The Mental Health (Scotland) Act 2015

Section 2 (information where order extended)

Section 2 of the 2015 Act inserts new section 87A into the 2003 Act. This requires MHOs to submit a written report to the Tribunal providing details about the patient when the Tribunal is required to review the RMO's determination to extend the CTO either due to a change in the type of mental disorder or where the MHO disagrees with the extension or has not indicated a view.

A similar obligation is imposed in respect of compulsion orders by section 50 of the 2015 Act, which inserts new section 153A (further information on extension of compulsion order) into the 2003 Act.

You should note that, while new sections 87A and 153A of the 2003 Act both came into force on 30 June 2017, neither section has effect where the determination by the RMO was made before 30 June 2017 (see articles 3 and 4 of the *Mental Health (Scotland) Act 2015 (Commencement No. 4 and Transitional and Savings Provisions) Order 2017* (**Commencement No. 4**)).

Section 3 (transfer to another hospital)

Section 3 of the 2015 Act came into force on 30 June 2017. Section 3 amends section 124 (transfer to another hospital) of the 2003 Act so that it applies where detention of a patient in hospital is authorised by an *interim* CTO as well as by a CTO.

Section 4 (emergency detention in hospital)

Section 4 of the 2015 Act came into force on 30 June 2017. Section 4 amends section 36(2) of the 2003 Act to extend the circumstances in which a patient cannot be made subject to emergency detention in hospital to include the circumstance where, immediately before the medical examination referred to in section 36(1)(a), the patient is subject to detention under section 113(5) of the 2003 Act. Where a patient is subject to detention under section 113(5), it will not now be possible to make the patient subject to emergency detention. In appropriate circumstances, however, it would be open to the RMO to authorise the continuing detention of the patient for a period of 28 days under section 114 of the 2003 Act.

Section 4 also amends section 38 of the 2003 Act to require notification of a patient's detention in hospital under an emergency detention certificate to the Mental Welfare Commission and, if known, any guardian or welfare attorney of the patient. You should note that these notification requirements do not apply where the emergency detention certificate was granted before 30 June 2017 (see article 5 of Commencement No. 4).

Section 5 (short-term detention in hospital)

Section 5 of the 2015 Act came into force on 30 June 2017. Section 5 amends section 44(2) of the 2003 Act to extend the circumstances in which a patient cannot be made subject to short-term detention in hospital to include the circumstance

where, immediately before the medical examination referred to in section 44(1)(a), the patient is subject to detention under section 113(5) of the 2003 Act. Where a patient is subject to detention under section 113(5), it will not now be possible to make the patient subject to short-term detention. In appropriate circumstances, however, it would be open to the RMO to authorise the continuing detention of the patient for a period of 28 days under section 114 of the 2003 Act.

Section 5 also amends section 46 of the 2003 Act to require a copy of the STDC to be sent to each person who is given notice of the granting of the STDC, in terms of section 46(2) and (3). You should note that the requirement to send a copy of the STDC does not apply where the STDC was granted before 30 June 2017 (see article 6 of Commencement No. 4).

Section 7 (suspension of orders on emergency detention)

Section 7 of the 2015 Act came into force on 30 June 2017. It extends section 43 (effect of subsequent emergency detention certificate on compulsory treatment order) of the 2003 Act so that the granting of an emergency detention certificate causes any compulsion order or interim CTO, as well as any CTO, to cease to authorise the measures specified in it during the period of the emergency detention. You should note that the amendments to section 43 do not have effect where the emergency detention certificate was granted before 30 June 2017 (see article 7 of Commencement No. 4).

Section 8 (suspension of orders on short-term detention)

Section 8 of the 2015 Act came into force on 30 June 2017. It extends section 56 (effect of subsequent short-term detention certificates on compulsory treatment order) of the 2003 Act so that the granting of a STDC causes any compulsion order or interim CTO, as well as any CTO, to cease to authorise the measures specified in it during the period of the short-term detention. You should note that the amendments to section 56 do not have effect where the STDC was granted before 30 June 2017 (see article 8 of Commencement No. 4).

Sections 9 and 10 (suspension of detention)

Sections 9 and 10 of the 2015 Act came into force on 30 June 2017. They make changes to the suspension of detention regimes in respect of CTOs and compulsion orders provided for under sections 127 and 224 of the 2003 Act respectively.

