Alzheimer Scotland
Scottish Government – Implementation of certain sections of the Mental Health Act (Scotland) 2015

Introduction

Alzheimer Scotland is Scotland’s leading dementia voluntary organisation. We work to improve the lives of everyone affected by dementia through our campaigning work nationally and locally and through facilitating the involvement of people living with dementia in getting their views and experiences heard. We provide specialist and personalised services to people living with dementia, their families and carers in over 60 locations and offer information and support through our 24 hour freephone Dementia Helpline, our website (www.alzscot.org) and our wide range of publications.

General Comments

Alzheimer Scotland broadly welcomes the proposals as set out within the consultation, believing that these will support implementation of the provisions within the Mental Health (Scotland) Act 2015 in a pragmatic way, helping to safeguard the rights of people subject to order under the Mental Health (Care and Treatment) Act 2003.

However, we believe that there are areas which would benefit from clarification and provision of further detail, which we have detailed under the relevant sections below.

Alzheimer Scotland remains of the view that whilst the improvements and reform of this legislation are to be welcomed, it is undesirable that changes to this legislation are being made in isolation. In the context of the current review of the Adults with Incapacity (Scotland) Act 2000, following the Scottish Law Commission’s report, and the Scottish Government’s commitment to review of the 2000 Act as a whole, we believe that a holistic review of all existing legislation in this area, including the 2000 Act, the 2003 Act and the Adult Support and Protection (Scotland) Act 2007, would be most valuable, with a view to establishing a single unified legal framework underpinned by a consistent set of principles.

Named person provisions and right of application/appeal

Alzheimer Scotland broadly welcomes the proposals set out within the consultation, believing that these address some underlying and recurring issues that arise as a result of the original 2003 Act. However, we some have specific concerns about implementation of sections 24 and 25 of the 2015 Act.

In particular, Alzheimer Scotland believes that there is a need for greater clarity and explanation, possibly through statutory guidance, about section 24 and the circumstances in which a Mental Health Tribunal (MHT) may use its existing powers to remove an individual’s ‘named person’. It is essential that any regulations or accompanying guidance set out clear parameters for the circumstances in which such decisions may be taken, with a clear process for how a person’s interests will be represented.
The consultation proposes that:

... it is generally preferable for the service user to no longer have a named person (even if they had intended to have one) rather than an individual who they may not have chosen to be appointed as their named person without their say.

However, we believe that this is only preferable if there is a robust system of safeguards in place which ensure that the person’s interests continued to be represented; otherwise, the person may be left vulnerable. How this is to be achieved must be set out clearly in regulations or guidance.

It is welcome that listed persons under section 25 will be given the status of a relevant person before an MHT and are able to make applications on the behalf of the person and this, to an extent, addresses our concerns about section 24.

In relation to section 25, the consultation document refers to “certain applications, certain decisions and certain reports”. We have responded to this proposal, however, it would have been helpful if the consultation document had been more specific about the applications, decisions and reports to which the section refers.

The proposals in Section 25 allow certain listed persons (carers, nearest relative, guardian or welfare attorneys) to initiate certain applications or appeals on behalf of the person where the person does not have capacity. However, the changes proposed in the consultation document suggest that only the guardian or welfare attorney can receive the outcome of certain decisions where there is no named person. It is our view that carers and nearest relatives acting as listed person should also be able to receive notification of the decisions. Under the proposed changes none of the listed persons will have access to the content of certain reports so it appears unnecessary to exclude carers and nearest relatives.

In response to the original consultation on the Mental Health Bill, Alzheimer Scotland noted that under the current system a person may not wish to for some information to be shared with the default or appointed named person. This will also be true of the proposed system where a listed person is regarded as a relevant person by the MHT. It is therefore welcome that the proposal does not provide automatic access to the individual’s medical records or other sensitive information for listed persons.

