

MENTAL HEALTH (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Mental Health (Scotland) Bill introduced in the Scottish Parliament on 19 June 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 53–EN.

BACKGROUND

2. The Mental Health (Care and Treatment) (Scotland) Act 2003 (the "2003 Act") came into force in October 2005. The 2003 Act, introduced a different mechanism for deciding on compulsory treatment, making use of a tribunal system rather than the sheriff court; it also allowed compulsory treatment in the community, which had not previously been allowed. A new legal entity, called a named person, was created, to attempt to overcome problems experienced with next of kin having automatic rights when a person became mentally ill. The possibility of making advance statements, detailing treatment wanted or not wanted in the event of a person becoming mentally ill, was created. These were among the most radical of the changes introduced.

3. In the two years following commencement of the 2003 Act, there were many bodies monitoring the situation, from user and carer groups, service providers, the Tribunal Service and the Mental Welfare Commission ("the Commission"). Each had kept the Scottish Government informed of areas which did not appear to be functioning as well as had been anticipated. Although there was no strong feeling that there was anything fundamentally wrong with the 2003 Act, the Scottish Government decided that a "light touch" review should be undertaken.

4. In 2008, the Scottish Government therefore instituted a limited review of the civil provisions of the 2003 Act under the chairmanship of Professor Jim McManus and the Review Group reported back on March 2009.^{1,2}

5. As the Scottish Government response to the McManus Review noted some recommendations would require primary legislation to amend the 2003 Act before they could be implemented. These recommendations related to advance statements, named persons,

¹ Link to McManus Report <http://www.scotland.gov.uk/Publications/2009/08/07143830/0>

² Link to SG response <http://www.scotland.gov.uk/Resource/Doc/1094/0105288.pdf>

medical examinations, suspension of detention and multiple hearings at Mental Health Tribunal (“the Tribunal”).

6. The Bill also contains provision allowing victims of crime committed by mentally disordered offenders to receive certain information and to make representations about the release of the offender. Improving the provision of information, including case specific information, for victims has long been a policy objective of the Scottish Government. Evidence suggests that victims of crime require information for a number of reasons: a perception that it is a victim's right to receive case progress information; it helps to control anger and the desire for retribution; and to reduce fears of repeat victimisation. These information needs may be more pronounced for victims of serious violent and sexual crimes. Provision of information therefore meets a legitimate need, and can help to alleviate, at least to some degree, the sometimes severe effect that a crime can have on an individual.

7. The Criminal Justice (Scotland) Act 2003 (“CJ Act 2003”) gives all victims or an eligible family member the right to receive information about the release from prison of the offender, who committed the crime against them, and to receive information from and to make representations to the Parole Board for Scotland. The scheme is formally referred to as the "Victim Notification Scheme" (VNS) for Scotland. Although victims of an offender sentenced to imprisonment have a right to receive information about an offender, victims of a mentally disordered offender have no similar rights.

8. In 2010 the Scottish Government publicly consulted³ on whether a scheme similar to that in place for other offenders in the criminal justice system should be introduced for victims of mentally disordered offenders. The Scottish Government’s analysis of responses report⁴ published in March 2011 (following a public consultation discussed below) stated the Scottish Government’s intention to implement a statutory scheme but noted that primary legislation would be required to progress this matter.

CONSULTATION

9. The provisions in the Bill have been extensively consulted on.

10. The recommendations of the McManus Review, which form the bulk of the Bill, were consulted on between August and November 2009. The recommendations from this consultation exercise helped inform the Scottish Government’s formal response to the McManus review which was published in October 2010. This is referred to throughout this Memorandum as the McManus consultation.

11. The Scottish Government consulted on whether there should be a victim notification scheme for the victims of mentally disordered offenders between August and November 2010. This is referred to as the VNS consultation throughout this Memorandum.

³ SG consultation <http://www.scotland.gov.uk/Publications/2010/08/27104119/0>

⁴ SG analysis report <http://www.scotland.gov.uk/Publications/2011/03/21112101/0>

12. The provisions relating to appeals against excessive security were the subject of a public consultation between June and September 2013⁵. This consultation is referred to as the excessive security consultation throughout this Memorandum.

13. The whole of the Bill was published in draft on 23 December 2013, as part of a public consultation which ran until 25 March 2013⁶. This consultation generated over 100 responses. This is referred to throughout this Memorandum as the draft bill consultation. Therefore all changes proposed in the Bill have been based on best available evidence and subject to thorough consultation with stakeholders.

POLICY OBJECTIVES OF THE BILL

14. The overarching approach of the 2003 Act is to ensure that the law and practice relating to mental health should be driven by a set of principles, particularly minimum interference in peoples' liberty and the maximum involvement of service users in any treatment. The Bill, which amends the 2003 Act, seeks to reinforce this approach by making a number of changes to practice and procedures to ensure that people with a mental disorder can access effective treatment timeously by providing improvements to the legislative framework.

15. The policy objectives of the Bill are as outlined below—

- **Part 1:** to improve the efficiency and effectiveness of the mental health system in Scotland by implementing the changes the Scottish Government said it would bring forward following on from the McManus Review; to provide a better system for the review of conditions of security to which patients are subject by adjusting the provisions which allow the Tribunal to consider, on application, whether a patient is being detained in conditions of excessive security, and make a number of technical and drafting amendments to improve the legislative framework.
- **Part 2:** to make a number of minor technical amendments to Part VI (Mental Disorder) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to assist in providing greater clarity of meaning as well as improving operational efficiency.
- **Part 3:** to implement a victim notification and representation scheme for victims of mentally disordered offenders subject to a hospital direction, transfer for treatment direction or a compulsion and restriction order. This will place victims of mentally disordered offenders subject to these orders on the same footing as victims who are currently eligible to be part of the Criminal Justice Victim Notification Scheme. The proposed scheme is also intended to implement the recent EU Directive⁷ establishing minimum standards on the rights, support and protection of victims of crime.

16. A glossary of frequently used terms is attached at Annex A to this document.

⁵ Excessive Security Consultation: <http://www.scotland.gov.uk/Publications/2013/08/7455/0>

⁶ Mental Health (Scotland) Bill Consultation: <http://www.scotland.gov.uk/Publications/2013/12/1962>

⁷ EU Directive 2012/29/EU – establishing minimum rights and standards for victims of crime: http://ec.europa.eu/justice/criminal/victims/index_en.htm

PART 1 – THE 2003 ACT

Procedure for compulsory treatment

Policy objectives

17. The policy intention behind the changes discussed below is to ensure patients have sufficient time to prepare for hearings, even those requiring to be held at short notice, and that the Tribunal has all the information needed, including reports from Mental Health officers where they currently do not receive such reports.

Measures until application determined

Current position

18. Currently where an application for a compulsory treatment order is made in relation to a patient who is liable to detention under a short term detention certificate, the period of detention is automatically extended for a period of five working days beyond the date on which authority to detain under the certificate is due to expire. The Tribunal must determine the application for the compulsory treatment order or grant an interim compulsory treatment order under section 65 of the 2003 Act within this five day period.

19. Applications for compulsory treatment orders are regularly received by the Tribunal immediately prior to the expiry period of the short term detention certificate. This results in the Tribunal facing a significant logistical and administrative burden to ensure that the necessary arrangements are put in place to enable a hearing to be held and all relevant parties are notified in effect within five working days. This short timeframe adversely impacts on the patient who has limited opportunity to instruct legal representation if they so wish or to instruct an independent medical report prior to the first hearing of the compulsory treatment order application.

Proposed change

20. The Scottish Government considers increasing the five working day period to ten working days will have a number of benefits, amongst which are: enabling Convenors of the Tribunal to make use of existing powers to review and proactively manage cases in advance of setting a date to ensure, as far as possible, only one full hearing needs to be held; providing service users, carers and named persons with significantly more opportunity to prepare for the hearing. The Bill provides for the increase from five to ten working days. In order to preserve the principle of least restriction, provision is also made within the Bill to ensure that the proposed extension to the period of detention will not increase the continuous period of detention of fifty six days provided for by section 65(3) of the 2003 Act nor the six month period provided for in section 64.

Information where order extended

Current position

21. Currently, where an individual's responsible medical officer is proposing to extend a compulsory treatment order, the responsible medical officer is required to seek the views of certain persons, including the individual's mental health officer, before making a

determination. Section 101(2) of the 2003 Act provides that when (i) the type of mental disorder recorded in the determination by the responsible medical officer to extend the compulsory treatment order is different to that which was recorded in the original compulsory treatment order or (ii) when the mental health officer disagrees with the extension of the compulsory treatment order or (iii) where the Tribunal has not reviewed the compulsory treatment order during the two year period prior to which the compulsory treatment order would have lapsed had it not been extended by the responsible medical officer, then the Tribunal must review that determination.

