 30th June 2017 or 30th September 2017.

There are two aspects to the general approach taken with the transitional and savings provisions. Where the change brought in by the 2015 Act is to an aspect of granting or reviewing of an order (e.g. the length of the order or the notification requirements) then these only apply where the process for granting or reviewing of the order, certificate or direction begins on or after the commencement date. If the change brought in by the 2015 Act is to an aspect of an action whilst someone is subject to an order (other than a review), then the general approach the new provision applies from the commencement date, regardless of when the order was granted.

Compulsory treatment orders and compulsion orders

Articles 3 and 4 make transitional provision for the coming into force of sections 2 and 50 of the Act which concern compulsory treatment orders and compulsion orders.

Articles 3 and 4 make provision to the effect that the new requirements to provide further information where a compulsory treatment order, or compulsion order, is extended do not have effect where the relevant determination made by the patient's responsible medical officer ("RMO") is made before 30th June 2017.

These articles mean that where the RMO's determination is made before 30th June, the previous provisions in relation to a report by the Mental Health Officer (MHO) will apply, rather than the amended provisions brought in by the 2015 Act.

Emergency and short-term detention certificates

Articles 5 and 6 concern emergency and short-term detention processes and also disapply amendments made by the Act in cases where actions have been taken before 30th June 2017. Section 4 of the Act makes amendments to provisions for emergency detention to ensure that a patient who has been taken into custody for non-compliance with an order under section 113(5) of the 2003 Act cannot be subject to emergency detention. The transitional provision disapplies that exclusion where the emergency detention certificate has already been granted before the appointed day. Parallel provision is made in respect of short-term detention (section 5 of the Act and article 6 of this Order).

This means that no additional action needs to be taken after 30th June 2017 for a certificate granted before 30th June, other than any requirements in place at the time the certificate was granted.

Suspension certificates

Sections 7 to 10 of the Act make amendments in respect of powers to suspend measures in an underlying order. Sections 7 and 8 make amendments to suspension of orders during emergency and short-term detention. Those amendments apply only where the certificate of emergency or short-term detention is granted after 30th June 2017 (articles 7 and 8).

Sections 9 and 10 of the Act make various amendments in respect of powers of responsible medical officers to grant certificates suspending detention and in particular the calculation of the maximum periods of detention. The two main components to the amendments to sections 127 and 224 of the 2003 Act are the calculation of a longer single period of suspension (now 200 days) and the cap on the cumulative total of suspension which is amended to 200 days in any 12 month period. Section 128 of the 2003 Act, which provides the power to suspend measures other than detention, is amended also so that the suspension certificate may be granted for a single period for 90 days and the maximum period of suspension is 90 days (section 10(3) of the Act).

The Order preserves any existing suspension certificate as at 30th June 2017 to ensure that the new rules on calculating the time periods do not mean that the certificate is either invalid or has passed its cumulative total. Any certificate made before 30th June 2017 can therefore have effect until its expiry.

Where an order is in place as at 30th June 2017 and a certificate of suspension has been granted before that date, the amendments introducing the new cap on the cumulative total do not apply so the certificate will continue to be valid regardless of its duration, in line with the provisions before amendment by the 2015 Act. When that certificate expires, any new certificate made on or after 30th June will be subject to the new rules.

Removal and detention of patients

Sections 19 and 20 of the Act make amendments to powers in the 2003 Act about the removal of adults to places of safety and powers of nurses to detain patients pending medical examination. Section 19 introduces a new provision requiring notification to the Mental Welfare Commission. Article 10 provides that the notification requirements do not apply when the decision on the removal order is made before 30th June 2017. Section 20 provides that the amendments to section 299 of the 2003 Act, including the changes to timescales, do not apply in cases where the holding power has been exercised before 30th June 2017.

Periodical referral of cases

Section 21 of the Act makes various amendments to provisions in the 2003 Act which concern the referral of cases to the Mental Health Tribunal. Certain actions are triggered by a

“renewal day” or “relevant day” in those amended provisions. Article 12 provides that those amendments have no effect where those triggers fall before 30th June 2017.

Named persons

The Act makes various changes to the provisions in the 2003 Act in respect of named persons who have certain rights to receive information, to make representations and raise appeals or request reviews. Where a patient has no named person, section 251 of the 2003 Act provides a hierarchical list of persons who will act as the “default named person” for the patient. That provision is repealed by the Act. In addition the Act introduces new provision for cases where there is no named person and the patient is incapable in relation to decisions as to whether to initiate an application or an appeal. Persons who are listed at new section 257A(9) will have the authority to initiate an application or an appeal. In addition guardians and welfare attorneys will have authority to obtain any notice or information to be provided under certain provisions which are listed at s257A(4).

Article 13 provides that a person who is a default named person by virtue of section 251 as at 30th June 2017 will continue to act as such until the patient’s underlying order is revoked or where the patient makes a declaration to the effect that the individual should no longer continue to be their named person (this is provided for in article 15 of the Order). If, by 30th September 2017, a default named person is still continuing to act by virtue of this savings provision, then their role will come to an end when the underlying order is reviewed or revoked following a mandatory review of the order (article 14). The default named person’s role will come to an end at the point of the medical examination as part of the mandatory review by the Responsible Medical Officer (RMO). Therefore where the review by the RMO takes place before 30th September 2017, this will not bring an end to the default named person’s role unless the order is revoked. The savings provision for default named persons made by article 13 of the Order will automatically cease to have effect as at 30th June 2018.

Article 15 provides that a patient may make a declaration in respect of a default named person to confirm that the patient no longer wishes that person to act in that role.

