

*These notes relate to the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) which received Royal Assent on 25 April 2003*

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 – the Mental Welfare Commission for Scotland**

##### *Sections 4 to 20: the Mental Welfare Commission for Scotland*

#### **Continued existence of the Mental Welfare Commission for Scotland**

18. [Section 4](#) introduces schedule 4 and along with the schedule makes provision for the continued existence of the Commission. It was originally established by the Mental Health (Scotland) Act 1960. Schedule 1 of the 2003 Act contains provisions as to the membership, organisation and general powers of the Commission and is discussed in detail in paragraphs 655 to 666 of the Notes.

#### **General duties**

19. [Section 5](#) requires the Commission to monitor the operation of the 2003 Act and to promote best practice in relation to its operation.
20. [Section 6](#) places the Commission under a duty to inform the Scottish Ministers of any matter relating to the operation of the 2003 Act that it considers should be brought to their attention.

#### **Particular functions**

21. [Sections 7](#) and [8](#) together place duties on the Commission to bring matters relating to the welfare of patients to the attention of any of the persons listed.
22. [Section 7](#) is directed at matters of general interest or concern, while section 8 deals with the situation where the Commission believes that the persons listed have the ability to prevent or remedy certain circumstances. These circumstances are outlined in section 11(2) and include unlawful or improper detention, ill-treatment, neglect or a deficiency in the care or treatment of a person with mental disorder, loss or damage to a patient's property and when a patient is living alone and is unable to manage his or her affairs.

#### **Duty to give advice**

23. [Section 9](#) establishes a duty on the Commission to provide advice where the Scottish Ministers, a local authority, a Health Board, the Scottish Commission for the Regulation of Care or the Scottish Public Services Ombudsman has referred a matter regarding the 2003 Act to it with the Commission's agreement.

### **Publishing information, guidance etc.**

24. [Section 10\(1\)](#) allows the Commission to publish general information and guidance with regard to its functions as well as more specific information and guidance following an investigation under section 11(1), an inquiry under section 12(1) or visits to persons who have mental disorder carried out under section 13(1). The Commission may not publish advice given under section 9(1) without the permission of a person mentioned in subsection (2) of that section.
25. [Section 11\(1\)](#) enables the Commission to inquire into and make recommendations relating to any patient's case, where the circumstances outlined in subsection (2) apply. Those circumstances include that the patient may be, or may have been, subject or exposed to ill-treatment, neglect or some other deficiency in care or treatment.
26. (Local authorities also have certain powers of investigation in some of these circumstances under sections 33 to 35 of the Act (see paragraphs 60 to 63 of these Notes)).

### **Investigations: further provisions**

27. [Section 12](#) allows the Commission to hold a formal inquiry when it carries out an investigation under section 11(1). The Commission can require the attendance of persons, and has the ability to examine witnesses under oath.

### **Visits in relation to patients**

28. [Section 13\(1\)](#) requires the Commission to ensure that persons authorised by it visit certain categories of patients specified in subsection (2). The frequency of visits is a matter for the discretion of the Commission. The duty applies whether the patients concerned are in hospital or the community. In addition to the duty to visit patients subject to compulsory measures, the Commission may visit hospitals, community mental health facilities and prisons both to inspect the facilities and to allow patients to discuss with the Commission any concerns they may have. Subsection (6) allows the Commission to make unannounced visits.

### **Interviews**

29. [Section 14](#) allows a person authorised by the Commission (the "authorised person"), in the discharge of its functions (for example as part of a visit or an investigation) to interview patients or other appropriate persons in private. The section also requires the authorised person, when carrying out visits under section 13, to give patients the opportunity of a private interview.

### **Medical examination and inspection of records**

30. [Section 15\(1\)](#) provides that an authorised person may carry out a private medical examination of a patient. Subsection (2) provides that the authorised person must be a medical commissioner or a member of staff of the Commission with such qualifications, training and experience as may be prescribed by regulations. Medical commissioners are appointed in terms of paragraph 3(1)(b) of schedule 1 (see paragraphs 655 to 666 of these Notes).
31. [Section 16\(1\)](#) provides that an authorised person may, in connection with the discharge of any of the Commission's functions under the 2003 Act or the 2000 Act, require the production of medical or other records a person may hold and inspect those records. Subsection (2) provides that the authorised person for this purpose must be a member of the Commission or a member of staff of the Commission.

**Duties of Scottish Ministers, local authorities and others with respect to the Commission**

32. [Section 17\(1\)](#) requires the persons mentioned in subsection (2) to provide facilities for the Commission to carry out its functions.

**Annual report; statistical information**

33. The Commission must publish an annual report (section 18) and must provide and publish statistical information (section 19). The Scottish Ministers may direct what statistical or other information is to be provided to them and published.

**Protection from actions of defamation**

34. This provision in section 20 provides explicit protection to the Commission and its employees from actions of defamation unless they can be shown to be acting maliciously. Privilege would apply, for example, to any report published by the Commission as a result of an investigation into deficiencies in a patient's care.