

POLICY NOTE

THE MENTAL HEALTH (CROSS-BORDER TRANSFER: PATIENTS SUBJECT TO DETENTION REQUIREMENT OR OTHERWISE IN HOSPITAL) (SCOTLAND) AMENDMENT REGULATIONS 2017

SSI 2017/229

The above instrument was made in exercise of the powers conferred by section 290 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The instrument is subject to affirmative procedure.

Policy Objectives

This instrument amends the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 to take account of provisions in the Mental Health (Scotland) Act 2015, alongside some amendments to the regulations to improve their operation. The 2005 regulations set out the process for transferring a patient who is detained under either the 2003 Act or the relevant provisions of the Criminal Procedure (Scotland) Act 1995 from Scotland; transferring a patient who is not detained but who is in hospital for treatment for a mental disorder from Scotland to outwith the UK; and the reception of patients into Scotland from other UK jurisdictions who are detained on a corresponding order.

Provisions derived from the Mental Health (Scotland) Act 2015

The 2015 Act makes amendments to the appeal rights that require to be included within the regulations under section 290. The instrument introduces a right of appeal for named persons against a decision to transfer the patient from Scotland and, where there is no named person and the person does not have capacity, for the welfare guardian, welfare attorney, primary carer, or nearest relative. This is in line with the new provisions in section 25 of the 2015 Act, as well as allowing for an onward appeal against the Tribunal's decision. It also extends the process for receiving a patient on a corresponding order to those transferring from another EU member state.

Other changes

This instrument also makes changes which will improve the operation of cross-border transfers, including minor and technical changes.

Removal of patients from Scotland:

The 2005 regulations require certain parties to be notified of a decision and to allow them to make representations about the decision to transfer. These regulations extend the parties to be notified to include the patient's named person, or if they do not have a named person, the patient's primary carer or nearest relative (if known). This provides an additional safeguard for a patient who may be removed from Scotland.

The 2005 regulations set out timescales for the cross-border transfer process before and after the Scottish Ministers decision whether to grant a warrant or not. These timescales allow certain actions to take place, such as the patient or named person may make representations to

the Responsible Medical Officer (RMO) or to Scottish Ministers before the decision, or an appeal to the Mental Health Tribunal for Scotland may be made after the decision. In some circumstances, all parties may agree to the transfer, and the patient may wish it to happen as quickly as possible. Although there is some provision for the statutory period after the decision is made to be reduced, in some cases it would be beneficial for the patient to be removed as soon as possible after the warrant is granted.

The regulations therefore introduce a fast-track process which allows for a quicker removal where the patient and named person agree to a fast-track transfer. The fast-track process includes certain safeguards to ensure this is only used where the patient wishes for a faster transfer, including that the application must include the written consent of the patient and named person and that an approved medical practitioner other than the RMO certifies that the patient is capable of agreeing to this.

Alongside this change, adjustments are made to the regulations setting out how a patient is removed in accordance with a warrant after the Scottish Ministers agree to the transfer or following any proceedings before the Tribunal etc. The practical process remains largely the same, but the timescales following any Tribunal hearing are set out more clearly.

Reception of patients into Scotland:

The regulations introduce an ability to appeal against the RMO's decision to place the patient on a compulsory treatment order (if applicable) within the first three months of the order being made (the equivalent order in Scotland is treated as having been made on the date the order in the original jurisdiction is made). A patient can only appeal to the Tribunal about being subject to a compulsory treatment order within the first four weeks of the order being made and after three months of the order being made. The equivalent order in the original jurisdiction may not be subject to the same safeguards as in Scotland. The transferring patient could be disadvantaged in relation to a patient whose order was made in Scotland. There may also be disagreement as to whether a compulsory treatment order should be seen as the equivalent order. This appeal right also allows the Tribunal to consider whether the order should be varied or revoked in such a circumstance.

Regulation 41 of the 2005 regulations requires certain information (such as the date of transfer and name and contact details of the patient's RMO following transfer) to be shared with certain parties. When a person transfers to Scotland, they are unlikely to have yet chosen whether to have a named person or not. This regulation is amended so that this information is also shared with any guardian or welfare attorney and with the patient's carer or nearest relative. This information will not be shared with the patient's carer or nearest relative if the patient objects.

The Mental Welfare Commission will no longer have a duty to visit a patient within six months of their reception into Scotland, but will still have the power to do so under the 2003 Act.

Consultation

Proposals for changes to these regulations were included in a public consultation which took place from 25 July and 17 October 2016. Policy officials also set up a stakeholder reference group which not only helped shape the form of the consultations but also focussed on the implementation of the Act itself. The first meeting of the group was on 18 December 2015

and further meetings took place during 2016, with a final meeting in May 2017. The reference group consists of a range of stakeholder organisations as set out on the Scottish Government mental health law webpages (for example the Mental Health Tribunal for Scotland, Mental Welfare Commission, professional groups, service providers, rights, advocacy and service user representation organisations) and has had a key role in providing advice and recommendations.

The proposals put forward in the consultation were widely supported. As a result of consultation some amendments were made, including those below.

The consultation proposed much narrower circumstances for the patient's ability to appeal a decision to place them on a compulsory treatment order as brought in by amendments to regulation 33 of the 2005 regulations, as it set out a potential gap for transferring patients within three months of their order being granted. Consultation responses included a suggestion that a transferring patient should be able to appeal to the Tribunal the decision to place them on a compulsory treatment order as the equivalent order. There may not always be a clear equivalent if the patient had transferred from outwith UK jurisdictions and an appeal provision is an appropriate safeguard in that instance. Such an appeal provision overlaps, and is wider than, the narrow circumstances we had set out in the consultation. This single amendment to the appeal right provides a simple route that covers both circumstances.

The carer or nearest relative will not be notified under amended regulation 41 of the 2005 regulations if the patient objects. Consultation responses generally agreed that this would protect the patient's right to autonomy and privacy.

A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website on 12 January 2017 with ISBN 978-1-78652-727-1.

Impact Assessments

This SSI is part of a package of SSI to come into force on 30 June 2017. Impact assessments including a Privacy Impact Assessment (PIA), Equality Impact Assessment (EQIA); Child Rights and Wellbeing Impact Assessment (CRWIA) are to be concluded on the policy and will be provided with the second tranche of SSIs at the end of May 2017. Mental disorder is included in the definition of the protected characteristic of disability under the Equality Act 2010. Therefore it is likely that any effects that the SSI provisions have on service users will particularly impact the protected characteristic of disability.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) is to be concluded and will be provided with the second tranche of SSIs at the end of May 2017. The impact of this policy on business is expected to be small.

Scottish Government
Population Health Directorate

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