

## **Guide to transitional provisions for the Mental Health (Scotland) Act 2015**

This document sets out the transitional provisions for the 2015 Act, subject to successful Parliamentary process. The table at Annex A sets out when provisions of the Act will come into force and the information below sets out where there are transitional provisions for all or part of a section of the 2015 Act. This is chiefly aimed at practitioners with duties under the Mental Health (Care and Treatment) (Scotland) Act 2003 which are affected by the 2015 Act.

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## **MHO reports for section 86 and section 152 determinations (Section 2 and section 50 of 2015 Act)**

What the provisions do:

Section 2 requires MHOs to provide a report to the Mental Health Tribunal when a Compulsory Treatment Order (CTO) is being reviewed by the Tribunal (but only where the diagnosis has changed or where the MHO disagrees with, or does not give view on, the decision to extend a CTO.) Section 50 makes this provision for Compulsion Orders (CO).

Proposed transitional provisions:

These provisions will apply to relevant cases where the section 86 (2003 Act) determination (CTOs) or the section 152 (2003 Act) determination (COs) is made by the Responsible Medical Officer (RMO) on or after the commencement date.

Examples in practice:

Dan's RMO has carried out a mandatory review of his CTO and has determined it should be extended. The RMO makes the section 86 determination on 27 June and Dan's MHO gives their view disagreeing with assessment on 2 July. The Tribunal hearing takes place later in July - as the RMO's determination was made before 30 June, the 2015 Act provisions do **not** apply.

Ruth's RMO has carried out a mandatory review of her CTO and makes a section 86 determination on 2 July. Ruth's diagnosis has changed since the CTO was granted or last reviewed by the Tribunal - the 2015 Act provisions apply and the MHO must provide a report to the Tribunal.

## **Emergency Detention Certificates (EDC) (Section 4 of the 2015 Act)**

What the provisions do:

The transitional provisions only apply to changes to notifications under section 38 as introduced by section 4 of the 2015 Act.

The following must be notified within 12 hours when a certificate is granted under section 38:

- a) The patient's nearest relative;
- b) If the nearest relative does not reside with the patient, any person who resides with the patient.
- c) If not included at (a) or (b) already, and if known to the hospital managers, the patient's named person, guardian or welfare attorney.

Unless judged inappropriate, the managers should also provide a copy of the certificate to the people above within 7 days.

A copy of the certificate must also be sent to the Commission, but they no longer need to be notified within 12 hours.

Proposed transitional provisions:

These provisions will only apply to certificates granted on or after commencement date.

Example in practice:

Jean has been detained under an EDC at 22:00 29 June but hospital managers are not able to notify all relevant parties until 09:00 the next morning - as the certificate was granted before the commencement date, the 2015 Act provisions do not apply.

### **Short-term Detention Certificates (STDC) (Section 5 of the 2015 Act)**

What the provision does: A copy of the certificate is now to be sent to the patient, their named person and any guardian or welfare attorney, as well as to the Commission and Tribunal as currently.

Proposed transitional arrangements: This will not apply to any STDC granted before 30 June.

Example in practice:

John has been detained on an STDC on 29 June but hospital managers are not able to notify all relevant parties until the next day - as the certificate was granted before the commencement date, the 2015 Act provisions do not apply.

### **Suspension of orders on emergency or short-term detention (Section 7 and Section 8 of the 2015 Act)**

What the provisions do:

Provide that measures authorised by COs or interim CTOs are suspended (with exception of giving medical treatment under part 16) when patients become subject to EDC (section 7) or an STDC (section 8), in same way as currently for CTOs.

Proposed transitional provisions:

That this only applies to EDCs or STDCs granted in these circumstances on or after the commencement date regardless of when the CO or ICTO was granted.

Examples in practice:

A community-based interim CTO is granted for Ruth on 23 June but Ruth becomes more unwell an STDC is granted on 29 June - as the STDC is granted before the commencement date, the 2015 Act provisions do **not** apply.

A community-based CO is granted for Dan on 26 May but Dan becomes more unwell an STDC is granted on 2 July - as the STDC is granted after the commencement date, the 2015 Act provisions do apply and the measures authorised by the interim CTO are suspended.

## **Suspension of detention (Section 10 of the 2015 Act)**

What the provisions do:

Make various changes to what is required by a certificate for suspension of detention and how limits to suspension of detention are calculated, including that periods of less than 8 hours will no longer count to overall limits and that the maximum allowed in a 12 month period is 200 days.