Section 23 of the Act makes further amendments to the 2003 Act in respect of the nomination of a named person. Where the patient makes a nomination this must include a docket confirming that the individual consents to being the named person and it must be signed and witnessed. Article 16 provides that this requirement does not apply to any nomination made before 30th June 2017. This means that any nomination made before 30th June 2017 will remain valid after that date. In addition that requirement will not apply in respect of a declaration made by the patient under section 257A to prevent an individual from acting under s257A to initiate an application or an appeal (subsection (3)) or to receive information under certain provisions (subsection (4)).

Where the Mental Health Tribunal makes an order appointing a named person under section 257 that will require, after 30th June 2017, a document that the person agrees to be the named person which is then signed and witnessed. That requirement will not apply where the application is made on or before 30th June 2017.

Compulsory treatment of prisoners

Section 35 of the Act amends schedules 2 and 3 of the 2003 Act. Schedule 2 makes provision about the organisation of the Tribunal and paragraph 7(4) provides who may sit as convenor where the patient is a prisoner. That provision is amended to provide that, where an application for a compulsory treatment order is made in respect of a patient who is subject to a hospital direction or a transfer for treatment direction, the convenor need not be the President or a sheriff convenor to reflect the organisation of the Tribunal for other compulsory treatment order applications. Schedule 3 is amended to include a requirement that, for such patients, notice is given to the Scottish Ministers when the application is made. Article 17 provides that this requirement does not apply where the requirement to make that application applies before 30th June 2017.

Information provided by the Mental Welfare Commission

Section 19 of the 2003 Act requires the Commission to provide and publish such information as Ministers may direct. That requirement is amended by section 19 of the Act to provide information as may be prescribed in regulations. Article 18 makes a saving to preserve the effect of any direction which is issued before 30th June 2017.

Criminal cases

Sections 40 to 45 of the Act are brought into force on 30th September 2017. These provisions make various amendments to the 1995 Act in respect of the calculation of periods of certain criminal disposals under the 1995 Act.

Section 40 amends the 1995 Act in respect of assessment orders and the periods within such orders. Article 19 provides that those amendments do not apply where the assessment order is made before 30th September 2017.

Section 41 of the Act makes parallel amendments in respect of treatment orders under the 1995 Act. Article 20 provides that those amendments have no effect where that order is made before 30th September 2017.

Section 42 makes changes to sections 53A and 54 of the 1995 Act which concern short-term compulsion. Section 53A of the 1995 Act applies where an interim compulsion order is made and the offender requires to be admitted to a hospital other than the one specified in the order. Article 21 provides that amendments to section 53A do not apply where the underlying order was made before 30th September 2017. Similarly, for section 54 (which allows the court to make a temporary compulsion order), the amendments do not apply where the temporary compulsion order was made before 30th September 2017.

Article 22 restricts the application of the amendments made by section 43 of the Act to sections 57B and 57D of the 1995 Act. Section 57B of the 1995 Act applies where a compulsion order is in place and allows the removal of the offender to hospital within a specified time. The amendments to the calculation of that time period do not have effect in respect of compulsion orders made before 30th September 2017. Parallel provision is made in

respect of the amendments to section 57D of the 1995 Act which allow the removal of an offender to another hospital within a set period. The amendments to the calculation of that time period do not have effect in respect of compulsion orders which are made before 30th September 2017. Similar amendments are made in respect of hospital directions (section 59C of the 1995 Act as amended by section 44 of the Act) and those amendments are restricted and do not apply to hospital directions made before 30th September 2017.

This means that the changes to the timescales (and other related changes in sections 40-44) will only apply where the order is made on or after 30th September 2017.

Section 49 repeals section 9 of the Crime and Punishment (Scotland) Act 1997. That provision is a deeming provision to allow the power to specify a hospital in certain orders to include a hospital unit. Article 24 provides that the repeal does not affect the validity of any order or the detention of any patient authorised by virtue of an order mentioned in the 1997 Act.

Section 52 of the Act amends section 198 of the 2003 Act where a restriction order is revoked by the Tribunal.

Consultation

Proposals for transitional and savings provisions were included in a public consultation which was open between 25th July and 17th October 2016. The consultation set out the proposed general approach discussed above, detailed proposals for suspension of detention and the likely approach for other individual sections. Detailed proposals for transitional and savings proposals for named persons were based on suggestions from our Stakeholder Reference Group and were included in a public consultation which was open between 7th March and 30th May 2016.

The vast majority of respondents agreed with the general approach to transitional and savings provisions and the order is consistent with this as far as possible. Consultation responses, and discussions with stakeholders such as medical records staff, have shaped the final provisions related to transitional and savings provisions for suspension of detention and named persons.

One of the concerns raised in consultation responses was that some patients could be left with a named person they did not want for longer than others. The Order sets a clear process for any patient to declare that they no longer want someone appointed under section 251 of the 2003 Act (a default named person) at any time from 30th June 2017. It also includes a final date (30th June 2018) after which any remaining default named persons would cease to hold their role. A further concern was that there was potential for patients to need to make a decision too close to a Tribunal hearing, which can be a stressful time. The provisions therefore introduce a three-month period until individual default named persons begin to cease to hold their role. This will allow a lead-in time for practitioners to ensure they are discussing options with patients well in advance of their next Tribunal hearing.

Impact Assessment and Financial Effects

An Equality Impact Assessment was undertaken for the Bill for the Act prior to its introduction to Parliament. The transitional provisions are not expected to have a significant financial impact.

Directorate for Population Health

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