Draft proposals for a Mental Health (Scotland) Bill – Care Inspectorate response

Background

The Care Inspectorate is the independent scrutiny and improvement body established under the Public Services Reform (Scotland) Act 2010, that brings together the scrutiny work previously undertaken by the Care Commission, HMIE child protection team and the Social Work Inspection Agency.

Our role is to regulate and inspect care and support services (including criminal justice services) and carry out scrutiny of social work services. We provide independent assurance and protection for people who use services, their families and carers and the wider public. In addition, we play a significant role in supporting improvements in the quality of services for people in Scotland.

We welcome the opportunity to give comments on the draft Mental Health (Scotland) Bill at this early stage.

Question 1. Do you have any comments on the proposed amendments to the Advanced Statement provisions?

a) Providers of services registered under Part 5 of the Public Services Reform (Scotland) Act 2010 will play a key role in delivering this duty. As a scrutiny and improvement body, we will support them to do this through our regulation and improvement processes.

b) Under the Mental Health (Care and Treatment) (Scotland) Act 2003, the responsible medical officer (RMO) must ‘have regard’ for an advanced statement. We broadly welcome the duties placed on health boards within the draft Bill to amend the 2003 Act and formalise the NHS/RMO role. Access to such information at critical times in a person’s care is paramount.

We would also suggest that the proposal placing a duty on health boards to ensure that when they are made aware of advanced statements they must be placed in the person’s medical records, includes GP practices (Part 1, Section 20(2)).

It is our understanding that GP practices are independently contracted by health boards, however it is our view that it will be central to the success of this duty that all
of the primary and secondary care services come under this definition. This is so accessibility to health records across all the sectors is more efficient and effective.

If GPs are not included, this could mean that vulnerable individuals with poor mental health are at risk of information only being available to secondary care mental health services at significant times in their care - impacting on their human rights if they are detained without their advanced statement being considered. The Mental Welfare Commission (MWC) 2012/13 monitoring report highlights a 7% rise in Emergency Detention Certificates (EDCs), a large proportion of which were granted by GPs, mostly out of hours; while 37% of all EDCs did not have Mental Health Officer (MHO) consent. We believe that this underlines the need for them to be included.

c) The health board will also need to develop systems that deal with situations where a person withdraws their advanced statement. For example, does this stay on file, is it superseded, who communicates this, who updates the files? Care Programme Approach (CPA) could help to manage this, but where not subject to such measures, it is difficult to see how this system will be accurately administered / maintained.

d) We further support the recommendation that health boards submit copies to the MWC as this will allow effective monitoring of future issues. We also note that there are current concerns held by the MWC as stated in their 2012/13 monitoring report in respect of advanced statements and the lack of awareness about when they are overridden by medical staff. We welcome the MWC’s recently revised guidance and will be supporting this in our work as stated above.

e) We would welcome further clarification around the definition of “any individual acting with the person’s authority in relation to the statement” (Part 1, Section 20(2)). For example, we would like further clarification if this will be a proxy appointed under the Adults with Incapacity (Scotland) Act, a named person under the Mental Health (Care and Treatment) (Scotland) Act 2003, a RMO, a social worker or Community Psychiatric Nurse. Or will this extend to include services registered under Part 5 of the Public Services Reform (Scotland) Act 2010, who may need to access information at critical support times.

Question 2. Do you have any comments on the proposed amendments to the Named Person provisions?

a) We welcome the proposal in the draft Bill to enable individuals to make a written and witnessed declaration that they do not wish to have a named person appointed. This upholds the individual’s rights to self determination at a time when they are well and clearly responsible for making this determination (Part 1, Section 16(3)).

b) We also support the proposal that Named Person’s must give their witnessed written consent to act in this role. These amendments will bring about a co-production element built on a genuinely integrated working relationship that was
previously missing from the legislation. It should also encourage better anticipatory and crisis planning among all stakeholders involved in the individual’s care. (Part 1, Section 16(3)).

c) We further welcome the proposal to review the tribunal rules and look forward to the opportunity of consulting on this change later in the year. The move to block the Named Person’s automatic right to be entered into proceedings or receive confidential information contained in reports etc. makes sense (Para.11 in consultation document).

d) Additionally we also support the view that the Mental Health Officer (MHO) is best placed to advise the tribunal about appointing appropriate named persons. We would urge caution about extending this further to include other professionals involved in the care of the individual who may not understand the complexity of the social / medical issues when suggesting a named person. (Part 1, Section 18(2)).

e) We feel the above measures are relevant and necessary. They make an excellent suit of measures that preserve the individual’s human rights.

f) Overall, we will help support registered providers as part of our regulatory and improvement activities to implement the changes to the Named Person provisions.