Proposed change

22. The Scottish Government considers that in certain specific cases – namely where the Tribunal is required to review a determination by virtue of section 101(2) of the 2003 Act - then the mental health officer should submit a written report to the Tribunal containing the information set out at new section 87A(4) to aid the Tribunal's consideration of this matter. Section 2 of the Bill makes provision for this.

Consultation

23. These proposals in sections 1 and 2 of the Bill were welcomed by respondents to the draft Bill consultation.

Alternative approaches

24. No alternative approaches were considered.

Emergency, short term and temporary steps

Policy objective

25. The broad policy objective behind the provisions discussed below is to ensure a patient is subject as far as is possible to the appropriate order for his or her condition and that any changes required to the order can be made as quickly and fairly as possible.

Emergency detention in hospital

Current position

26. Section 36 of the 2003 Act provides for the granting of an emergency detention certificate by a medical practitioner in respect of a patient. An emergency detention certificate authorises the removal of a patient to a hospital (if not already in hospital) or to a different hospital and the detention of the patient for a period of 72 hours. Any medical practitioner can grant the emergency detention certificate. Section 36(1) provides the conditions which must be met for the medical practitioner to grant the emergency detention certificate.

27. One of these conditions is that the patient does not fall within section 36(2). Section 36(2) provides that the patient falls within that subsection if, immediately before the medical examination the patient is subject to specified measures which authorise the detention of the patient. So, if a patient is subject to any of these measures (for example a short term detention

certificate) immediately before the examination then an emergency detention certificate cannot be granted in respect of that patient.

28. Section 113 of the 2003 Act applies to patients who are subject to a compulsory treatment order. These orders authorise certain measures to be taken in respect of the patient. Section 113 applies where the patient fails to comply with any of these measures and the order does not authorise detention of the patient in a hospital, i.e. it is a community based order.

29. Section 113(4) empowers the patient's responsible medical officer to take or make arrangements to take the patient into custody and convey the patient to a hospital. Section 113(5) provides that where that power is exercised the patient may be detained in hospital for a period of 72 hours. Section 113(4) and (5) are not specified in section 36(2). This means that a patient who is subject to detention in hospital under section 113(5) by virtue of the power in section 113(4) having been exercised will not be excluded from the operation of the power in section 36(1) to grant an emergency detention certificate.

30. The provisions in Part 5 of the 2003 Act are intended to apply to emergency situations. The granting of an emergency detention certificate is appropriate where a patient urgently needs to be detained in hospital and there is insufficient time to make arrangements for the usual procedures leading to short term detention (Part 6 of the 2003 Act) or long term detention (Part 7 of the 2003 Act). The provision in section 36(2) is consistent with the policy behind these provisions and is intended to prevent inappropriate use of the emergency detention provisions.

Proposed change

31. A patient subject to detention under section 113(5) is already within a detention regime and the Scottish Government considers it is that regime which should govern any subsequent detention which follows immediately on that detention – not the emergency provisions set out in Part 5 of the 2003 Act. The Scottish Government therefore considers it appropriate to extend the list of specified measures in section 36(2) to include a reference to section 113(5). The Bill makes provision for this at section 3.

Notification of emergency detention

Current position

32. Section 38 of the 2003 Act (duties on hospital managers: examination, notification etc.) applies where a patient is detained in hospital under the authority of an emergency detention certificate granted under section 36(1). The managers of the hospital in which the person is detained must arrange for the person to be medically examined by an approved medical practitioner, who will be a psychiatrist, to determine whether the detention criteria continue to be met. If not, the approved medical practitioner must revoke the emergency detention certificate. If the detention criteria are met then it is likely to be appropriate to grant a short term detention certificate under section 44(1).

33. The managers of the hospital must within 12 hours of the emergency detention certificate being given to them, inform the persons specified in section 38(4) of the 2003 Act

of the granting of a certificate (section 38(3)(a)). The hospital managers are also required, within 7 days of receiving notice from the medical practitioner of the additional information under section 37, to notify the persons listed in section 38(4) of that information (section 38(3)(b)(i)).

Proposed change

34. The Commission is currently one of the persons specified in Section 38(4) of the 2003 Act. The Commission has advised that because emergency detention certificates can be granted at any time, frequently the notification under section 38(3)(a) amounts to a message being left on an answering machine and serves little purpose. The Scottish Government concurs with the Commission's view on this matter. In the interests of streamlining procedures and as the hospital managers will still require to notify the Commission in terms of section 38(3)(b)(i), the Bill at section 3(4) removes the need for the Commission to be notified additionally in respect of the same circumstances, under section 38(3)(a).

35. As some of the additional information provided by the medical practitioner under section 37 of the 2003 Act to the hospital managers may be of an unduly sensitive nature, the Bill provides that hospital managers can exercise discretion as to whether or not to give notice of certain matters to the persons listed in section 38(4) at section 3(3) of the Bill.

Short term detention

Current position

36. Section 44 of the 2003 Act is in similar terms to section 36 (discussed above). Section 44 provides for the granting of a short term detention certificate by an approved medical practitioner in respect of a patient. This certificate authorises the removal of a patient to a hospital (if not already in hospital) or to a different hospital and the detention of the patient for a period of 28 days. It also authorises the giving of medical treatment to the patient in accordance with Part 16 of the 2003 Act. Part 16 sets out a framework of powers, restrictions and safeguards for the giving of medical treatment for mental disorder. Only an approved medical practitioner who will be a psychiatrist can grant a short term detention certificate.

37. Section 36(1) of the 2003 Act provides the conditions which must be met for the approved medical practitioner to grant the short term detention certificate. One of these conditions is that the patient does not fall within section 44(2). Section 44(2) provides that the patient falls within that subsection if, immediately before the medical examination, the patient is subject to specified measures which authorise the detention of the patient. So, if a patient is subject to any of these measures (for example an extension certificate under section 47(1)) immediately before the examination then a short term detention certificate cannot be granted in respect of that patient.

Proposed change

38. As discussed above in relation to emergency detention certificates, a patient subject to detention under section 113(5) of the 2003 Act is already within a detention regime and the Scottish Government considers it is that regime which should govern any subsequent

detention which follows immediately on that detention – not the short term provisions set out in Part 5 of the 2003 Act. The Scottish Government therefore considers it appropriate to extend the list of specified measures in section 44(2) of the 2003 Act to include a reference to section 113(5). The Bill provides for this at section 4.

Consultation

39. The changes were included in the draft Bill consultation and were welcomed by those respondents who answered questions in relation to these proposed changes.

Alternative approaches

40. No alternative approaches were considered.

Suspension of orders and measures etc.

Policy objectives

41. The policy intention behind these provisions is twofold. Firstly, with regard to the suspension of orders on emergency and short term detention, to ensure that in circumstances where the health of a patient subject to an order in the community deteriorates very quickly such that emergency detention is required, that the patient is only subject to that emergency order, rather than subject to duplicate orders.

42. Secondly, with regard to suspension of a patient's detention in hospital by the patient's responsible medical officer, suspension of detention allows patients to attend court hearings, clinical appointments and facilitates the gradual testing out of a patient's response to increasing freedoms and the assessment of risk associated with their eventual return to the community. However, the McManus review found that the current time limits and processes required to grant suspension of detention were complicated, arbitrary and difficult to operate in practice. The intention behind these provisions in the Bill therefore is to ensure the regime for suspending a patient's detention is improved so that suspension of detention can be carried out in a manner which is clearly understood by all parties and provides the flexibility needed for an effective suspension of detention system.

Suspension of orders on emergency detention

Current position

43. A compulsory treatment order under Part 7 of the 2003 Act may or may not authorise detention in hospital. A patient's condition may suddenly deteriorate to such an extent that urgent hospital treatment is necessary and the patient may require to be admitted to hospital as an emergency. In such cases there is unlikely to be time for an application to be made to the Tribunal to vary the compulsory treatment order to provide for detention in hospital and it may be necessary to grant an emergency detention certificate. Section 43 of the 2003 Act provides that with one exception (giving of treatment under Part 16 of the 2003⁸ Act) if a patient is subject to a compulsory treatment order and then an emergency detention certificate

⁸ Part 16 of the 2003 Act sets out a framework of powers, restrictions and safeguards for the giving of medical treatment.

is granted, any measures authorised by a compulsory treatment order cease to have effect for the period of time the patient is subject to the emergency detention certificate.

