

Right of access to independent advocacy

- 01 Independent advocacy supports a patient’s right to have their own voice heard in decisions made about their health and well-being. Independent advocacy enables vulnerable people to be heard and promotes social inclusion. Section 259 of the Act sets out the main provisions for independent advocacy.
- 02 “Every person with a mental disorder shall have a right of access to independent advocacy; and accordingly it is the duty of –
- (a) each local authority, in collaboration with the (or each) relevant Health Board; and
 - (b) each Health Board, in collaboration with the (or each) relevant local authority, to secure the availability, to persons in its area who have a mental disorder, of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services.” (Sections 259(1))
- 03 For local authorities and Health Boards, the duty is a mutual one. Each local authority is required to collaborate with each Health Board in its area and likewise each Health Board is required to collaborate with each local authority in its area to secure the availability of these services. In the case of patients in the State Hospital, responsibility for securing the availability of independent advocacy services falls to the State Hospitals Board alone. However, in the case of a State Hospital patient who is granted a conditional discharge or for whom a compulsory treatment order has been suspended, the State Hospitals Board is required to collaborate with the local authority and Health Board for the area in which the former patient is now residing. This may be helpful in ensuring continuity of advocacy services to the patient.

Who can access independent advocacy under the Act?

- 04 The right of access to independent advocacy under section 259 applies to anyone with a mental disorder, here referred to as the “patient”. The term “mental disorder” is defined in section 328 of the Act and means any mental illness, personality disorder or learning disability, however caused or manifested.
- 05 This right applies to any patient:
- regardless of age, disability, ethnic origin, culture, faith, religion, sexuality, social background or personal circumstances;
 - whatever their need for advocacy; and
 - whether or not they are ordinarily resident in Scotland.

What is independent advocacy?

- 06 Section 259(4) describes independent advocacy services for the purposes of the Act as:

- 07 “services of support and representation made available for the purpose of enabling the person to whom they are available to have as much control of, or capacity to influence, that person’s care and welfare as is, in the circumstances, appropriate.”
- 08 Under the Act, independent advocacy might assist a patient to express their needs and thoughts or to present their views. An independent advocate might help the patient in their everyday dealings in relation to their healthcare and might speak on their behalf in their dealings with, for example, their MHO, RMO or members of hospital staff. Independent advocacy can assist patients:
- to make informed decisions;
 - to increase their decision-making capacity by helping them to understand the issues being discussed;
 - in communicating their views to others; and
 - in representing the patient’s interests to enable those to be taken into account in decisions made relating to their care and treatment.
- 09 Local authorities and Health Boards should make arrangements to ensure that their staff are aware of a patient’s right of access to independent advocacy and the role of independent advocates and advocacy groups, whether or not those staff have any specific duties corresponding to the patient’s rights, as detailed below. It is important that staff understand that independent advocates may assist any patient with a mental disorder, including those with incapacity or communication difficulties, children and adolescents, or elderly patients.

The role of independent advocacy

- 10 Independent advocacy can enable a patient to express their needs and thoughts and to make these known to those who are making decisions about the patient’s care and welfare. Many of those decision makers are required to take the patient’s views into account and an independent advocate can play a vital part in ensuring that this can be done. The role of independent advocacy is to help a patient to understand their options and to convey their views. While it is not the role of an independent advocate to make decisions for the patient, he/she is there to offer support to facilitate the patient’s decision-making.
- 11 The involvement of independent advocacy does not change the level of responsibility on other professionals involved with the patient. Those professionals still require to exercise their professional judgement in the patient’s case. Nor does the involvement of independent advocacy affect a patient’s rights with regard to seeking advice from a solicitor or access to legal aid.

- 12 Independent advocacy organisations may provide individual or group advocacy. The Act is not specific about the type or types of independent advocacy services to which a patient should have a right of access. Any or all of the various types might be appropriate depending on the circumstances and personal preferences of the patient concerned.
- 13 Each Health Board and local authority should produce and maintain a list of independent advocacy organisations in their area.
- 14 As a matter of best practice, where the patient has chosen to use independent advocacy, the independent advocacy organisation or advocate should then be entitled to (where the patient agrees):
 - be invited to attend, where practicable, a consultation, interview or meeting about the patient's treatment or care in order to support or represent the patient there;
 - have access to the patient at any reasonable time to provide any support or representation needed;
 - correspond or communicate in any other way with the patient on any matter relating to the patient's care and welfare; and
 - receive such information as would assist them to perform their role.
- 15 Independent advocacy organisations and its advocates must be clear about their obligations in respect of patient confidentiality. The patient should be asked to consent, where they are capable of giving that consent, before any personal information is passed on to a third party. The nature and amount of such information released to another person should be proportionate and relevant to the desired objective. Where it is not possible to obtain such consent, the independent advocate may consider that effective advocacy support cannot be provided if personal information is not shared. In those circumstances, the independent advocate must be alert to the need to respect patient's confidentiality and must only disclose information on a strictly "need to know basis" with appropriate safeguards. Otherwise, it will not be appropriate for an independent advocate to pass on information.
- 16 Independent advocacy organisations and advocates do not have an automatic right of access to the patient's medical records, although the patient may authorise them to have such access.
- 17 Where the patient consents, it would be best practice for the MHO and hospital managers to help ensure that patients who are members of advocacy groups are able to:

