

Explanatory Notes to Mental Health (Care And Treatment) (Scotland) Act 2003

2003 Chapter 13

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MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader. They do not form part of the 2003 Act and have not been endorsed by the Scottish Parliament.
 2. These Notes should be read in conjunction with the 2003 Act. They are not, and are not meant to be, a comprehensive description of the 2003 Act. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.
 3. Since Royal Assent there have been two orders made which modify the 2003 Act. These are:
 - The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Modification) Order 2003¹ made on 13 October 2003 and coming into force on 14 October 2003; and
- ¹ S.S.I 2003/498
- The Mental Health (Care and Treatment) (Scotland) Act 2003 Modification Order 2004² made on 1 December 2004 and coming into force on 2 December 2004.

These Notes will indicate at the relevant paragraphs where changes have been effected by the orders.

4 The following terms are referred to in these Notes and have the following meanings:

- "the 1984 Act" means the Mental Health (Scotland) Act 1984;
- "the 1995 Act" means the Criminal Procedure (Scotland) Act 1995;
- "the 2000 Act" means the Adults with Incapacity (Scotland) Act 2000;
- "the 2003 Act" means the Mental Health (Care and Treatment) (Scotland) Act 2003;
- "the 2003 Order" means the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Modifications) Order 2003;
- "the 2004 Order" means the Mental Health (Care and Treatment) (Scotland) Act 2003 Modification Order 2004;
- "the Commission" means the Mental Welfare Commission continued in existence by section 4 of the 2003 Act;
- "the Tribunal" means the Mental Health Tribunal for Scotland established by section 21 of the 2003 Act.

5. Certain other important terms are defined in section 329(1) of the 2003 Act as follows:

- "approved medical practitioner" has the meaning given by section 22(4) of the 2003 Act:
- "carer", in relation to a person, means "an individual who, otherwise than—
 - (a) by virtue of a contract of employment or other contract with any person; or
 - (b) as a volunteer for a voluntary organisation, provides, on a regular basis, a substantial amount of care for, and support to, the person; and includes, in the case where the person is in hospital, an individual who, before the person was admitted to hospital, provided, on a regular basis, a substantial amount of care for, and support to, the person".
- "a medical practitioner who has such qualifications and experience,

and has undertaken such training, as may be specified in directions given by the Scottish Ministers; and who has been approved by a Health Board or by the State Hospitals Board for Scotland as having special experience in the diagnosis and treatment of mental disorder".

- "hospital" means—

" (a) any health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29));
(b) any independent health care service; or
(c) any state hospital."

- "medical practitioner" means "any registered medical practitioner".
- "medical treatment" means "treatment for mental disorder; and for this purpose "treatment" includes—
 - (a) nursing;
 - (b) care;
 - (c) psychological intervention;
 - (d) habilitation (including education, and training in work, social and independent living skills); and
 - (e) rehabilitation (read in accordance with paragraph (d) above)".
- "mental health officer" means "a person appointed (or deemed to be appointed) under section 32(1) of this Act", and "the mental health officer" in relation to a patient, means "a mental health officer having responsibility for the patient's case".
- "patient" means "a person who has, or appears to have, a mental disorder".

6. Certain other important terms are not defined in section 329 but are defined elsewhere in the 2003 Act. Such terms include:

- "mental disorder": this is defined in section 328(1) of the Act as meaning "any mental illness, personality disorder or learning disability". Subsection (2) of that section states, however, that "a person is not mentally disordered by reason only of sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act".
- "responsible medical officer" means the approved medical practitioner appointed under section 230(1) of the Act.

THE 2003 ACT - AN OVERVIEW

7. The 2003 Act replaces the 1984 Act. It establishes new arrangements for the detention, care and treatment of persons who have a mental disorder. It also refines the role and functions of the Commission and establishes the Tribunal as the principal forum for approving and reviewing compulsory measures for the detention, care and treatment of mentally disordered persons.