Proposed change

44. As it would be possible for a patient subject to either an interim compulsory treatment order or a compulsion order to be given an emergency detention certificate, the Scottish Government considers that section 43 of the 2003 Act should also apply to patients subject to those orders. The Bill provides for this at section 6.

Suspension of orders on short term detention

Current position

45. In a similar vein, section 56 of the 2003 Act provides that if a patient is subject to a compulsory treatment order and is subsequently given a short term detention certificate, the compulsory treatment order ceases to authorise the measures specified in the order during the period of the short term detention certificate.

Proposed change

46. As it would be possible for a patient subject to either an interim compulsory treatment order or a compulsion order to be given a short term detention certificate, the Scottish Government considers that section 56 should also apply to patients subject to those orders and the Bill provides for this at section 7.

Suspension of detention for certain purposes

Current position

47. Section 221 of the 2003 Act allows a patient's responsible medical officer to grant a certificate suspending an assessment order made by the criminal courts. Section 224 makes similar provision in relation to a treatment order, and an interim compulsion order. In addition it is noted that section 8(4) of the Bill adds a temporary compulsion order to the list of orders at section 224 of the 2003 Act. Before a detained patient leaves hospital, for example for attendance at court hearings, a certificate authorising suspension of detention is required. The patient remains liable to be detained and subject to the other measures authorised by the order under which the patient is detained. Ministerial control of remand patients (which is what individuals subject to the orders mentioned above are) was introduced under the 2003 Act.

Proposed change

48. With the benefit of over eight years of working with the 2003 Act, the Scottish Government considers that in certain specific circumstances, Ministerial involvement is both unnecessary and inefficient. For example, when a patient requires to attend a court hearing relating to their case, the responsible medical officer currently requires to obtain the Scottish Ministers' prior consent to the suspension of detention. Clearly in circumstances such as these, that consent is not going to be withheld.

49. In the interests of streamlining procedures, the Scottish Government considers that it should no longer be necessary for a responsible medical officer to seek the prior approval of the Scottish Ministers before granting a certificate suspending detention in the case of assessment orders, treatment orders, interim compulsion orders and temporary compulsion orders to enable a patient to attend a court hearing or necessary medical (including dental) appointment. The Bill provides for this revised policy position at section 8.

Maximum suspension of detention measures

Current position

50. The Scottish Government recognises that suspension of detention is an essential tool in the treatment of mentally disordered offenders. This is provided for at chapter 7, sections 127 to 129 of the 2003 Act. In many cases this will be a vital part of the rehabilitation and recovery programme as it allows the patient extended time out of the hospital in the community subject to conditions imposed by the responsible medical officer, whilst still being liable to detention under the Act. This may include periods of time at home or in a community-based care setting. Suspension of detention in practice is often used as a precursor to an application for a variation of a compulsory treatment order to make it community based.

Proposed change

51. The Scottish Government is aware that the current arrangements for suspension of detention are perceived by some as inflexible and difficult to manage and have resulted in the development of excessively bureaucratic systems to count up the number of days a patient has had their detention requirement suspended. The Scottish Government therefore considers the revised arrangements outlined below should result in a system that is flexible enough to respond to practical issues of day to day care and treatment whilst at the same time provide safeguards against suspension of detention being used in situations where an application for variation of the order would be more appropriate.

52. Under the revised procedures, at section 9 of the Bill, the responsible medical officer of a patient who is subject to a compulsory treatment order can authorise the suspension of detention for a period of no more than 200 days in any 12 month period. This only applies to periods of suspension of detention incorporating an overnight element. The responsible medical officer will be given the power to grant a certificate suspending detention for an individual period not incorporating an overnight element and there is no limit to the number of times the power can be exercised. The responsible medical officer should record the suspension of detention in the patient's case notes.

53. The responsible medical officer will not be able to authorise any overnight periods of suspended detention beyond the 200 day limit unless he or she first makes an application to the Tribunal. The responsible medical officer can make an application for increasing the 200 days at any point during or after the 200 days. In addition the responsible medical officer must notify the Commission when the application is submitted to the Tribunal and also notify the Commission of the outcome of the application. This will give the Commission the opportunity to consider whether to exercise their powers under the Act to make a reference to the Tribunal for review of the order to which the patient is subject.

54. Where the Tribunal approves an application to increase the maximum number of overnight periods of suspension of detention, the responsible medical officer will be able to authorise a further 100 overnight stays within the original 12 month period.

Consultation

55. The provisions on suspension of certain orders were fully consulted on in the draft Bill consultation. They build on recommendations from the McManus consultation. The proposals with regard to suspension of orders on emergency and short term detention were welcomed by respondents. However, the proposals with regard to suspension of detention by responsible medical officers differ from those in the draft Bill consultation. The proposal in the consultation draft was that the current 9 month limit on suspension of detention should be removed altogether, and no limit placed on the amount of suspension of detention afforded to a patient. This was criticised by the majority of responses to the consultation, the general view being that removing the limit on the length of time for detention to be suspended could lead to patients being detained on a hospital based order inappropriately.

56. In response to this, the Bill now reflects the position proposed in the McManus consultation, whereby a clearer approach is taken to the calculation of time periods for detention. In addition it will be necessary for the Tribunal to approve any increase of the 200 day maximum for overnight periods of suspension of detention and any application made for such an increase must be notified to the Commission.

Alternative approaches

57. As mentioned above, an alternative approach whereby the time limit on suspension of detention was removed altogether was considered but was changed to the current position in the Bill for the reasons outlined at paragraph 55.

Orders regarding level of security

Policy objective

58. The policy objective behind these proposals is to provide an effective right of appeal against a perceived level of excessive security for certain patients who are held out with the state hospital, to ensure as far as possible the principle of least restriction is upheld.

Current position

59. At present, section 268 of the 2003 Act gives qualifying patients in qualifying hospitals the right to apply to the Tribunal for a declaration that the patient is being held in conditions of excessive security. If the Tribunal is so satisfied that the patient is subject to conditions of excessive security then it may make an order to that effect and specify a period of time, up to 3 months, within which the Health board for the area in which the patient normally resides shall identify a suitable hospital, not being a state hospital, which the Board and the Scottish Ministers agree would not involve the patient being subject to levels of excessive security.

60. The definition of qualifying patient and qualifying hospital for the purposes of section 268 were to be made by regulations but to date no regulations have been made under this section. Therefore, there is at present in reality no provision for an appeal against levels of excessive security for patients other than patients detained within the state hospital under section 264 of the 2003 Act.

61. There is an inherent difficulty with the existing provision in that if the Tribunal finds that a patient is subject to a level of security that is excessive then that patient can be moved to a different hospital under the powers in section 268, but not to a different part of the same hospital operating a lower level of security. This does not reflect the reality of the secure estate in Scotland today where a number of hospitals have differing levels of security on the same site, and it is far preferable for a patient to be able to remain within the same overall site, that he or she may be familiar with, with a reduction in the level of security as appropriate, rather than be required to move to another hospital altogether, simply to meet a reduction in security levels.

Proposed changes

62. The Scottish Government acknowledges that in so far as patients held within medium secure settings are concerned, the lack of provision for appeals against excessive security for patients out with the state hospital is not appropriate. As regards patients in low secure settings, the Scottish Government does not consider there to be a problem with patients being held in conditions of excessive security (particularly since the next step in progressing such patients onward from a low secure setting would be to release them into the community, which it is open to the Tribunal to order as part of the on-going review procedures available elsewhere in the 2003 Act).

63. Amendments have therefore been made to section 268 of the 2003 Act, by sections 11 and 12 of the Bill, to provide that patients who are subject to a compulsion and restriction order, a hospital direction or a transfer for treatment direction, and are within a qualifying hospital may apply to the Tribunal for a declaration that they are being held in conditions of excessive security. Regulations will provide for a definition of qualifying hospital (by identifying those hospitals, or hospital units which operate a medium level of security) and the power to move a patient, on a successful appeal, includes the power to move a patient to a lower level of security within the same hospital. The Scottish Government considers that these changes to the appeal provisions in section 268 will result in an effective appeal process against levels of excessive security for patients outwith the state hospital that fits within the way the secure estate is provided in Scotland.

