Legal Services Agency Mental Health Representation Project

Mental Health (Scotland) Bill

1. Do you agree with the general policy direction set by the Bill?

We agree with the general policy direction set by the Bill which on the whole seeks to promote the approach adopted by the 2003 Act to ensure that law and practice relating to mental health is underpinned by a set of principles, particularly minimum restriction of an individual’s liberty, maximum benefit and involvement of service users in their care and treatment.

We also agree with the policy objectives of the Bill to improve the efficiency and effectiveness of the mental health system in Scotland, to ensure that patients have sufficient time to prepare for hearings, even those requiring to be held at short notice, and that the Tribunal has all the required information to make its decision.

We are concerned, however, that the proposed changes contained in the Bill, whilst in theory may appear to promote the policy objectives, will not achieve the policy objectives in practice. Furthermore, we are concerned that some of the changes proposed may be an unnecessary infringement of individuals’ rights and freedoms.

We welcome the policy objective to extend the system of review of conditions of excessive security with proposals to provide an effective right of appeal against detention in conditions of excessive security for patients outwith the State Hospital, to promote the principle of least restriction. We do however look forward to being consulted in relation to relevant draft Regulations.

2. Do you have any comments on specific proposals regarding amendments to the Mental Health (Care and Treatment) Scotland Act 2003 as set out in Part 1 of the Bill?

**Procedure for Compulsory Treatment**

**S1: Measures until Application is Determined**

We are very concerned about the proposal to increase the five working day period to ten working days in s1 of the Bill.

We are also concerned that this proposal did not feature in the draft Bill consultation and in our view there has not been a full, considered consultation on this point. We have significant concerns regarding this proposal and believe that it may not be ECHR compliant. We note that there are provisions for an individual to challenge a Short Term Detention Certificate under s50 of 2003 Act however in practice where an individual lacks capacity or lacks the motivation, to do so, the proposal could essentially result in individuals being detained in excess of 40 days without any form of independent review by a judicial body.
We noted that a number of respondents, in particular the Mental Welfare Commission for Scotland, commented in their responses to the draft Bill consultation that they were pleased to see that this aspect of the McManus review had not been included in the draft Bill consultation and we are therefore surprised that it has been included at this stage.

In our view not only are the proposals potentially not ECHR compliant but they are also unnecessary. Whilst the McManus Report indicated that during their consultations there were concerns about the large number of cases which required multiple hearings, it has not been evidenced that this remains an issue. The Mental Health Tribunal for Scotland has reported a decrease in multiple hearings. A number of factors have occurred since the McManus Report which may have contributed to this decrease.

Firstly, it is expected that the Code of Conduct for Mental Health Tribunal work produced by the Law Society of Scotland will have assisted in reducing the number of multiple hearings. Secondly, there has been an increase in solicitors practicing mental health law throughout Scotland since the McManus report was produced which has assisted in accessing solicitors in areas outside the Central Belt within the tight timescales for Mental Health Tribunals and it is reasonable to expect that this too will have reduced the number of multiple hearings required. Thirdly, since the McManus report there has been seen a greater use of technology with individuals, particularly medical professionals giving evidence by phone which will have reduced the number of multiple hearings. The Mental Health Tribunal is also now piloting video conferencing that may further help reduce the need for multiple hearings particularly in rural locations. Fourthly, many Mental Health Officers will now also include details of the solicitor acting in the CTO application where this is known which has also assisted as this gives the solicitor acting more advance notice of the hearing.