Proposed transitional provisions:

Any certificate in existence before the go-live date, will be valid until it expires. Any certificate issued on or after the go-live, will need to meet the new rules.

Examples in practice:

**[These examples are also only looking at what would be allowed under the law, rather than best practice in relation to applying for a community-based order or revoking the order rather than suspending detention for several months.]**

Example 1 - patient potentially reaching new maximum sus limit (200 days) shortly before 30 June 2017.

John has had several short periods of suspension for testing out between October 2016 and January 2017. These lasted between 2 and 10 days and totalled 30 days. His detention was then suspended on a longer term basis and has been suspended continuously since 8 January 2017. The most recent certificate covers suspension from 1 May to 31 July.

Under the new 2015 Act timescales, John will have had his detention suspended for 204 days of the previous year on 30 June, in excess of the new 200 day limit.

However, the certificate issued on 1 May remains valid for its duration until 31 July. A new certificate could not be issued after this until October.

Example 2 - patient potentially reaching new maximum suspension limit (200 days) shortly after 30 June 2017.

Ruth had her detention suspended for the first time on 8 March 2017 and it has been suspended continuously since. This means it will have been suspended for 115 days by 30 June. Under the current timescales, detention could then be suspended until around 8 December 2017, i.e. 9 months of suspended detention.

Under the new timescales in the 2015 Act, if a further certificate was issued on or after 30 June 2017, then detention could only be suspended continuously until 24 September 2017, as that is the date on which the total would be 200 days.

Example 3 - patient who has only had their detention suspended shortly before 30 June 2017.

Dan had suspended detention for 5 accompanied daytime visits in April 2017, then several short periods of sus testing out between 1 May and 25 May 2017 totalling 17 days. He then has his detention suspended for six weeks from 2 June to 14 July. The certificate issued on 2 June remains valid until it expires on 14 July. For any further certificates, the new timescales should therefore be used. The 5 days in January no longer count towards the limit, as periods of less than 8 hours no longer count towards the cumulative limit. Detention can be suspended for a cumulative total of up to 154 further days until 1 May 2018.

## **Removal orders (Section 19 of the 2015 Act)**

What the provisions do:

Introduces requirement for MHOs to notify the Commission as to (a) whether any application for a removal order under section 293 is refused or granted, and (b) the outcome of any application to the sheriff under section 295 seeking recall or variation or a removal order.

Proposed transitional provisions:

(a) Applies where the decision to make or refuse to make the order is made on or after the commencement date.

(b) Applies where the decision to make or refuse to make an order recalling or varying the removal order is made on or after the commencement date.

[Please note, these transitional provisions do not apply where the application is made to a justice of the peace, because of their urgent nature. In such a case, from 30 June, MHOs must inform the Commission as soon as practicable after a decision is made by the JP.]

Examples in practice:

A removal order for John is made on 29 June, which will be valid for 72 hours (and therefore after the commencement date) – as the decision was made before 30 June, the new provisions do not apply (although it is best practice in the Code of Practice to notify the Commission)

An MHO applies for a removal order for Jean on 29 June and the decision is made whether or not to grant the order on 30 June - the 2015 Act provisions apply and the Mental Welfare Commission must be notified of decision.

A removal order is granted for Ruth on 27 June. An MHO applies for the recall or variation of the removal order on 29 June and the decision is made on 30 June - the 2015 Act provisions apply and the Mental Welfare Commission must be notified of decision.

## **Nurse's power to detain (Section 20 of the 2015 Act)**

What the provision does:

Adjusts the nurse's power to detain under section 299 to three hours from the outset, rather than two hours with an option to extend by an hour.

Proposed transitional provision:

This will not apply to any use of the power before the commencement date (i.e. to any use whether the detention begins before 23:59 on 29 June).

## **Periodical referral of cases (Section 21 of the 2015 Act)**

What the provision does:

Provide that two year referrals of CTOs, COs, Compulsion Orders with Restriction Orders (CORO), Transfer for Treatment Directions (TTD) and Hospital Direction (HD) to the Tribunal are required where an application has not been determined by the Tribunal within the two years prior to the 'renewal day' or 'relevant day' rather than whether an application for review has been made in that time.

Proposed transitional provisions:

That this applies to orders the next time the 'renewal day' or 'relevant day' occurs on or after the commencement date.

Examples in practice:

'Relevant day' falls on 28 June, though determination whether a referral is required does not occur until 10 July - 'relevant day' falls before commencement date so 2015 Act provisions do **not** apply.