For a patient subject to a CTO, the maximum period of suspension of detention is reduced from 9 months in a rolling 12 month period to 200 days within any period of 12 months (whenever counted from). A suspension certificate may specify a single period not exceeding 200 days or a series of more than one individual period falling within a particular 6 month period. For the purposes of calculating the 200 day maximum, periods of suspension of detention for 8 hours or less in a day do not count, while "a single period … of more than 8 hours and less than 24 hours, whether in one day or spanning two days, is to count as a whole day towards the total period".

Section 224 of the 2003 Act is extended so that it applies to temporary compulsion orders as well as to treatment orders, *interim* compulsion orders, compulsion orders

and restriction orders, hospital directions or transfer for treatment directions. Patients subject to any of the foregoing orders or directions may have their detention suspended for a single period not exceeding 90 days or a series of more than one individual period falling within a particular 3 month period. The maximum period of suspension of detention is reduced from 9 months in a rolling 12 month period to 200 days in any period of 12 months (whenever counted from). For the purpose of calculating the 200 day maximum, periods of suspension of detention for 8 hours or less in a day do not count, while "a single … period of more than 8 hours and less than 24 hours, whether in one day or spanning two days, is to count as a whole day towards the total period".

You should note that despite the commencement of section 10 of the 2015 Act – which reduces the maximum period of suspension of detention from 9 months to 200 days and makes new arrangements for the calculation of the 200 day maximum – the amendments made by section 10 of the 2015 Act to sections 127 (suspension of measure authorising detention), section 128 (suspension of other measures) and section 224 (patients subject to certain other orders and directions: suspension of measure authorising detention) do not have effect in respect of suspension certificates granted before 30 June 2017. It appears that the intention is that any certificate granted before 30 June 2017 is to continue to have effect subject to the old suspension of detention regime maximum period of suspension and methods of calculation of that maximum. As soon as that certificate comes to an end, any new certificate granted in respect of the patient will be subject to the new suspension of detention regime maximum period of suspension and methods of calculation of that maximum. Accordingly, the policy intention appears to be that any RMO granting a suspension certificate prior to 30 June 2017 which remains extant after 30 June 2017 should take appropriate steps before the expiry of the certificate to either return the patient to detention in hospital, if that is justified clinically, or to make an application timeously to the Tribunal seeking variation of the patient's order to being community based.

Sections 11, 12 and 13 (specification of hospital units)

Sections 11, 12 and 13 of the 2015 Act came into force on 30 June 2017. Section 11 amends section 36 (emergency detention in hospital) of the 2003 Act and section 44 (short-term detention in hospital) of the 2003 Act and inserts new section 71A (compulsory treatment in hospital unit). These amendments together provide that references in sections 36, 44, 46–49 and 62–68 of the 2003 Act to a "hospital" may be read as references to a "hospital unit", which means "any part of a hospital which is treated as a separate unit". The effect is that emergency detention orders, STDCs, *interim* CTOs and CTOs may authorise detention in a specified hospital unit.

Section 12 of the 2015 Act amends section 136 (transfer of prisoners for treatment for mental disorder) of the 2003 Act so that references in section 136 to a "hospital" may be read as references to a "hospital unit", which means "any part of a hospital which is treated as a separate unit". The effect is that a transfer for treatment direction may authorise a transfer of prisoners to, and the detention in, a specified hospital unit.

Section 13 of the 2015 Act inserts new section 124A (transfer to other hospital unit) into the 2003 Act. New section 124A applies where the detention of a patient in

hospital is authorised by a CTO or an *interim* CTO and the order specifies the hospital unit in which the patient is to be detained. The term "hospital unit" is defined as meaning "any part of a hospital which is treated as a separate unit". Section 124A provides for the transfer of a patient from one hospital unit to another hospital unit within the same hospital. Section 124A(3) applies section 124(4) to (14) (transfer to other hospital) of the 2003 Act to a transfer or proposed transfer between hospital units within the same hospital subject to certain specified modifications.

You should note that section 178 (transfers) of the 2003 Act applies sections 124 to 126 of the 2003 Act in relation to a patient whose detention in hospital is authorised by a relevant compulsion order. Accordingly, new section 124A will be applied in relation to such patients.

