

Amendments to Mental Health Act 1983 made under Coronavirus Act 2020

Introduction

At 9am on 27 March 2020¹ section 10 of the Coronavirus Act 2020 (CVA 2020) came into force in Wales, by virtue of regulation 2 of the The Coronavirus Act 2020 (Commencement No. 1) (Wales) Regulations 2020.

Section 10 (1) CVA 2020 applies to Wales and provides for Schedule 8 which contains temporary modifications to the Mental Health Act 1983 (MHA 1983).

This article is intended to deal with those various amendments.

Applications for Compulsory Admission to Hospital for Assessment or Treatment

Position under MHA 1983

Where making an application for admission to hospital under either section 2 or 3 MHA 1983, any such application “shall be founded on the written recommendations in the prescribed form of **two** registered medical practitioners” (section 2(3) and 3 (3), emphasis added).

Position under CVA 2020

The application may be made by a **single** registered medical practitioner, if it is considered that complying with the existing requirement (requiring two medical practitioners to make an application) **is impractical or would involve undesirable delay** (*paragraph 3, Part 2, Schedule 8*). The other requirements under sections 2 and 3 of the MHA 1983 must still be complied with and this change does not apply in the case of an emergency application under section 4 of the MHA 1983.

The general provisions as to medical recommendations set out in section 12 MHA 1983 apply to a single recommendation as it would to a dual recommendation.

Applications for Compulsory Admission of Patients Already in Hospital

Position under MHA 1983

Where, “in the case of a patient who is an in-patient in a hospital, it appears to the **registered medical practitioner or approved clinician in charge of the treatment of the patient** that an application ought to be made under this Part of this Act for the admission of the patient to hospital, he may furnish to the managers a report in writing to that effect[...]” (Section 5(2) MHA 1983).

¹ If anyone uses Westlaw, I would advise that these regulations are showing as “Not in Force”

If the practitioner/clinician in charge of treatment is absent, there is also provision in subsection (3) for another registered medical practitioner or approved clinician to be nominated, but only in the absence of the practitioner/clinician in charge.

Position under CVA 2020

Any registered medical practitioner or approved clinician may furnish a written report for the purposes of section 5(2) of the MHA 1983 (concerning the detention of patient in hospital pending application for admission), if it appears that complying with the current requirement that the report be furnished by the practitioner or clinician in charge of the treatment of the patient **is impractical or would involve undesirable delay** (*paragraph 4, Part 2, Schedule 8*).

Time Limits for Detention of Patients for the Preparation of Reports Under Section 5 MHA 1983

Position under MHA 1983

The patient may be detained for **72 hours** for the preparation of a report under section 5(2) MHA 1983 (where it appears to a registered medical practitioner or approved clinician).

Where it is not practicable to secure the immediate attendance of a practitioner or clinician for the purpose of furnishing a report under subsection (2), but it appears to a nurse of the prescribed class that the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital, the nurse may record that fact in writing; and in that event the patient may be detained in the hospital for a period of **6 hours** from the time when that fact is so recorded or until the earlier arrival at the place where the patient is detained of a practitioner or clinician having power to furnish a report under that subsection.

Position under CVA 2020

The period for which patient can be detained pending a report from a practitioner or clinician is **increased from 72 hours to 120** (*paragraph 4, Part 2, Schedule 8*).

The period for which patient can be detained pending a report from a practitioner or clinician is **increased from 6 hours to 12** (*paragraph 4, Part 2, Schedule 8*).

Patients concerned in Criminal Proceedings or Under Sentence

Remand to hospital for report on mental condition OR remand to hospital for treatment

Position under MHA 1983

An accused person shall not be remanded or further remanded under section 35 or 36 for more than **28 days at a time** or for more than **12 weeks in all**; and the court may at any time terminate the remand if it appears to the court that it is appropriate to do so.

Position under CVA 2020

Sections 35(7) (concerning the period of remand to hospital for report on mental condition) and 36(6) (period of remand to hospital for treatment) of the MHA 1983 have effect as if the words “or for more than 12 weeks in all” were **omitted** (*paragraph 5, Part 2, Schedule 8*).

Powers of criminal courts to detain an accused or convicted person in hospital

Position under MHA 1983

The following sections under MHA 1983 give criminal courts the power to detain an accused or convicted person in hospital:

- Section 36(1) (power to remand accused person to hospital for treatment);
- Section 37(1) (power to order detention in hospital, or guardianship, of convicted person);
- Section 38(1) (power to order interim detention of convicted person in hospital pending final hospital order or other disposal);
- Section 45A(3) (power to direct that a person sentenced to imprisonment be detained in hospital instead of prison); and
- Section 51(5) (power to order detention of a person in hospital in the absence of the person).

All require a report from **two registered medical practitioners**.

Position under CVA 2020

The requirement for a criminal court to have a report from **two registered medical practitioners** is amended so that it may be made by a **single registered medical practitioner** when making orders for the detention of an accused or convicted person in hospital. The test is if it is considered that complying with the existing requirement – requiring two medical practitioners to make an application – is **impractical or would involve undesirable delay** (*paragraph 6, Part 2, Schedule 8*).

