

EXPLANATORY MEMORANDUM TO
THE MENTAL HEALTH ACT 2007 (CONSEQUENTIAL AMENDMENTS)
ORDER 2008

2008 No. 2828

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Description

This Order makes amendments to other legislation which are required to reflect changes made by the commencement of the bulk of the provisions in the Mental Health Act 2007 (“the 2007 Act”) which amend the Mental Health Act 1983 (“the 1983 Act”). A few of the changes are to primary legislation but most of provisions amended by this order are in secondary legislation.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Background

4.1 This Order makes consequential amendments to other primary and secondary legislation required in the light of changes made by the 2007 Act to the 1983 Act. In particular:

- amendments to the definition of mental disorder in the 1983 Act made by Chapter 1 of Part 1 of the 2007 Act;
- the broadening of the range of professionals who can undertake the role currently restricted to approved social workers with the introduction of approved mental health professionals by Chapter 2 of that Part; and
- the introduction of supervised community treatment (SCT) and the associated repeal of existing provisions for after-care under supervision (ACUS) by Chapter 4 of that Part.

4.2 The Government’s intention is that these provisions of Part 1 of the 2007 Act will be brought into force from 3 November 2008. The Mental Health Act 2007 (Commencement No. 6 and After-care under Supervision: Savings, Modifications and Transitional Provisions) Order 2008 already provides that the repeal of after-care under supervision will come into effect on that date, but with a number of provisions saved until 3 May 2009.

4.3 One provision included in this Order updates a reference to the “Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983” to the “Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008” when the latter replace the former on 3 November 2008.

4.4 Finally, two redundant instruments are revoked by this order.

5. Territorial Extent and Application

Most of the articles in this instrument extend only to England and Wales. A few articles, specified in article 2, also extend to Scotland and/or Northern Ireland. One article (article 17) applies only to Scotland.

6. European Convention on Human Rights

The Minister for Health, Ivan Lewis has made the following statement regarding Human Rights:

“In my view the provisions of the Mental Health Act 2007 (Consequential Amendments) Order 2008 are compatible with Convention rights.”

7. Policy Background

Policy

7.1 The 1983 Act provides, amongst other things, for certain compulsory measures to be taken in respect of people with mental disorders where those measures are justified by the risk posed by their mental disorder. The compulsory measures include detention in hospital for assessment or treatment, being placed under the guardianship of a local social services authority (or an individual approved by such an authority).

7.2 At 31 March 2007 there were 15,300 patients detained in hospital under the 1983 Act in England, of whom 12,200 were detained in NHS facilities and 3,100 in independent hospitals. At the same date 926 people were subject to guardianship (with more than 99% being subject to the guardianship of a local social services authority rather than a private individual).

7.3 The 2007 Act makes a number of significant amendments to the 1983 Act in order to modernise it and ensure it reflects the way in which mental health services are now provided.

7.4 The compulsory measures available under the 1983 Act will in future include being discharged from hospital onto SCT. SCT is a new provision which allows patients to be treated in the community rather than in hospital. Patients on SCT may be recalled to hospital for treatment if necessary to prevent harm to themselves or others. Articles 7, 9, 11 to 14 and 17 to 19 of this Order make amendments to secondary legislation to reflect the introduction of SCT and the associated repeal of existing arrangements for ACUS.

7.5 Article 7 amends the order which establishes the Mental Health Act Commission (MHAC). MHAC is the body charged with monitoring the use of the 1983 Act. One of its functions is to appoint second opinion doctors (SOADs) to approve certain treatments for patients subject to the Act. The amendment made by Article 7 reflects the fact that SOADs will, in future, issue certificates approving certain treatments for SCT patients and, more specifically, the power which MHAC will have under s64H of the Act to withdraw such certificates.

7.6 Articles 17 to 19 amend regulations concerned with the making of direct payments in lieu of the provision of social services. At present, ACUS patients are

excluded from such arrangements. These Articles remove those exclusions (which will become redundant), but apply the exclusion to SCT patients instead.