Consultation

64. The proposals relating to appeals against excessive security were the subject of a separate consultation from June to September 2013. This was the excessive security consultation, which followed the Supreme Court case *RM v Scottish Ministers*⁹, wherein the Supreme Court held that the Scottish Ministers had acted unlawfully in failing to bring forward regulations under section 268 of the Act as outlined above. The consultation sought views on bringing forward a set of regulations under the existing power, or repealing the

⁹ *RM v Scottish Ministers*: http://supremecourt.uk/decided-cases/docs/UKSC_2011_0212_Judgment.pdf

existing section 268 and looking at alternative ways of considering whether an individual was being held in conditions of excessive security or not.

65. The consultation did not bring forward any conclusive answers, save for consensus on the point that section 268 of the Act was not fit for purpose as outlined above, given it does not permit the movement of patients between different levels of security within the same hospital. The Bill therefore amends the current excessive security provisions in the 2003 Act to resolve this issue and adjusts the regulation making power in order to determine which patients the right will apply to. These changes provide a right of appeal that can be exercised appropriately within the current and anticipated Scottish secure estate.

Alternative approaches

66. As mentioned above, the excessive security consultation proposed as an alternative way forward, repeal of section 268 altogether and consideration of a different method of assessing whether an individual was being held at an appropriate level of security. However, any new method of assessment would require extensive analysis of the secure estate in Scotland at present, and any proposals for change would require to be fully consulted upon. This work would take two to three years to complete and such a delay was not welcomed. Therefore the Scottish Government considered the most appropriate way forward was to create an effective appeal process, as outlined in the Bill and consider a new approach to assessing whether a patient is being held at an appropriate level of security or not, over the longer term.

Removal and detention of patients

Policy objective

67. The broad policy objective behind these provisions is to ensure that the Commission is notified when a removal order is made, thus giving those persons subject to such orders, the same opportunity for support from the Commission as persons subject to similar types of order.

Current position

68. Sections 293 to 296 of the 2003 Act make provision to allow a mental health officer to apply to the sheriff (or, in certain circumstances, a Justice of the Peace under section 294) for a removal order. Such an application can be made in relation to a persons over 16 who have a mental disorder and where any of the circumstances in section 293(2) apply (for example, the person lives alone and is unable to look after themselves). Section 293(3) enables a mental health officer, any police constable and any other specified person to enter the premises and remove the person subject to the order to a place of safety and to detain that person for a period not exceeding 7 days. Section 300 defines "place of safety" to mean a hospital, premises used for the purposes of providing a care home service, or any other suitable place (other than a police station).

69. Where a removal order is made, section 295 allows the person subject to the order, or any person claiming an interest in the welfare of that person to apply to the sheriff for an order recalling the removal order or varying it (for example, by specifying a different place of

safety). Currently there is no provision for the Commission to be notified when an application is made for a removal order, or when such an order is made. This is at odds with other provisions in the 2003 Act dealing with similar situations. For example, there is a duty placed on a mental health officer to notify the Commission where a warrant is obtained under section 35 seeking authority to carry out inquiries under section 33 of the 2003 Act.

Proposed change

70. The Scottish Government is of the view that the making of a removal order is a significant event as it can authorise detention for up to 7 days. The absence of a duty to notify the Commission means that the Commission cannot consider whether to apply to make an application to the sheriff under section 295 as outlined above. The Scottish Government therefore considers that where an application for a removal order is made under Part 19 of the 2003 Act, a duty should be placed on the mental health officer to notify the Commission. The Bill makes provision for this at section 13.

Consultation

71. This proposal was contained within the draft Bill consultation and was welcomed. The Commission is content with the proposal.

Alternative approach

72. No alternative approach was considered.

Detention pending medical examination

Policy objective

73. The broad policy objective of the proposed changes discussed below is to ensure a patient in urgent need of attention can be detained for an appropriate length of time to ensure initial examination takes place.

Current position

74. Section 299 of the 2003 Act empowers certain nurses (a mental health or learning disabilities nurse registered in Sub-Part 1 of the Nurses' Part of the register kept in accordance with the Nursing and Midwifery Order 2001) to detain a patient who is in hospital receiving treatment but who is not subject to compulsory treatment for mental disorder for a period of two hours.

Proposed change

75. Section 14 of the Bill provides for an amendment to section 299 whereby a patient can now be detained for up to three hours, for the purpose of enabling the examination of a patient to be carried out by a medical practitioner. This additional time seeks to balance the need for flexibility to arrange for a medical examination with maintaining the need for minimum restriction on patients.

Consultation

76. This proposal was contained in the draft Bill consultation and was welcomed by the majority of respondents. A small number of respondents were concerned that the extension of the maximum length of detention from 2 to 3 hours, was an infringement on a person's liberty. But, on balance, given the short increase in length of time of detention, the fact that this is a permissive power and that 3 hours is the maximum length of detention possible, it was considered that it was appropriate to proceed with this change.

Alternative approach

77. No alternative approaches were considered.

Time for appeal referral or disposal

Policy objectives

78. The policy objective of the provisions discussed below is to ensure the appeal process under section 220 of the Act is brought into line with similar appeals in other parts of the Act, thereby ensuring the matter is resolved within a reasonable time to allow patients to get the treatment they need timeously.

Current position

79. The power of managers of a hospital to transfer a patient detained in a hospital, subject to a compulsion and restriction order, a hospital direction, or a transfer for treatment direction, from one hospital to another include the power to transfer the patient to a state hospital even when the state hospital is not specified in the order. A patient who is notified of an intention to transfer, or who has been transferred to a state hospital has a right of appeal against this decision and has 12 weeks within which to lodge an appeal.

Proposed change

80. The proposed change in the Bill, brings the appeal period down from 12 weeks to 28 days. The current 12 week period has caused significant problems as where an appeal has been lodged prior to a transfer, the transfer cannot take place until the appeal is considered, which can delay a patient's treatment for up to 12 weeks. This change will ensure appeals are made within a reasonable time so that patients are appropriately placed and treated with the minimum of disruption.

Consultation

81. This proposal was contained within the draft Bill consultation and was welcomed by the majority of respondents. A small minority were concerned by the reduction in the length of the appeal period, offering the view that this was a reduction in the rights of a patient. However, given the delays caused by the current length of appeal process, and the fact that the new provision mirrors the time limits for similar appeals under other sections of the 2003 Act, it was felt appropriate to proceed with the changes in line with the majority of respondents.

Alternative approaches

82. No alternative approaches were considered.

Periodical referral of cases and recording where late disposal

Policy objective

83. The policy objective behind the provisions discussed below is to ensure the Tribunal deals with cases in a timely and appropriate manner.

Current position

84. At present, the time limits for review of certain types of orders are calculated by the date when an application is made to the Tribunal. This means however that it could be some weeks between the making of an application and the Tribunal determining the case.

Proposed changes

85. The Bill proposes changes whereby the time limits for review of certain orders are calculated by the date when a case has been determined by the Tribunal rather than an application made. This has the effect of shortening the length of time before a case is considered, which is beneficial to the patient. The Bill also proposes a change whereby the Tribunal must record in its record of proceedings if it has failed to consider a case by the correct deadline, thus ensuring a record is kept of all such delays so that they can be minimised in the future.

Consultation

86. These changes were contained in the draft Bill consultation and were welcomed by respondents.

Alternative approaches

87. No alternative approaches were considered.

Representations by named persons

Policy objective

88. The policy objective for the provisions discussed below is to ensure that a person can be reassured that their named person is an individual that they are content to have protect their interests, and that a named person will take on that role only if they are content to do so.

Current position

89. If an individual needs treatment under the 2003 Act then the person can choose someone to help protect their interests. This person is called a named person and anyone aged 16 or over can choose a named person. The 2003 Act also provides that if a person does not choose a named person then a carer or nearest relative may become a named person by default.

Proposed changes

90. The Scottish Government considers that an individual should only have a named person if they chose to have one. The Scottish Government also considers it is important that an individual should give their written and witnessed consent to acting as a named person. The rationale for this is that this will enable the named person to discuss matters with the individual and obtain information about the role and responsibilities of a named person prior to their accepting the nomination. The Bill makes provision for this and also repeals the Tribunal's power upon application to appoint a named person where no such person exists. The Tribunal retains the power on application to remove a named person where that person is considered to be inappropriate, and where, in such a case the patient is under 16, the Tribunal will be able to appoint another person as the named person.

