
DRAFT SCOTTISH STATUTORY INSTRUMENTS

2017 No.

The Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017

PART 2

Amendments to the principal Regulations

CHAPTER 1

Amendment to Part 1 (General)

Amendment of regulation 1

6. In regulation 1(2) of the principal Regulations (interpretation), in the definition of “relevant territory”—

- (a) omit the “or” immediately preceding paragraph (d); and
- (b) at the end of that paragraph insert—
 - “, or
 - (e) a member State of the European Union (apart from the United Kingdom)”.

CHAPTER 2

Amendments to Part 2 (Removal of patients from Scotland)

Amendment of regulation 5

7.—(1) Regulation 5 of the principal Regulations (responsible medical officer: notification of proposed application) is amended as follows.

(2) In paragraph (1), for sub-paragraph (b) substitute—

- “(b) either—
 - (i) the patient’s named person; or
 - (ii) if the patient does not have a named person—
 - (aa) the patient’s primary carer; and
 - (ab) the patient’s nearest relative (if the responsible medical officer knows who that is);”.

(3) For paragraph (2) substitute—

“(2) A notice under this regulation, other than the notice given to the mental health officer, is to invite the recipient of the notice to inform the Scottish Ministers, within 7 days of the day on which the notice is given, of any wishes or preferences that person has in relation to the proposal to remove the patient from Scotland.”.

Amendment of regulation 7

8. In regulation 7(2) of the principal Regulations (warrant for removal: application by responsible medical officer), for sub-paragraphs (a) to (c) substitute—

“(aa) the names and addresses of the persons notified under sub-paragraphs (a) to (d) of regulation 5(1);”.

New regulation 7A

9. After regulation 7 of the principal Regulations insert—

“Application for fast-track removal with consent

7A.—(1) In an application under regulation 7 for a warrant, the responsible medical officer may request that the warrant authorise the patient’s removal from Scotland before the end of the standstill period.

(2) The responsible medical officer may make the request mentioned in paragraph (1) only if—

- (a) the place to which it is proposed the patient will go after being removed from Scotland is in—
 - (i) England;
 - (ii) Wales;
 - (iii) Northern Ireland;
 - (iv) any of the Channel Islands; or
 - (v) the Isle of Man;
- (b) the patient has given written consent to being removed before the end of the standstill period;
- (c) an approved medical practitioner, who is not the patient’s responsible medical officer, has certified that the patient is capable of giving that consent; and
- (d) the patient’s named person (if the patient has one) has given written consent to the patient being removed before the end of the standstill period.

(3) If the responsible medical officer intends to make the request mentioned in paragraph (1), the responsible medical officer must inform the Commission of that fact before making the application.

(4) An application under regulation 7 which includes the request mentioned in paragraph (1) must—

- (a) state the date on which the responsible medical officer informed the Commission of the officer’s intention to make the request as required by paragraph (3); and
- (b) be accompanied by a copy of the following documents—
 - (i) the written consent of the patient referred to in paragraph (2)(b);
 - (ii) the certificate referred to in paragraph (2)(c); and
 - (iii) if the patient has a named person, the written consent referred to in paragraph (2)(d).”.

Amendment of regulation 8

10. In regulation 8(1) of the principal Regulations (information and factors to be considered in respect of an application for a warrant for removal), for the words from “the information” to the end substitute—

- “(a) the information provided by the responsible medical officer in the application; and
- (b) any wishes or preferences in relation to the proposal to remove the patient from Scotland of which the Scottish Ministers have been informed by a person invited to do so in a notice under regulation 5.”.

Amendment of regulation 9

11.—(1) Regulation 9 of the principal Regulations (notification of the decision) is amended as follows.

(2) For paragraph (1)(b) substitute—

- “(aa) any other person named in accordance with regulation 7(2)(aa) in the application which led to the decision;”.

(3) For paragraph (2) substitute—

“(2) The notice under paragraph (1) to—

- (a) the patient; and
- (b) the patient’s named person (if the patient has one),

must advise the recipient of the right to appeal under regulation 13.