- receive assistance to attend the meetings of their advocacy group, where practicable; and
 - correspond or communicate with their advocacy group.
- 18 Where the patient consents, it would be best practice for MHOs and hospital managers to ensure that advocacy providers and groups are given:
- information from those planning or providing patient care or treatment which would assist the group to perform its role; and
 - an opportunity to be involved, where practicable, in all stages of the decision-making process, including representation on planning and strategy groups.

Written communications with an independent advocate or independent advocacy organisations

- 19 Section 281 of the Act gives hospital managers the power to prevent certain detained patients (“specified persons”) from sending or receiving mail. However, mail to or from any person who is known by the hospital manager to be providing independent advocacy services, is specifically excluded from this provision under section 281(5)(n). Therefore a “specified person” has the right to send mail to or receive mail from their independent advocate, even where the patient is otherwise restricted in sending or receiving mail.
- 20 Any independent advocate or independent advocacy organisations should inform hospital managers responsible for a patient of their interest, and give their contact details. This is particularly important where the patient may be subject to restrictions in terms of section 281. Wherever possible, mail should be sent to or from the contact address notified to hospital managers. This will enable hospital managers to recognise more easily that mail is intended for, or is from, an independent advocate or organisation.

What is meant by “Independent” advocacy

- 21 Independence is key in the patient’s right to advocacy, because it is vital that the role of independent advocacy is not compromised in any way. Independence ensures that the advocacy services provided are divorced from the interests of those persons concerned with the patient’s care and welfare. Conflict might occur for example, if a person providing advocacy services was also a care provider and a patient wanted to raise issues about their care. It is clear that in those circumstances, the advocate’s ability to support that patient would be severely compromised.
- 22 The Act, therefore, makes specific provision that to be “independent”, the advocacy services must be provided by persons other than a local authority or a Health Board responsible for providing services in the area where the patient is to receive care or

treatment, or a member of those bodies or any other person involved in their care treatment or in providing services to them. Any independent advocacy organisation should have policies in place to identify and manage/minimise the risk of any conflict of interest.

- 23 Independent advocacy should be provided by an organisation whose sole role is independent advocacy or whose other tasks either complement, or do not conflict with, the provision of independent advocacy. If the independent advocacy service or advocate has a conflict of interest, they should inform all relevant parties of this, and should withdraw from acting for the patient.

Duty to inform patients of and assist them to access independent advocacy

- 24 Mental Health Officers (MHOs) have a duty under the Act at certain times to:

- inform patients about the availability of independent advocacy services; and
- take appropriate steps to ensure that patients have the opportunity to make use of those services.

- 25 MHOs are required by the Act to carry out this duty at each of the following times.

- when considering whether to consent to the grant of a short-term detention certificate (section 45);
- on application for, extension of and extension and variation of, compulsory treatment orders (sections 61, 85, 89 and 94); and
- on extension of and extension and variation of compulsion orders (sections 147, 151, 155 and 160).

- 26 Regulations made under section 290 of the Act (The Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005) place a duty on the MHO to inform a patient of their right to access independent advocacy and to take steps to help them use such services where consideration is being given to the removal of the patient to a hospital outwith Scotland and on a patient's reception into a hospital in Scotland on removal from another part of the United Kingdom, the Isle of Man or the Channel Islands.

- 27 The "appropriate person" is under a duty in terms of section 260 of the Act to 'take all reasonable steps' to:

- inform patients subject to any form of compulsion of the availability of independent advocacy services; and
- ensure that those patients have the opportunity of making use of those services.

28 The “appropriate person” to carry out the duties under section 260 is:

- the managers of the hospital where a patient is detained;
- where, by virtue of a certificate granted under the Act, the authorisation to detain is suspended, the managers of the hospital in which, but for the certificate, the patient would be treated; or
- in any other case, the managers of the hospital specified in the order.

