EXPLANATORY MEMORANDUM TO

THE MENTAL HEALTH (HOSPITAL, GUARDIANSHIP AND TREATMENT) (ENGLAND) (AMENDMENT) REGULATIONS 2012

2012 No. 1118

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument changes the administrative procedures that need to be followed when a mental health patient who is subject to a community treatment order (CTO) consents to treatment. It removes the requirement for a "second opinion appointed doctor", appointed by the Care Quality Commission (CQC), to certify that the treatment is appropriate in the patient's case. The change is being made in the light of experience of operating the arrangements for supervised community treatment (SCT) which were introduced into the Mental Health Act 1983 (the 1983 Act) by the Mental Health Act 2007 on 3 November 2008.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 SCT enables people who have been detained in hospital for treatment under the 1983 Act to continue their treatment in the community under a CTO once they are sufficiently recovered. One of the requirements put in place in 2008 was that an SCT patient could not be given specified treatment unless a second opinion appointed doctor (SOAD) had certified on a statutory form that the treatment was appropriate in the patient's case. This is known as the "certificate requirement".

4.2 When SCT was introduced, the SOAD opinion was required for SCT patients who consented to their treatment, whether or not they had the capacity or competence to consent, as well as those who did not.

4.3 Section 299 of the Health and Social Care Act 2012 removes the requirement in primary legislation for a SOAD opinion in the case of competent consenting SCT patients. This opens the way to amending the detailed requirements set by the Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008, which this instrument accordingly does. The instrument inserts a new statutory form into the 2008 Regulations . This new form (CTO12) is an alternative to a longer form (CTO11) that still has to be completed by a SOAD where the patient does not consent.

4.4 This reflects broad agreement that section 299 takes a generally unwelcome burden off mentally ill people, as well as reducing bureaucracy within CQC and mental health services, and it would be helpful to address this as soon as possible. It will achieve a reduction of approximately 70% in the number of SOAD opinions required for SCT patients.

5. Territorial Extent and Application

5.1 This instrument only applies in England.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 When SCT was introduced on 3 November 2008 the certificate requirement was applied to SCT patients whether they consented to the treatment in question or not. This was because there were concerns about what was a new procedure and also that as patients on SCT have less frequent contact with their clinicians, changes to their capacity to consent would be spotted less quickly. Otherwise, unless it is immediately necessary, treatment without consent would require a new SOAD certificate, which could cause delay.

7.2 However, a similar certificate requirement has never applied to consenting patients who are still liable to be detained in hospital. This means that SCT patients have to undergo more examinations, which seems inequitable. This perception of inequity and unnecessary duplication may be a significant part of the explanation for the degree of SCT patients' non-compliance with SOAD appointments.

7.3 In addition to its more exacting certificate requirement, the take-up of SCT has been far faster than the Department forecast. This resulted in larger than anticipated demand for SOAD opinions. CQC, who are responsible for the SOAD service in England, have found it far more difficult to arrange and complete SOAD visits to patients on SCT, than visits to detained patients. This has put considerable pressure on the SOAD service and has resulted in a backlog of requests for SOAD visits. This means that patients for whom the SOAD opinion is important may be kept waiting for it while opinions are given to those for whom it is less significant.

7.4 The changes introduced by the 2012 Act will mean that where SCT patients consent to treatment they will no longer have to undergo an additional examination by a SOAD. This will reduce administrative burdens on local mental health services and CQC. As the SOAD system has been struggling to cope with the demand for second opinions, we do not expect this proposal to achieve significant financial savings. It will, however, target the available

resources more efficiently and effectively on the people for whom a SOAD opinion is most significant and appropriate.

8. Consultation outcome

8.1 No formal consultation on the amendment regulations has been undertaken, but the Department's proposals were discussed with various mental health organisations and CQC before the relevant provision was included in what is now the Health and Social Care Act 2012.

9. Guidance

9.1 We are notifying the service through "The Week" (the NHS Chief Executive's weekly bulletin to senior health and social care managers). The information is also going into a bulletin which CQC sends to all public and private sector providers once a month and into a more targeted bulletin they send to mental health service providers.

10. Impact

10.1 No impact assessment has been undertaken as the regulations make an administrative change to introduce an alternative form to give effect to the parent legislation. CQC estimate that in 2011 about 2,900 out of 4,100 SCT SOAD requests have been for consenting patients. The measure will achieve a reduction of approximately 70% in the number of SOAD opinions required for SCT patients.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 CQC will monitor the effects of these changes. The regulations and their parent provisions will also come up for routine post-legislative scrutiny in due course.

13. Contact

13.1 Clive Marritt at the Department of Health on 020 7972 4492 or on e-mail at clive.marritt@dh.gsi.gov.uk can answer any queries regarding the instrument.