Furthermore, in our view, extending the five day to ten days would not necessarily resolve the issue of multiple hearings. We would submit that in many cases it may be difficult to fully prepare for a Tribunal hearing where a patient is opposed to a Compulsory Treatment Order in 10 working days. The steps that require to be taken include meeting with the patient, obtaining papers from the Tribunal, considering these and discussing them with the patient, thereafter carrying out enquiries that can include obtaining an independent psychiatric report. This requires the solicitor to identify an available expert, have the expert examine the patient and prepare a written report which thereafter requires to be fully considered and discussed with the patient. This does not account for inevitable delays that will still exist outwith the solicitors control such as late service of papers, patients not seeking legal representation until close to the hearing (which in our experience is not uncommon), and availability of suitably qualified experts.
We would submit that if the issue of multiple hearings still exists to the same extent as it did when the McManus Report was produced, (which we do not consider to be the case), other areas could be addressed which would potentially improve the experience of the Tribunal process without further infringement on the patient’s rights. For instance, one of the main issues expressed during the consultation for the McManus Report was panels at continued hearings having different panel members from those at the first hearing which then requires evidence previously heard by the Tribunal to be repeated. This could be addressed by other means through the Tribunal administration.

The proposal to ensure that the proposed extension to ten working days will not increase the continuous period of detention of 56 days provided by s65(3) or the six month period in s64 although well meaning would result in considerable confusion, and would not be sufficient to offset the infringement of human rights caused by the extension of the five day period. We believe that the proposal would lead to confusion and lack of certainty in establishing the start date and end date of the Compulsory Treatment Order. There is also in our view a real risk that this in itself could lead to unnecessary delays in the Tribunal process and hearings have to be adjourned which is clearly not the policy objective of the Bill.

Orders Regarding Level of Security
Section 11 and 12: Orders relating to non-state hospitals
We welcome the proposal to amend legislation to allow movement of an individual within the same hospital as we agree that this more accurately reflects the current forensic estate.

S12 Qualifying Non-State Hospitals and Units
We note that s272A provides that ‘qualifying hospitals’ should be provided for by Regulations but note that the Policy Memorandum indicates that there will be no provision for patients detained in low secure setting and yet the Supreme Court judgement in RM v Scottish Ministers relates to exactly this. In our response to the draft Bill consultation we agreed that it was appropriate for ‘qualifying hospitals’ to be medium secure facilities given the current landscape of the secure estate.

Time for appeal referral or disposal
S15: Appeal on Hospital Transfer
We note the proposed change to bring the appeal period down from 12 weeks to 28 days. We do not support this change and do not agree with the policy objective to bring the Act into line with similar appeals in other parts of the Act in this regard. Our view is that there are specific transfer provisions for transfer to the State Hospital and these serve a very distinct purpose from other transfer provisions found in s125 or s219 of the Act. Section 126 and section 220 relate to the State Hospital alone. There are other instances of special provisions throughout the 2003 Act in respect of the State Hospital, for example
the excessive security provisions, and we would submit that it is appropriate that State Hospital cases are treated differently.

The first consideration is that that generally individuals are admitted to the State Hospital when they are very unwell, particularly so where they have been transferred from another hospital or prison. Such individual’s may at the time of transfer lack capacity to instruct a solicitor in relation to a potential appeal against their transfer, or may not realise initially the implications of their transfer to the State Hospital. In these circumstances, it would disadvantage individuals transferred to the State Hospital to reduce the 12 week period to 28 days.

Secondly, the comments in the Policy document that all that is required to initiate an appeal under both s219 and 220 is to submit an appeal in writing with a brief statement of reasons does not have regard to good professional practice. It is appropriate before advising a client to appeal against their transfer to make enquiries and provide them with advice regarding prospects of success. In the context of the State Hospital this is not always possible within the timescale of 28 days given the location of the hospital and the difficulty in identifying appropriately qualified doctors to complete independent psychiatric reports for patients at the State Hospital. Often appropriately qualified psychiatrists who are willing and able to do such reports have other heavy work commitments. There are also special security measures at the State Hospital which further impinge on their ability to complete reports in limited time scales. We would therefore submit that 28 days from the date of transfer is not sufficient time to allow patients to appeal to the Tribunal against the transfer.

Finally, in practice we do not agree that the current 12 week period should cause any significant problems in people receiving appropriate treatment. We would point out that there are already provisions contained in the 2003 Act to allow transfers to go ahead before the determination of an appeal in urgent situations.