However, we have previously noted that restriction of access to such information or relevant papers may prevent them from making a full and adequate representation, application or appeal on behalf of a person. Whilst Alzheimer Scotland appreciates that there is a balance to be struck balance between the need to protect the individual’s right to privacy (Article 8 of the European Convention on Human Rights (ECHR)) and the right to a fair hearing (Article 6 of ECHR), we believe that that this limitation of information has the potential to prevent a fair hearing and could be considered as going against the principles of the 2003 Act.
Furthermore, the Scottish Government has previously committed to approaching policy and legislation in a way which underpins supported decision-making and moves away from substitute decision-making. This is in line with the principles of Article 12 of the United Nations Convention on the Rights of People with Disabilities (Equal Recognition Before the Law). It is therefore crucial, as noted above, to ensure that the circumstances in which the MHT would exercise substitute decision-making by removing the named person, is clearly defined, with a clear process in place to ensure that the rights and interests of the person are not negatively affected by this decision.

**Information and Advance Statements**

Alzheimer Scotland believes that clear, plain English guidance must be available and easily accessible for people who may be affected by this legislation, particularly where they are expected to make decisions about their future representation. This information should be provided in a number of different formats, including easy read versions, as well as other formats for those who may have sensory impairment.

The information included should set out:

- The process of different orders made under the 2003 Act and the involvement of different agencies and professionals.
- An explanation of the roles of a named person, a listed person and advocacy support and how each of these can be/are involved in each stage of the process.
- The different options for representation available to a person and the practical implications of each option e.g. the four options at the bottom of the diagram on p.20 of the consultation.
- Information on where individuals and carers can go for more information and advice, including advocacy support.

In addition, we believe it would be helpful for any guidance and information to contain Case Study examples or vignettes of how orders under the 2003 Act work and how the different agencies, professionals and individuals (including the person concerned and carers/family members) are involved at each stage. We further believe that this is an area where advocacy would be of particular use to people with dementia, their families and carers to support and inform their decision-making about future representation. It is imperative that where an independent advocate is working with a person with dementia, they have the necessary skills to communicate and work with people with dementia to appropriately support the individual.

Furthermore, Alzheimer Scotland believes that in addition to a concerted effort around advance statements, there should be a similar focus on the right to independent advocacy. This should set out a person’s entitlement to an independent advocacy, setting out what an independent advocate can and cannot do and how a person may go about accessing this support.
Alzheimer Scotland believes that a good way of distributing and raising awareness is to disseminate information and resources through networks of organisations across the statutory, independent and third sectors who work with people who are likely to be affected by this legislation in some manner.

A positive example of this is the recent launch of a campaign by the Mental Welfare Commission for Scotland (MWC) around the 2003 Act, promoting awareness and resources for advanced and personal statements using a variety of formats. Similarly, we believe that the work being undertaken in some areas across Scotland to encourage people to create Power of Attorney documents sets out a good example of how collaboration across different agencies can raise public awareness.

**Conflict of Interest Regulations**

Alzheimer Scotland believes that the approach taken to the conflict of regulations is pragmatic and supports the regulations as set out.

We agree in principle about the regulations with regards to conflict of interest amongst medical professionals, however, in some rural settings where services are geographically spread or are smaller in scale, there may be a practical challenge in achieving this separation of medical professionals. Where the person subject to these regulations is a person with dementia, it is essential that the approved medical practitioner has relevant expertise in dementia.

In addition, we accept that there will be circumstances where an emergency detention will necessitate overriding this conflict of interest provision, however, these should be reviewed as soon as possible.

**Conclusion**

Alzheimer Scotland welcomes that the approach taken by this consultation seeks to implement the changes to the 2003 Act in a way which is both pragmatic and practical, whilst strengthening the rights of people subject to interventions under the Act.

We believe the proposals would be strengthened through the provision of greater detail and clarity, either within the regulations themselves or in accompanying statutory guidance, particularly around the provisions in sections 24 and 25.

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Policy Officer
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