

**Discussion paper on proposals relating to the Management of Offenders (Scotland) Bill and Compulsion Orders and potential contradictor in applications to the Mental Health Tribunal Scotland.**

The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and is the professional and educational organisation for doctors specialising in psychiatry.

**Context**

The Scottish Government proposes in section 26 of the Management of Offenders (Scotland) Bill, (“the MoO(S) Bill), to amend the Rehabilitation of Offenders Act 1974, (“the 1974 Act”), in Scotland in order to create a new application process whereby an individual (or their named person) can apply to the Mental Health Tribunal for Scotland, (MHTS) to seek the disclosure of their Compulsion Order, (CO), as a result of them being convicted of an offence, to end. The Bill is currently in Stage 1.

The Scottish Government is seeking RCPsych in Scotland’s view in relation to whether it would be appropriate for the RMO, in discussion with MHOs, to take on the role of contradictor in the new application process and whether a contradictor was in fact necessary in such an application to the MHTS.

This document is based on correspondence between the Scottish Government and RCPsych in Scotland (RCPsychiS), as well as discussions within RCPsychiS. The aim of this paper is to provide background and outline RCPsych in Scotland’s position on the proposals, so further conversations can be had between the RCPsychiS, Scottish Government and the Mental Health Tribunal for Scotland.

**Current position:**

**The 1974 Act**

The 1974 Act provides for a system of protection to individuals with previous convictions not to have to disclose their convictions in certain circumstances. Therefore, the 1974 Act restricts the disclosure of previous convictions and without it the common law position would still apply, (i.e. full disclosure forever). There is nothing in the 1974 Act that prevents an individual from gaining employment and it is not intended as a means of punishing people for their previous offending behaviour. It is about how information about an individual’s previous offending behaviour is considered as part of the individual’s future life once they have served their sentence. Therefore, the 1974 Act is an important piece of legislation that offers legal protection to an individual not to disclose a previous conviction and as a result restricts disclosure where appropriate.

At its heart, the 1974 Act has a very simple concept: where someone has been convicted of an offence and sentenced, they are required to disclose their conviction in accordance with the disclosure periods for that sentence as set out in the legislation.

**Compulsion orders (CO)**

A CO can be made by the Court in a case where a person is convicted in either the High Court or the Sheriff Court and the offence for which they are convicted is punishable with imprisonment. In addition, a person can be made subject to a CO under section 57(2)(a) of the Criminal Procedure (Scotland) Act 1995 where, following an examination of facts, the Court is satisfied that the person has done the act or omission constituting the offence and there are no grounds for acquittal. In this scenario, the finding of the court would be a ‘conviction’ for the purposes of the 1974 Act.

The court must be satisfied that the person has a mental disorder and that medical treatment which would be likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder is available for the individual. The court must also be satisfied that if the person were not provided with such medical treatment there would be a significant risk to the health, safety or welfare of the person convicted or to the safety of any other person and that the making of the CO is necessary. COs can be made by a court to authorise the detention of a person in hospital and/or the giving medical treatment to the convicted person and can also authorise treatment in the community.

**Existing practice in the management of Compulsion order**

The Scottish Government has considered carefully the nature of a CO. While it can be imposed in respect of the risks posed by the convicted person to the safety of other people, it can also be imposed in respect of the risks the convicted person poses to their own health, safety and welfare. In some cases, risks to safety may exist for both the public and the person themselves.

When a criminal court imposes a CO, it will expire after 6 months unless:

* the responsible medical officer (RMO) applies to the MHTS under section 149 of the Mental Health (Care and Treatment) (Scotland) Act 2003, (“the 2003 Act”) to extend the CO and the Tribunal agrees to this under section 167(1) of the 2003 Act, or
* the RMO makes an application under section 158 of the 2003 Act to extend and vary the CO and the Tribunal decides, under section 167(2) of the 2003 Act, to extend the CO for 6 months (whether they vary it or not).

It should be noted that within the first six months, the individual has no right of appeal but the responsible medical officer (RMO) has the duty to keep the grounds for the order under review from time to time (section 142 of the 2003 Act). Therefore, it is currently possible for COs to be revoked by the RMO in the first 6 months. The CO can thereafter be extended for 12 months at a time.

It should also be noted that there is no limitation on the number of extensions, providing the person continues to meet the conditions for being subject to the order. It is therefore possible for a CO to be extended for many years, or even life, based on the risks a convicted person poses to themselves and/or to the public.

**Proposals in MoO(S) Bill**

The additional provisions in the proposed MoO(S) Bill aims to deal with perceived discriminatory aspects of the treatment of patients and protecting the rights of patients while balancing those rights with the protection of the public. The MoO(S) Bill proposes the disclosure period for a CO is the length of the order. However, the new provisions also include a power for a review to be sought for the need for ongoing disclosure where someone is subject to a CO. This is explained further below.

The Bill proposes that once a person (the patient) has been subject to a CO for a period of 12 months, they (or their named person) can make an application to the MHTS to request the disclosure period in respect of that CO be brought to an end.