Consultation

91. These changes were contained within the draft Bill consultation subject to one change which was that the draft Bill retained the power the Tribunal had under the 2003 Act, to appoint a named person for an individual if they considered that was appropriate. All the changes to the named persons policy were welcomed with the exception of the retention of the Tribunal's power to appoint a named person. This was considered to breach the policy intention that a person should only have a named person if he or she wanted one and had appointed one as the need for trust between a person and his or her named person was considered an essential element of the role by virtually all respondents. The Scottish Government, having considered all consultation responses, therefore amended the proposals for introduction to reflect the preferred option.

Alternative approaches

92. An alternative approach whereby retention of the Tribunal's power to appoint a named person was considered but, for the reasons outlined in paragraph 91 above, the Scottish Government has decided not to proceed with that approach.

Advance statements

Policy objective

93. The policy objective for these provisions is to ensure where an advance statement exists, it is used as appropriate, thus underpinning the principle of maximum involvement of service users in proceedings and treatment.

Current position

94. An advance statement sets out the way a person wishes to be treated, or not treated, for mental disorder in the event of becoming mentally unwell and unable to make decisions about treatment. It should be considered by medical staff and the Tribunal when decisions are being taken about a patient.

Proposed changes

95. The Scottish Government considers it is important that where an individual has completed an advance statement and thus shown a willingness to participate in their treatment then it is important that the relevant parties are aware of the existence of this document.

96. The Bill at section 21 places a duty on Hospital Boards to ensure that where they receive a copy of an individual's advance statement this must be placed in the person's medical records and a copy must be sent to the Commission. In turn, the Bill places a duty on the Commission to maintain a central register of advance statements. The register will only be available for inspection to the persons specified at new section 276C(2).

Consultation

97. These proposals were contained in the draft Bill consultation and were strongly supported by respondents.

Alternative approach

98. No alternative approaches were considered.

Support and services

Policy objective

99. The policy objective behind the proposals set out below is to ensure patients are able to participate as fully as possible with their treatment. The Bill requires assistance to be given to aid communication at examinations as well as to patients detained in hospital. By requiring additional support for mothers who have a mental disorder, the welfare of both a mother and her children are being prioritised.

Communication at medical examination

Current provision

100. Section 261 of the 2003 Act (Provision of assistance to patient with communication difficulties) applies in relation to patients detained in hospital by virtue of the 2003 Act or to the 1995 Act and to patients not detained in hospital but subject to an order or direction listed in this section.

Proposed change

101. The Scottish Government considers it is appropriate to extend the existing provision of assistance to patients with communications difficulties to, not only those who are the subject of certain orders, but also to those who are subject to an application for these orders. Section 23 of the Bill provides for this.

Services and accommodation for mothers

Current provisions

102. Section 24 of the 2003 Act requires Health Boards to make provision to allow a mother to care for a young child, under the age of one, in hospital where the mother is 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 purpose is to ensure that the mother and baby are not separated in the child's first year of life, recognising the importance of maintaining and supporting this relationship.

Proposed change

103. Mothers are frequently admitted to hospital according to their need for inpatient care, not necessarily according to diagnosis. Women may be affected by a variety of conditions, including for example, psychosis and schizophrenia in the months leading up to and following a birth. The Scottish Government therefore considers it is appropriate that the services and accommodation mentioned in section 24 should be available to all such women and the Bill at section 23 extends the scope of section 24 of the 2003 Act to provide for women admitted to hospital for any type of mental disorder (including post-natal depression).

Consultation

104. Both the provisions relating to help with communication at medical examinations and to support for mothers with mental disorders, beyond post-natal depression were contained in the draft Bill consultation and were strongly welcomed.

Alternative approaches

105. No alternative approaches were considered.

Cross-border and absconding patients

Policy objective

106. The policy objective behind these provisions is to ensure parity of treatment for patients in other EU member states in respect of cross border transfers and absconding patients with patient in the rest of the UK.

Current position

107. Using enabling powers available to them under section 289 of the 2003 Act the Scottish Ministers have made regulations which allow for the cross-border transfer of patients subject to a community based compulsory treatment order or compulsion order from Scotland to England or Wales, and for the reception in Scotland of persons subject to a corresponding requirement in England and Wales. Regulations have been made under section 290 which allow for (i) the transfer of patients whose detention in hospital in Scotland is authorised by virtue of the 1995 Act or the 2003 Act from Scotland to a place outwith Scotland (whether or not a place in the UK); (ii) the removal of a patient who is in hospital for the purpose of receiving treatment for mental disorder, other than by virtue of the 1995 Act or the 2003 Act from Scotland to a place outwith the UK; and (iii) the reception in Scotland of persons

subject to corresponding measures in England, Wales, Northern Ireland, the Isle of Man or the Channel Islands. Sections 289 and 290 do not allow regulations made under those sections to authorise the reception of patients from outwith the United Kingdom – i.e. from other member States of the European Union into Scotland in order to provide treatment for mental disorder.

Proposed changes

108. Where a patient absconds from a hospital or other such place in Scotland, the patient will be taken back to the hospital or other address in accordance with section 303 of the 2003 Act and the order or certificate to which they are subject continues to run. Accordingly, authority to treat the patient continues under the original order or certificate and Part 16 of the 2003 (refer to paragraph 43) Act will apply to the giving of such treatment. However, there is no provision to authorise the giving of treatment to patients who abscond from detention in another jurisdiction and are taken into custody in accordance with section 309 of the 2003 Act and associated Regulations. The Bill makes provision to allow this to happen in sections 24 and 25.

Consultation

109. These provisions were included within the draft Bill consultation and though few respondents commented on the provisions, those that did were in favour of the changes.

Alternative approaches

110. No alternative approaches were considered.

Arrangements for treatment of prisoners

Policy objective

111. The policy objective behind the provisions discussed below is to ensure firstly, with regard to the additional requirement placed on mental health officers, in respect of persons transferring to hospital, those persons are afforded the same support from mental health officers as individuals subject to similar orders under the 2003 Act receive, and secondly, to ensure the Tribunal can operate as efficiently as possible with the minimum of delay to patients.

Agreement to transfer of prisoners

Current position

112. A person who is serving a prison sentence and who has a mental disorder requiring treatment can be transferred from prison to a specified hospital under a transfer for treatment directions. There is no requirement for involvement of a mental health officer at present, in such transfers.

Proposed change

113. The Scottish Government considers that as mental health officers are involved in other contexts such as the making of a compulsory treatment order, where their contribution

is invaluable, it would be beneficial to patients for mental health officers to be involved in the decisions to transfer a person from prison to hospital under a transfer for treatment direction. The Bill makes provision for this at section 26 wherein the agreement of a mental health officer is required before such a transfer from prison to hospital can take place.

Compulsory treatment of prisoners

Current position

114. Where the Tribunal is dealing with cases relating to certain restricted patients, namely those subject to compulsion orders with restriction orders, transfer for treatment direction, and hospital directions, the panel must be led by the President of the Tribunal or a Shrieval Convener. This is provided for in paragraph 7, schedule 2 to the 2003 Act.

Proposed change

115. The Scottish Government considers that removing the obligation for the Convenor of a Tribunal Panel to be either the Tribunal President or to be selected from the Shrieval Panel in certain cases will result in in some small efficiencies in relation to the scheduling of such cases. These are cases where a prisoner becomes unwell during their prison sentence and has to be transferred to hospital and at the expiry of their sentence are still in hospital and may need to remain subject to compulsory measures of treatment and care under the mental health legislation.

Consultation

116. These provisions were included in the draft bill consultation and were commented on by very few respondents. Those that did respond were content with the proposal.

Alternative approach

117. No alternative approaches were considered.

PART 2 – CRIMINAL CASES

Policy objective

118. The provision for the disposal by the criminal courts of persons with mental disorders who are involved in criminal proceedings is made by Part VI of the 1995 Act. This Act was amended by the 2003 Act to provide for, amongst other matters, two new pre-sentencing disposals (assessment orders and treatment orders) and to replace old interim hospital orders and hospital orders with interim compulsion orders and compulsion orders. Given the technical nature of these changes, with the exception of changes to section 52G of the CJ Act 2003, no alternative approaches were considered.

119. Since the 2003 Act commenced, a number of minor and technical amendments have been identified. The implementation of these amendments will assist in providing greater clarity of meaning as well as improving operational efficiency.

