

Secondary Legislation associated with the implementation of the Mental Health (Scotland) Act 2015

**Business and Regulatory Impact Assessment
(BRIA)**

September 2017

Business and Regulatory Impact Assessment (BRIA) — secondary legislation associated with the implementation of the Mental Health (Scotland) Act 2015

This Business and Regulatory Impact Assessment (BRIA) covers the following secondary legislation, laid before the Scottish Parliament in May and June 2017:

- The Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017
- Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017
- Mental Health (Cross-border transfer: patient subject to detention requirements or otherwise in hospital) (Scotland) Amendment Regulations 2017
- Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017
- The Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Amendment Rules 2017
- The Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017
- The Mental Health (Conflict of Interest) (Scotland) Regulations 2017
- The Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2017

The legislation outlined above is made in consequence of implementation of the Mental Health (Scotland) Act 2015 (“the 2015 Act”).

Purpose and Intended Effect

Background

The Mental Health (Scotland) Act 2015 (“the 2015 Act”) received Royal Assent on August 4, 2015 following passage through the Scottish Parliament. The Act makes changes to the Mental Health (Care and Treatment) (Scotland) Act 2003 to allow service users with a mental disorder to access effective treatment quickly and easily. It also contains measures around named persons, advance statements and advocacy to enhance service users' rights and to promote service users' involvement in their treatment. It introduces a Victim Notification Scheme for victims of mentally disordered offenders. It also makes some changes to the Criminal Procedure (Scotland) Act 1995 in relation to mental health disposals in criminal cases.

The implementation of the 2015 Act is part of the Scottish Government's programme to streamline, simplify and clarify the system for efficient and effective treatment for people with a mental disorder. The 2015 Act does not seek to overhaul mental health law, simply to make those changes that are needed to improve further the operation of the 2003 Act. Provisions with regard to appeals against excessive security and a review of the arrangements for investigating deaths of mental health inpatients are already in force. The policy to be assessed in this BRIA is the secondary legislation

associated with the 2015 Act as the bulk of the remaining provisions are brought into force in 2017.

The Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017

The 2015 Act provision simplifying the nurses holding power is due to come into force on 30 June 2017. The power is currently available in respect of patients in hospital by virtue of a probation order with a mental health treatment requirement. This Order does not extend the power of nurses to detain patients, it simply updates language to reflect the introduction of the community payback order.

The 2015 Act makes the use of the nurse's holding power clearer to both service users and practitioners. It seeks to balance the flexibility need to arrange a medical exam of benefit to the patient while maintaining the need for minimum restriction on the liberty of a patient. There is no increase in the overall maximum permitted period and the period is a maximum period of three hours, not a standard period of three hours.

There are no additional costs on business, third sector organisations, or public sector organisations as a result of this order.

Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017

These regulations amend the Mental Health (England and Wales Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008 to take account of provisions in the 2015 Act, alongside some amendments to the regulations to improve their operation. The 2008 regulations set out the process for the transfer of patients on community-based orders between Scotland and England or Wales.

These regulations will have a minor financial impact. The amendments are focussed on improving the operation of cross-border transfers. The extended appeal rights do have a potential cost implication, however these are areas where the Mental Welfare Commission for Scotland currently can make a reference to the Tribunal on behalf of the patient, so any increase in the number of Tribunal hearings, under these regulations, and associated cost, is likely to be very small.

Mental Health (Cross-border transfer: patient subject to detention requirements or otherwise in hospital) (Scotland) Amendment Regulations 2017

These regulations amend the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 to take account of amends to section 290 of the 2003 Act in the Mental Health (Scotland) Act 2015, alongside some amendments to the regulations to improve their operation. The 2005 regulations set out the process for transferring a patient who is detained under either the 2003 Act or the relevant provisions of the Criminal Procedure (Scotland) Act 1995 from Scotland; transferring a patient who is not

detained but who is in hospital for treatment for a mental disorder from Scotland to outwith the UK; and the reception of patients into Scotland from other UK jurisdictions who are detained on a corresponding order.

