

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 18 – Miscellaneous

Section 274: Code of Practice

534. [Section 274](#) requires the Scottish Ministers to publish a Code of Practice to give guidance to people discharging functions by virtue of the 2003 Act or, as a result of the amendment made by the 2004 Order, Part VI of the 1995 Act. Before publishing the Code, Ministers must consult and lay a draft before Parliament. The Code may be revised periodically.
535. Any person who has a function to discharge must have regard to the latest available version of the Code. This would include, in particular, medical practitioners and mental health officers. The Code does not bind the Tribunal, the courts or the Commission, nor as a result of an amendment made by the 2004 Order, a prosecutor. However, those persons would be entitled to have regard to whether other parties exercising those functions had properly applied the Code.

Section 275 to 276: advance statements

Advance statements: making and withdrawal

536. [Section 275](#) sets out a procedure by which a patient can make an ‘advance statement’. This is a statement setting out how the patient would wish or would not wish to be treated for any mental disorder if, at some future time, he or she has a mental disorder which causes his or her ability to make decisions about those matters to be significantly impaired.
537. Subsection (2) provides that an advance statement must be in writing and must be signed by the patient and a witness. The witness must also certify that, in his or her opinion, the patient was capable of making the statement at the time.
538. A patient may withdraw an advance statement in accordance with the provisions in subsection (3).

Advance statements: effect

539. [Section 276](#) sets out the effect of an advance statement which has been made in accordance with section 275, and which has not been withdrawn.
540. If the Tribunal is making a decision, subsection (1) requires it to have regard to the terms of any extant advance statement made by the patient concerned, if the Tribunal is satisfied that:

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- because of mental disorder, the patient's ability to make decisions about his or her treatment is significantly impaired;
 - the statement was properly made (that is, it is in compliance with section 275(2));
 - the statement covers any aspect of the measures or treatment which might be authorised or no longer authorised by the decision to be made by the Tribunal; and
 - the Tribunal is satisfied there has been no material change in circumstances since the statement was made.
541. Subsection (3) provides that, where any person is giving treatment authorised under the 2003 Act or the 1995 Act (for example, the responsible medical officer), that person has to have regard to any extant advance statement made by the patient concerned, if satisfied that the patient's current decision-making ability is significantly impaired by virtue of mental disorder.
542. Any designated medical practitioner making decisions under the 2003 Act must also have regard to any extant advance statement.
543. The Tribunal must consider an advance statement (or a withdrawal of a statement) to be valid unless the contrary appears. If the Tribunal has considered an advance statement as valid, it should be presumed to be valid by any person giving treatment authorised by a decision of the Tribunal. Similarly, if treatment is being given otherwise than by virtue of a decision of the Tribunal, then the person giving treatment must consider a statement (or its withdrawal) to be valid unless the contrary appears to be the case.
544. Wherever a decision of the Tribunal or a designated medical practitioner, or treatment given under authority of the 2003 Act or the 1995 Act, conflicts with a valid extant advance statement, then the Tribunal or person concerned must record the circumstances and their reasoning in writing, notify various parties including the patient who made the statement and the Commission, and place a copy of the record in the patient's medical records.

Section 277: education of persons who have mental disorder

545. **Section 277** amends section 14 of the Education (Scotland) Act 1980 to require education authorities to make arrangements to provide school education for children unable to attend school because they are subject to measures authorised by the 2003 Act or, in consequence of their mental disorder, by the 1995 Act.
546. Subsection (3) provides a corresponding amendment to section 131 of the 1980 Act to remove the exclusion of children who are detained in hospital by virtue of measures authorised by the 2003 Act from the scope of the 1980 Act.

Section 278: duty to mitigate adverse effects of compulsory measures on parental relations

547. **Section 278** requires any person having functions under the 2003 Act to take all reasonable steps to reduce any adverse effect on the relationship between a child and a person having parental responsibilities for that child, where either the child or that person is made subject to measures authorised by the 2003 Act or, in consequence of his or her mental disorder, by the 1995 Act.

