

# **PATIENT RIGHTS (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 1: Charter of Patient Rights and Responsibilities***

7. Subsection (1) sets out that the Scottish Ministers must publish a Charter of Patient Rights and Responsibilities, within six months of this section of the Act coming into force.
8. Subsections (2) and (3) provide that the Charter must contain a summary of the rights and responsibilities of patients and relevant persons, and that it may also contain a summary of the duties of relevant NHS bodies, the behaviour expected from patients and relevant persons, as well as any other information which the Scottish Ministers consider to be relevant in relation to health care or the health service.
9. Subsection (4) provides that the Charter is not to give rise to any new rights or impose any new responsibilities on patients, and nor is it in any way to alter an existing right or responsibility.
10. Subsection (5) defines a “relevant person” as a person who has a personal interest in the health care of the patient, such as a family member or carer, or any other category of person who the Scottish Ministers consider to be appropriate.
11. Subsection (6) sets out that it is for Ministers to decide on the form and manner of the Charter and subsection (7) provides that, before publishing the Charter, Ministers must consult appropriate people and lay a copy of the Charter before Parliament.
12. Subsection (8) places a duty on Ministers to notify relevant NHS bodies of the publication of the Charter, as soon as reasonably practicable after its publication. Subsections (9) and (10) place a duty on NHS bodies to make copies of the Charter available to patients, staff and members of the public, free of charge and in a format which is suitable for their particular needs.

#### ***Section 2: Review and revision of Charter***

13. Subsections (1) and (2) place a duty on Scottish Ministers to review the Charter at least once every 5 years, in order to ensure that it is accurate and up to date and that it effectively raises awareness of the rights and responsibilities of patients and relevant persons. Subsection (6) provides that the Scottish Ministers must revise the Charter where, following such a review, they consider the Charter does not accurately summarise the rights and responsibilities of patients or relevant persons, or is not sufficiently effective in raising awareness of those rights and responsibilities. Subsection (7) sets out that Ministers may also revise the Charter at any other time, if they consider it appropriate to do so.
14. Subsection (3) provides that, when reviewing the Charter under subsection (1), Ministers must also review how effective the arrangements for the publication and distribution have been in raising awareness of the Charter, and if they consider it appropriate, take such steps as they consider necessary to improve those arrangements.

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15. Subsection (4) provides that in carrying out a review under subsections (1) and (3), the Scottish Ministers must consult appropriate persons and subsection (9) sets out that, before publishing the updated Charter, the Scottish Ministers must consult appropriate people and lay a copy of the revised Charter before Parliament.
16. Subsection (8) places a duty on Ministers to notify relevant NHS bodies of the publication of the revised Charter and subsection (10) clarifies that a reference to 'the Charter' in this Act is a reference to the Charter, as revised.

***Section 3: Patient rights***

17. Subsection (1) sets out the right for every patient that the health care they receive is to be provided in a certain way, as described in subsection (2).
18. Subsection (2) describes the way in which that health care should be provided. It should be patient focused, which means regard must be had to the patient's needs; to the importance of providing the optimum benefit to the patient's health and wellbeing; and the patient should be encouraged to play an active part in decisions relating to their treatment and health care, and they should be provided with appropriate information and support, in a format that is appropriate for their needs, to be able to participate in such decisions. In practice, this might mean:
  - A healthcare professional listening to a patient's experience of coping with a long-term condition, and taking this into account when considering the best treatment options.
  - A patient being encouraged to take their medication regularly or to become more active in order to lose weight and improve their health.
  - A deaf patient being provided with a British Sign Language interpreter so that they can discuss their illness and treatment with their doctor, and make an informed decision as to their preferred treatment.
19. Subsection (3) gives patients a right to give feedback or comments, or raise concerns or complaints about the health care they have received.
20. Subsection (4) enables the Scottish Ministers to modify subsection (2), following appropriate consultation. For example, bodies that might be consulted could include Health Boards, healthcare workers professional bodies, and members of the public.