The onus will be on the patient to make the application and if they do not do so, disclosure requirements will continue for the length of the order. If an application is made, the MHTS shall allow the patient, the patient’s named person, any guardian of the patient, any welfare attorney of the patient, the mental health officer, the patient’s responsible medical officer, the patient’s primary carer, any curator ad litem appointed in respect of the patient by the Tribunal and any other person appearing to the Tribunal, to have an interest in the application to make oral or written representations and to lead or produce evidence.

The test the Tribunal must consider is whether it is satisfied that, without the provision of medical treatment of the kind mentioned in section 139(4)(b) of the 2003 Act to the patient, there would be a significant risk to the safety of other persons. Where the Tribunal is so satisfied, it must refuse the application to bring the person’s disclosure requirement to an end.

If the Tribunal does not consider that this test is met, they are required to make the determination that disclosure of the CO is not required any longer.

This does not necessarily mean the conviction will no longer be disclosable, because this will depend on factors such as whether any other disposal was given which still necessitates disclosure. If, however, the person is not subject to any other court orders imposed in respect of this conviction or another conviction, disclosure will cease, (i.e. the conviction will become spent and the person will be a protected person).

Once the Tribunal makes its determination, it will be empowered to share the outcome of its decision with Disclosure Scotland, but only where a request is received, by the Tribunal, from Disclosure Scotland as a result of a disclosure application being made.

After a person (the patient) has made an application, if their application is not successful, then they are entitled to make a further application after a period of 12 months has elapsed from that determination. This ensures that an ongoing review can take place, if so wanted by the person subject of the CO.

**Potential ‘contradictor’ in applications to the MHTS**

The current provisions within the MoO(S) Bill have safeguards for representations from parties. Insertions under the Duties of Tribunal on application under section 164A subsections (4) and (5) specifies:

Before refusing an application under subsection (2) or making a determination under subsection (3), the Tribunal must afford the persons mentioned in subsection (5) the opportunity

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(a) of making representations (whether orally or in writing), and

(b) of leading, or producing, evidence.

(5) Those persons are

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(a) the patient,

(b) the patient’s named person,

(c) any guardian of the patient,

(d) any welfare attorney of the patient,

(e) the mental health officer,

(f) the patient’s responsible medical officer,

(g) the patient’s primary carer,

(h) any curator ad litem appointed in respect of the patient by the Tribunal,

and

(i) any other person appearing to the Tribunal to have an interest in the

application

The key legal test for the MHTS to be satisfied that without the provision of medical treatment of the kind mentioned in section 139(4)(b) to the patient, there would **NOT** be a significant risk to the safety of other persons. Before making such determination, the Tribunal must afford the parties, which includes the patient’s RMO an opportunity (a) of making representations (whether orally or in writing), and

(b) of leading or producing evidence.

In the work done so far by the Scottish Government, the MHTS do not anticipate there will be a large number of end of disclosure applications and the intention is that, in the early stages, all such applications will be convened by the President of the Tribunal to establish a consistency of approach in dealing with such applications.

From the Tribunal’s perspective, the one issue which remains to be resolved is who the potential ‘contradictor’ should be in such applications.

At the moment, on the face of the Bill, the people entitled to make such an application are the patient and the patient’s named person. Accordingly, in terms of the definition of “party” in rule 2 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005, as amended, the patient and the named person would both be a party in any such application before the Tribunal.

The MHTS consider it would not be appropriate for them to be the only parties. As such, the MHTS is anxious that an appropriate potential ‘contradictor’, who would have the status of a “party” in any such application before the Tribunal, be identified.

There are 3 likely options in this area:

1. the Scottish Ministers;
2. RMOs (in discussion with MHOs), to take on the role of contradictor; or
3. it is not necessary for a contradictor to be ‘a party’ to the proceedings for such applications.

**Discussion**

To discuss this matter, Scottish Government met with the RCPsych representatives at RCPsych Offices in Edinburgh on 3 October 2018.