8. The 2003 Act is divided into 23 parts:

- Part 1 sets out a range of the factors and principles to be considered when certain parties are discharging functions under the 2003 Act.
- Part 2 specifies the duties and powers of the Commission.
- Part 3 establishes the Tribunal.
- Part 4 places certain duties, mainly concerning the provision of services for persons with mental disorder, on Health Boards and local authorities.
- Part 5 deals with the emergency detention in hospital of persons with mental disorder.
- Part 6 deals with the short-term detention in hospital of persons with mental disorder.
- Part 7 makes provision about compulsory treatment orders in respect of mentally disordered persons.
- Part 8 makes provision about the disposals that may be made in respect of mentally disordered persons in criminal proceedings and where such persons are serving sentences of imprisonment.
- Part 9 provides for the consequences of a compulsion order (one of the main orders established in Part 8).
- Part 10 deals with the situation where a compulsion order is combined with a restriction order.
- Part 11 provides for the consequences of a hospital direction and a transfer for treatment direction.
- Part 12 provides for the transfer between hospitals of mentally disordered persons subject to compulsion orders combined with restriction orders, hospital directions or transfer for treatment

directions.

- Part 13 provides for the temporary release from detention of persons subject to assessment orders, treatment orders, interim compulsion orders, compulsion orders combined with restriction orders, hospital directions and transfer for treatment directions.
- Part 14 provides for an assessment of a person's needs to be carried by a local authority or Health Board under certain circumstances.
- Part 15 provides for the designation of mental health officers and the appointment of responsible medical officers as well as the preparation of certain reports following the making of orders under the 2003 Act.
- Part 16 specifies the safeguards for patients where certain medical treatments are being considered or given.
- Part 17 makes provision about patient representation and patients detained in conditions of excessive security.
- Part 18 makes miscellaneous provisions including the drawing up of a code of practice, the making of statements indicating a patient's wishes about treatment, the withholding of correspondence and communications from certain detained patients and the cross-border transfer of patients.
- Part 19 sets out entry, removal and detention powers.
- Part 20 deals with patients who abscond while subject to compulsory measures.
- Part 21 creates offences in respect of the sexual abuse, ill-treatment and neglect of persons with mental disorder, as well as offences relating to the obstruction of the proper administration of the 2003 Act.
- Part 22 sets out provision for appeals against decisions of the Tribunal.
- Part 23 contains general provisions on matters such as interpretation and commencement.

COMMENTARY ON SECTIONS

PART 1 - INTRODUCTORY

Section 1: principles for discharging certain functions

9. Section 1 sets out a series of factors which must be considered by persons when they are discharging functions under the 2003 Act in relation to a patient who is over 18.

10. "Discharging a function" means carrying out a duty imposed by the 2003 Act or exercising a power conferred by it. (For this purpose, a power may be exercised by taking no action (see subsection (11)). As an example, a doctor, member of medical staff or mental health officer may take a decision concerning emergency or short term detention of a patient, or applying for, renewing, or seeking to vary a compulsory treatment order.

11. Subsection (3) sets out matters which a person discharging a function under the 2003 Act must take account into when doing so. The matters mentioned in subsections (3)(a), (b) and (d) should be read along with subsections (8), (9) and (10) respectively.

12. In addition, subsections (5) and (6) set out further matters that the person is to take account of in certain cases. The matters mentioned in subsection (5) are only to be considered if the function is not the making of a decision about medical treatment. The matters in subsection (6) are only to be considered where the person in relation to whom the function is being discharged is a person who is, or has been, subject to one of the certificates and orders mentioned in the subsection.

13. After having considered the matters mentioned in subsections (3), (5) and (6) and any other relevant matters, the person is required to discharge the function in a manner that appears to the person to be the one that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances(subsection(4)).

14. Subsection (7) exempts certain persons from the ambit of the section.

Section 2: welfare of the child

15. Section 2 requires that where a person is discharging a function under the 2003 Act which may be discharged in more than one manner in respect of a patient aged under 18, the person shall act in the manner which best secures the welfare of the child. The section sets out how the general principles in section 1 apply in respect of children. The section does not impose duties on the patient or any of the persons mentioned in section 1(7).

16. In deciding how to best secure the welfare of the child, the person discharging the function is to have regard to subsections (3), (5) and (6) of section 1. That person must also have regard to the importance of acting in the manner which involves the minimum necessary restriction on the

freedom of the child.

Section 3: equal opportunities

17. Section 3 requires the Scottish Ministers, the Commission, Health Boards, hospital managers and local authorities, doctors, nurses and mental health officers to discharge functions under the 2003 Act in a manner which encourages equal opportunities and in particular the equal opportunities requirements. These requirements include the subject matter of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995. "Equal opportunities" has the same meaning as in the Scotland Act 1998, being "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions".