Provisions about moving prisoners

Position under MHA 1983

Sections 47(1) and 48(1) contain provisions about moving prisoners (serving prisoners and other prisoners). The requirement is for reports from at least **two registered medical practitioners** that the prisoner suffers from a mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital and that appropriate medical treatment is available.

Position under CVA 2020

The requirement for a criminal court to have a report from **two registered medical practitioners** is amended so that it may be made by a **single registered medical practitioner** when making orders for the detention of an accused or convicted person in hospital. The test is if it is considered that complying with the existing requirement – requiring two medical practitioners to make an application – is **impractical or would involve undesirable delay** (*paragraph 7, Part 2, Schedule 8*).

Provisions about moving prisoners

Position under MHA 1983

There are various time limits for detention and movement between court, prison and hospital.

Section 35(9) (including as applied by section 36(8)) (remand to hospital for report on accused's mental condition) = a constable or any other person directed to do so by the court shall convey the accused person to the hospital specified by the court within **7 days** beginning with the date of the remand and the managers of the hospital shall admit him within **7 days**.

Section 40(1) and (3) (Effect of hospital orders, guardianship orders and interim hospital orders)

- Hospital order = a constable, an approved mental health professional, or any other person directed to do so by the court should convey the patient to the hospital within a period of **28 days** and the managers of the hospital to admit them at any time within that **28 days**.
- Interim hospital order = a constable, or any other person directed to do so by the court should convey the patient to the hospital within a period of **28 days** and the managers of the hospital to admit them at any time within that **28 days**.

Section 45B(1) (effect of hospital directions and limitation directions) = a constable, or any other person directed to do so by the court should convey the patient to the hospital within a period of **28 days** and the managers of the hospital to admit them at any time within that **28 days**.

Section 47(2) (period within which person subject to transfer direction must be received into hospital) = a transfer direction shall cease to have effect at the expiration of the period of **14 days** beginning with the date on which it is given unless within that period the person with respect to whom it was given has been received into the hospital specified in the direction.

Position under CVA 2020

The time periods set out in sections 35(9), 40(1) and (3) and 45B(1) all have an additional “fail-safe” mechanism added in that the transfer/conveyance/admission should take place within that period **or as soon as practicable after the end of that period** (*paragraph 7, Part 2, Schedule 8*).

The time period set out in section 47(2) is amended to **28 days** (*paragraph 7, Part 2, Schedule 8*)

Administration of Medicine to persons Liable to Detention in Hospital

Position under MHA 1983

Section 58 (3) prevents the administration of medication to a person to whom section 58 applies (3 months of receiving medication) unless they:

- (a) consent, or
- (b) a registered medical practitioner appointed as aforesaid (not being the Responsible Clinician or the Approved Clinician in charge of the treatment in question) has certified in writing that the patient is not capable of understanding the nature, purpose and likely effects of that treatment or being so capable has not consented to it but that it is appropriate for the treatment to be given.

Further, subsection (4) requires the registered medical practitioner to consult two other persons who have been professionally concerned with the patient's medical treatment but, of those persons–

- (a) one shall be a nurse and the other shall be neither a nurse nor a registered medical practitioner; and
 - (b) neither shall be the Responsible Clinician or the Approved Clinician in charge of the treatment in question
- before giving a certificate under section 58(3)

Position under CVA 2020

The Approved Clinician *may* give a certificate under section 58(3) MHA 1983 if the clinician considers that complying with the requirement for the certificate to be given by a registered medical practitioner other than the Approved Clinician or the Responsible Clinician **is impractical or would involve undesirable delay** (*paragraph 9, Part 2, Schedule 8*).

However, if, having consulted only one other person, if the practitioner (or clinician) considers that complying with the requirement under section 58(4) for consultation with two other persons is impractical or would involve undesirable delay, the person consulted:

- (a) must have been professionally concerned with the patient's medical treatment, and
- (b) must not be a nurse, a registered medical practitioner, the Responsible Clinician or the Approved Clinician in charge of the treatment in question.

(*paragraph 9, Part 2, Schedule 8*)

Detention in Place of Safety

Position under MHA 1983

Sections 135(3ZA) and 136(2A) (period of detention in a place of safety) and 136B (extension of detention) all prescribe time limits of **24 hours**.

Position under CVA 2020

Under *paragraph 10, Part 2, Schedule 8*, the time limit is amended to **36 hours**.

Further Guidance

NHS England and NHS Improvement are currently preparing detailed guidance setting out the exact circumstances in which such powers would be used. This is in response to concerns raised during the Bill's passage through Parliament about the effect of the legislation on the existing deprivation of liberty safeguards.

The government confirmed that it did not intend to amend the safeguards in primary legislation. It would instead publish emergency guidance making clearer when a deprivation of liberty safeguards authorisation is necessary, and the basis on which an assessment can be made, including, for example, phone or video calling for assessment. More to follow in respect of Mental Capacity and DoLS.

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