Section 279: information for research

548. **Section 279** allows the Scottish Ministers to require any person having functions under the 2003 Act to provide relevant information for research purposes, as defined in section 33 of the Data Protection Act 1998. The section provides a number of exceptions and safeguards to this:

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- information which a person could not be compelled to give as evidence in proceedings in court need not be provided;
- information which would enable the person who is the subject of the information to be identified must if reasonably possible be provided in such a way as to prevent identification; and
- where provision would breach a duty of confidentiality, the information cannot be provided without the permission of the person to whom the information relates.

Section 280: restriction of Scottish Ministers' powers to delegate management of state hospitals

549. Originally, Part VIII of the 1984 Act contained provisions regarding state hospitals for patients who required special security. These provisions have now largely been repealed, and the responsibility of the Scottish Ministers to provide such hospitals is contained in section 102 of the National Health Service (Scotland) Act 1978.
550. Section 102 of the 1978 Act provides that a state hospital may be managed on behalf of the Scottish Ministers by:
- a committee constituted under section 91 of the 1984 Act; or
 - a Health Board, Special Health Board, the Common Services Agency or an NHS Trust.
551. Section 91 of the 1984 Act is not re-enacted in the Act. This section removes the reference to it from the 1978 Act.

Sections 281 to 283: correspondence

Correspondence of certain persons detained in hospital

552. **Section 281** provides powers for a specified person's incoming and outgoing mail to be inspected and withheld in certain circumstances. 'Specified person' means a person detained in hospital who meets other conditions as may be specified by the Scottish Ministers in regulations.
553. Subsections (1) and (3) provide that a postal packet addressed by a specified person to any person may be withheld from a "relevant carrier" (defined in subsection (9)) if the intended recipient has requested in writing that communications from the patient be withheld. The request should be made in writing to the managers of the hospital, the responsible medical officer or the Scottish Ministers. "Postal packet" has the same meaning as in the Postal Services Act 2000, namely "a letter, parcel, packet or other article transmissible by post".
554. Hospital managers may also withhold a postal packet if they consider that receipt is likely to cause distress to the person to whom it is addressed or any other person (not being a member of staff of the hospital), or to cause danger to any person.
555. Subsection (6) provides that hospital managers may withhold a postal packet addressed to a specified person if they consider it is necessary to do so in the interests of the safety of the patient concerned or for the protection of any other person. The powers described in this paragraph and the preceding one do not apply to any correspondence between a patient and those persons or organisations listed at subsection (5).
556. Subsection (7) provides that hospital managers may open and inspect a postal packet to determine whether they can or should withhold it, or any of its contents.

Correspondence: supplementary

557. [Section 282](#) provides that if a postal packet, or anything contained within it, is withheld by the managers of a hospital under section 281(1) or (6), those managers must:
- record that fact in writing;
 - within 7 days, notify the Commission of the name of the specified person, the nature of the packet or contents withheld, and the reasons for doing so; and
 - also within 7 days, notify the specified person and, in the case of incoming correspondence, the person who sent the packet.
558. However, these notification requirements do not apply if the reason for the packet being withheld is that the addressee has made a request that communications to them from the specified person be withheld.
559. Subsection (7) enables the Scottish Ministers to make regulations in relation to two matters: the exercise of the powers conferred by section 281, and, extending the application of that section to other forms of written communications.

Review of decision to withhold postal packet

560. [Section 283](#) requires the Commission to review any decision to withhold a postal packet (or anything contained within it) if an application is made to them within 6 months of the day on which notification was received.
561. The application can be made by the patient where an outgoing postal packet (or anything contained within it) was withheld and by the patient and the sender where an incoming postal packet (or anything contained within it) was withheld.
562. Having reviewed the decision of the managers of the hospital, the Commission may direct that the packet or item in question should be released to the addressee, and the hospital managers are required to comply with any such direction.
563. The Scottish Ministers may make regulations with respect to the making of applications and as to the production to the Commission of relevant items.