***Section 4: Patient rights: further provision***

21. This section provides that meeting the rights of an individual patient should be balanced with the effect on the rights of other patients in receiving healthcare and should take into account the resources available and should be subject to the exercise of clinical judgement and the effective and efficient use of health service organisation and resources.

***Section 5: Duty to uphold the health care principles***

22. Subsection (1)(a) places a duty on the bodies specified in subsection (2), (which are Health Boards, Special Health Boards and the Common Services Agency for the Scottish Health Service) to uphold the health care principles set out in the schedule when providing health care, where relevant to the service being provided. For example, it might be relevant for a hospital consultant to have regard to all of the principles in the schedule when discussing with a patient their diagnosis and treatment. Or, it might be relevant for a healthcare practitioner to check back with a patient that the patient has understood the information they have been given about their medication.
23. Subsection (1)(b) means that bodies specified in subsection (2) must also ensure that any person they enter into a contract, agreement or arrangement with also upholds the

health care principles, in so far as they are relevant to the service being provided. For example, this may apply to cleaning and catering services in hospitals, where they have patient contact, and to services provided at a primary care level, such as GP practices that are contracted by Health Boards. For example, it might be relevant for a member of catering staff to treat patients with dignity and respect when serving them food. However, ensuring that health care is based on current clinical guidance would not be relevant to a member of catering staff as they would not provide clinical care.

### ***Section 6: Health care principles***

24. Subsection (1) defines “health care principles” as the principles set out in the schedule to this Act and subsection (2) explains that Scottish Ministers may amend the health care principles, following consultation with appropriate people.

### ***Section 7: Health care principles: guidance and directions***

25. Subsection (1) provides that any body with a duty under section 5 must have regard to any guidance issued by the Scottish Ministers about the practical application of the health care principles. Subsection (2) provides that the Scottish Ministers must consult relevant people or organisations before giving that guidance. For example, the Scottish Ministers may provide guidance about practical ways to implement Health Care Principle 5 “Support necessary to receive or access health care is available”, which might include ensuring patients are aware that they can have a third party with them to support them, such as a friend, relative or partner etc, or ensuring that patients are aware of translation, interpreting and communication support services and how to access them.
26. Subsection (3) provides that the Scottish Ministers may give the bodies directions on how the health care principles should be applied in practice.

### ***Section 8: Treatment time guarantee***

27. Section 8(1) and (2) establishes a maximum waiting time for eligible patients, known as the treatment time guarantee. The maximum waiting time is set out in section 10. Eligible patients should start to receive that treatment within 12 weeks of the treatment being agreed between the patient and the Health Board.
28. Subsection (3) provides that Health Boards must take all reasonably practicable steps in order to comply with the treatment time guarantee and subsection (4) gives examples of actions a Health Board must take to deliver the treatment time guarantee for its eligible patients. Health Boards must monitor the guarantee, take account of the patient’s clinical needs and the clinical needs of other eligible patients awaiting agreed treatments when arranging the patient’s treatment start date, make arrangements for the agreed treatment to start within its area or if it is unable to treat the patient in its own area, make arrangements either with another Health Board, with the National Waiting Times Centre Board or with another suitable provider such as the NHS in England or a private healthcare provider.
29. Subsection (5) clarifies that the provisions regarding the treatment time guarantee are in addition to and do not affect the duty of Health Boards to comply with other waiting time targets, where these are set out in regulations, orders or directions, and to have regard to other guidance issued by the Scottish Ministers in relation to waiting time targets.

### ***Section 9: Treatment time guarantee: further provisions***

30. Subsections (1) and (2) place a duty on the Scottish Ministers to, by regulations, provide a description of those patients who are eligible for the treatment time guarantee and show how the waiting time is to be calculated, specifying the circumstances in which days are not to be counted towards the maximum waiting time.

31. Subsection (3) gives the Scottish Ministers power to make regulations providing for other matters relating to the treatment time guarantee, including the treatments and services and categories of treatments and services in relation to which the guarantee will not apply.
32. Subsection (4) allows the Scottish Ministers to change the length of the treatment time guarantee by order. For example, this could be to make the maximum waiting time shorter, as services become more efficient. Different periods could be specified for different treatments, for example if some treatments should be delivered within a shorter time.