29 This duty must be carried out for patients who are:

- detained in hospital by virtue of the 2003 Act or the 1995 Act, or
- are not detained in hospital but are subject to:
 - an emergency detention certificate;
 - a short-term detention certificate;
 - a compulsory treatment order;
 - an interim compulsory treatment order;
 - an assessment order;
 - a treatment order;
 - a hospital direction;
 - a transfer for treatment direction;– an interim compulsion order; or
 - a compulsion order.

30 In addition, section 260(3) states that the duty of the appropriate person to inform and assist patients in relation to independent advocacy must be carried out:

- as soon as practicable after the beginning of a detention order, where the patient is detained in hospital;
- as soon as practicable after the making of the order, where the patient is not detained in hospital;
- as soon as practicable after any occasion on which the patient ‘reasonably requests’ to be informed of those matters; and
- at such other times as may be prescribed by regulations.

31 Regulations made under section 260(3)(c) of the Act (The Mental Health (Provision of information to patients) (Prescribed times) (Scotland) Regulations 2005 (SSI No. 206)) require that, in addition to the times specified above, the managers of the hospital must also inform the patient about the availability under section 259 of the Act of independent advocacy services as soon as practicable after a number of other events. These events include:

- the making of an order by the Tribunal in relation to a CTO or a compulsion order;
- the making of a determination by the RMO in relation to such orders;

- the grant of a certificate by an RMO suspending detention for more than 28 days under an interim CTO;
 - a CTO, a compulsion order (with or without restrictions) or a transfer direction and the revocation of such a certificate.
- 32 In practice, the role of the appropriate person may be carried out by other hospital staff on behalf of the managers. However, it remains the appropriate person's responsibility to ensure that their duty is fulfilled. Where the duty is to be delegated, they should ensure that there are clear processes in place to ensure effective delegation, and in particular, that roles and responsibilities of members of staff or others who are to exercise delegated authority are defined.
- 33 All relevant staff should be made aware of the patient's right to independent advocacy and its role, the legal requirements relating to independent advocacy under the Act and of best practice. It is important that staff know that advocates may support any patient, including child and adolescent patients, patients with incapacity, and patients with communication difficulties.
- 34 It would be best practice for information on independent advocacy to be displayed in public areas and on wards as well as in forms which can be handed out to people, such as leaflets or in audio or video formats. In addition, MHOs and hospital managers might provide such information at other times where it appeared to them that the patient would benefit from learning about, or how to access, independent advocacy services.
- 35 MHOs and the appropriate person should ensure that they are aware of the independent advocacy services that are available in their area. Claiming ignorance of these will not be sufficient excuse for a failure to comply with a duty under the Act.
- 36 Information about independent advocacy services will need to be communicated to patients in a way which each patient can understand, taking account of any special communication needs they may have. Such needs may arise, for example, where the patient is deaf or hard of hearing or has a visual impairment, a learning disability or where their first language is not English. In addition, any information provided in writing should be clear and in a style and language which can be easily understood by the individual patient. This is especially important for child and adolescent patients, as standard information may be presented using vocabulary which is too advanced or complex for them. While it may be considered to be important to give the patient information for their own future reference, perhaps in the form of a leaflet or an audio or video file, it will not be sufficient for the MHO or appropriate person to just hand over that leaflet or audio or video format information without making sure that the patient understands the information being given or has the means to access it.

- 37 When informing a patient of their right to independent advocacy, it would be best practice to also inform the patient of the benefits of accessing support from independent advocacy. This might include that independent advocacy ensures that people know and better understand their rights, their situation and systems. Independent advocates help people to speak up for themselves and speak to those who need it. Independent advocacy helps build confidence and empowers people to assert themselves. When people are involved in individual or collective advocacy they are more likely to know about other rights such as Named Persons and Advance Statements. Independent advocacy also supports people who have limited capacity and or communication. This is called non instructed advocacy and advocates would work with significant people in the person's life to establish their preferences, their past wishes and how they might want to live their life to help inform the advocacy support.
- 38 The involvement of independent advocacy can help ensure that a person better understands what and why something is happening, is fully involved and engaged in decisions and it aims to help the person achieve the outcome they are looking for.
- 39 The patient may also benefit from understanding some of the ways that the involvement of independent advocacy can bring significant benefits for their relationship with practitioners and with their carers;
- It helps build relationships
 - It enables smoother communication
 - It helps staff and the person better understand each other's views, opinions and perspectives
 - It enables the carer to provide care instead of having to also advocate for the person
 - It takes away some of the complexities of the relationship especially if there is disagreement between the carer and the cared for.
- 40 The MHO and the appropriate person may need to explain what an independent advocate is and how an advocate or an advocacy group might help. It may be necessary for discussions on independent advocacy to take place on more than one occasion, as there may be factors such as stress, which make it difficult for the patient to fully absorb or understand the information being offered. The MHO or the appropriate person may wish to ask ward staff or other members of the multi-disciplinary team to assist them in this.
- 41 In addition to informing people about the availability of independent advocacy services, the MHO and the "appropriate person" also have a duty to take appropriate steps to ensure that the patient has the opportunity of making use of those independent advocacy services. The Act is not specific about the steps which they should take and