'Relevant day' falls on 3 June - 'relevant day' falls after commencement date so 2015 Act provisions apply and referral to the Tribunal is now only required if the application has not been determined in the previous two years rather than made.

## **Named persons (Sections 22-23 of the 2015 Act)**

What the provisions do:

Section 22 of the 2015 Act repeals section 251 of the 2003 Act, which appoints a named person (the carer or nearest relative) by default if the patient has not nominated a named person, or the nominated named person declines to act. Section 23 introduces a requirement for a nominated named person to agree in writing to take on the role.

Proposed transitional provisions:

Section 22 repeal of default named persons provisions (note: named persons nominated under section 250 or appointed by the Tribunal under section 256 do not come under these provisions)

Default named persons will be phased out in three main ways:

- 1) A patient who does not want their named person to continue in the role can make a declaration removing them from 30 June 2017, and no new named person will be appointed in their place.
- 2) If the patient's order expires or is revoked from 30 June 2017, then the default named person will cease to hold that role. That includes where an STDC or interim CTO comes to an end and is replaced by a CTO.
- 3) The default named person will cease to hold the role from the time of a mandatory review of a longer-term order from 30 September 2017. This is:

- the first mandatory review of a CTO by the RMO at section 77(2) of the 2003 Act;
- further mandatory reviews of a CTO by the RMO at section 78(2) of the 2003 Act;
- the first mandatory review of a compulsion order by the RMO at section 139(2) of the 2003 Act;
- further mandatory reviews of a CO by the RMO at section 140(2) of the 2003 Act;
- mandatory reviews of a hospital direction or transfer for treatment direction by the RMO at section 206(2) of the 2003 Act.

Point 3 does not include time-to-time reviews of orders or appeals to the Tribunal. If there are still any default named persons holding their role by 30 June 2018, this will cease on that date.

#### Examples in practice:

##### Example 1

Ruth is subject to a CTO, which was first granted by the Tribunal on 2 June 2017. Therefore, her RMO must carry out a medical examination under s77 within 2 months of the expiry of the CTO, ie between 2 October and 2 December.

Ruth has a named person, her nearest relative which is her sister, Jean. Ruth wasn't well enough when she was first detained to choose her named person, so it defaulted to Jean under s251. If Ruth does not nominate Jean under section 250 before then, Jean will cease being Ruth's named person when the medical examination under s77 takes place.

##### Example 2

Dan has been subject to a CTO for around two and a half years. His CTO was granted on 15 December 2014. His RMO must carry out a medical examination under s78 within two months of the anniversary, i.e. between 15 October and 15 December 2017.

Dan's named person is his dad John. It isn't clear if Dan appointed John under s250, or if it defaulted to John under s251. If there is no clear evidence that Dan nominated John under section 250 or he does not nominate him again, John will cease being Dan's named person when the medical examination under s78 takes place.

#### Section 23 requirement for named person to agree in writing:

This will only apply to nominations made on or after 30 June, so nominations made under section 250 of the 2003 Act before that day will continue to be valid, even if the named person has not agreed in writing.



## **Compulsory treatment of prisoners (Section 35 of the 2015 Act)**

What the provisions do:

Transitional provisions will only apply to the provision which adds a requirement to give notice to Scottish Ministers where CTO applied for, for patients subject to HD and TTD.

Proposed transitional provisions:

That it applies only where requirement to make the application falls on or after the commencement date.

Examples in practice:

The application is made by the MHO on 29 June and determined by the Tribunal on 5 July - as the application was made before 30 June, the 2015 Act provisions do **not** apply.

The application is made by the MHO on 3 July - the 2015 Act provisions apply and notification must be given to Scottish Ministers.

## **Orders under the 1995 Act (Section 40 and sections 41-44 of the 2015 Act)**

What the provisions do:

(a) Changes the way in which timescales for removal of a person to hospital under an assessment order (AO), treatment order (TO), interim compulsion order (ICO), compulsion order and hospital direction are calculated.

(b) Section 40 also allows the court to make an order extending the AO for 14 days, instead of 7 days at present.

Note these provisions come into effect on 30<sup>th</sup> September 2017

Proposed transitional provisions:

That these changes would only apply to orders where the order is granted on or after the commencement date (30<sup>th</sup> September 2017) or the extension is made on or after that date.

Examples in practice:

An assessment order is granted for Jean on 26 September. On 5 October, an application to extend the AO is made - as the extension is made after the commencement date, the new provisions apply.