### ***Section 10: Breach of the treatment time guarantee***

33. This section sets out what will happen if a Health Board does not deliver the treatment time guarantee. Subsections (2)(a) and subsection (3)(a) mean that the Health Board will be required to offer the patient treatment in a way that will ensure the patient is admitted quickly for treatment but will not distort the clinical priority of patients whose condition requires more urgent treatment. Subsections (3)(b) and (c) provide that the patient's availability and anything else that is relevant should also be taken into account when making arrangements for the patient to be treated at the next available opportunity. Subsection (2)(c) places a duty on the Health Board to give the patient details of the advice and support that is available to them and information about how to give feedback or comments or raise concerns or complaints.

### ***Section 11: Treatment time guarantee: guidance and directions***

34. [Section 11\(1\)](#) provides that that Health Boards must have regard to any guidance issued by the Scottish Ministers in terms of the treatment time guarantee.
35. [Section 11\(2\)](#) provides that the Scottish Ministers may direct a Health Board to take action specified in the directions in relation to the guarantee.

### ***Section 12: Treatment time guarantee: suspension***

36. Subsections (1) to (3) provide that, in exceptional circumstances, the Scottish Ministers may, by direction, suspend the treatment time guarantee for a period of up to 30 days. If the Scottish Ministers consider it is necessary to extend the direction for a period of more than 30 days, or consider it is necessary from the outset to suspend the guarantee for longer than 30 days, an order must be laid before Parliament by virtue of subsections (4) and (5). Subsection (5) sets out the emergency affirmative procedure for laying such an Order before Parliament. Subsections (6) and (7) allow for negative parliamentary procedure to be used when an order under subsection (4) is revoked.

### ***Section 13: Treatment time guarantee: key terms***

37. This section defines the key terms referred to in sections 8 to 12, including specifying that the maximum waiting time for eligible patients for an agreed treatment is 12 weeks. The period of 12 weeks runs from the date on which the patient agrees the treatment to the date on which the treatment begins.

### ***Section 14: Encouragement of patient feedback etc.***

38. This section provides for Health Boards, Special Health Boards and the Common Services Agency for the Scottish Health Service to encourage patients to give feedback or comments, or raise concerns or complaints on health care, and that patients may give this to the relevant NHS body or to a provider of the Patient Advice and Support Service.
39. Subsection (3) establishes that feedback or comments given to, or concerns or complaints raised with the provider of the Patient Advice and Support Service may be passed to the relevant NHS body, but only with the patient's consent.

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40. Subsection (4) means that NHS bodies must consider all feedback, comments, concerns or complaints to see how they could improve the delivery of their services.
41. Subsection (5) means that NHS bodies may be required by the Scottish Ministers to provide information to Ministers on their performance in relation to encouraging patients to provide feedback, etc. and how this has been considered.
42. Subsection (6) means that the Scottish Ministers may direct NHS bodies in how they should perform their duties in dealing with feedback, comments, concerns or complaints.

***Section 15: Arrangements for handling and responding to patient feedback etc.***

43. Subsection (1) provides that the Scottish Ministers must ensure that each Health Board, Special Health Board and the Common Services Agency for the Scottish Health Service has: a suitable process in place for: handling and responding to feedback, comments, concerns or complaints on health care; publicising this process; identifying best practice; telling the complainant about the advice and support available to patients; publicising the advice and support available; and monitoring complaints.
44. Subsection (2) provides that those bodies must also ensure that anyone providing a health service on its behalf (such as GPs) must have suitable processes in place to deal with these matters.
45. Subsection (3) sets out the matters which the processes for handling feedback, complaints, concerns, or comments must deal with.
46. Subsection (4) gives the Scottish Ministers power to give directions to NHS bodies and make regulations about the processes which must be in place. This enables Scottish Ministers to direct a Health Board to take appropriate actions. For example, if a particular Health Board had not been publicising its process adequately, the Scottish Ministers could direct the Health Board to publicise the process via a series of posters and leaflets situated in hospitals and health centres.
47. Subsection (5) provides that directions given by the Scottish Ministers to NHS bodies may include provision for the resolution of complaints by conciliation or mediation.
48. Subsection (6) sets out what is meant by a “service provider”. For example, a “service provider” could be a GP practice.
49. Subsection (7) provides that the powers that the Scottish Ministers have under this section of the Act do not interfere with the powers they have under the National Health Service (Scotland) Act 1978.
50. Subsection (8) provides that nothing done in terms of section 15 excludes the Scottish Public Services Ombudsman’s (SPSO) right to carry out investigations, and the right of a person who has made a complaint to go to the Ombudsman. A complainant will normally still have had to exhaust (or at least invoke) the complaints mechanism provided before seeking an SPSO investigation.

