



## Mental Health (Care and Treatment) Scotland Act 2003

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### 1. Summary

The Mental Health (Care and Treatment) Act 2003 outlines how individuals with a 'mental disorder' are to be treated in community and inpatient settings. 'Mental disorder' is defined by the Act as any mental illness, personality disorder, or learning disability, regardless of how it is caused or manifested. The Act has been in effect from October 2005, and replaces the previous 1984 Act.

### 2. Guiding Principles

Within the Mental Health (Care and Treatment) Act 2003 are a number of guiding principles:

- 1. Non-Discrimination** - people with mental disorder should wherever possible retain the same rights and entitlements as those with other health needs.
- 2. Equality** - all powers under the act should be exercised without any direct or indirect discrimination on the grounds of physical disability, age, gender, sexual orientation, language, religion or national, ethnic, or social origin.
- 3. Respect for Diversity** - service users should receive care treatment and support in a manner that respects their individual qualities, abilities and diverse background, and takes into account their age, gender, sexual orientation, ethnic group social cultural and religious background.
- 4. Reciprocity** - where society imposes an obligation on an individual to comply with a programme of treatment of care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services, including ongoing care following discharge from compulsion.
- 5. Informal Care** – where ever possible care, treatment and support should be provided to people with mental disorder without the use of compulsory powers.

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6. **Participation** - service users should be fully involved as far as they are able to be in all aspects of their assessment, care, treatment and support. Their past and present wishes should be taken into account. Due consideration should be given to an advanced statement. They should be provided with all information and support necessary to enable them to participate fully. Information should be provided in a way, which makes it most likely to be understood.
7. **Respect for Carers** - those who provide care to service users on an informal basis should receive respect for their role and experience, receive appropriate information and advice and have their views and needs taken into account.
8. **Least Restrictive Alternative** - service users should be provided with any necessary care, treatment and support both in the least invasive manner and the least restrictive manner and environment compatible with the delivery of safe and effective care, taking account where appropriate of the safety of others.
9. **Benefit** - any intervention under the act should be likely to produce a benefit for the service user that cannot reasonably be achieved other than by intervention.
10. **Child Welfare** - the welfare of a child with mental disorder should be paramount in any interventions imposed on the child under the Act.

Unlike the Mental Health Act for England and Wales, the Scotland Act explicitly outlines what carers should receive, under Principle 7 above. This is discussed further in later sections.

### 3. Key Details of the Act

The Act outlines the responsibilities of mental health services and professionals to ensure effective and correct treatment is offered to all persons with a mental disorder. The legislation also aims to ensure that the rights and liberties of patients are respected to the utmost degree. Unfortunately, for mental health carers, it is usually the controversial aspects of the Act which are more commonly encountered. As a result, it is these Sections which this guidance will focus upon.

#### Key Sections

The Act covers the circumstances under which individuals with a mental disorder may be deprived of certain rights and liberty, in the interests of their or others' safety. In this way, the most controversial and well-known parts of this Act for carers deal with compulsory treatment or 'compulsion'. These include:

- ⊕ **Section 36** - outlines the issuing of an **emergency detention certificate**. This authorises the transfer of a patient to hospital within 72 hours of certificate being issued, and detention of patient in hospital for up to 72 hours in order to assess their needs for treatment. Contrary to the 1984 Act, there is no longer any requirement for consent from the next of kin for this order. See <http://www.nes.scot.nhs.uk/mhagp/three.htm> for more details.

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- ⊕ **Section 44** - explains when and how to issue a **short-term detention certificate**. This authorises a patient's detention in hospital for specific treatment for up to 28 days, within 72 hours of certificate being issued. See <http://www.nes.scot.nhs.uk/mhagp/four.htm>
- ⊕ **Section 57** - deals with **compulsory treatment orders**. These allow a patient to be detained for treatment for up to 6 months, with provisions for extension. See <http://www.nes.scot.nhs.uk/mhagp/five.htm>

In this sense, when someone is 'sectioned', this means that they have been detained in line with one of the sections of the Mental Health (Care and Treatment) Scotland Act.