(3) In a case where the patient does not have a named person, the notice under paragraph (1) to—

- (a) the patient’s primary carer;
- (b) the patient’s nearest relative;
- (c) any guardian of the patient; and
- (d) any welfare attorney of the patient,

must advise the recipient that the recipient may have authority to initiate an appeal under regulation 13.

(4) If the application made to the Scottish Ministers under regulation 7 included a request of the kind mentioned in regulation 7A(1), the notice under paragraph (1) must state that the request was made.”.

Amendment of regulation 10

12.—(1) Regulation 10 of the principal Regulations (warrant for removal) is amended as follows.

(2) Omit the following—

- (a) paragraph (4); and
- (b) paragraphs (6) to (11).

(3) For paragraph (5)(b) substitute—

- “(aa) any other person named in accordance with regulation 7(2)(aa) in the application which led to the decision that the patient should be removed from Scotland;”.

New regulations 10A to 10E

13. After regulation 10 insert—

“Warrant for fast-track removal with consent

10A.—(1) If the conditions in paragraph (2) are met, the Scottish Ministers are to state in a warrant under regulation 10 that—

- (a) it authorises the patient’s removal from Scotland before the end of the standstill period; but
- (b) that is subject to the patient not withdrawing consent and there being neither an appeal nor a reference to the Tribunal under regulation 13 or 17 respectively.

(2) The conditions for the purpose of paragraph (1) are—

- (a) that the application for the warrant—
 - (i) requests that the warrant authorise the patient’s removal before the end of the standstill period; and
 - (ii) complies with the requirements set out in regulation 7A(4);
- (b) more than 3 days have elapsed since the responsible medical officer informed the Commission of the officer’s intention to make the request mentioned in subparagraph (a)(i); and
- (c) the Scottish Ministers have not received—
 - (i) notice under regulation 13B(1) of an appeal against the proposed removal of the patient from Scotland; or
 - (ii) notice under regulation 17(2) of a reference by the Commission in respect of the proposed removal of the patient from Scotland.

Removal in accordance with warrant

10B.—(1) A patient may be removed from Scotland under the authority of a warrant under regulation 10 at any time between—

- (a) the end of the standstill period; and
- (b) the end of the day that falls 7 days after the last day of the standstill period.

(2) A patient may be removed from Scotland under the authority of a warrant under regulation 10 before the end of the standstill period if—

- (a) the warrant states that it authorises the patient’s removal from Scotland before the end of the standstill period;
- (b) the proposed removal of the patient from Scotland has not been appealed against under regulation 13;
- (c) the Commission has not made a reference to the Tribunal in respect of the proposed removal under regulation 17; and
- (d) the patient has not indicated an unwillingness to be removed from Scotland before the end of the standstill period.

(3) For the purposes of this regulation, the end of the standstill period in relation to a warrant is to be determined in accordance with regulations 10C to 10E.

End of the standstill period where removal unchallenged

10C.—(1) The standstill period referred to in regulation 10B comes to an end in accordance with this regulation where—

- (a) the proposed removal of the patient from Scotland has not been appealed against to the Tribunal under regulation 13; and