Calculating time periods

Current position

120. At present the time periods for assessment orders, treatment orders, interim compulsion orders, compulsion orders and hospital directions are calculated starting with the day on which the order is made and running to the end of the last day of the relevant time period. For example a 7 day order begins on the day it is made until the end of 7 days after that day. This approach to calculating a period of detention differs from the computation of time periods in the criminal courts more generally.

Proposed changes

121. Sections 29 to 33 of the Bill amend the relevant time periods for assessment orders, treatment orders, interim compulsion orders, compulsion orders and hospital directions. The time periods for these orders are calculated starting with the day on which the order is made and ending at the end of the day following the expiry of the relevant period. In the case of a seven day order, this will now mean that the order starts on the day it is made and ends at the end of the day following the expiry of the seven days. This reflects the approach taken in criminal cases and should minimise the miscalculation of time periods.

Extension of Assessment Order

Current position

122. Where an assessment order is made by the court under sections 52D or 52E of the 1995 Act, the period of detention in hospital authorised by the order is 28 days. Before the end of this period the patient's responsible medical officer must submit a report to the court in accordance with section 52G. Currently, if following receipt of that report, the court thinks that further time is required to complete the assessment then the court may extend the assessment order, on one occasion only, for a further period of 7 days.

Proposed changes

123. Section 29(4) of the Bill amends section 52G (review of assessment order) of the 1995 Act so that if the court considers that further time is required to complete an assessment, the court may extend the assessment order on one occasion only, for a further period of 14 days.

Variation of interim compulsion order

Current position

124. A court can make an interim compulsion order under section 53 of the 1995 Act after conviction and before final disposal. This order is intended to be used in cases where the offender may present a high risk to the public and a compulsion order and restriction order or a hospital direction is in prospect. The assessment of the offender's mental disorder will include a full risk assessment, which would detail how any risk presented is related to the mental disorder and what final disposal may be appropriate. It would be open to the responsible medical officer to state in their report to the court that the treatment that the patient requires is no longer available in the hospital specified in the order and to recommend a change of hospital. However, the current legislation does not provide for this.

Proposed changes

125. Section 34 of the Bill provides a power for the court to direct, if it is appropriate to do so, that the offender be admitted to a different hospital, specified by direction. If that is done, section 32(2)(c) provides that this is to have the same effect as if the hospital specified in the direction were the hospital specified in the interim compulsion order. Furthermore, section 35 (through the insertion of a new section 61A of the 1995 Act enables a responsible medical officer, subject to the consent of the Scottish Ministers, to move a patient within the first seven days of that patient having been admitted to the hospital specified in the order. The order in question might be an assessment order, a treatment order or an interim compulsion order. The rationale being that the first seven day period is the time when a patient is being fully assessed and it can often become apparent very quickly in that assessment period that the hospital specified in the order is not the most suitable environment for the patient and any delay could potentially be very damaging to the patient's short and longer term health.

Consultation

126. The draft Bill consultation set out the Government's proposals with regard to the proposed amendments to the 1995 Act. Very few respondents commented on these proposals but the majority of those who did respond supported these mainly minor and technical refinements. The one more substantive amendment in relation to the extension of an assessment order did generate some comments outlined at paragraph 126 below.

Alternative approach

127. In relation to section 52G (review of assessment order) of the 1995 Act, the Scottish Government considered enabling the court to extend the assessment order on one occasion only, for a further period of 21 days. Those who responded to the consultation expressed concern at this proposal. Respondents commented that, whilst they could appreciate the need for an extension, an increase from 7 to 21 days was too big a leap when talking about a person's liberty and appeared to be more for the benefit of court programming than being about ensuring a person-centred approach to change. The Scottish Government reflected on these comments and considered a pragmatic approach here would be to allow the court to extend the assessment order for a period of up to 14 days (as opposed to 21 days) rather than 7 days, on one occasion only.

PART 3 - VICTIMS' RIGHTS

Policy objective

128. The policy objective of these proposals is to introduce a statutory notification and representation scheme for victims of mentally disordered offenders, who are subject to certain orders (hospital direction, transfer for treatment direction or a compulsion and restriction order) akin to the scheme available to offenders under the CJ Act 2003. The scheme is to be administered by officials within the Scottish Government Health and Social Care Integration Directorate. The Scottish Ministers consider that the implementation of such a scheme will bring the rights of victims of mentally disordered offenders into line with victims of other offenders thereby promoting victims' rights.

Information and representation

Current position

129. Section 16 of the CJ Act 2003 introduced a statutory scheme for the provision of information to certain victims, or to their relatives in certain circumstances, about the offender who perpetrated the offence against them. This statutory scheme does not apply to victims of mentally disordered offenders. The CJ Act 2003 also introduced a statutory right for victims to make representations about the release of the offender and any conditions with which they ought to comply on release, prior to any decision being taken by the Parole Board to release the convicted person on licence. This right does not extend to victims of mentally disordered offenders.

Proposed changes

130. Sections 43 to 49 of the Bill make provision for victims' rights. These sections insert provisions into the existing victim notification scheme in Part 2 of the CJ Act 2003 so as to extend the scheme to the victims of mentally disordered offenders.

131. The proposals will allow qualifying victims to receive limited information about the status of the patient who perpetrated the crime against them, as well as the right to make representations to the Tribunal, the Scottish Ministers or the patient's responsible medical officer, as the case may be, in connection with the conditions which might apply to the patient upon being released from detention. The intention behind the provisions is to provide victims with the opportunity to receive information and make representations regardless of whether the offender happens to be given a prison sentence or a mental health disposal (or else is subsequently transferred into the mental health system from prison) thereby producing a comprehensive and consistent scheme. However, in recognition of the fact that mentally disordered offenders are themselves vulnerable, the proposals do not require Scottish Ministers to disclose information to victims where there are exceptional circumstances which would make doing so inappropriate: this could, for example, apply if the mentally disordered offender is particularly vulnerable and release of the information would cause them harm.

132. Section 16 of the CJ Act 2003 currently applies to victims of a prescribed offence where the offender is convicted and sentenced to imprisonment or detention for a period of at least 18 months, to imprisonment or detention for life, or to detention without limit of time. In such a case, section 16 requires the Scottish Ministers to give the victim information regarding the offender's date of release, date of death, transfer out of Scotland, eligibility for temporary release, recall to custody following release, and any period that the offender is unlawfully at large.

Right to information: offender imprisoned

Current position

133. At present there is no provision in law for victims of mentally disordered offenders to be notified of changes to that offenders detention

Proposed change

134. Amendments are made to section 16 of the CJ Act 2003 by section 43 of the Bill to deal with cases where an offender is subject either to a hospital direction (made by a court under section 59A of the 1995 Act) or a transfer for treatment direction (made by the Scottish Ministers under section 136 of the 2003 Act). In such a case, a victim who has intimated a desire to receive information under the scheme will be notified if the offender has for the first time been granted unescorted suspension of detention under the 2003 Act.

135. The nature of the information which is to be made available to victims of convicted persons is intended to—

- assist the victim and/or their close family members in coping with the longer term effects of the offence by giving them notice of the offender's release (rather than them learning this through media sources or by seeing them in the community);
- give victims and/or their close family members peace of mind by informing them of the offender's death or transfer out of Scotland;
- warn victims and/or their close family members of any periods during which the offender is unlawfully at large so they can take whatever precautions they consider necessary.

Right to information: compulsion order

Current position

136. At present there is no provision for victims of mentally disordered offenders to receive any information about that offender's period of detention.

Proposed change

137. New sections 16A to 16C are added (by section 44 of the Bill) to the CJ Act 2003 to deal with victims of mentally disordered offenders who are not sentenced to imprisonment but instead receive a mental health disposal. Section 16A provides that the Scottish Ministers must give certain information which relates to an offender who has perpetrated an offence against a natural person and who has been made subject to a compulsion order and a restriction order under the 1995 Act to persons who are, by virtue of section 16B, entitled to receive the information.

138. A person's entitlement to receive information under the scheme is determined by section 16B, which provides that the victim is to receive the information, unless certain specified circumstances persist. If a person would otherwise be entitled to receive the information but they are aged under 12, the person's carer is entitled to receive the information instead. The information which is to be provided to victims or such other persons is set out in section 16C and includes revocation of the compulsion order or restriction order to which the patient is subject, the offender's date of death, release of the patient on conditional discharge and any periods in which the offender is unlawfully at large.

Right to make representations

Current position

139. Section 17 of the CJ Act 2003 currently provides a right to make representations to victims who are entitled to receive information under section 16 of that Act. The entitlement available to victims under section 17 is to make representations to Scottish Ministers as regards the release of the offender on licence and as to the conditions which might be specified in the release licence.