***Section 16: Repeal of the Hospital Complaints Procedure Act 1985***

51. This section repeals the Hospital Complaints Procedure Act 1985 in full. The provisions of this Act are replaced by the measures around feedback and complaints outlined in the Act.

***Section 17: Patient Advice and Support Service: establishment and funding***

52. **Section 17** amends the National Health Service (Scotland) Act 1978 by inserting a new section 10ZA. The functions of the Common Services Agency for the Scottish Health Service are extended to its new functions under section 10ZA. This, read with section 10(7) of the National Health Service (Scotland) Act 1978, means that there is

a specific provision which states that in carrying out its functions the Agency shall act subject to, and in accordance with, such directions as may be given by the Scottish Ministers.

53. Section 10ZA requires the Common Services Agency for the Scottish Health Service to secure the provision of a Patient Advice and Support Service in relation to each Health Board, and any other body that Scottish Ministers specify in an order. In order to do this, the Agency will procure the service from a provider or providers. The service may be supplied by more than one provider, but not by a Health Board, a Special Health Board, Healthcare Improvement Scotland, or the Agency itself.

### ***Section 18: Patient Advice and Support Service***

54. **Section 18** outlines the services that the Patient Advice and Support Service will provide to patients and members of the public.
55. Subsection (2)(a) and (b) place a duty on the Patient Advice and Support Service to promote awareness and understanding of the rights and responsibilities of patients (in particular, promote awareness of the Charter) and to advise people who want to complain, raise concerns or give feedback about healthcare. In practice, this might mean, for example, advising a patient who wanted to complain about their GP how to do so, and providing guidance to the patient as to whether the complaint is a matter for the GP practice complaints system, or whether it is a regulatory matter that should be referred to the regulatory body.
56. Subsections (2)(c) and (e) provide that the Patient Advice and Support Service is to provide other information and advice on subjects as it considers likely to be of interest to people using the health service, or as the Agency may specify. Subsection (2)(d) provides that the service must also advise people of other sources of help and advice, including services providing advocacy or representation.
57. Subsections (3) and (4) set out that the provider of the Patient Advice and Support Service is not prevented from providing advice on matters other than the health service, but this must not interfere with its provision of advice and support in relation to health matters.
58. Subsection (5) sets out examples of the patient responsibilities of which the patient advice and support service is to raise awareness and understanding. An example of such a patient responsibility might be to attend an agreed appointment or to cancel if necessary, well in advance, so that an appointment can be offered to another patient.

### ***Section 19: Duties to share information***

59. **Section 19** subsection (1) places a duty on relevant bodies (such as Health Boards) to share information (where practical and appropriate) with the Patient Advice and Support Service, and allows the Patient Advice and Support Service to ask for any other relevant information that it would find helpful. For example, the Patient Advice and Support Service might seek clarification on procedures or services offered in a particular area.
60. Subsection (2) means that the Agency must ensure that providers of the Patient Advice and Support Service give information on its services to the relevant bodies. It also means that these bodies can request information from the Patient Advice and Support Service. An example might be a Health Board asking its local Patient Advice and Support Service for statistical information on the numbers of women and men using the service because it wanted to compare that with the gender profiles of patients in the Health Board area.
61. Subsection (3) requires that when sharing information, patient confidentiality must be respected.

