POLICY NOTE

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) (NO. 2) AMENDMENT RULES 2020

SSI 2020/246

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by sections 21(4) and 326 and paragraph 10 of schedule 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Purpose of instrument:

To amend the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 ("the 2005 Rules") to take into account amendments made by section 26 of the Management of Offenders (Scotland) Act 2019 ("the 2019 Act") to the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act").

Policy Objectives

1. To ensure the 2005 Rules operate effectively and appropriately in order for the Mental Health Tribunal for Scotland ("the Tribunal") to be able to consider an application by a patient or the patient's named person asking for the disclosure period applicable to the patient's compulsion order to end.

2. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") sets out the rules as to when a conviction is considered "spent". Whether a conviction is spent or not has implications for disclosure of that conviction in different contexts. Section 6 of the 1974 Act sets out the rules that apply to determine when a conviction becomes spent. These rules depend on the disclosure period applicable to the sentence(s) imposed in respect of the conviction.

<u>2019 Act</u>

3. Section 26(2) of the 2019 Act inserts a new section 5G of the 1974 Act. This new section provides that convictions for which compulsion orders are given are to be disclosed from the date of conviction until the order ceases or ceased to have effect.

4. However, this disclosure period will be subject to a new process which will allow an application to be made to the Tribunal asking for the disclosure of that conviction to end.

5. An application of this type is made under section 164A of the 2003 Act (as inserted by section 26(4) of the 2019 Act). Section 26 of the 2019 Act also amends section 257A(3) of the 2003 Act to apply to applications under section 164A. This means that the persons listed in section 257A(9)(a) to (d) can initiate an application where the patient does not have a named person, where the patient has attained the age of 16 and where the patient is incapable in relation to a decision as to whether to initiate an application. Section 167A of the 2003 Act sets out the duties of the Tribunal on receipt of an application.

6. If an application is made, the Tribunal 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.

7. In making a decision on an application under section 164A, the test that 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 a determination that the disclosure period applicable to the compulsion order ends with immediate effect.

8. Applications can be made 12 months after the compulsion order is given. If the application is successful the disclosure period applicable to the compulsion order will end. If a person's application is not successful then they may apply again. However, they are not able to apply until 12 months after their previous application was refused.

9. 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. In practice such a request will be made as a result of a disclosure application being made to Disclosure Scotland.

10. The 2005 Rules set out the procedure which applies to proceedings before the Tribunal. This instrument will amend the 2005 Rules to accommodate the new application process.

2005 Rules

11. Rule 3 of this instrument amends the definition of "party" in rule 2 of the 2005 Rules. This means that the patient's responsible medical officer will be a party in any proceedings in relation to an application under section 164A of the 2003 Act.

12. Rule 4 of this instrument amends rule 13(1) of the 2005 Rules to include applications under section 164A of the 2003 Act. This means that the procedure set out in rule 13[1] applies to such applications.

13. Rule 5 of this instrument amends rule 20(1) of the 2005 Rules to include applications under section 164A of the 2003 Act. Rule 20 sets out the circumstances in which an application may be withdrawn.

14. Rule 6 of this instrument amends rule 72(5A) of the 2005 Rules to include applications under section 164A of the 2003 Act. This amendment means that, by virtue of the operation of Rule 72(5A) and (5B), the Clerk to the Tribunal must send a copy of the

[1] http://www.legislation.gov.uk/ssi/2005/519/article/13/made as amended by rule 4(1) of the Mental Health Tribunal for Scotland (Practice and Procedure (No. 2) Amendment Rules 2017: http://www.legislation.gov.uk/ssi/2017/172/article/4/made.

application, along with the Tribunal's decision in relation to an application, to the Mental Welfare Commission for Scotland.

Consultation

15. The Scottish Government has had extensive engagement on reforming the 1974 Act with key stakeholders, employers and members of the public. The Scottish Government also published a consultation paper in May 2015[2]. The consultation closed on 12 August 2015 and the responses were published on 16 October 2015[3]. The analysis of the consultation responses was published on 22 December of 2015[4].

16. Scottish Government justice officials had numerous discussions and held numerous meetings with the Tribunal in order to help the Scottish Government develop the policy under section 26 of the 2019 Act. Discussions also took place with the Royal College of Psychiatrists. This engagement was extremely beneficial in developing a suitable disclosure policy for those individuals who have a mental health condition, convicted of an offence and given a compulsion order as a sentence.

Information Commissioner's Office (ICO)

17. Legislation which relates to the processing of personal data triggers the requirement under regulation 36(4) of the GDPR for consultation with the Information Commissioner's Office ("ICO"). This instrument relates to the processing of personal data by virtue of the amended rule 13 of the 2005 Rules requiring certain information to be included in an application under section 164A of the 2003 Act. The Scottish Government has consulted with the ICO and the ICO has provided advice.

Impact Assessments

18. An EQIA and a CRWIA in relation to the Bill for the 2019 Act were completed and published prior to the Bill being introduced into the Scottish Parliament. As the 2019 Act was introduced on 22 February 2018 and GDPR came into force on 28 May 2018 a data protection impact assessment (DPIA) was not completed. It was not a requirement at that time. However, after consulting with the ICO a DPIA for legislation was completed in respect of this instrument.

Financial Effects

19. The financial effects of this policy are set out under the financial memorandum accompanying the Bill for the 2019 Act. The Cabinet Secretary for Justice confirmed prior to the 2019 Act being introduced to Parliament that no BRIA was necessary.

Scottish Government
Justice Directorate
19 August 2020

2 http://www.gov.scot/Publications/2015/05/5592
3 http://www.gov.scot/Publications/2015/10/3324
4 http://www.gov.scot/Publications/2015/12/1435