what is appropriate and these will depend on the circumstances. Again, this may take more than one approach from the MHO or the appropriate person and other staff may be asked to assist and support to achieve this.

- 42 Where the patient would like independent advocacy, it would be best practice for an MHO and the appropriate person to assist the patient to contact an independent advocacy organisation. For example, they might contact the independent advocacy organisation on that patient's behalf to make arrangements for the patient to meet with an independent advocate if the patient would otherwise be unable to do this. They should not at this stage be disclosing any personal information about the patient to the independent advocacy organisation. The patient should be asked for consent to disclose any information before it may be shared with the organisation. Where the patient cannot give consent to the sharing of information the MHO or the appropriate person should consult the RMO and members of the multi-disciplinary team to consider what information, if any, it might be appropriate to share in the circumstances, bearing in mind the patient's right to confidentiality. It may also be appropriate to seek legal advice on the sharing of personal information.
- 43 As a matter of best practice, the MHO and the appropriate person should record in the patient's medical records the steps taken to inform that patient of independent advocacy, how and where to access it. It would be best practice to keep other people who support the patient informed about whether or not the patient would like independent advocacy, and any follow-up action required, where a patient has consented to such information being shared. Where an independent advocate is involved, details of that advocate's involvement should be intimated to others concerned in the care and welfare of the patient.
- 44 If a patient has been fully informed about independent advocacy services, and chooses not to involve an advocate in their case, it would be best practice for the MHO and the appropriate person to:
 - record in the patient's medical records the fact that the patient was informed about independent advocacy and did not want advocacy support; and
 - check with the patient again at a later date that they remain of the same view, in the event that they may have changed their mind.
- 45 If the MHO or appropriate person considers that the patient's decision to decline independent advocacy is due to their mental disorder, and also considers that independent advocacy would benefit the patient, then the MHO may wish to consult the RMO and other members of the multi-disciplinary team as to whether to refer the patient to independent advocacy services anyway.

What happens if the MHO does not interview the patient?

- 46 It is possible, in very limited circumstances, for an MHO to consent to a detention without having seen the patient in question. Section 45(1) states that the MHO has a duty to inform the patient about independent advocacy services before deciding whether to consent to a detention. If the MHO does not interview the patient for whatever reason, the MHO still has a duty to inform that patient about independent advocacy services and to take appropriate steps to ensure the patient has the opportunity of making use of those services. The MHO may have to visit the patient on more than one occasion.
- 47 Sections 85, 89, 147, 151 and 155 place a duty on the MHO to inform the patient about independent advocacy services, and to ensure the patient has the opportunity to use those services, as soon as practicable after receiving notice of a proposed extension of an order to which the patient is subject and, where applicable, grant of such an extension, notwithstanding that it may be impractical for the MHO to interview the patient.
- 48 It would be best practice for the MHO to record in the patient's records the steps taken in these cases.

What does 'as soon as practicable' mean?

- 49 Section 260(3) states that the duty on the appropriate person to inform and assist patients in relation to independent advocacy must be carried out:
- as soon as practicable after the beginning of a detention order, where the patient is detained in hospital;
 - as soon as practicable after the making of the order, where the patient is not detained in hospital;
 - as soon as practicable after any occasion on which the patient 'reasonably requests' to be informed of those matters; and
 - at such other times as may be prescribed by regulations.
- 50 Regulations made under section 260(3)(c) of the Act (The Mental Health (Provision of information to patients) (Prescribed times) (Scotland) Regulations 2005 (SSI No. 206)) require that, in addition to the times specified above, the managers of the hospital must also inform the patient about the availability under section 259 of the Act of independent advocacy services as soon as practicable after a number of other events. These events include the making of an order by the Tribunal in relation to a CTO or a compulsion order, the making of a determination by the RMO in relation to such orders, the grant of a certificate by an RMO suspending detention for more than 28 days under an interim CTO, a CTO, a compulsion order (with or without restrictions) or a transfer direction and the revocation of such a certificate.