### ***Section 20: Protections and limitations***

62. Subsection (1) provides that the Act does not prejudice the exercise of clinical judgement; the effective and efficient use of the health service organisation or resources or any relevant legislation or rule of law.
63. Subsection (2) provides that nothing in the Act affects any other relevant legislation or rule of law. This is, however, subject to the provisions of sub-section (3), which excludes the right to pursue specified legal remedies to enforce the rights in the Act.
64. Subsection (3)(a) provides that the rights set out in the Act are not of a nature that will impose any liability on any person to pay damages. This means that a patient could not claim damages from a Health Board for an alleged failure to deliver health care in the manner set out in the Act.
65. Subsection 3(b), (c), (d) and (e) provide that no person could enforce the rights set out in the Act by an action for specific implement, specific performance of a statutory duty, interdict or suspension.
66. The interaction of the provisions in subsections (2) and (3) do not alter or affect a person's rights to take action to enforce rights which they have on grounds other than those conferred by this Act, for example a right to claim damages in the case of medical negligence.
67. Subsections (4) and (5) clarify that patients have other rights when receiving health care (beyond those rights set out in the Act) and that the Act does not affect those other rights.
68. Subsection (6) specifies that references to this Act, in section 20, also include references to any orders, regulations or directions made under this Act.

### ***Section 21: Powers of the Scottish Ministers***

69. This section means that the ministerial powers available under sections 76 to 78A of the National Health Service (Scotland) Act 1978 will also be available to the Scottish Ministers in the context of the Act. Sections 76 to 78A of the National Health Service (Scotland) Act 1978 relate to powers of inquiry, and default and emergency powers which are available to the Scottish Ministers, for example, where they consider that a Health Board (or other relevant body) is not adequately fulfilling its functions.

### ***Section 22: Payments to or in respect of certain persons infected with hepatitis C as a result of NHS treatment etc.: eligibility***

70. This section amends section 28 of the Smoking, Health and Social Care (Scotland) Act 2005. A scheme was made by the Scottish Ministers under section 28 to make payments to persons who acquired hepatitis C as a result of NHS treatment and who did not die before 29 August 2003. The amendments to section 28 in this section give the Scottish Ministers powers to make payments in respect of persons who acquired hepatitis C as a result of NHS treatment, but who died before 29 August 2003, and to the dependants of infected persons.

### ***Section 23: Interpretation***

71. This section provides legal definitions for key terms that have been referred to in the Act.

### ***Section 24: Ancillary provision***

72. This section gives the Scottish Ministers the power to make consequential, supplemental, incidental, transitional, transitory or saving provisions by order for the purpose of giving full effect to the Act.

***Section 25: Orders, regulations and directions***

73. Subsection (1) provides that all regulations and orders under the Act are to be made in the form of a statutory instrument and that regulations and orders may make different provisions for different purposes.
74. Subsection (2) provides that (i) orders made under section 3(4), relating to changes in how healthcare is delivered, section 6(2) relating to changes in the healthcare principles, section 9(4) relating to the maximum length of time a patient should wait for treatment under the treatment time guarantee or section 24, relating to ancillary provision, and (ii) regulations made under section 9(1) or (3), relating to the treatment time guarantee, are to be subject to affirmative procedure.
75. Subsection (3) provides that any other statutory instrument made under the Act (apart from under sections 12(4) and 26(3), relating to the date that the provisions come into force) is to be subject to negative procedure.
76. Subsections (4) and (5) make provision for the way in which Scottish Ministers can exercise their powers of direction under the Act.

***Section 26: Short title and commencement***

77. Subsection (2) means that sections 22, 24, 25 and 26 will come into force on the date of Royal Assent. The remaining provisions will come into force on a date or dates appointed by the Scottish Ministers.

***Schedule: Health care principles***

78. The schedule sets out the health care principles. Section 5 of this Act places a duty on relevant NHS bodies to uphold these principles, and to ensure that those with whom they enter into contracts, agreements or arrangements uphold these principles when delivering healthcare. The principles should ensure that health services are provided in a way that places the patient and their needs and experiences at the centre of an interaction with health services, and which also ensures that patients are encouraged and provided with support to participate in decisions about their treatment and health care.