Sections 284 and 285: telephone calls

Certain patients detained in hospital: use of telephones

564. Subsection (1) of section 284 empowers the Scottish Ministers to make regulations in connection with regulating the use of telephones by such patients detained in hospital as may be specified. The regulations may in particular make provision in relation to the matters set out in subsection (2).
565. Subsection (4) provides that the interception of telephone calls by such patients to certain persons detailed in subsection (6), may not be authorised by regulations unless the person has requested the interception of calls made by the patient, or the telephone call is, or would be, unlawful.

Directions as to implementation of regulations under section 284(1)

566. Subsection (1) of section 285 empowers the Scottish Ministers to give directions to hospital managers in relation to their implementation of regulations under section 284(1); and requires the managers to comply with any such directions. Subsection (2) empowers Ministers to require hospital managers to provide them with specified information in relation to their implementation of those regulations.

Section 286: safety and security in hospitals

567. **Section 286(1)** empowers the Scottish Ministers to make regulations authorising and placing conditions on various activities relating to safety and security in hospitals, including:
- searches;
 - the taking and examination of body samples;
 - restrictions on property which may be kept in hospital;
 - restrictions on visitors and the property they bring into hospital;
 - surveillance; and
 - the searching of visitors and their property.
568. Implementation of those regulations in any particular hospital will be a matter for the managers of that hospital. Subsection (2) empowers the Scottish Ministers to make regulations requiring the provision by hospital managers of specified information to Ministers and to the Commission, in relation to their implementation of those regulations. Subsection (3), provides that regulations may also empower the Commission to make directions on certain matters.
569. The Scottish Ministers can also issue directions to hospital managers with which those hospital managers must comply (subsection (5)).

Information

Section 287: information

570. **Section 287** empowers the Scottish Ministers to require a patient's responsible medical officer to provide them with such information as they specify, for the purposes of carrying out functions exercisable by the Scottish Ministers under the provisions of the 2003 Act and the 1995 Act mentioned in paragraphs (a) and (b) of the section.

Payments for expenses

Section 288: payments to persons in hospital to meet personal expenses

571. **Section 288** empowers the Scottish Ministers to pay a patient such amounts as they consider appropriate in relation to the patient's occasional personal expenses, where the patient, has been admitted to a hospital and is receiving treatment there primarily for mental disorder, and where it appears to the Scottish Ministers that the patient would otherwise not be able to meet the expenses in question.

Cross-border transfers

Sections 289 and 290: cross-border transfer of patients

572. **Sections 289 and 290**, which have both been subject to minor modifications by the 2004 Order enable the Scottish Ministers to make regulations in relation to the transfer of patients to and from Scotland. Section 289 relates to patients subject to a community-based compulsory treatment order or compulsion order while section 290 provides for patients who are detained compulsorily in hospital. Regulations may make provision for such patients to move between different parts of the UK, and for patients being treated for mental disorder (whether or not subject to measures authorised by the 2003 Act or the 1995 Act) to be removed from the United Kingdom.
573. Any removal from Scotland will require the consent of the Scottish Ministers and will be subject to a right of appeal by the patient.

574. Patients will only be received in Scotland with the consent of the Scottish Ministers.

Informal patients

Section 291: application to Tribunal in relation to unlawful detention

575. **Section 291** provides that where a patient has been admitted to hospital informally to receive treatment primarily for a mental disorder, that patient or any other person specified in subsection (4) may apply to the Tribunal for an order requiring the managers of the hospital to cease to detain the patient. If the Tribunal determines that the patient is being unlawfully detained, it will make an order requiring that the detention cease.

576. These provisions do not interfere with any existing rights a patient may have to challenge in the courts or seek redress for any unlawful interference with his or her liberty.