PART 2 - THE MENTAL WELFARE COMMISSION FOR SCOTLAND

Sections 4 to 20: the Mental Welfare Commission for Scotland

Continued existence of the Mental Welfare Commission for Scotland

18. Section 4 introduces schedule 4 and along with the schedule makes provision for the continued existence of the Commission. It was originally established by the Mental Health (Scotland) Act 1960. Schedule 1 of the 2003 Act contains provisions as to the membership, organisation and general powers of the Commission and is discussed in detail in paragraphs 655 to 666 of the Notes.

General duties

19. Section 5 requires the Commission to monitor the operation of the 2003 Act and to promote best practice in relation to its operation.

20. Section 6 places the Commission under a duty to inform the Scottish Ministers of any matter relating to the operation of the 2003 Act that it considers should be brought to their attention.

Particular functions

21. Sections 7 and 8 together place duties on the Commission to bring matters relating to the welfare of patients to the attention of any of the persons listed.

22. Section 7 is directed at matters of general interest or concern, while section 8 deals with the situation where the Commission believes that the persons listed have the ability to prevent or remedy certain circumstances.

These circumstances are outlined in section 11(2) and include unlawful or improper detention, ill-treatment, neglect or a deficiency in the care or treatment of a person with mental disorder, loss or damage to a patient's property and when a patient is living alone and is unable to manage his or her affairs.

Duty to give advice

23. Section 9 establishes a duty on the Commission to provide advice where the Scottish Ministers, a local authority, a Health Board, the Scottish Commission for the Regulation of Care or the Scottish Public Services Ombudsman has referred a matter regarding the 2003 Act to it with the Commission's agreement.

Publishing information, guidance etc.

24. Section 10(1) allows the Commission to publish general information and guidance with regard to its functions as well as more specific information and guidance following an investigation under section 11(1), an inquiry under section 12(1) or visits to persons who have mental disorder carried out under section 13(1). The Commission may not publish advice given under section 9(1) without the permission of a person mentioned in subsection (2) of that section.

25. Section 11(1) enables the Commission to inquire into and make recommendations relating to any patient's case, where the circumstances outlined in subsection (2) apply. Those circumstances include that the patient may be, or may have been, subject or exposed to ill-treatment, neglect or some other deficiency in care or treatment.

26. (Local authorities also have certain powers of investigation in some of these circumstances under sections 33 to 35 of the Act (see paragraphs 60 to 63 of these Notes)).

Investigations: further provisions

27. Section 12 allows the Commission to hold a formal inquiry when it carries out an investigation under section 11(1). The Commission can require the attendance of persons, and has the ability to examine witnesses under oath.

Visits in relation to patients

28. Section 13(1) requires the Commission to ensure that persons authorised by it visit certain categories of patients specified in subsection (2). The frequency of visits is a matter for the discretion of the Commission. The duty applies whether the patients concerned are in hospital or the community. In addition to the duty to visit patients subject to compulsory measures, the Commission may visit hospitals, community mental health

facilities and prisons both to inspect the facilities and to allow patients to discuss with the Commission any concerns they may have. Subsection (6) allows the Commission to make unannounced visits.

Interviews

29. Section 14 allows a person authorised by the Commission (the "authorised person"), in the discharge of its functions (for example as part of a visit or an investigation) to interview patients or other appropriate persons in private. The section also requires the authorised person, when carrying out visits under section 13, to give patients the opportunity of a private interview.

Medical examination and inspection of records

30. Section 15(1) provides that an authorised person may carry out a private medical examination of a patient. Subsection (2) provides that the authorised person must be a medical commissioner or a member of staff of the Commission with such qualifications, training and experience as may be prescribed by regulations. Medical commissioners are appointed in terms of paragraph 3(1)(b) of schedule 1 (see paragraphs 655 to 666 of these Notes).

31. Section 16(1) provides that an authorised person may, in connection with the discharge of any of the Commission's functions under the 2003 Act or the 2000 Act, require the production of medical or other records a person may hold and inspect those records. Subsection (2) provides that the authorised person for this purpose must be a member of the Commission or a member of staff of the Commission.