- (b) the Commission has not made a reference to the Tribunal in respect of the proposed removal under regulation 17.
- (2) Once the standstill period has come to an end in accordance with this regulation, it remains at an end despite an appeal or reference to the Tribunal subsequently being made.
- (3) If the patient is to be transferred to a place within the United Kingdom, the standstill period ends at the end of the day which falls—
 - (a) 7 days after the warrant is issued; or
 - (b) 3 working days after the warrant is issued if—
 - (i) the Scottish Ministers consider it necessary that the patient be removed from Scotland as a matter of urgency; and
 - (ii) the Commission agrees that is necessary.
- (4) If the patient is to be transferred to a place outwith the United Kingdom, the standstill period ends—
 - (a) at the end of the day which falls 28 days after the warrant is issued;
 - (b) at the end of the day which falls 7 days after the warrant is issued if—
 - (i) the Scottish Ministers consider it necessary that the patient be removed from Scotland as a matter of urgency; and
 - (ii) the Commission agrees that is necessary; or
 - (c) if the Scottish Ministers specify a day in the warrant in accordance with paragraph (5), at the end of the specified day.
- (5) The Scottish Ministers—
 - (a) may specify a day under paragraph (4)(c) only if they are satisfied that—
 - (i) appropriate care and treatment would be given to the patient at the place to which the patient is to be transferred were the patient to arrive there on that day; and
 - (ii) it would be in the patient’s best interests to arrive there earlier than the patient would be likely to arrive were a day not specified under paragraph (4)(c);
 - (b) may not specify a day under paragraph (4)(c) which falls fewer than 7 days after the warrant is issued;
 - (c) must, if they specify a day under paragraph (4)(c), draw the fact that they have done so to the Commission’s attention.
- (6) For the purposes of paragraph (3), a working day is any day which is not a—
 - (a) Saturday;
 - (b) Sunday; or
 - (c) bank holiday in Scotland under the Banking and Financial Dealings Act 1971⁽¹⁾.

End of the standstill period following appeal against removal

10D.—(1) The standstill period referred to in regulation 10B comes to an end in accordance with this regulation if (before the period has come to an end in accordance with regulation 10C) the proposed removal of the patient from Scotland has been appealed against to the Tribunal under regulation 13.

(1) 1971 c.80; which has been relevantly amended by the St Andrew’s Day Bank Holiday (Scotland) Act 2007 (asp 2), section 1.

(2) The standstill period ends at the end of the day on which the Scottish Ministers give notice to the patient's responsible medical officer that the period has ended.

(3) If—

- (a) the Tribunal makes an order that the proposed removal shall not take place; and
- (b) that decision by the Tribunal is appealed against,

the Scottish Ministers are to give the notice mentioned in paragraph (2) as soon as practicable after that appeal has been finally determined.

(4) If—

- (a) the Tribunal refuses to make an order that the proposed removal shall not take place; and
- (b) that decision by the Tribunal is appealed against within 21 days of it being made,

the Scottish Ministers are to give the notice mentioned in paragraph (2) as soon as practicable after that appeal has been finally determined.

(5) If—

- (a) the Tribunal refuses to make an order that the proposed removal shall not take place; and
- (b) that decision by the Tribunal is not appealed against within 21 days of it being made,

the Scottish Ministers are to give the notice mentioned in paragraph (2) as soon as practicable after that period of 21 days has ended.

(6) But, the Scottish Ministers may give the notice mentioned in paragraph (2) before the end of the 21 day period referred to in paragraph (5) if—

- (a) the patient consents in writing to being removed from Scotland without delay;
- (b) an approved medical practitioner, who is not the patient's responsible medical officer, certifies that the patient is capable of giving that consent; and
- (c) the patient's named person (if the patient has one) gives written consent to the patient being removed from Scotland without delay.

(7) The references in this regulation to an appeal against a decision by the Tribunal are to an appeal under section 320 or 322 of the 2003 Act (as applied by these Regulations).

(8) For the purposes of this regulation, where an appeal against a decision by the Tribunal is made to the sheriff principal, the appeal is finally determined—

- (a) at the end of the period of 21 days beginning on the day that the sheriff principal decides the appeal; or
- (b) if, before the end of that period, the sheriff principal's decision is appealed against to the Court of Session, when the Court has finally determined that further appeal.

End of standstill period following reference by Commission

10E.—(1) The standstill period referred to in regulation 10B comes to an end in accordance with this regulation if—

- (a) (before the period has come to an end in accordance with regulation 10C) the Commission makes a reference to the Tribunal under regulation 17 in respect of the proposed removal; and
- (b) the proposed removal of the patient from Scotland has not been appealed against to the Tribunal under regulation 13.

