



## Mental Health Tribunal for Scotland

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**President: Dr J J Morrow**

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Dear Sirs and Mesdames

### **MENTAL HEALTH (SCOTLAND) BILL**

I am grateful to the Committee for the opportunity it gave me to give evidence on 30 September 2014 for the Mental Health Tribunal for Scotland (“**the Tribunal**”).

In the course of answering questions on the issue of named persons, Dr Richard Simpson asked me if the Tribunal had, or wished to have, a power to require a person who had made a declaration not to have a named person to have an advocate. I undertook to consider that matter, to discuss it with Mr Colin McKay (Chief Executive of the Mental Welfare Commission for Scotland (“**the Commission**”)) and to respond to the Committee on that matter in writing.

At the moment the Mental Health (Care and Treatment) (Scotland) Act 2003 (“**the 2003 Act**”) allows a person to nominate a named person and, in the event that no such nomination is made, section 251 of the 2003 Act will operate to identify a “default” named person (essentially, the person’s primary carer or nearest relative). A named person is a party to any case before the Tribunal concerning the person whose named person they are. Accordingly, the named person is automatically provided with all case papers, which may contain information that the named person does not wish to know and which the person who is the subject of the case before the Tribunal did not wish the named person to have.

The Scottish Government’s stated policy is “... that an individual should only have a named person if they choose to have one” (paragraph 90 of the Policy Memorandum). That policy is in line with recommendation 4.1 of the *Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: Report* that “A service user should only have a named person if he or she has appointed one”.

The Tribunal and the Commission both support the policy objective that a person should have a named person only if the person has chosen to have a named person. (In passing I note that the Tribunal and the Commission both have concerns that the provisions of the Bill as they stand do not actually deliver that policy objective).

I have discussed Dr Simpson's question with Colin McKay. It appears to the Tribunal and to the Commission that the issues of whether a person who is the subject of a case before the Tribunal has a named person or has an advocate are – and should remain – separate. The issue of the named person is whether a person should have a named person only if the person chooses to have one, or if section 251 of the 2003 Act should be allowed to continue to operate to identify a “default” named person where no named person has been nominated. The Tribunal and the Commission are clear that a person should have a named person only if the person has chosen to have one.

The issue of advocacy concerns patient participation in Tribunal hearings. A patient is entitled to have an advocate in Tribunal hearings and is entitled to be represented by a solicitor in Tribunal hearings. However, no one can require a patient to have an advocate or to be represented by a solicitor. Those are matters, rightly, for the patient. Accordingly, it appears to the Tribunal and to the Commission that, irrespective of whether or not a patient has a named person, the decision as to whether a patient should have an advocate (or a solicitor) in Tribunal hearings is, and should remain, a matter for the patient.

In our discussion on Dr Simpson's question, Colin McKay and I went on to consider whether the Tribunal should have a power to appoint a named person in the case of a patient who has not chosen to have one. The Tribunal and the Commission are of the view that where a person has not chosen to have a named person that should be the end of the matter. Where a person has not chosen to have a named person it appears to the Tribunal and to the Commission that to give a power to the Tribunal to appoint one in proceedings before the Tribunal would override the autonomy of the patient. Further, it would put the Tribunal in the position of deciding whether a family member should become named person and so a party to the Tribunal's proceedings and so required to be provided with information which the patient may not wish the family member to have.

Simply for the sake of completeness the Tribunal and the Commission note that the 2003 Act provides various layers of protection for patients in terms of Tribunal hearings. Mental health officers (**MHOs**) and responsible medical officers (**RMOs**) are subject to various statutory duties in addition to their professional responsibilities; a patient may have a named person; a patient is entitled to have access to advocacy services; a patient is entitled to be legally represented in Tribunal hearings (for which a form of non means tested legal aid is available); Tribunal panels themselves are independent and comprise general and medical members and are convened by a legal member; where a patient does not have the capacity to instruct a solicitor the Tribunal appoints a curator *ad litem* from a list of solicitors to take a view on the case, to instruct a medical report if the curator so wishes and to ask such questions and to make such submissions as the curator considers appropriate; Tribunal panels are semi-inquisitorial, which means that they do not simply hear evidence and legal argument and then make a decision but have power to ask questions, require the production of documents and even to instruct their own reports.

Accordingly, even if a Tribunal panel is faced with a case in which a patient who is capable of instructing a solicitor does not do so, who declines to have an advocate, chooses not to have a named person and decides not to attend any Tribunal hearings, the Tribunal itself is able to obtain documents, instruct reports and test the evidence of MHOs and RMOs by questioning before making a decision. Finally, decisions of the Tribunal are subject to review on appeal to the superior courts.

From all of the forgoing it appears to the Tribunal and to the Commission that decisions as to whether to choose to have a named person, whether to choose to have an advocate, whether to choose to be legally represented and to choose to what extent a person wishes to participate in any case concerning that person before the Tribunal are decisions best left to the patient.

The Tribunal and the Commission recognise the importance of the involvement of close relatives and carers in the lives of service users. However, the Tribunal and the Commission are of the view that appointing a “default” named person is not the best route to secure such involvement.

I trust that the Committee finds this response helpful. If the Committee requires clarification of anything in this letter or wishes any further information from the Tribunal please do not hesitate to contact me.

Mr Colin McKay has had sight of the text of this letter and I copy this letter to Mr McKay for his information.

Yours faithfully

**Dr J J Morrow**  
**President**