

ADVICE NOTES

Updated September 2017

Please note that this publication was updated in September 2017 to correct a minor error on page 7. No other changes have been made.

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Introduction

Changes to the Mental Health Act came into force on 30.06.17. These were made by the Mental Health (Scotland) Act 2015 and associated regulations.

We have included main points about changes particularly relevant to mental health professionals. However, please note that this is not a complete guide to all changes made in these areas.

Full details about all the changes can be found on the Scottish Government's website:

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law>

Mental Health Act forms

Mental Health Act forms have been updated to take account of the changes. There are new versions of almost all the forms and these should be used. They are available on the Scottish Government's website:

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law/Forms>

One difference is that forms for an application to the Tribunal have been split into A and B forms at the Tribunal's request – one for the application and one for the Tribunal e.g. CTO5A and CTO5B.

The Tribunal is now able to grant measures specifying detention in a specified hospital unit, rather than just the hospital. They will not always do this.

Two areas of the 2015 Act that are not yet implemented

1. Section 1 contains changes to timings of interim CTOs and CTOs to take account of extended detention under a short term detention certificate caused by a CTO application.

There are no changes to CTO timings meantime. No date is set for implementation of Section 1.

2. Part 3 of the 2015 Act (the Victim Notification and Information Scheme) will come into force on 30 September, with some provisions coming into force on 15 September to allow for registration with the scheme.

Changes implemented on 30.06.17

The Scottish Government have published documents on their website about the main changes and transitional provisions.

This is the main Mental Health Act law page with links to the full 2015 Act, and links to pages on the site:

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law>

The explanatory notes for the 2015 Act:

<http://www.legislation.gov.uk/asp/2015/9/notes/contents>

The page <http://www.gov.scot/Topics/Health/Services/Mental-Health/Law/mh2015guidance> has links including:

- A summary of the main provisions of the 2015 Act.
- Information for different groups (Individuals, RMOs, MHOs, etc).
- A link to guidance on patient representation provisions, including changes to named persons and advance statements.
- A summary of all the transitional provisions (the document has brief summaries about changes for which there are transitional arrangements, and details of those).
- Specific guidance on transitional provisions for named persons.
- Guidance on changes to Cross-border transfers requiring approval of Scottish Ministers.

New treatment forms (T2s and T3s)

It is particularly important for psychiatrists to be aware of the changes to T2 and T3 forms. To make forms less complex, there are now separate forms for ECT and other treatments:

- T2A (S237) - ECT
- T2B (S240) - medication
- T2C - artificial nutrition
- T3A (S237) - ECT
- T3B (S240) - medication or artificial nutrition

All the T2 and T3 forms, apart from T2C, are “statutory” forms. This means that the actual form needs to be used and properly completed to authorise treatment.

Any T2 or T3 form completed from 30.06.17 needs to be on a new form. If an old form is completed after that date, it is not valid.

Old forms completed before 30.06.17 continue to be valid.

New CTO3c form for MHOs

MHOs are now required to make a record of particular information in certain circumstances when the RMO makes a determination to extend a CTO (under s86) or a compulsion order (under s152). These are the circumstances where the Tribunal is required to review the determination under s101(2)(a) for a CTO, or s165(2)(a) for a compulsion order.

Form CTO3c is available for this. This should be completed any of the following situations:

- Where there is a difference between the type(s) of mental disorder that the patient has, and the type(s) recorded in the order in respect of which the determination has been made.
- Where the MHO disagrees with the determination.
- Where the MHO has “failed to comply” with the duty to inform the RMO whether they agree or disagree with the determination.

We have added wording to the guidance at the top of the CTO3c form to clarify better when it should be used. The amended form is on the MHA forms webpage.

Suspension of detention

The following webpage has interim guidance on suspension of detention (this is an extract from the draft revised code of practice).

<http://www.gov.scot/Resource/0052/00521758.pdf>

Patients on hospital-based CTOs or compulsion orders can now only be granted up to 200 days suspension of detention in any 12 month period. This rule applies for any suspension of detention certificate granted on or after 30.06.17.

Any period of suspension of detention which lasts for 8 hours or less does not count as a day towards the allowable total of 200 days. This is likely to include escorted and unescorted daytime visits or placements. Periods of more than 8 hours but less than 24 hours count as a day toward the 200 day total.

Any certificate granted before 30.06.17 will continue to be valid, even if it authorises suspension of detention beyond 200 days. The new SUS1A form should be used to authorise suspension of detention (SUS3A for restricted patients).

Named persons and listed initiators

Changes are being phased in so that a patient will not have a named person unless they nominate somebody to be their named person. For a nomination to be valid, the nominated person now has to consent in writing to be the named person, and that needs to be witnessed.

There are links to details of transitional arrangements for named persons and a flowchart on the webpage already referenced above:

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law/mh2015guidance>

Nominations of named persons made before 30.06.17 will continue to be valid, even if the named person has not agreed in writing.

Default named persons for people who were already subject to an order on 30.06.17 will continue in the role until any of the following happen:

- The patient nominates them or someone else as named person
- The Order expires
- The first mandatory review after 30.09.17 takes place
- If the default named person is still in place on 30.06.18, their role will elapse.

The Scottish Government has provided new suggested templates for named persons nominations, declarations and consent on the Mental Health Act forms page.