(2) The standstill period ends at the end of the day on which the Scottish Ministers give notice to the patient’s responsible medical officer that the period has ended.

(3) The Scottish Ministers are to give the notice mentioned in paragraph (2) as soon as practicable after the reference to the Tribunal has been finally determined.”.

Revocation of regulation 11

14. Omit regulation 11 of the principal Regulations (suspension of effect of warrant).

Amendment of regulation 13

15.—(1) Regulation 13 of the principal Regulations (appeal to Tribunal) is amended as follows.

(2) For paragraph (1) substitute—

“(1) Following a decision under regulation 8 that a patient be removed from Scotland, an appeal against the proposed removal may be made to the Tribunal by—

- (a) the patient; or
- (b) the patient’s named person.”.

(3) After paragraph (2) insert—

“(3) An appeal may not be made to the Tribunal under paragraph (1) after the patient has been removed from Scotland.”.

New regulation 13A

16. After regulation 13 of the principal Regulations insert—

“Ability to initiate appeal if no named person

13A.—(1) An appeal under regulation 13 may be initiated by one of the persons mentioned in paragraph (2) if—

- (a) the patient does not have a named person;
- (b) the patient has attained the age of 16 years; and
- (c) the patient is incapable in relation to a decision as to whether to initiate an appeal.

(2) The persons who may initiate an appeal by virtue of paragraph (1) are—

- (a) any guardian of the patient;
- (b) any welfare attorney of the patient; and
- (c) unless the patient has made a written declaration precluding the person (or all persons) from initiating the appeal—
 - (i) the patient’s primary carer; and
 - (ii) the patient’s nearest relative.

(3) In paragraph (1)(b), “incapable” has the same meaning as in section 250 of the 2003 Act.

(4) Subsections (2), (3) to (5) and (7) of section 250 of the 2003 Act apply to a declaration mentioned in paragraph (2)(c) as they apply to a nomination to which subsection (1) of that section relates (with that section to be read accordingly).”.

New regulation 13B

17. After regulation 13A of the principal Regulations insert—

“Tribunal’s duties to notify Scottish Ministers

13B.—(1) The Tribunal must notify the Scottish Ministers of an appeal under regulation 13 as soon as practicable after the appeal is made.

(2) The Tribunal must notify the Scottish Ministers of its decision in an appeal under regulation 13 as soon as practicable after the decision is made.”.

Amendment of regulation 14

18.—(1) Regulation 14 of the principal Regulations (appeals to the sheriff principal and Court of Session against certain decisions) is amended as follows.

(2) In paragraph (1), for “regulation 12(2)” substitute “regulation 13(2)”.

(3) In paragraph (2)(a), for “paragraphs (b) to” substitute “paragraphs (c) and”.

(4) After paragraph (3) insert—

“(4) In relation to a case in which section 320 or 321 of the 2003 Act applies by virtue of this regulation, subsection (5) of section 257A of the 2003 Act⁽²⁾ (ability to act if no named person) is to be ignored.”.

Amendment of regulation 15

19.—(1) Regulation 15 of the principal Regulations (appeal to the Court of Session against certain decisions of the Tribunal) is amended as follows.

(2) In paragraph (2)(a), for “paragraphs (b) to” substitute “paragraphs (c) and”.

(3) After paragraph (2) insert—

“(3) In relation to a case in which section 322 applies by virtue of this regulation, subsection (5) of section 257A of the 2003 Act (ability to act if no named person) is to be ignored.”.

Revocation of regulation 16

20. Omit regulation 16 of the principal Regulations (delay of removal pending further appeal).

Amendment of regulation 17

21. In regulation 17(2) of the principal Regulations (reference to Tribunal by Commission), for sub-paragraphs (b) and (c) substitute—

“(b) either—

(i) the patient’s named person; or

(ii) if the patient does not have a named person—

(aa) the patient’s primary carer; and

(ab) the patient’s nearest relative;”.

Amendment of regulation 20

22.—(1) Regulation 20 of the principal Regulations (notification requirements: post removal) is amended as follows.

