



## **MEMORANDUM OF UNDERSTANDING BETWEEN THE MENTAL WELFARE COMMISSION FOR SCOTLAND, THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND AND THE SCOTTISH COURTS AND TRIBUNALS SERVICE**

### **I. Introduction**

- The aim of this memorandum is to set out a framework for cooperation between the Mental Welfare Commission for Scotland (“the Commission”) and the Mental Health Tribunal for Scotland (“the Tribunal”).
- This memorandum does not affect the statutory functions of the Commission or the Tribunal or amend any other policies or agreements relating to their activities.
- This memorandum shall be reviewed from time to time (*at intervals of no longer than 3 years*), and may be amended if agreed by both the Commission and the Tribunal.
- From the date when the Tribunal transfers into the First-tier Tribunal for Scotland, references in this memorandum to ‘the Tribunal’ shall be understood as referring to the Mental Health Chamber of the First-tier Tribunal.

### **II. Functions of the Commission**

The Mental Welfare Commission for Scotland (the Commission) is an independent organisation set up by Parliament with a range of duties prescribed under mental health and incapacity law, namely the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Scotland) Act 2015. It acts to promote the welfare of individuals with mental illness, learning disability or related conditions. Its functions include:

- to monitor the operation of the Act and promote best practice
- to report on the operation of the Act.
- to bring general matters to the attention of Scottish Ministers and others.
- to give advice
- to raise service concerns with certain bodies.

### **III. Functions of the Tribunal**

The Tribunal is an independent body established by section 21 of, and schedule 2 to, the 2003 Act and is the principal forum for authorising and reviewing compulsory measures for the detention, care and treatment of people in Scotland who have a mental disorder. The Tribunal's judicial functions include:

- Determining applications for revocation of short-term detention certificates
- Determining applications for compulsory treatment orders and for the extension, variation or revocation of such orders
- Reviewing determinations to extend compulsory treatment orders and deciding applications to revoke such determinations
- Deciding applications for extension, variation or revocation of compulsion orders
- Reviewing determinations to extend compulsion orders and deciding applications to revoke such determinations
- Deciding applications and references in respect of compulsion and restriction orders
- Deciding applications for orders declaring that patients are detained in conditions of excessive security

The Scottish Courts and Tribunals Service (the "Tribunal Administration") provides administrative support to the Tribunal and exercises certain functions delegated to it by the President of the Tribunal, primarily regarding the practical arrangements for the holding of hearings and allocation of members to sit on such hearings, and the distribution of materials to parties, including the decision reached in each case..

### **IV. Relationship between the Commission and the Tribunal**

- The Commission may refer cases to the Tribunal, if the Commission considers it appropriate to do so.
- The Commission has the power to revoke certain orders, including compulsory treatment orders, interim compulsory treatment orders and compulsion orders, but only if satisfied that the grounds are not met. The Commission will not normally exercise this power and would be likely to make reference to the Tribunal
- The Tribunal will provide information to the Commission as outlined in the 2003 Act and regulations made thereunder. The Tribunal will send all decisions and accompanying applications and reports to the Commission in accordance with rule 72(5) of The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 ("the Tribunal's Rules"). This ensures that the Commission can carry out its statutory duty of monitoring the operation of the Act.

- The Commission has the duty to monitor the operation of the 2003 Act and may identify unlawful detention. It also has the duty to promote the principles of the 2003 Act. This may result in the Commission bringing matters to the attention of the Tribunal. The Commission has no other statutory responsibilities in relation to the Tribunal.
- The Tribunal has no statutory responsibilities in respect of the Commission other than the duty imposed by the Tribunal's Rules to send a copy of Tribunal decisions to the Commission.
- Except for rule 44 of the Tribunal's Rules, there is no direct provision for the Tribunal to refer matters to the Commission. Both organisations agree that such reference is proper where the Commission has functions that are appropriate to the individual matter being referred. For example, the Tribunal may refer to the Commission matters of apparent unlawful detention or deficiency of care and treatment (see Reference procedure)

## V. Reference Procedures

- Where the Commission wishes to refer a case to the Tribunal it will do so to the Tribunal Administration which will, without delay, draw the making of the reference to the attention of the President of the Tribunal
- Where the Commission has referred a case to the Tribunal it will normally seek to be represented as a party at hearings
- Where the **Tribunal refers a matter to the Commission** this should be by letter or encrypted email to the Commission's Chief Executive by the Tribunal President.
- Commissioners and Commission staff may from time to time request to attend Tribunal hearings for training and information gathering purposes. Such a request will be made in writing to the President of the Tribunal giving at least five days' notice of any specific hearing for which permission to attend is sought. Attendance will only be allowed if: accommodation permits; there are no other 'observers' present; and the convener of the hearing and other participants raise no objections.

## VI. Exchange of information

### 1. Information about identifiable individuals

- The Commission will give the Tribunal appropriate information about an individual, when the Commission makes a formal referral to the Tribunal

- The Tribunal will give the Commission appropriate information about an individual
  - When it makes a determination
  - When it refers a matter to the Commission
  - When the Commission requires information in pursuance of its statutory functions

## **2. Aggregated anonymised information**

- Where practicable, the Commission will give the Tribunal aggregated anonymised information when:
  - The Tribunal requires this to monitor and audit its performance
  - The Tribunal requires this to plan its service.
- The Tribunal will give the Commission aggregate, anonymised information when:
  - The Commission requires it to monitor the operation of the 2003 Act

## **3. Publication of statistical reports**

- The Tribunal and the Commission will work together to produce a coherent set of statistical reports (agreeing titles, definitions and timescales).
- The Commission will not seek to produce reports that are already available from the Tribunal, but rather use the Tribunal's material appropriately acknowledged
- The Tribunal will conduct its own analysis of statistical returns, for management and planning purposes. The Tribunal may decide to report to the Commission items giving indications of unusual care performance which may be of interest to the Commission.