Section 21 (periodical referral of cases)

Section 21 of the 2015 Act came into force on 30 June 2017. Section 21 makes amendments to section 101 (Tribunal's duty to review determination under section 86), section 189 (reference to Tribunal by Scottish Ministers) and section 213 (reference to Tribunal by Scottish Ministers) of the 2003 Act. Sections 101, 189 and 213 provide for "2 year reviews" in respect of CTOs, compulsion orders and hospital directions / transfer for treatment directions respectively. The amendments to each of these sections bring the way in which they calculate whether a 2 year review is due in line with section 165 (Tribunal's duty to review determination under section 152).

In short, when calculating whether a 2 year review is due in respect of a CTO, a compulsion order or a transfer for treatment direction, what is to be taken account of is not whether any application or reference of the types specified in the relevant sections has been "made to" the Tribunal during that relevant 2 year period, but whether any such application or reference has been "determined by" the Tribunal during that relevant 2 year period. These amendments bring sections 101, 189 and 213 into line with section 165.

Sections 22, 23 and 24 (named persons)

Sections 22, 23 and 24 of the 2015 Act came into force on 30 June 2017. Commencement No. 4 imposes a tiny restriction on the coming into force of section 23 of the 2015 Act. This restriction arises, it appears, as a result of a technical error which occurred during the amendment of the Bill as it passed through the Scottish Parliament and should not have any noticeable effect on the operation of these sections.

Section 251 (named person where no person nominated or nominated person declines to act) of the 2003 Act is repealed, so a person may only have a named person if one is nominated (and the nominated person consents). Section 253 (declaration in relation to named person) of the 2003 Act is also repealed.

You should note, however, that section 252 of the 2003 Act remains, so that people under the age of 16 years will continue to have a default named person, namely a person with parental rights and responsibilities, a local authority or a primary carer.

Nomination of a person as named person will be valid only if a docket to the nomination states that the nominated person has consented, the docket is signed by

the nominated person and the nominated person's signature is witnessed by a prescribed person: see new section 250(2A). Equally, an order by the Tribunal under section 257 (named person: Tribunal's powers) of the 2003 Act appointing a person to be a patient's named person may be made only if the person to be appointed named person has signed a document stating that the person has consented to be the patient's named person and that person's signature is witnessed: see new section 257(5).

You should note that where before 30 June 2017 a patient subject to a STDC, a CTO, an *interim* CTO, a compulsion order, a hospital direction or a transfer for treatment direction has a default named person (i.e. a named person by virtue of section 251 of the 2003 Act), then – by virtue of article 13 of Commencement No. 4 – that default named person continues to be named person in relation to the patient until:

- the patient makes a written declaration declaring that the person specified in the declaration is not to be the patient's named person, all in accordance with article 15 of Commencement No. 4
- the patient's STDC is revoked
- the patient's CTO is revoked
- the patient's compulsion order is revoked
- the patient's hospital direction or transfer for treatment direction is revoked
- the patient's *interim* CTO is revoked by section 75 of the 2003 Act on the making of a CTO.

You should note that, where after 30 September 2017 a patient who is subject to a CTO, compulsion order, hospital direction or transfer for treatment direction continues to have a default named person by virtue of article 13(1) of Commencement No. 4, then – by virtue of article 14 of that commencement order – that default named person continues to be named person in relation to the patient until:

- where the patient is subject to a CTO, the review of the CTO under section 77(2) (first mandatory review) or 78(2) (further mandatory review) of the 2003 Act
- where the patient is subject to a compulsion order, the compulsion order is reviewed under section 139(2) (first review of compulsion order) or 140(2) (further reviews of compulsion order) of the 2003 Act
- where the patient is subject to a hospital direction or a transfer for treatment direction, the direction is reviewed under section 206(2) (review of hospital direction and transfer for treatment direction) of the 2003 Act.

You should note that where a default named person prior to 30 June 2017 continues to act as a patient's named person by virtue of article 13 of the Commencement No. 4 after 30 June 2017, a patient who has attained the age of 16 years may make a declaration in accordance with article 15 of Commencement No. 4 stating that the person specified in the declaration is not to be the patient's named person.