Listed Initiators

The 2015 Act has inserted Section 257A. This makes provisions for others, known as “listed initiators”, to initiate applications or appeals to the Tribunal if a patient does not have capacity to exercise those rights themselves.

Listed initiators include:

- any welfare guardian of the patient
- any welfare attorney of the patient (the welfare attorney must be operational)
- the patient’s primary carer (if any)
- the patient’s nearest relative

The patient’s primary carer and nearest relative cannot act as a listed initiator if the patient has made a written declaration precluding them doing so. The patient needs to be capable of making such a declaration and this needs to be witnessed. The Scottish Government has provided a suggested template for this on the Mental Health Act forms page.

Advance statements

If a Health Board receives a copy of an advance statement, or a document withdrawing an advance statement, it must place a copy of this with the person's medical records.

The Health Board is required to inform the Commission that they have a copy of this document, and where it is kept.

There is a new ADV1 form for medical records to use to inform the Commission of this. The Commission now keeps a register of this information.

The Commission should not be sent a copy of the document itself unless we ask for this (or unless the advance statement has been overridden).

The Commission's advance statement register can be accessed to check if a person has an advance statement by:

- the person themselves
- an individual acting on their behalf (including their advocate, solicitor, named person, guardian or welfare attorney)
- a mental health officer
- their responsible medical officer
- the relevant health board responsible for the person's treatment.

The following webpage has interim guidance on nurses' power to detain; suspension of detention and removal orders. These documents are extracts from the draft revised code of practice.

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law/mh2015guidance/amendedsections>

Nurses power to detain pending medical examination (section 299)

Nurses power to detain has been simplified so that a patient in hospital may be detained there by nursing staff for up to three hours to enable a medical practitioner to carry out an examination.

Timings of Criminal Procedures Act (CPSA) Orders

Changes have been made to time periods for authority conferred by CPSA orders. This is to bring the mental health disposals in line with the general rule for calculation of time periods in the criminal court. Time periods are calculated from the day the relevant order begins to the end of the day following the expiry of the relevant period.

This affects time periods for assessment orders, treatment orders, interim compulsion orders, compulsion orders, and hospital directions.

Medical Records and RMOs should familiarise themselves with these changes.

For example, a compulsion order now authorises compulsory treatment until the end of 6 months following the day on which the order is made.

- i.e. - the order authorises compulsory treatment for one full day longer
- the two month period for the RMO's first mandatory review commences one day later

Extension of assessment order

The court can now, on one occasion only, extend an assessment order by up to 14 days under s52G(4). Previously the court could only do this for up to 7 days.

Regulations

The following webpage has new regulations and guidance on these, including medical conflict of interests and cross-border transfer regulations.

<http://www.gov.scot/Topics/Health/Services/Mental-Health/Law/2015-act-regulations>

Medical conflict of interest regulations

These relate to medical examinations for detentions in hospital. Link to the regulations themselves:

<http://www.legislation.gov.uk/ssi/2017/174/contents/made>

For CTO applications, it is now permissible for two doctors working in the same NHS hospital to do the two required medical examinations *if* one of the doctors is a consultant and the other does not work directly with or under the supervision of that consultant.

Private hospitals

For CTO applications for detention in an independent hospital, one of the medical examinations can now be undertaken by a doctor employed by that independent hospital*.

For a patient who is, or will be, detained in an independent hospital under a CTO, CO or CORO, a medical examination for a mandatory review can be undertaken by the RMO or an AMP employed by that independent hospital* *if*.....the patient has an additional examination undertaken during the mandatory review period by an AMP who is not.

* means “employed by or to provide services in or to that independent healthcare service”

Cross Border Matters

Cross-border return of a patient subject to detention in a hospital elsewhere in the UK who has absconded into Scotland

The Scottish Ministers have made it clear to us during recent discussions that they consider that a patient cannot be removed from Scotland under cross-border absconding provisions if they have been detained under Scottish legislation.

If the patient is detained under Scottish legislation, a cross-border transfer application to the Scottish Ministers should be made if it is proposed to transfer them out of Scotland.

New cross-border provisions

The Regulations for planned cross-border transfers have been extended to cover all other member states of the EU.

For patients subject to detention in hospital, an “application for fast-track removal with consent” to another hospital within the UK can now be made if:

- the patient gives written consent
- an AMP other than the RMO certifies that the patient is capable of consenting
- if the patient has a named person, they give written consent

When an RMO applies to the Scottish Ministers to transfer a patient subject to detention in hospital out of Scotland, they need to complete a TX1a form. This form has been extensively updated to include new changes, but also to gather information that the Scottish Ministers require to consider the request. Ministers always requested this information when considering such applications, but this is now required at the outset.

Compulsory treatment for cross-border absconders – possible future changes

The Government brought forward regulations to allow treatment to be given compulsorily to a patient who has absconded from another jurisdiction, pending their return. These regulations were not approved by the Health and Sport Committee. The Government is reviewing this, and may bring forward revised legislation later in the year.

In the meantime, if an absconding cross-border patient requires treatment in hospital without their consent, consideration may need to be given to initiating a short term detention certificate (STDC) under the Scottish Act. If this treatment is required urgently, before assessment for a STDC can be arranged, consideration could be given to granting an emergency detention certificate and giving urgent medical treatment within the provisions of s243.





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