Duties of Scottish Ministers, local authorities and others with respect to the Commission

32. Section 17(1) requires the persons mentioned in subsection (2) to provide facilities for the Commission to carry out its functions.

Annual report; statistical information

33. The Commission must publish an annual report (section 18) and must provide and publish statistical information (section 19). The Scottish Ministers may direct what statistical or other information is to be provided to them and published.

Protection from actions of defamation

34. This provision in section 20 provides explicit protection to the Commission and its employees from actions of defamation unless they can be shown to be acting maliciously. Privilege would apply, for example, to any report published by the Commission as a result of an investigation into

deficiencies in a patient's care.

PART 3 - THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Section 21: the Mental Health Tribunal for Scotland

35. This section introduces schedule 2 which along with this section makes provision concerning the Tribunal.

36. Subsections (1) and (2) establish the Tribunal. The Tribunal will act as an independent judicial body which will authorise compulsory treatment orders and deal with appeals against and reviews of compulsory treatment orders, short-term detention, compulsion orders and other mental health disposals affecting mentally disordered offenders. The Tribunal substantially replaces the role of the sheriff under previous mental health legislation.

37. The Scottish Ministers may make regulations in connection with the Tribunal (subsection (3)).

38. The composition of the Tribunal and its organisation and procedures are detailed in schedule 2 (see paragraphs 667 to 687 of these Notes). Appeals from the Tribunal to the sheriff principal and the Court of Session are dealt with in Part 22 (see paragraphs 633 to 645 of these Notes).

PART 4 - LOCAL AUTHORITY AND HEALTH BOARD FUNCTIONS

Chapter 1: Health Board duties

Sections 22 to 24

Approved medical practitioners

39. Section 22 places a duty on Health Boards and on the State Hospitals Board for Scotland, (the special Health Board with responsibility for the State Hospital) to each maintain a list of approved medical practitioners having special experience in the diagnosis and treatment of mental disorder. An approved medical practitioner has a number of functions under the 2003 Act. For example, at least one of the mental health reports making a recommendation for a compulsory treatment order must be provided by an approved medical practitioner while a short-term detention certificate may only be granted by an approved medical practitioner.

Provision of services and accommodation: children and young people

40. Where a patient under 18 is either detained in hospital under Parts 5 or 6 of this Act (that is, on the authority of an emergency detention

certificate or a short-term detention certificate respectively) or has been admitted to hospital, whether voluntarily or not, to receive treatment, section 23 places a duty on Health Boards to provide services and accommodation sufficient to meet the young patient's particular needs.

Provision of services and accommodation: mothers with post-natal depression

41. Section 24 places a duty on Health Boards to provide services and accommodation for mothers with post-natal depression. The duty applies where the mother or adoptive mother of a child under the age of one admitted to hospital for treatment for post-natal depression, cares for the child, and is not likely to endanger the child's health or welfare. The duty consists in providing such services and accommodation as are necessary to ensure that the mother is able, if she wishes, to care for the child in hospital.

Chapter 2: local authority functions

Sections 25 to 35

Provision of services

42. Section 25(1) places a duty on a local authority to provide, or secure the provision of, services that provide care and support for patients in its area who are not in hospital. The section also gives local authorities the power to do the same for such patients who are in hospital.

43. Subsection (2) requires the services provided to be designed so as to minimise the effect of the mental disorder and to give the patient the opportunity to lead as normal a life as possible.

44. Subsection (3) describes care and support services which might be provided, including practical and emotional support in a crisis, assistance with daily tasks, and accommodation with appropriate levels of support.

45. Subsection (4) incorporates sections 25 and 26 into section 59(1) of the Social Work (Scotland) Act 1968 (c.49), with regard to the duty of local authorities to provide and maintain residential or other establishments.

46. Section 26(1) places a duty on a local authority to provide, or secure the provision of, services that are designed to promote the well-being and social development of those patients in its area who are not in hospital. Like section 25, the section also gives local authorities the power to do the same for patients in hospital.

47. Subsection (2) sets out some of the services that may be provided.

48. Subsection (3) states that the duty conferred by subsection (1) is without prejudice to the existing duty on local authorities to provide social,

cultural and recreational activities and vocational and industrial training under section 1 of the Education (Scotland) Act 1980 (c.44), and the duty on Scottish Ministers to provide further education under section 1 of the Further and Higher Education (Scotland) Act 1992 (c.37).