In order to enact compulsory treatment and/or detention, certain criteria must be met, including the following:

- the patient must have, or be considered by a registered practitioner likely to have, a mental disorder
- because of that mental disorder, the patient's ability to make decisions about their medical treatment for that disorder is significantly impaired.
- it is necessary to urgency detain the patient in hospital in order to (a) provide the necessary medical treatment, or (b) determine what medical treatment should be provided to the patient for the mental disorder
- there would be a significant risk to the health, safety or welfare of the patient or other people if the patient were not detained in hospital

In most circumstances, application for compulsory treatment and/or detention will be done by a registered doctor (usually a psychiatrist). They must consult a Mental Health Officer (MHO); a social worker who has received training in mental health and mental health law. In the cases of short-term detention and compulsory treatment orders, doctors must also consult and 'have regard to' the views of patient's **named person** (see below). In addition, the decision-makers must consider whether the patient would consent to voluntary admission – compulsion is to be used only when there is no other option.

However, be aware that the circumstances and responsibilities of doctors and Mental Health Officers vary according to the different circumstances outlined by Sections 36, 44 and 57 (as well as other Sections in the Act). For more detailed information on specific procedures, please see the webpages above for each Section.

### Community compulsion

In contrast to the former 1984 Act, the Mental Health (Care and Treatment) Scotland Act also provides a legal framework for compulsory treatment in the community.

As outlined by Section 57 above, a compulsory treatment order's purpose is to provide treatment of a mental disorder. This can be in hospital or in the community. Hence, a *community treatment order* may include powers to compel patients in the community to:

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- receive medical treatment
- attend specific services or places for medical treatment, on specific dates or at defined intervals
- reside at a specific place
- permit a mental health officer (MHO), a responsible medical officer (RMO – i.e. doctor/psychiatrist), and other professionals to visit them at their place of residence
- obtain MHO permission to change address prior to any move

If a patient fails to comply with the criteria of the community treatment order, they may be taken back into custody (i.e. secure mental health inpatient units) under procedures similar to Sections 36 and 44 above. In this way, carers must ensure that they are given clear guidance on any community treatment orders issued to the person they care for, as well as have a clear sense of what their rights are (see below).

The Act also prescribes the Care Programme Approach for treatment of mental health problems.

### Care Programme Approach

This Approach outlines that everyone diagnosed with a mental health problem should be involved in a thorough assessment of their needs, and a plan drawn up of their care package. This Care Programme Approach (CPA) should identify the carer(s) involved, outline how they should be involved, and recognise the need for a carers' assessment. This care programme must include:

- Ⓢ Written care plan
- Ⓢ Named Care Coordinator
- Ⓢ Health and Social Care Needs Assessment
- Ⓢ Risk Assessment
- Ⓢ Regular Review

### Relationship with Adults with Incapacity (Scotland) Act 2000

The Adults with Incapacity (Scotland) Act 2000 outlines how decisions can be made about the medical treatment of “adults with incapacity”. These are adults who lack the ability to make some or all medical decisions for themselves, due to mental health conditions or incapacity, or severe communication difficulties caused by a physical disorder.

These two Acts are intended to work together, rather than supersede one another. For example, compulsory treatment cannot be administered under the Adults with Incapacity (Scotland) Act, only under the Mental Health (Care and Treatment) Scotland Act. Likewise, a guardian or attorney cannot “authorise the admission of a patient to a mental hospital for treatment”. However, any welfare guardian or welfare attorney with medical decision-making

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powers would have to be consulted if a short-term detention certificate or community treatment order under the Mental Health (Care and Treatment) Scotland Act was being considered.

When supporting mental health carers, the key issue to consider is whether the person they care for lacks capacity *at that time*, and *in that way*. For example, although someone may be in a psychiatric ward and have a diagnosis of schizophrenia, this does not automatically mean that they lack capacity, or that they lack capacity to make any or all decisions. Capacity is **decision specific**; while someone may not have the capacity to make decisions about their finances, they may be capable of making decisions about their care and treatment. A key example would be discharge, where regardless of whether or not someone is detained under the Mental Health (Care and Treatment) Scotland Act, the service user's capacity to make decisions needs to be considered in discharge planning.