1. The main point discussed during this meeting were
   1. The proposed application process.
   2. What was meant by ending disclosure of a CO and what its impact would be.
   3. The role of the RMO in such a process.
   4. The disaggregation of the significant harm test and when this should be undertaken.
   5. The RMOs interaction/contact with a patient when in hospital and when in the community and what impact this would have on the process.
   6. The time periods for when a further end of disclosure application should be undertaken if a previous application failed.
   7. The use of a supportive Approved Medical Practitioner (AMP) report as a mandatory requirement for an end of disclosure application to be considered by the MHTS, similar to that used for an appeal against excessive security.
   8. What would happen if after disclosure ended, it was determined by the RMO during a review of the CO the patient’s behaviour has changed and now posed a significant harm to others.
   9. The potential effect the disaggregation of the significant harm test for a CO could have on a civil Compulsory Treatment Order.
2. The RCPsych in Scotland (RCPsychiS) is generally supportive of the overall policy intention set out in section 26 of the MoO(S) Bill.  However, it is considered by the RCPsychiS that further work and discussions with the Mental Health Tribunal for Scotland is required to ensure the process works effectively and efficiently.
3. It was confirmed the application process would only relate to when a CO could become spent. If the CO ends then it would become spent and the disclosure requirements would end for general employment purposes, e.g., working in a shop or factory.  As such, it would not apply to and would have no impact on the system of higher-level disclosures, i.e., when a standard, an enhanced or Protection of Vulnerable Group disclosure was required.  The RCPsychiS is content with this.
4. The RCPsychiS raised a concern that members felt an end of disclosure process could be seen or used as a mechanism by the patient in which to challenge the continuation of a CO.  It was confirmed the purpose of the application process was to end disclosure for general employment purposes and this was only required because the CO has been extended.  It should not be and is not intended to affect the ongoing requirements for a CO to continue.  The CO could continue for as long as was deemed necessary.
5. RCPsychiS accepts the RMO will have a role to play in the proposed process to end the disclosure of a CO and accepts for this to be effective the RMO will need to be ‘a party’ to the proceedings, although not necessarily as a potential ‘contradictor’.  That is, rather than having a role at the end point, i.e., where a tribunal is convened by the MHTS as a result of an application being made and the RMO is called as a potential contradictor, it is consider the RMO should undertake the disaggregation of the significant harm test at each and every review of the CO for as long as the CO is in effect.

This would mean the process for determining whether a person posed a significant risk of harm to others without medical treatment would form part of the current review process for a CO.  If during such a review it was determined by the RMO that the patient no longer posed a significant risk to others, then this information would be passed on to the MHTS and recorded by them.  Such an approach would mean the patient would not have to separately apply to the MHTS for the disclosure to end.  This is because the disaggregation of the significant harm test has already been undertaken, the patient no longer poses a risk to others without medical treatment and, as such, the RMO would support the disclosure of the CO to end.

Therefore, for example, when Disclosure Scotland contacts the MHTS as a result of receiving a request for a basic disclosure, such as for a criminal conviction certificate under the Police Act 1997, the MHTS can inform them that no disclosure is required.

It was understood that such an approach would involve an amendment of section 26 at stage 2 and would need to be discussed further with the Scottish Government.  It was agreed further discussion with Scottish Government officials and the MHTS would also be necessary in relation to this suggestion.

From the discussion it was clarified that perception of risk to others will be different for patients in the hospital to the ones in the community.  It is more likely that a person under a CO will decide to make an end of disclosure application to the MHTS when in the community rather than when in hospital.  Therefore, it is necessary for the RMO to be ‘a party’ to the proceedings to ensure that when the patient is in the community, and the RMO may not have been in contact for several months, the RMO must have access to all the case papers, be informed about the application and be present throughout the proceedings.

1. We discussed whether 12 months for a further application to be made if the first was rejected was the correct time frame.  We did not reach any conclusions on this issue and there was agreement to discuss this further.
2. We discussed the use a supportive report from the RMO or an AMP report as a prerequisite for an end of disclosure applications to be considered by the MHTS.

The Mental Health (Scotland) Act 2015 (as modified by the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015) introduced a requirement for a report prepared by an AMP to accompany an application to the Tribunal. An excessive security application may only proceed if the report that accompanies it states that in the practitioner's opinion the patient meets the relevant test (that is either the test in section 264 for State Hospital applications or the test in the regulations for all others) and sets out the practitioner's reasons for being of that opinion. The report should be based on the patient's position at the time the report is being produced. The person making the application can either instruct a solicitor to obtain the report or instruct the report directly.  If, after considering the matter, the AMP is not of the opinion the test is met in relation to the patient then it would be best practice to inform the patient, named person, guardian or welfare attorney or Commission who requested the report that they cannot support the application and provide the reasons for being of that opinion.

Such provisions in end of disclosure applications would mean where the patient's RMO is aware that the patient intends to make an application, it would be best practice for them to discuss the application and its potential outcomes with the patient and, where applicable, with any named person, guardian or welfare attorney, before the application is made to ensure as far as possible the implications of making the application are known beforehand.

1. It was clarified that once a decision was made to end the disclosure of a CO and as such, it became spent it could not become unspent.  This would be the case even if the person was subsequently deemed to be a significant risk to others without medical treatment.  Whilst RCPsychiS understands the reasoning behind this proposal, it sees this as a concern as risk is dynamic and will change with the mental condition of the patient. The disclosure should be able to become ‘unspent’, if necessary, as the condition of the patient changes.
2. It was clarified that Part 2 of the MoO(S) Bill related to amendments being made to the 1974 Act which didn’t included civil orders.  As such, the Bill could not make any changes to the treatment of a civil orders (Compulsory Treatment Orders).  However, depending on the final process being agreed, it was noted the potential impact the disaggregation of the significant harm test in a CO could have on those receiving a CTO.