## **VII. Publication of information**

The Commission and the Tribunal will seek to minimise duplication of published information. When it is appropriate to do so, each body will check the accuracy of its information with the other before publishing it.

The Commission will publish information in respect of:

- The performance of its own statutory functions
- Statistical information on the operation of the 2003 Act

- Its views on the operation of the 2003 Act in respect of individual people, including the observance of the principles

The Tribunal will publish information in respect of:

- The performance of its statutory functions
- Volumes of applications and outcomes
- The quality of its own work and that of others in terms of the timing and turnaround of applications
- Information on the trends of volume and quality of applications and references

### **VIII. Freedom of Information.**

Where a request for information under the Freedom of Information (Scotland) Act 2002 or the Freedom of Information Act 2000 is received by the Commission, which relates to data that has been provided by the Tribunal, the Commission will consult the Tribunal before deciding whether to release the information.

### **IX. General Data Protection Regulation 2016 and Data Protection Act 2018.**

The Commission and the Tribunal shall exchange personal data only in accordance with the General Data Protection Regulation (GDPR) and Data Protection Act 2018 and as outlined in the Annex.

### **X. Dispute resolution**

- Wherever possible any disputes should be resolved locally on a case by case basis, between officials, if necessary by reference to each organisation's line management
- If officials are unable to reach agreement disputes should be referred to the Chief Executive of the Commission and the President of the Tribunal

### **XI. Meetings**

Representatives from the Commission and the Tribunal shall meet at least every six months, to discuss issues affecting the interaction between the Commission and the Tribunal and other issues of mutual interest.

More frequent meetings will be held between appropriate officials to discuss matters of common interest

Date: June 2022

Signed

For the Commission .....  
Chief Executive

For the Tribunal

President (Laura Dunlop QC)

For the Tribunal Administration

Director of Tribunals, SCTS (Lesley Black)

## **Annex 1: Data Controller Declaration**

### **Purpose**

1. The purpose of this annex is to explain the respective roles that the Mental Welfare Commission (MWC) and the Mental Health Tribunal for Scotland (MHTS) will play in managing the processing of personal data associated with the effective operation of this Memorandum of Understanding. The MWC and MHTS are considered independent controllers of the data collected, as both parties separately determine the means and purpose of processing personal data as part of the functions defined in the broader Memorandum of Understanding.

### **Data Protection**

2. Both parties have functions prescribed by law and written in statute which provide a lawful basis for sharing personal, sensitive data where sharing is necessary for the exercise of those functions, proportionate, and carried out in accordance with the rights of the data subjects (GDPR article 6.1 (e) and 9.2.g. DPA 2018 Section 8 and Schedule 1. Part 2, paragraph 6 for the purpose of exercising a function conferred on a person by enactment or rule of law)
3. MWC and MHTS will comply with all relevant provisions of the Data Protection Act 2018 (and the General Data Protection Regulation). MWC and MHTS will act as independent data controllers, in respect of any personal data pursuant to this memorandum of understanding; they will only process such personal data to the extent defined in the relevant regulatory framework.
4. Neither MWC nor MHTS will transfer any personal data it is processing outside of the European Economic Area, unless appropriate legal safeguards are in place, such as an adequacy decision or Model Contract Clauses.
5. MWC and MHTS will ensure that they have appropriate technical and organisational procedures in place to protect any personal data they are processing. This includes any unauthorised or unlawful processing, and against any accidental disclosure, loss, destruction or damage. Both parties will also take reasonable steps to ensure the suitability of their staff having access to such personal data.

### **Individual Rights**

6. GDPR specifies new rights for individuals over the processing of their data. These rights, and the process an individual should follow when making a request, are listed in both MWC and MHTS's privacy notice. Both parties should ensure they consult and comply fully with their respective privacy policies in the event of a Data Subject exercising any of their rights under data protection legislation.
7. In response to any subject access request, MWC or MHTS will undertake a proportionate and reasonable search and respond within one month of the original request.

## Data breach

8. MWC is responsible for reporting any breach occurring within their authority to their Data Protection Officer and ICO (where appropriate). MWC will also inform MHTS of the breach if there is any direct impact on their staff or wider interest.
9. MHTS are responsible for reporting any data breaches within their Authority to their Data Protection Officer and ICO (where appropriate), as well as to MWC if there is any direct impact on their staff or wider interests.
10. Any personal data breach as defined by GDPR Article 4(12) that meets the relevant threshold criteria will be reported to the relevant Information Commissioners' Office (ICO) within 72 hours of notification. This will include informing the affected data subject should the circumstances warrant it. The appropriate Data Protection Officer (see below) will be responsible for making the report, following consultation their Chief Executive Officer (CEO).

## Data retention

11. MWC and MHTS will retain personal data associated with the effective operation of this memorandum of understanding in accordance with their respective organisational disposal policies. Each party is responsible for ensuring appropriate technical and procedural functions are in place to ensure the secure and timely destruction of personal data.

## Data Protection Officers

The contact details of the Data Protection Officers are:

Mental Welfare Commission for Scotland	MHT
Data Protection Officer Mental Welfare Commission for Scotland Thistle House 91 Haymarket Terrace Edinburgh EH12 5HE  email, to <a href="mailto:mwc.enquiries@nhs.scot">mwc.enquiries@nhs.scot</a>	Leanne Jobling Head of Information Governance and Correspondence SCTS N1 Spur Saughton House Broomhouse Drive Edinburgh EH11 3XD  Email: <a href="mailto:dpo@scotcourts.gov.uk">dpo@scotcourts.gov.uk</a>