(2) In paragraph (1), after “officer” insert “, the Scottish Ministers”.

(2) Section 257A of the Mental Health (Care and Treatment) (Scotland) Act 2003 is inserted by the Mental Health (Scotland) Act 2015, section 25.

(3) Omit paragraph (3).

CHAPTER 3

Amendments to Part 3 (Reception of patients in Scotland)

Amendment of regulation 24

23. In regulation 24(4) of the principal Regulations (reception in Scotland: consent), after subparagraph (b) insert—

- “(ba) the name and address of any guardian of the patient;
- (bb) the name and address of any welfare attorney of the patient;”.

Amendment of regulation 33

24.—(1) Regulation 33 of the principal Regulations (patients subject to compulsory treatment order) is amended as follows.

(2) The text of the regulation, as it was immediately before this regulation came into force, becomes paragraph (1).

(3) After that paragraph insert—

“(2) Where a patient is being treated as if subject to a compulsory treatment order by virtue of regulation 30, an application may be made in respect of that order under section 100 of the 2003 Act (application by patient etc. for revocation or variation of order) before the end of the 3 month period mentioned in subsection (4) of that section.

(3) But an application may not be made by virtue of paragraph (2) until the patient’s responsible medical officer has decided not to make a determination under regulation 38 revoking the order.”.

Amendment of regulation 36

25. In regulation 36 of the principal Regulations (assessment of patient: post transfer), omit paragraph (7).

New regulation 36A

26. After regulation 36 of the principal Regulations insert—

“Interpretation of regulation 36(3): conflict of interest

36A.—(1) For the purposes of regulation 36(3), there is to be taken to be a conflict of interest in relation to the medical examination of a patient if the medical practitioner who carries out the examination is related to the patient in any degree specified in the schedule of the Conflict of Interest Regulations.

(2) Any enactment which governs the interpretation of the schedule of the Conflict of Interest Regulations for those Regulations’ own purposes also governs the interpretation of the schedule for the purposes of regulation 36(3).

(3) In this regulation, “the Conflict of Interest Regulations” means the Mental Health (Conflict of Interest) (Scotland) Regulations 2017(3).”.

Amendment of regulation 38

27.—(1) Regulation 38 of the principal Regulations (responsible medical officer’s duty to revoke: interim compulsory treatment order, compulsory treatment order and compulsion order) is amended as follows.

(2) In paragraph (2)(a), for “regulation 36(4)(c)” substitute “the applicable sub-paragraph of regulation 36(4)”.

(3) After paragraph (3) insert—

“(4) In paragraph (2)(a), “the applicable sub-paragraph of regulation 36(4)” means—

- (a) in the case of a patient subject to a compulsion order, sub-paragraph (a) of regulation 36(4);
- (b) in the case of a patient subject to an interim compulsory treatment order or a compulsory treatment order, sub-paragraph (c) of regulation 36(4).”.

Amendment of regulation 41

28.—(1) Regulation 41 of the principal Regulations (notification requirements: post assessment) is amended as follows.

(2) After paragraph (3)(b) insert—

- “(ba) any guardian of the patient;
- (bb) any welfare attorney of the patient;
- (bc) any person named in the request for consent to the patient’s reception in Scotland as the patient’s nearest relative or primary carer (but see paragraphs (3A) to (3C));”.

(3) After paragraph (3) insert—

“(3A) Before giving notification under paragraph (2) to a person named as the patient’s nearest relative or primary carer, the managers of the receiving hospital must establish whether the patient objects to notification being given to that person.

(3B) If the patient objects to the person mentioned in paragraph (3A) being notified, the person is not to be notified under paragraph (2).

(3C) Paragraphs (3A) and (3B) do not apply where the person mentioned in paragraph (3A) is the patient’s named person, guardian or welfare attorney.”.

Revocation of regulation 45

29. Omit regulation 45 of the principal Regulations (visits to patients: duty on Commission).