**S19: Consent to being a Named Person**

We continue to have concerns regarding the provisions of requiring consent to be given to being appointed as a Named Person contained within s19. Whilst we understand the rationale behind the need for an individual to consent to acting as a Named Person we are concerned that the focus should be on the individual making a nomination or declaration. We would suggest that the onus should be on the individual nominated to make a declaration where they do not wish to accept the nomination of Named Person. To have a situation where someone is not a Named Person until they provide written consent to acting as Named Person is fraught with difficulties, could potentially delay the Tribunal process and result in an individual being deprived of the additional safeguard of a Named Person.
3. Do you have any comments on the provisions in Part 2 of the Bill on criminal cases?

4. We do not have any further comments to make on Part 2 of the Bill beyond those we made in our response to the draft Bill consultation.

5. Do you have any comments to make on Part 3 of the Bill and the introduction of a victim notification scheme for mentally disordered offenders?

We do not have any further comments to make on Part 3 of the Bill beyond those we made in our response to the draft Bill consultation.

6. Is there anything from the McManus Report that’s not been addressed in the Bill and that you consider merits inclusion in primary legislation? If so, please set out why.

In relation to Named Persons the McManus Report recommended that if a service user who has not appointed a named person is at the relevant time unable to appoint a named person and has not signed an advance statement or other document expressing a wish not to have a named person, anyone with an interest should be able to apply to the tribunal to be appointed as a named person. The Bill does not provide for this as it seeks to remove the provision of Section 256(1) (a). Whilst we fully adhere to the right of a patient to have autonomy there are situations which could arise where there is no Named Person but it would be appropriate for an individual to be appointed to act as the Named Person to promote the interests of the patient.

7. Do you have any other comment to make about the Bill not already covered in your answers to the questions above?

We note that there is no provision for a register of Named Persons. We believe there may be benefit in holding a register of Named Persons. We believe this would be helpful to practitioners and the Mental Health Tribunal Service alike.

We note that there are no proposals for the addition of Curator Ad Litem as a party who can appeal to the Sheriff Principal in terms of s320 and appeal to the Court of Session in terms of s322 of the Mental Health (Care and Treatment) (Scotland) Act 2003. We would welcome such proposals.

We also note that there are no proposals for the inclusion of recorded matters in respect of orders under the Criminal Procedure (Scotland) Act 1995. We believe that the Tribunal should be able to make recorded matters in appropriate cases. We would welcome such proposals.
Finally we note that there is no provision to allow for interim CTO to be made where an application for a CTO is being made for someone on a HD or TTD which is due to expire. We would welcome such a proposal.

Information about Legal Services Agency’s Mental Health Representation Projects
Legal Services Agency (LSA), Scotland’s National Law Centre, is a registered charity and public service organisation. Its objectives are to assist disadvantaged persons in Scotland by undertaking casework to a high volume and quality, by conducting legal research and by providing legal education and training.

LSA runs two specialist Mental Health Legal Representation Projects comprising of eight solicitors and one Solicitor Advocate based in Glasgow and Edinburgh. The Projects provide specialist legal advice, assistance and representation to people with mental health problems, acquired brain injury and dementia, their families and carers in these areas. The Projects, generally, aim to provide a holistic legal advice, assistance and representation service on all aspects of civil law relevant to the needs of their client group specifically in the areas of mental health and incapacity law and where there is an interface with other aspects of civil law the Projects look to provide the service in those areas for example family law, reparation, debt, housing, community care etc. The primary areas of activity of the Projects are, however, in the areas of detention, compulsory treatment and guardianship.

The Projects are widely regarded as two of Scotland’s main providers of legal advice, assistance and representation in the field of Mental Health and Incapacity Law.

We would welcome the opportunity to give oral evidence to the Committee.

Legal Services Agency Mental Health Representation Project
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