7.7 Articles 11 to 14 remove references to ACUS which will become redundant once ACUS is abolished. Article 9 revokes an instrument which deals with ACUS, which is already redundant as a result of changes to legislation in Scotland.

7.8 The 2007 Act opens up the role of the approved social worker (ASW) under the 1983 Act to a wider group of professionals, to be called approved mental health professionals (AMHPs). AMHPs will be drawn from: social workers; first level nurses, whose field of practice is mental health or learning disability nursing; occupational therapists; and chartered psychologists.

7.9 The functions of the AMHP will be similar to the ASW role (with the addition of functions related to SCT). The AMHP role will build on the strengths of the existing system and the training will be based on the current ASW training regulated through the General Social Care Council.

7.10 Local social services authorities will be responsible for approving AMHPs in the same way that they currently approve ASWs. Articles 3 and 20 reflect the change from ASW to AMHP. Article 3 ensures that local authorities' functions in respect of the approval of AMHPs are treated, like their current functions in relation to ASWs, as social services functions for the purposes of the Local Authority Social Services Act 1970. Article 20 ensures that the current powers of ASWs in England and Wales to take custody of patients who abscond from hospital in Scotland under Scottish mental health legislation may in future be exercised by AMHPs.

7.11 The 2007 Act also simplifies the way in which the 1983 Act defines mental disorder, and abolishes the current distinctions between four separate categories of mental disorder. Articles 4, 5, 6, 8 and 10 make amendments consequential on the abolition of those categories.

7.12 Section 68(1) of Disability Discrimination Act 1995 states that, for the purposes of that Act, "mental impairment" does not have the meaning that it has in the 1983 Act. Because the 2007 Act removes references to "mental impairment" (and other categories of mental disorder) from the 1983 Act, that provision is no longer necessary. It is repealed by Article 4. Article 6 repeals a provision of the Disability Discrimination Act 2005 which becomes redundant as a result.

7.13 Article 5 amends section 63L of the Family Law Act 1996. That section is one of a number of provisions of that Act under which the courts may make orders detaining patients in hospital under the 1983 Act. The amendment means that the power in question is no longer restricted only to certain categories of mental disorder. It mirrors the change made by the 2007 Act to the relevant provision of the 1983 Act itself. Article 8 amends the statutory forms used by the courts when using the Family Law Act to make orders under the 1983 Act.

7.14 Article 10 amends a reference in the Teachers Pensions Regulations 1997 to teachers employed by hospitals, voluntary organisations or local authorities to work with people suffering from "mental impairment, severe mental impairment, psychopathic disorder or mental illness". It replaces the reference to those four distinct categories of mental disorder with a reference to mental disorder generally. In

doing so, it acknowledges that the removal of categories from the 1983 Act means that hospitals and other organisations will no longer have reason to categorise patients in that way.

7.15 Article 16 replaces a reference in the Private and Voluntary Health Care (England) Regulations 2001 to records kept by independent hospitals in accordance with the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 with one to the equivalent records held under the Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008 when the latter replace the former on 3 November 2008. The amendment is a technical one. The 2008 regulations are, in effect, an updated version of the 1983 regulations, revised in the light of the 2007 Act.

7.16 Finally Article 15 revokes a remedial order made under the Human Rights Act 1998 whose effect has already been incorporated into the 1983 Act.

Guidance

7.17 The main mental health secondary legislation to be made in the light of the 2007 Act and the revised Code of Practice to the Mental Health Act 1983, were both laid before Parliament earlier this year and have been subjected to the negative resolution procedure. The Department of Health also proposes to publish a Reference Guide to the amended 1983 Act (and the related secondary legislation) which will explain the requirements of the legislation. Apart from notifying the field formally about this instrument we do not propose to produce any detailed guidance about it.

Consultation

7.18 The Department of Health consulted relevant government departments and the devolved governments on the amendments specified in this order.

8. Impact

8.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

Clive Marritt at the Department of Health (tel. 020 7972 4492 or e-mail: clive.marritt@dh.gsi.gov.uk) can answer any queries about the instrument.