

Briefing note on emergency provisions in the Coronavirus (Scotland) Act 2020

Date: 20/04/2020

Quick read summary of emergency changes to MHA and other legislation for clinicians

Detentions

- Section 36(8)(b) extends the detention limit from 72 hours to 120 hours.
- Section 44(1) – An approved medical practitioner may grant a short-term detention certificate without consulting a mental health officer if it is impractical or would involve an undesirable delay.
- Section 299(2) is amended to extend the limit a nurse can detain a patient from 3 to 6 hours.
- Sections 77, 78, 139, 140, 182, 189, 206, 213 – The requirement to review the following orders and directives will be suspended.

Compulsory detention orders

- Section 63 – An application by a mental health officer can be based on one report from a single approved medical practitioner if trying to comply with the requirement for two medical practitioners would involve undesirable delay. The single report still needs to comply with Section 57.

Transfer for treatment directions

- Section 136(2) – A transfer for treatment direction may be made if the Scottish Ministers are satisfied that complying that seeking reports from two medical practitioners is impractical or would involve undesirable delay

Admission to hospital

- Section 136(3) and (6) are changed to mean admission to hospital happens as soon as possible rather than the current 7-day limit.

Administration of medicine

- Section 241(1) – Medicine (as defined in section 240) may be given to a patient without a certificate if the patient's responsible medical officer has requested a certificate but the designated medical practitioner has not yet issued a certificate (and a certificate has not been refused).

Forensic detentions (under the Criminal Procedure (Scotland) Act 1995

- Section 52G(4A)(b) is amended to extended assessment orders from 14 days to 12 weeks
- Sections 52M(2), 53(2), 54(1), 57A(2, 5 and 6), 59A(2) and 60C(2) – all of these orders can be issued without the need for two medical practitioners to provide written or oral evidence if this requirement is impractical.
- Sections 53(8), 54(2B), 57A(5) and 59A(4 and 7) means time limits for admissions to hospital need no longer take place within 7 days but as soon as is practicable

Adults with Incapacity (relating to the Social Work (Scotland) Act 1968)

- S13ZA – the requirement for local authorities to account for the views of the adult and carers/guardians when making decisions on their community care is removed.
- The power is given for local authorities to act regardless of whether there a guardianship/ power of attorney has been or in the process of being granted.
- It is important to note the S13ZA powers have not been invoked and will only be invoked by ministers when they are given evidence an authority has “exhausted all other measures”

Oversight

- The Mental Welfare Commission is convening a stakeholder-led Oversight Group to assist in monitoring if/when these measures come into effect

Executive summary/analysis

- The legislation’s emergency measures have been proposed as a last resort for staff facing additional pressures due to the Coronavirus lockdown. Therefore, these are not the expected but minimum standard, with services still to be delivered as normal wherever possible.
- The evidence base for implementing these on a localised/national basis will be data-driven alongside the advice of relevant bodies. Decisions on whether to implement these measures could be based on quantitative data and qualitative advice from senior medical representatives.
- Many of the measures are around the number of opinions required to implement detention orders and prisoner transfers. These ensure that slowdowns don’t occur due to a lack of available medical staff.
- Of greater concern from stakeholders was the provisions around S13ZA of the Social Work (Scotland) Act 1968 and the removal for local authorities to be required to consult a patient or their carer when making community care decisions.
- In order to mitigate the human rights concerns around this, the government pledged during the parliamentary scrutiny of the Act they would seek to involve the Mental Welfare Commission in scrutiny of this. They also pledged that these would be introduced “when all other measures have been exhausted”, potentially setting a higher evidence bar for their introduction.

Background

- Following the outbreak of the Coronavirus and the subsequent announcement of a UK-wide lockdown, both the Scottish and UK governments produced legislation in response to the crisis. This was fast tracked through their respective legislatures.
- The legislation touched on several issues up to and including the treatment of people experiencing mental health problems. The regulations as a whole apply for up to six months initially, with the option to extend by a further 6 months following a review.
- In Scotland, the Bill was passed in one sitting of the Parliament. This did include the opportunity for MSPs to propose amendments but on a general assumption the principles of the Bill would be enacted.