49. Section 27 places a duty on local authorities to provide, or secure the provision of, transport for patients who are not in hospital to attend or participate in those services provided under sections 25 and 26. Again, local authorities are given a power to do the same for patients in hospital.

Charging for services

50. Section 28 amends section 87 of the Social Work (Scotland) Act 1968 and sections 2 and 22(1) of the Community Care and Health (Scotland) Act 2002, so that:

- a local authority providing a service under sections 25 to 27 may recover such charge (if any) for it as it considers reasonable;
- if a patient utilises a service provided under these sections and satisfies the authority that they cannot afford to pay the charge for the service provided, the authority must only charge what that patient can practically afford; and
- the Scottish Ministers may by regulations exclude certain services from any charging regime under these provisions.

Relationship with general duties

51. Section 29 makes it clear that the duties established under this Part are in addition to the duties set out in sections 12(1), 13A, 13B and 14 of the Social Work (Scotland) Act 1968 (the general duty to promote social welfare, and the duties to provide residential accommodation with nursing, to provide care and after-care, and to provide domiciliary and laundry services) and section 22(1) of the Children (Scotland) Act 1995 (a duty to provide an appropriate range and level of services to safeguard and promote the welfare of children in need).

Co-operation and assistance

52. Section 30 imposes a duty on a local authority providing services, under sections 25 to 27 to co-operate with Health Boards, Special Health Boards, and voluntary organisations who have an interest in the provision of those services or a power or duty in relation to the provision of services for the patient.

53. Section 31(1) allows local authorities to request that Health Boards and Special Health Boards assist them in the performance of their duties under sections 25 and 26. These bodies are required to co-operate if to do so

is compatible with their own responsibilities and would not prejudice the discharge of those responsibilities (subsection (2)). Subsection (3) makes it clear that the section does not interfere with, and is in addition to, the provisions of section 21 of the Children (Scotland) Act 1995.

Appointment of mental health officers

54. A local authority is required by section 32(1) to appoint for its area sufficient mental health officers for the purpose of discharging the functions of such officers under the Act, the 1995 Act and the 2000 Act. Mental health officers carry out a range of functions, including consenting to the granting of a short-term detention certificate under Part 6, and making an application for a compulsory treatment order under Part 7.

55. Subsection (2) sets out the requirements for being appointed as a mental health officer, which will include requirements on registration, qualifications and experience as directed by the Scottish Ministers.

56. Subsection (3) operates so that persons already appointed as mental health officers on the day section 32 comes into force are deemed to be appointed under that section. Effectively, such persons simply continue as mental health officers.

57. A local authority must provide or secure the provision of training of mental health officers in accordance with directions given by the Scottish Ministers, both to enable new mental health officers to be appointed and for those continuing as mental health officers (subsection (4)).

58. Subsection (5) provides for the circumstances in which a local authority is required to terminate the appointment of a mental health officer. The validity of anything done by that mental health officer before termination occurs is unaffected (subsection (6)).

59. Subsection (7) provides that the directions by the Scottish Ministers referred to in paragraphs 54 and 56 above, must be given to local authorities together rather than individually.

Duty to inquire into individual cases

60. Section 33(1) places a duty on local authorities to inquire into situations where an adult patient in its area may be at risk (see subsection (2) for the circumstances). Under section 34, local authorities may, where it is necessary for, or would assist, such inquiries, seek the co-operation of Health Boards, the Commission, the Public Guardian or the Scottish Commission for the Regulation of Care.

61. Section 35 confers powers on a sheriff or justice of the peace, which support the carrying out of inquiries under section 33. A relevant mental health officer may seek a warrant for any of a range of purposes which may

be relevant to the inquiry: to enter premises and open lock-fast places; to detain a person for 3 hours for the purpose of a medical examination; or for a medical practitioner to have access to a person's medical records. Such an examination could be a preliminary to emergency detention or short-term detention under Parts 5 and 6 respectively.

62. Where a warrant is granted or refused, the mental health officer who applied for it must notify the Commission (subsection (10)). There is no appeal available against the decision of the sheriff or justice of the peace.

63. The meaning of "relevant mental health officer" for the purposes of this section depends on which warrant is being obtained (see subsection (12)).