Indeed, people with a mental illness do not necessarily lack capacity, although those with a severe mental illness “may experience a temporary loss of capacity to make decisions about their care and treatment.”<sup>1</sup>

## 4. Carers' role

Carers are defined in the Act as persons who provide, on a regular basis, a substantial amount of care for, and support to, the service user. Carers need not be a relative, nor do they have to live with the service user. Carers have a key role in:

- managing the care of the mental health service user
- being involved in care planning for the service user
- requesting a Mental Health Act Assessment of the person cared for
- requesting an assessment of needs of the person cared for
- setting up Powers of Attorney for the service user
- being involved in decisions about hospital discharge and Mental Health Tribunals

In some instances, carers' legal rights are dependent on whether they are identified as the service users' **'named person'**. This is a new role created by the Act, and is defined below:

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*The named person “has particular powers and rights in relation to patients who become subject to compulsory powers. The named person has similar rights to the patient to apply to the Tribunal, to appear and be represented at Tribunal hearings (for example, concerning compulsory treatment orders, appeals against short term detention, review of compulsion orders etc.), and to appeal. The named person is also entitled to receive information when a patient is being or has been subject to compulsory measures.*

*The role of the named person is to represent and safeguard the interests of the patient. The named person and the patient are entitled to act independently of each other. For instance, a named person can apply to the Tribunal for a review of the patient’s compulsory treatment order with or without the patient’s approval. The named person has the right to put his or her own view forward, even when the patient has a different view.*

*The Act requires any person exercising functions under the Act to take account of the views of the named person when making a decision or considering a course of action, where it is reasonable and practicable to do so.”*

Quotes taken from <http://www.nes.scot.nhs.uk/mhagp/six.htm> (please see this webpage for more information on the concept).

In this way, if mental health carers wish to have more involvement in the care and treatment of the person they care for, they need to speak to them about becoming the named person. This person will only have the extra rights as a named person if the service user is **currently** subject to treatment under the Act. The named person does not need to be a relative, but must be over 16.

Be aware that if a service user has not identified a named person, the **primary carer** automatically becomes the named person. Because the primary carer is simply the person who gives all or most of a person’s care and support, this may not be the person that the service user would choose to make decisions for them. For more information, please see <http://www.nes.scot.nhs.uk/mhagp/six.htm>.

If mental health carers are unhappy with any aspects of treatment received by the person cared for, and have had no success in having their concerns addressed locally, they can speak to the Mental Welfare Commission for more support and action. The contact details for the Commission are in **Further Help and Guidance** below.

## 5. What does this mean for staff working with carers?

In working with carers:

- ☞ Be aware of the Mental Health (Care and Treatment) Scotland 2003, and where it applies
- ☞ Help carers to understand their rights, and the rights of the person cared for

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- Support carers to exercise their rights under the Act and other legislation and guidance, including being involved on the service users' care plan

## 6. Further help and guidance

- Overview of mental health carers rights (Scotland)** on [www.carers.org/professionals](http://www.carers.org/professionals)
- Resources on the Mental Health (Care and Treatment) Scotland Act 2003**, from the Scottish Executive - an excellent site produced by the Scottish Executive and NHS Education for Scotland, which gives a thorough tutorial on the Act. Available at <http://www.nes.scot.nhs.uk/mhagp/index.htm>
- Mental Welfare Commission for Scotland** – this is an independent organisation set up by the Act, which works to safeguard the rights and welfare of everyone with a mental illness, learning disability or other mental disorder. They provides information, advice and guidance to make sure people being treated under the law get effective care and treatment. Their website is <http://www.mwscot.org.uk/home/home.asp>, and also offer a service user and carer freephone service on **0800 389 6809**.
- Named person concept** – please see [http://www.nes.scot.nhs.uk/mhagp/documents/Named\\_Person.pdf](http://www.nes.scot.nhs.uk/mhagp/documents/Named_Person.pdf) for a full explanation of the concept and the rights of named persons.
- Summary** of the Mental Health (Care and Treatment) Scotland Act 2003 - <http://www.scotland.gov.uk/Resource/Doc/55971/0015983.pdf>
- Easy read guide** to the Mental Health (Care and Treatment) Scotland Act 2003 - <http://www.scotland.gov.uk/Publications/2007/09/03145057/0>. See <http://www.scotland.gov.uk/Publications/2007/09/03145057/5> for the **Rights of Carers** under the Act.
- Code of Practice** for the Mental Health (Care and Treatment) Scotland Act 2003 - <http://www.scotland.gov.uk/Publications/2005/09/16121646/16474>
- Full text** of the Mental Health (Care and Treatment) Scotland Act 2003 - <http://www.opsi.gov.uk/legislation/scotland/acts2003/20030013.htm>
- Resources on the Adults with Incapacity (Scotland) Act**, from the Scottish Executive - <http://www.scotland.gov.uk/Topics/Justice/Civil/awi>

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<sup>i</sup> **Mental Health Training Set for Mental Capacity Act**, p.8, produced by the Department of Health, available at [www.dh.gov.uk](http://www.dh.gov.uk).