Proposed change

140. The amendments made to section 16 in the Bill to extend that provision to victims of persons subject to a hospital direction or transfer for treatment direction also have the effect of extending the right to make representation in section 17 to such persons.

141. In addition, section 17B (added by section 45 of the Bill) gives victims of offenders subject to a hospital direction or transfer for treatment direction the right to make representations to the patient's responsible medical officer before a decision is taken to suspend the offender's detention without imposing a supervision requirement.

142. Section 17B also provides victims of offenders subject to a compulsion order and restriction order with the right to make representations prior to certain decisions being taken relating to the discharge of the patient or the unescorted suspension of the patient's detention. It is made clear in section 17B that any representations made must be about how the decision in question might affect the victim or members of their family.

Consultation

143. The majority of the 34 responses received to the VNS consultation were in favour of procedures being introduced to enable information to be routinely given to victims of mentally disordered offenders in the same or similar way in which information is made available to victims of crime under the Criminal Justice Victim Notification Scheme.

144. The draft Bill consultation set out the Government's proposals in this regard and provision was made in the draft Bill (which issued with the consultation document) to reflect said proposals.

145. The views of the respondents who offered comments on these provisions ranged from those who welcomed the proposals, to those who were in favour of the proposals but only in the case of patients subject to a compulsion order with a restriction order (i.e. not for patients subject to just a compulsion order), through to those who were opposed to the proposals. A number of respondents commented that individuals subject to a compulsion order have often committed only minor offences and that to allow the proposed notification in such cases may be an unnecessary and disproportionate limitation of their rights to private and family life. A number of respondents who are service users raised concerns that the implementation of such a scheme would result in people who suffer from a mental disorder facing even more discrimination.

Alternative approaches

146. As highlighted at paragraph 15 (third bullet point) the victim notification scheme implements the recent EU Directive, which does not differentiate between offenders who suffer from mental disorder and those who do not in respect of the information to be given to victims. As such, alternative approaches were limited. Consideration had been given to a totally separate, standalone service for victims of mentally disordered offenders but it was considered for ease of use for both practitioners and victims, that incorporating the provisions for victims of mentally disordered offenders within the existing scheme was the most pragmatic and effective approach to take.

EFFECTS ON EQUAL OPPORTUNITIES

147. The Scottish Government does not consider that the measures in the Mental Health (Scotland) Bill will adversely impact on equal opportunities. An Equalities Impact Assessment will be published separately by the Scottish Government in due course.

148. The provisions in the Bill apply equally to all persons regardless of age, sex, race, gender reassignment, pregnancy and maternity, disability, marital or civil partnership status, religion or belief or sexual orientation; accordingly, the Government considers that they do not have any effect on equal opportunities. The only exception to this is section 23 of the Bill which amends section 24 of the 2003 Act; that section requires Health Boards to make provision to allow a mother to care for a young child, under the age of one, in hospital where the mother is admitted to hospital for treatment for post-natal depression. Section 23 extends the scope of section 24 of the 2003 Act to cover women admitted to hospital for any type of mental disorder (including post natal depression). The purpose of this amendment is to ensure that a mother and her baby are not separated in the child's first year of life, recognising the importance of maintaining and supporting this relationship. In that regard, the provision has a positive effect on equal opportunities on the basis of pregnancy and maternity.

EFFECTS ON HUMAN RIGHTS

149. The measures in the Bill are compatible with rights under the European Convention on Human Rights (ECHR).

150. The 2003 Act and the 1995 Act contain provision allowing for the compulsory detention and treatment of persons suffering from mental disorder in certain circumstances. Given that these provisions allow for compulsory treatment and detention, they have an effect on the human rights of the persons subject to such measures.

151. The compulsory detention of persons suffering from mental disorder is permitted under Article 5(e) of ECHR if it amounts to the 'lawful detention' of persons of 'unsound mind'. Orders or directions made under the 2003 Act (by doctors or by the Tribunal) authorising such detention and treatment, or by the court under the 1995 Act, amount to lawful detention for the purposes of Article 5(e).

152. By virtue of Article 5(4), persons detained on this basis are entitled to have the lawfulness of that detention reviewed by a court and their release ordered if that detention is not lawful.

153. All orders or directions authorising compulsory detention and or treatment for mental disorder under the 2003 Act or the 1995 Act are subject to regular review by the Tribunal in accordance with the 2003 Act (the Tribunal satisfies the definition of a “court” for the purposes of article 5(4)).

154. A number of provisions in the Bill make technical and procedural amendments to the provisions of the 2003 Act relating to the process for obtaining certain orders authorising compulsory treatment and related matters and these do not have any additional effect on the human rights of patients. Examples of such provisions are section 2 of the Bill which requires mental health officers to submit a record to the Tribunal in certain cases where a patient’s responsible medical officer makes a determination extending a compulsory treatment order, and sections 3 and 4 which adjust the requirement to notify certain persons when an emergency detention certificate is made.

Sections 10 to 12 of the Bill

155. Sections 10 to 12 of the Bill make a number of changes to the provisions of the 2003 Act which allow a patient to make an application to the Tribunal regarding the conditions of security to which they are subject, particularly as regards section 268 of the 2003 Act which relates to patients detained in hospitals other than a state hospital. The excessive security provisions in the 2003 Act are intended to ensure that patients are appropriately managed during the period of their detention in hospital and can progress on to lower levels of security and eventual discharge from hospital if that is considered appropriate.

156. The Bill does not give all patients subject to detention the right to apply to the Tribunal for an order declaring that the conditions to which they are subject are excessive; instead, section 12 of the Bill adds provision to the 2003 Act allowing Scottish Ministers to make regulations determining which patients will be able to exercise the right. The fact that the Bill does not apply this right to all patients is not considered to have a negative impact on the Article 5 rights of patients as the requirements of Article 5(4) are satisfied by the provisions in the 2003 Act allowing for the order or direction to which the patient is subject to be reviewed by the Tribunal (for example, under sections 193 and 215 of the 2003 Act in respect of patients subject to a compulsion order and restriction order or a transfer for treatment/ hospital direction).

157. Both domestic and Strasbourg case law supports the view that Article 5 is concerned with the fact, rather than the conditions, of detention. Accordingly, a patient already lawfully detained in Article 5 terms is not deprived of his liberty on account of being placed in more restrictive conditions: see, for example, *Ashingdane v United Kingdom*, *Aerts v Belgium* and *R (Munjaz) v Mersey Care NHS Trust*.

Section 15 of the Bill

158. Article 6 of ECHR guarantees practical and effective access for the determination of civil rights (and criminal liability) to an independent and impartial court or tribunal established by law. Currently, where it is proposed to transfer a patient subject to compulsory detention in hospital to a state hospital, section 220 of the 2003 Act allows the patient to appeal against the transfer within 12 weeks. Section 15 of the Bill reduces that period to 28 days to bring it into line with the time period in s.219 for appeals against transfers to hospitals other than a state hospital, and to seek to ensure that the matter is resolved within a reasonable time to allow patients to get the appropriate treatment they require as soon as possible with as little disruption as possible.

159. Transfer of a patient to the State Hospital amounts to a determination of the patient's civil rights (on the basis that the patient will be subject to special measures of security at the State Hospital and there may be an impact on the patient's ability to progress towards discharge) and Article 6 is therefore engaged by section 15. As far as criminal proceedings are concerned, Article 6 requires persons charged with a criminal offence to have adequate time and facilities for the preparation of his defence. Applying this to the context of appeals against transfer to the state hospital, it is considered that 28 days from the date that notice is given of a proposed transfer (or from the date of transfer if no notice is given) is sufficient time to allow patients to appeal to the Tribunal against the transfer. This is consistent with the period allowed for appealing to the Tribunal under section 219 as regards transfers to hospitals other than a state hospital. It is noted that all that a patient, or the patient's named person, need do to initiate an appeal under both sections 219 and 220 is to submit the appeal in writing stating the matter which is being appealed and a brief statement of the reasons for the appeal (rule 23 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005 (SSI 2005/519)).

160. In the light of the above, the reduction of the period within which a patient can submit an appeal against a transfer to the State Hospital to the Tribunal in section 15 of the Bill is not considered to breach a patient's Article 6 rights.

Part 3 – Victims' rights

161. The Bill makes provision allowing certain information to be provided to victims of mentally disordered offenders subject to a hospital direction, transfer for treatment direction or a compulsion order and restriction order. The proposals also allow for the right to make representations in certain circumstances in connection with the release of the patient from detention.