These regulations will have a minor financial impact. The amendments are focussed on improving the operation of cross-border transfers. The extended appeal rights do have a potential cost implication, however these are areas where the Mental Welfare Commission for Scotland currently can make a reference to the Tribunal on behalf of the patient, so any increase in the number of Tribunal hearings, under these regulations, and associated cost, is likely to be very small. In the last two reporting years, 2015/6 and 2016/7, there were eight appeals made to the Tribunal in relation to a transfer under section 290 and two references were made by the Mental Welfare Commission. It is likely that references made by the Commission can now be made by the patient's named person or a listed initiator where there is no named person, and in such a case, there may be legal aid costs. It is likely this will apply in 1-2 cases a year based on the figures above.

Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017

The regulations make provision in connection with escorted mental health patients who visit Scotland while on leave of absence under the law of another European Union member State. No financial impact is expected from these regulations.

The Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Amendment Rules 2017

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

The financial impact of these rules are that a new category of person will have the ability to make appeals and applications to the Tribunal. However, they only have this ability when an existing category of person, the named person, is not involved. Therefore, there is no net financial effect.

The Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017

This instrument revokes and replaces the existing regulations to take into account changes made by the Mental Health (Scotland) Act 2015. It allows a small number of additional classes of persons to act as a prescribed person. No financial impact is expected from these regulations.

The Mental Health (Conflict of Interest) (Scotland) Regulations 2017

The impact on business will be where an approved medical practitioner who is not employed or contracted to the independent healthcare provider is required for an additional medical examination of patients detained in an independent health care service. There may be a cost in providing these additional examinations in some cases.

There are currently 10 private psychiatric hospitals in Scotland. In these hospitals, the number of inpatient beds which will be taken up by detained patients is likely to be low. The majority of detained patients within independent sector psychiatric inpatient units are funded by a Scottish territorial health board. Psychiatrists from those services will be reviewing patients there from time to time anyway, to plan how to enable those patients to return to their home areas in the future and to justify the costs of the placements. Additional examinations for review purposes can be arranged as part of this process at no additional cost. There may be a very small number of patients for whom this is not a suitable arrangement, for example, patients referred from England to an independent service in Scotland. Private providers who require an approved medical practitioner to provide a report in these small number of cases may make arrangements with local NHS boards to cover this function in order to further minimise costs.

The Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2017

The 2003 Act makes provision at section 325 to prescribe statutory forms. The 2003 Act requires a certificate to be given by the responsible medical officer or other medical practitioner under certain circumstances. Under section 245(2) and 246(1) a certificate shall contain such particulars as prescribed in regulations.

Revision to these prescribed forms is required as part of a package of changes to forms used to administer certain processes under the 2003 Act.

There may be a financial impact in respect of replacing existing forms with the revised versions, however this is expected to be minor.

Consultation

Policy officials set up a stakeholder reference group which not only helped shape the form of the consultations but also focussed on the implementation of the Act itself. The first meeting of the group was on 18 December 2015 and further meetings took place during 2016, with a final meeting in May 2017. The group membership included a wide range of third sector organisations with an interest in mental health.

The membership of the group was as follows:

- British Psychological Society
- Carers Trust Scotland
- Centre for Mental Health and Incapacity Law, Edinburgh Napier University
- Convention of Scottish Local Authorities (COSLA)
- Forensic Network
- Mental Health Tribunal for Scotland
- Mental Welfare Commission for Scotland
- NHS Greater Glasgow and Clyde
- Royal College of Psychiatrists
- Scottish Association for Mental Health (SAMH)

- Scottish Association of Social Workers
- Scottish Autism
- Scottish Consortium for Learning Disability
- Scottish Courts and Tribunal Service
- Scottish Human Rights Commission
- Scottish Independent Advocacy Alliance
- Scottish Prison Service
- Social Work Scotland Mental Health sub-group
- The ALLIANCE
- Voices of Experience (VoX)

Two separate public consultation exercises were conducted in 2016. The consultation documents contained specific questions on the impacts on businesses of the proposed secondary legislation. Responses to these questions mainly referred to the possible impacts on the public sector and were general in nature.

Post-implementation Review

Review of the secondary legislation outlined above will be on-going, in light of feedback from stakeholders.

Declaration and Publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

DATE *5th September 2017*

SIGNED *Maureen Watt*

Maureen Watt
Minister for Mental Health



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