Section 25 (ability to act if no named person)

Section 25 of the 2015 Act came into force on 30 June 2017. Section 25 inserts new section 257A (ability to act if no named person) into the 2003 Act. New section 257A applies if a patient does not have a named person; the patient has attained the age of 16 years; and the patient is incapable in relation to a decision as to whether to initiate an application or appeal in the patient's case. The term "incapable" has the meaning given by section 250 of the 2003 Act.

Where section 257A applies, any guardian, welfare attorney, primary carer or nearest relative of the patient has authority to initiate an application or appeal under section 50(1), 99(1), 100(2), 120(2), 125(2), 126(2), 163(1), 164(2), 192(2), 201(1), 204(1), 214(2), 219(2), 220(2), 264(2), 268(2), 320(2), 321(1) or 322(2) of the 2003 Act. Section 257A(5) disapplies the authority to initiate an application or appeal under certain of the foregoing sections in relation to a guardian or welfare attorney of the patient, as the guardian or welfare attorney is already entitled to make an application or appeal under those sections.

Where section 257A applies, any guardian or welfare attorney of the patient has authority to obtain any notice or information that is to be provided under section 54(3), 60(1), 87(2)(c), 124(4) or (6), 127(7), 128(3), 129(3) or (4), 153(2)(c), 200(3), 218(4), (6) or (10)(b), 224(8), 225(3) or 226(3) of the 2003 Act. Section 257A(6) specifies that in respect of sections 87(2)(c) and 153(2)(c), the authority to obtain a notice relates only to the notice of the determination mentioned in the section, and does not include a copy of the record mentioned in the section. Section 257A(6) also provides that the foregoing references to sections 128(3) and 129(4) relate to an RMO's reasons only if the RMO is satisfied that it is "appropriate to give notice of them to a guardian or welfare attorney of the patient (having regard to the need to ensure the patient's wellbeing and confidentiality)".

Section 257A(7) provides that neither of the patient's primary carer or nearest relative has authority to act in relation to a patient by virtue of section 257A if the patient has made a written declaration precluding those persons or all persons from so acting.

You should note the amendments made to the Tribunal's Rules by the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2017 (SSI 2017/172). The term which the Scottish Government is using with regard to any guardian, welfare attorney, primary carer or nearest relative of the patient who has authority under section 257A of the 2003 Act to initiate an application or appeal under the sections listed above is "listed initiator". The Rules have been amended at various points to provide that where an application or appeal "… is made by virtue of a provision giving a listed initiator authority to act, the listed initiator requirement must be complied with". The "listed initiator requirement" is set out in new rule 2(1A). It is that the application or appeal must be accompanied by

(a) a written statement by an approved medical practitioner confirming that in the opinion of that practitioner the patient is incapable in relation to the decision as to whether to initiate an application or appeal; and

(b) a written statement from the person making the application or appeal stating that the patient has attained the age of 16 years and has no named person; which of the categories of person who may initiate the appeal or application by virtue of the provision giving a listed initiator authority to act the

person falls within; and that the patient has not made a written declaration which precludes the person from initiating the appeal or application by virtue of that provision.

You should note that the definition of "party" in section 2(1) of the Rules has been amended so that it now means "the person who initiated the proceedings before the Tribunal except a person who initiated them by virtue of a provision giving a listed initiator authority to act". The policy intention appears to be that a nearest relative who will no longer be a default named person under the new named person regime would be able to obtain papers by initiating an application or appeal to the Tribunal as a listed initiator, had the person acting in that capacity not been excluded from the definition of "party".

Members will wish to give careful consideration where an application or appeal which they are to hear has been initiated by a listed initiator. The Scottish Government's intention appears to be that such a person should be able to initiate an application or appeal, but should not be a party and therefore will not receive the case papers (which may contain sensitive information that a patient would not wish shared with that person). Such a person would appear to fall within the category of "any other person appearing to the Tribunal to have an interest in the application" sprinkled throughout the 2003 Act, for example at section 64(3)(j), whom the Tribunal must afford the opportunity of making representations (whether orally or in writing) and of leading or producing evidence before determining the case.