162. Whilst the information which falls to be disclosed under the scheme does not, as such, amount to medical information it is nevertheless private information in which the patient has a reasonable expectation of privacy. On that basis, the statutory scheme set out in the Bill engages Article 8(1) of ECHR (which protects the right to respect for private and family life) and falls to be justified under Article 8(2).

163. Disclosure of the information provided under the scheme can be justified under Article 8(2) on the basis that it is necessary for the protection of health (as victims suffer tremendous stress and anxiety wondering whether an offender has escaped from detention and if or when they might encounter the offender in public) and protection of the rights and freedoms of others. The information which falls to be provided to victims is restricted to information which will provide support and protection to them in terms of knowing whether the offender is due to be released, if the offender is being transferred out of Scotland, if the offender has escaped/been returned to hospital, if the offender has died and so on. This type of information can help victims to recover from the offence and deal with the stress and anxiety of wondering whether they are likely to encounter the offender in a public place, or indeed near their home.

164. In striking the right balance between the rights of victims to receive information under the proposed scheme and the rights of offenders in protecting their privacy, different considerations apply where the offender suffers from mental disorder and are themselves vulnerable. The provisions in the Bill allow a higher level of protection to be afforded to vulnerable patients in individual cases as section 16A(3) (inserted by s.44 of the Bill) will allow Ministers not to give information under the scheme if they consider there to be 'exceptional circumstances' which make it inappropriate. This provision can be relied on in individual cases if it is considered that disclosure of the information under the scheme would cause harm to the patient, for example, in terms of having a negative impact on their mental health. Section 16(1) of the CJ Act 2003 already contains similar provision which, following amendment of the scheme, will apply in relation to patients who are subject to a transfer for treatment direction or a hospital direction.

165. Similarly, the provisions which allow victims to make representations in relation to certain decisions relating to the release of an offender must, by virtue of s.17B(2) (as inserted by s.45(2) of the Bill) be about how the decision in question might affect the victim or the victim's family. In other words, the representations must be about the impact of the decision to release the patient on the victim, not whether the patient is released.

166. In the light of the above, whilst the Bill provisions have an effect on the Article 8 rights of certain patients, any infringement of their rights under Article 8(1) can be justified under Article 8(2) on the basis that the provisions pursue legitimate aims and go no further than is necessary to achieve those aims.

EFFECTS ON ISLAND COMMUNITIES

167. The provisions of the Bill apply equally to all communities. The Bill has no disproportionate effect on island communities. The increase in the period from 5 to 10 days for a Tribunal to determine an application for a compulsory treatment order, where such an application is made in relation to a patient who is liable to detention under a short term detention certificate, will benefit island and rural communities generally as it provides a longer period of time for the patient to prepare for the Tribunal, access legal representation etc., all of which can take more time to arrange in rural areas.

EFFECTS ON LOCAL GOVERNMENT

168. The Scottish Government does not consider that the measures in the Bill have any disproportionate effect on local government. The implications for local authorities relate to the services provided by mental health officers, who are officers of the local authority.

169. Mental health officers are affected by the terms of the Bill, in particular, sections 2, (further information where a compulsory treatment order is extended), section 26 (agreement to transfer of prisoners) and section 41 (information on extension of compulsion order). In both section 2 and section 41, a mental health officer will now be required to provide a report where a Tribunal is considering the extension of a compulsion order or a compulsion and treatment order. However the report by the mental health officer will only be required in the situation where the mental health officer disagrees with the approach taken by the patient's responsible medical officer, in any given case. On the basis of current figures, that situation arises in less than 20 cases per year.

170. Similarly, a new duty is placed on mental health officers under section 26 of the Bill, to provide a report for a Tribunal in cases where a transfer for treatment direction (TTD) is being considered in respect of a patient. A TTD is considered where a person is in prison and the person's health deteriorates to the extent that transfer for treatment in hospital is required. On the basis of current figures there are approximately 85 hearings of this type each year.

EFFECTS ON SUSTAINABLE DEVELOPMENT ETC.

171. The Bill will have no impact on sustainable development.

GLOSSARY REVIEW

A

Advance Statement – A signed and witnessed document written by a person setting out their preferences for how they wish to be treated, or not treated, when they are unwell.

Assessment Order – an granted by a criminal court under section 52D of the 1995 Act which authorises detention in hospital for 28 days, used as the starting point of investigation into mental disorder. Can be extended once for a period of seven days. Requires one medical report.

Approved Medical Practitioner – a medical practitioner who has been approved under section 22 of the 2003 Act by a Health Board or by the State Hospitals Board for Scotland as having specialist training experience in the diagnosis and treatment of mental disorder

C

Compulsion Order – a final disposal made under section 57A of the 1995 Act by a criminal court which authorises detention and treatment in a hospital or community setting for six months, then reviewed annually. Requires two medical reports and an MHO report. Applications for variation and revocation are made to the Tribunal.

Compulsion Order with Restriction Order – same as Compulsion Order but without limit of time. Reserved for the most serious and high risk offenders.

Compulsory Treatment Order – a civil equivalent to the compulsion order. Granted by a Tribunal under section 66 of the 2003 Act, authorises detention and treatment in hospital or community for an initial period of six months, then annual review. Requires two medical reports and an MHO report. Applications for variation and revocation are made to the Tribunal.

Cross Border Transfer – the transfer of patient to or from Scotland from another jurisdiction to enable care and treatment which cannot be provided for in Scotland, or for repatriation.

E

Emergency Detention Certificate – an order granted by a medical practitioner which lasts for 72 hours and is used to detain a person in hospital for making urgent inquiries into their mental health.

H

Hospital Direction – an order granted under section 59A the 1995 Act which authorises detention of a patient in hospital until they are well enough to be transferred to prison to complete their sentence.

I

Independent Advocate – a person who helps patients express their views in relation to their care and treatment. Advocacy is provided free of charge under section 259 to all persons with a mental disorder.

Interim Compulsion Order – an order which may be made whilst further medical reports have been requested before a full compulsion order can be imposed by the Court. Lasts 12 weeks and be renewed by further periods of 12 weeks for up to one year.

Interim Compulsory Treatment Order – an order which may be made whilst further medical reports have been requested before a full compulsory treatment order can be imposed by the Tribunal. Lasts up to 28 days, and can be renewed repeatedly so long as total detention does not exceed 56 days.

M

Mental Health Officer – a social worker with specialist training and skills in relation to mental health.

Mental Health Tribunal – an independent judicial body which deals with applications for review, variation and recall for civil orders and compulsion orders, including those with restriction.

Mental Welfare Commission – an independent regulatory body which provides on-going monitoring of the 2003 Act to Scottish Ministers. Provides advice to professionals and service users, and also has powers to investigate cases where there are concerns of care standards.

N

Named Person – someone appointed by the patient to look after their interests. They are entitled to receive information about the patient and in certain circumstances can make applications on their behalf.

P

Place of Safety – defined by section 300 of the of the 2003 Act as a hospital; place used as a care home; or other accommodation where the owner is willing to temporarily receive the patient. A police station may be used if none of the above are available. Normally used to facilitate medical examination when someone has become the subject of a Removal Order from premises or public.

R

Removal Order – an order granted by a sheriff where a person with a mental disorder is suspected to need immediate care and treatment, unable to look after themselves or for protection from ill-treatment or neglect is removed to a place of safety.

Responsible Medical Officer – the lead medical practitioner who has overall responsibility for a patient's care and treatment.

S

Short Term Detention Certificate - granted by an approved medical practitioner which enables a patient to be detained in hospital for a period of 28 days for the purposes of assessment or treatment of the patient's mental condition.

This document relates to the Mental Health (Scotland) Bill (SP Bill 53) as introduced in the Scottish Parliament on 19 June 2014

Suspension of Detention – a period(s) of authorised absence from hospital to help prepare a patient for a managed return into the community. Also used to facilitate attendance at court, routine medical appointments, or compassionate leave.

T

Transfer for Treatment Direction – issued by Scottish Ministers under section 136 of the 2003 Act where a serving prisoner requires hospital treatment for mental disorder.

Treatment Order – an order granted a by a court under section 52M of the 1995 Act which authorises detention and treatment in hospital until certain conditions have been met. Used to facilitate treatment whilst the patient is undergoing court process.

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MENTAL HEALTH (SCOTLAND) BILL

POLICY MEMORANDUM

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