Overview

- The emphasis in the Bill for those providing public services was said to be on relieving the strain of day to day business, in recognition of the impact the outbreak would have on health and social care services.
- The emergency powers can also only come into place when “evidenced as being absolutely necessary”, and the possibility of different health boards implementing these on a localised basis is also suggested.
- On mental health specifically, the government stressed they will be made available to professionals when the “safe running” of services requires it.
- The evidence used for such decisions is said to be based on workforce data indicating clear pressures and the “advice of partner bodies”.
- It is added these measures are extensions of powers but should not become the default setting. Instead, the focus should be on complying with current legislation “as far as possible”.
- While the Act itself can be extended for up to 2 years following 6-month reviews, the specific measures can be introduced ad-hoc for shorter periods, ensuring individual’s rights are safeguarded where possible.

What is proposed

- The following temporary modifications to mental health legislation can be implemented:

Focus of change	Specific emergency change
Detention	Extending the maximum emergency detention period to 120 hours.
Staffing	Allowing short term detention certificates to be granted without consulting a mental health officer “in certain circumstances”.
Staffing	Detentions requiring only one medical practitioner’s opinion if its impractical to get a second recommendation.

Detention	Extending the time nurses can detain patients from 3 to 6 hours.
Treatment	Prisoners suffering from a mental disorder requiring treatment can be transferred on the basis of one report from an approved medical practitioner. It will also be stipulated prisoners with such a transfer order should be moved within 7 days.
Staffing/administrative	Reviews of certain prisoner orders and directions by responsible medical officers are suspended, as well as the need to report to the tribunal.
Tribunals	A mental health tribunal can operate with less than three members, provided one is a legal member/Sheriff Convener.
Assessments	The period of extension for assessment orders will be increased from 2 to 12 weeks.
Treatment	Admitting convicted persons to hospital can take place as soon as is practicable beyond the time limits set in the 1995 Act. Tribunals can decide cases without oral hearings, with written submissions to be used as means of submitting evidence.
Staffing	Medical practitioners not independent of the same hospital where the patient is receiving treatment will be allowed to examine patients under the 2003 Act.

- The above are in addition to public health powers (already in place) enabling public health officers to detain and isolate others who are suspected of having the Coronavirus. For adults with incapacity, if detainment under mental health legislation is not possible, practitioners are to contact the public health officer and manage the individual with input from mental health services
- There also additional emergency measures proposed around adults with incapacity. These include:

Focus of change	Specific emergency change
Consultations	The removal of a requirement under s13ZA of the Social Work (Scotland) Act 1968 to account for the views of the adult or their primary carer/guardian when making significant care decisions such as moves to a community care setting
Duty of care	The local authority can make a decision under s13ZA of the Social Work (Scotland) Act 1968 on care provision, both if guardianship/intervention orders are in place or if they are being processed.

Their potential impact and efforts to mitigate this

- Much of these measures focus on the core principle of reducing and/or adapting to the increased time and staffing pressures. This includes a lack of available staff and the efforts to limit social contact.
- As a result, a focus on streamlining the number of people required to make decisions on a person's mental health or on implementing certain order is the common thread throughout. There is also a focus on ensuring previous time limits on transfers and implementing orders are no longer arbitrary, to reduce pressures.
- The focus of the latter two measures is on ensuring timely decisions can be taken to safeguard the welfare of vulnerable adults. It means that when an environment, such as hospital wards, are no longer safe from infection, that there can be a quick response.
- Concerns around the human rights impact of patients/guardians no longer having a clear say in decisions by local authorities on care provided to adults with incapacity have been raised. This was initially by the Mental Welfare Commission, followed by MSPs such as Monica Lennon.
- Following further discussions with the Mental Welfare Commission, it was confirmed by the government such measures, particularly for those adults with incapacity, would only be used when an authority "exhausted all other measures".
- During the Bill's scrutiny, Monica Lennon's amendments focused on ensuring the human rights impact of these proposals was recorded, with a report on these issues to be laid before parliament three months after the Act received Royal Assent (6 April). In response, the government successfully opposed on the grounds there was already a commitment to report on the impact of how these emergency powers were used, and that the Mental Welfare Commission would be involved in this process.