You will note from section 257A(3) that a listed initiator has the right to appeal a decision of the Tribunal to the Sheriff Principal and to the Court of Session. The appeal court is provided by the Tribunal with copies of all the papers that were before the Tribunal which made the decision being appealed against. It would appear that a listed initiator who appeals a decision of the Tribunal to the Sheriff Principal or the Court of Session would be entitled to have access to those papers (to which they would have been denied access throughout the proceedings before the Tribunal itself).

Section 26 (advance statements to be registered)

Section 26 of the 2015 Act came into force on 30 June 2017. Section 26 inserts new sections 276A, 276B and 276C into the 2003 Act. These new sections require Health Boards to place a copy of any advance statement or document withdrawing an advance statement received by the Health Board with the person's medical records. The Health Board is to inform the Mental Welfare Commission that a copy of the advance statement or document withdrawing an advance statement is held with the person's medical records and where those records are kept. The Commission is to keep a register of the information it receives from Health Boards about advance statements or documents withdrawing an advance statement being held with the person's medical records and where the medical records are kept. The register is open to inspection by an MHO dealing with the person's case, an RMO dealing with the person's case or a Health Board responsible for the person's treatment. Health Boards are to publicise any support offered by the Health Board for making or withdrawing an advance statement.

Section 28 (communication at medical examination etc.)

Section 28 of the 2015 Act came into force on 30 June 2017. Section 28 inserts new section 261A (help with communication at medical examination etc.) into the 2003 Act. Members will be familiar with section 261 (provision of assistance to patient with communication difficulties) of the 2003 Act, which concerns the provision of assistance by the managers of the hospital in which the patient is detained or in which the patient would be detained if the authorisation to detain was not suspended, and rule 53 (assistance to persons with communication difficulties) of the Tribunal's Rules, which concerns provision of assistance by the Tribunal where a person is taking part in proceedings and assistance is not required to be given under section 261 of the 2003 Act.

New section 261A applies where certain medical examinations or interviews are being carried out and the subject has difficulty in communication or generally communicates in a language other than English. The medical examinations are those carried out by virtue of section 36(1)(a) (emergency detention in hospital), 44(1)(a) (short-term detention in hospital), 57(2) (mental health officer's duty to apply for compulsory treatment order) and 136(2)((transfer of prisoners for treatment of mental disorder) of the 2003 Act. The interviews are those carried out by virtue of section 45(1)(a) (mental health officer's duty to interview patient etc.), 61(2)(a) (mental health officer's duty to prepare report) of the 2003 Act and by virtue of sections 57C(2)(a) and 59B(2)(a) of the Criminal Procedure (Scotland) Act 1995.

The assistance which must be provided is the taking of all reasonable steps to secure that, for the purpose of enabling the subject of the medical examination or interview to communicate during it, arrangements appropriate to the subject's needs are made or the subject is provided with assistance or material appropriate to those needs.

The appropriate person who is to provide the assistance is either the Scottish Ministers, the medical practitioner carrying out the medical examination, the MHO carrying out the interview or the managers of the hospital in which the medical examination or the interview is being carried out, depending upon the circumstances set out in section 261A(5).

Section 29 (conflicts of interest to be avoided)

Section 29 of the 2015 Act came fully into force on 30 June 2017. Section 29 inserts new section 291A (conflicts of interest to be avoided) into the 2003 Act. New section 291A provides that there must not be a conflict of interest in relation to a medical examination carried out for the purpose of sections 36(1), 44(1), 47(1), 57(2), 77(2), 78(2), 139(2), 140(2) and 182(2) of the 2003 Act. Section 291A empowers Ministers to make regulations which may specify the circumstances in which there is to be taken to be a conflict of interest or there is not to be taken to be a conflict of interest, or which may specify circumstances in which the aforementioned prohibition against conflict of interest does not apply.

Section 29(3) of the 2015 Act repeals the “no conflict of interest in relation to medical examination” requirements in sections 36 (emergency detention in hospital), 44 (short-term detention in hospital), 47 (extension of detention pending application for compulsory treatment order) and 58 (medical examination: requirements) of the 2003 Act.

The Mental Health (Conflict of Interest) (Scotland) Regulations 2017 came into force on 30 June 2017 (see the link on the List of Recent Mental Health Legislation which is available on the MHTS website). The 2017 Regulations revoke the Mental Health (Conflict of Interest) (Scotland) (No. 2) Regulations 2005. Members should familiarise themselves with the updated conflict of interest regime.