51 The Act does not define what 'as soon as practicable' means, because it is a matter of what is reasonable in the circumstances of any particular case.

What constitutes a 'reasonable request'?

52 Section 260(3)(b) states that the appropriate person will inform a patient of the availability of independent advocacy services "as soon as practicable after any occasion on which the patient reasonably requests to be informed of those matters". Again, the question of what is reasonable depends on the facts and circumstances of the individual case. It would be best practice to consider all requests to be reasonable in the first instance, unless there is some unusual circumstance suggesting otherwise, and to inform that patient about the services available. It would also be best practice to record in the patient's records when and how the request for information was responded to.

General Practitioners

53 General practitioners (GPs) are not specifically allocated duties regarding independent advocacy by the Act. However, as a key point of contact for patients their involvement is important to the successful implementation of these provisions. It is expected that general practices will have information about independent advocacy services on display, as well as having them available in a form that patients can take away with them. Where a patient requests information about independent advocacy, GPs and practice staff would be expected either to provide this information themselves or to direct the patient toward appropriate sources of information. Where the request for information is made during a consultation, it would be best practice for that request and the response to be recorded in the patient's case notes.

What happens when a patient is unable to communicate whether or not they would like an independent advocate?

54 Every patient has a right of access to independent advocacy under the Act, as detailed above in paragraph 90. It is important that they are able to make use of this right, in view of their potential vulnerability. Where a patient lacks capacity to make a particular decision, it should not be assumed that the patient does not have capacity to make decisions on any subject at any time. A patient's capacity may change over time and this needs to be taken into account. Where a patient appears to lack capacity to decide on making use of independent advocacy, the subject should be discussed again with them by those who have specific duties to bring the availability of those services to their attention, at a time when their capacity to understand the issue appears to have improved.

55 Where a patient has a degree of incapacity, or cannot for any reason clearly say whether or not they would like an independent advocate, an MHO/hospital managers/appropriate person should consider how an independent advocate may be involved. MHOs/hospital managers/ appropriate persons should pay particular attention

to the patient's past wishes, the views of people supporting them and any advance statement or other record of a patient's prior comments on having an independent advocate. The right of access to independent advocacy is for each patient and is not limited only to those who are best able to articulate their needs.

Speed of Response

- 56 When a referral is made to independent advocacy, it is expected that the independent advocacy organisation will respond to the patient concerned as quickly as is appropriate and practicable in the circumstances. For example, priority may be required where some immediate action is needed and in particular where a patient is liable to be or is subject to compulsion under the Act.
- 57 It is recognised that independent advocacy organisations often work 'office hours' and that in certain circumstances, this may mean that there will be a delay in responding to the referral, at such times as weekends and holidays. Following initial contact, independent advocacy organisations should prioritise provision according to agreements with local authority and Health Board commissioners based on local needs and national priorities.

Tribunals

- 58 As part of their role in supporting and representing a patient, an independent advocate may assist a patient in the time before and during any tribunal hearing. The independent advocate would not replace any legal representative a patient may have, though an independent advocate may fulfil a useful role in helping a patient in communicating with their legal representative.

Advance statements

- 59 Advance statements are described in section 275 of the Act as statements setting out the way the patient who has capacity to decide how they wish to be treated, or do not wish to be treated, at some time in the future, in the event that they become unable to make such decisions through mental disorder. Advance statements may be useful for patients to indicate whether they would wish to have an independent advocate or not.
- 60 Independent advocates may assist patients to write an advance statement and keep it up to date. Independent advocates are not one of the classes of persons authorised by regulations under section 275 of the Act to witness an advance statement. Where an independent advocate is qualified as a result of their professional qualifications (for instance, a nurse) to witness a patient's advance statement, then they will wish to consider carefully whether there may be a conflict of interest in doing so.

Independent advocates and named persons

- 61 Generally, a named person under the Act is any person 16 years and over nominated by a patient and the Act details the form in which this must be done. Independent advocates may assist a patient in writing out the nomination and witness the nomination.
- 62 As a matter of best practice, an individual should not act as both independent advocate and named person for the same patient. There are differences between the two roles which could cause confusion were the same person is to fulfil both roles.

Duty to report to the Commission

- 63 Section 259A sets out an additional reporting duty to the Commission in relation to the provision of independent advocacy services for local authorities, Health Boards and the State Hospitals Board. These bodies must report to the Commission, at least every two years, how they have exercised their functions under section 259, such as securing the availability of independent advocacy services within their area, in the previous two years. They must also report how they intend to exercise their functions over the next two years.