Question 3. Do you have any comments on the proposed amendments to the medical examination and compulsory treatment order provisions?

a) We have some reservations about the proposals to move towards a new system of granting compulsory treatment orders (CTO). Part 1, Section 3 of the draft Bill is unclear. Our interpretation of the draft Bill is that there will only be one approved medical practitioner (AMP) report required and that the GP does not have to see the patient and instead only comment on the AMP’s report.

We believe that this goes against the principles outlined in the Mental Health (Care and Treatment) (Scotland) Act 2003 code of practice. This states that there should be two independent medical reports, each of which who must see the patient face to face to make the necessary examination of their mental health, decision making abilities etc. We feel this disadvantages the patient quite significantly because the likelihood of a different perspective to that of the specialist consultant is diminished.

The second medical report typically from the GP brought about the following checks and balances:

- A second, face to face independent medical assessment.
- An opportunity for the patient to present their circumstances to a second, independent medical practitioner.
• The opportunity to include other critical information about the person’s relevant wider health needs that may not be available to the RMO.
• At present the two reports have to be done within five calendar days. This allows for changes in presentation to be discussed and triangulated between the medical practitioners and MHO. If the GP merely writes a report in support of the initial report this opportunity could be lost.

It is therefore our view that while we accept the rationale for this in the draft Bill, it brings about aspects of practice that we feel could significantly undermine the patient’s rights.

We would also seek confirmation that the proposed draft Bill includes the ability of any legally appointed person, in circumstances where the patient lacks the insight, to instruct the independent medical report. (Part 1, Section 3)

Question 4. Do you have any comments on the proposed amendments to the suspension of detention provisions?

a) We do not have any issues with the removal of the nine month restriction on suspension certificates in any 12 month period. The benefits of removing this are well outlined in the consultation document. (para.17 of the consultation document).

We feel that if all the stakeholders in the patient’s care are communicating and reviewing effectively as per the legislation, guidance and code of practice, then these processes should ensure the necessary checks and balances, offsetting any possibility of unnecessary restrictions on the patient’s freedom in the community where conditions are attached.

b) For providers of services delivered / registered under Part 5 of the Public Services Reform (Scotland) Act 2010, our regulatory inspectors will need to support providers to actively liaise with health and social work services and support these individuals to:

• Ensure that service providers supporting patients in community settings subject to suspension of compulsory measures are involved and contributing in the mental health monitoring arrangements.

c) We also feel that the proposal to relax on the consent of Scottish Ministers in relation to the patient attending a) a court hearing or b) a necessary medical appointment are proportionate, providing that the necessary risk management frameworks remain in place. (Part 1, Section 10(4).
Question 11. Do you agree with the proposed amendments to the arrangements for treatment of prisoners and cross border-and absconding patients provisions? If you disagree please explain the reason(s) why.

We support the draft Bill’s proposal to amend subsection 303(3) to include patients subject to interim compulsory treatment orders. There are already provisions that cover CTOs and it makes good sense to us that interim orders are afforded the same provision under the revised Bill.

Question 14. Do you agree with the proposed approach for the notification element of this Victim Notification Scheme (VNS)

a) We broadly welcome the opportunity for the victims of mentally disordered offenders to be included in the Victim Notification Scheme (VNS). We believe that this brings equity to a system that previously excluded this group of individuals (Part 2, Sections 36 & 37).

b) For providers of services registered under Part 5 of the Public Services Reform (Scotland) Act 2010, this is potentially a very important development. Some of the crimes could have been committed in settings where support is provided to vulnerable and/or high risk individuals who perpetrate or are mentally disordered victims of offences. Making representation to, and/or receiving disclosed information via the VNS, could make the provision of support very complex and skilled assistance/collaboration will be required from all stakeholders involved.

We will work with registered providers to help support them through our inspection and improvement role to implement the changes set out in the draft legislation concerning the VNS.

c) We would like further clarification on whether a mentally disordered victim can be represented by a proxy appointed under the Adults with Incapacity (Scotland) Act, for example Power of Attorney or welfare guardian, providing they have the appropriate powers at their disposal. Additionally the same question applies in respect of the disclosure of information (Part 2, Sections 37 & 38).

d) We would also welcome further guidance around the draft Bill where it states that “in essence the SG is proposing to introduce a statutory scheme allowing for the disclosure of information about mentally disordered offenders (MDOs) to their victims or relatives in certain circumstances”. In particular it would be helpful to know in what ‘circumstances’ relatives of victims can have information disclosed to them, and what would be the nature of such a disclosure.

e) We would support that the new principles being applied under Question 2, changes to the tribunal rules for named persons, are reflected in these proposals for the same reasons (Part 2, Sections 37 & 38).