

Executive Note

The Mental Health (England and Wales Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008 SSI/2008/ 356

The above instrument is being made in exercise of the powers conferred by Section 289 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). The instrument is subject to the affirmative resolution procedure.

Policy Objectives

The 2003 Act makes provision for community-based Compulsory Treatment Orders (CTO) and Compulsion Orders (CO); section 289 of the 2003 Act is a power to Scottish Ministers to make regulations providing for cross-border transfer of patients subject to a requirement other than detention, which includes patients subject to community based CTOs and COs. Such regulations had not however been made under this power, to enable a patient on such a community-based order to transfer from Scotland to another country in the UK and be placed on a similar order. This is because there have, to date, been no orders comparable to CTOs or COs in those countries to enable Scottish patients to transfer to an equivalent statutory order, or to which patients in other parts of the UK are subject such that they could transfer to a community based order in Scotland.

However, the current situation is set to change. The UK government are planning to implement the main provisions of the Mental Health Act 2007 (which amends the Mental Health Act 1983), which, with accompanying regulations, will bring into effect from 3rd November 2008 provisions for Supervised Community Treatment Orders (SCTO) in England and Wales. This provision will only apply to England and Wales at present and not to other UK territories that do not have similar orders under their legislation.

To tie in with the introduction of these provisions in England and Wales the Scottish Government is introducing these regulations under section 289 of the 2003 Act. The order will now enable the cross border transfer of patients on community based orders to England and Wales and allow patients on SCTOs in England and Wales to transfer to Scotland.

These regulations are similar to those made under section 290 of the 2003 Act (SSI 2005/467 – “the s290 regulations”) which enables the cross border transfer of patients detained in hospital. However, there are some significant differences. The main features of these new regulations for community based patients are:

Patients transferring from Scotland to England or Wales

- It is for the patient (or their named person where the patient does not have capacity) to initiate the request for a transfer (Regulation 3). This is in contrast to the section 290 regulations regime where the patient’s Responsible Medical Officer (RMO) initiates and indeed requires the patient to transfer to another country (e.g for treatment).
- The patient’s RMO is responsible for giving notice of the fact of the patient’s wish to move to the patient’s Mental Health Officer (MHO), primary carer and relevant others. (Regulation 3)

- The MHO must interview the patient and make their views on the transfer known to the RMO. (Regulation 4)
- The patient's RMO is responsible for satisfying him or herself through liaison with the receiving authorities that there are suitable arrangements in place in England or Wales to receive the patient, and may only authorise the transfer if so satisfied. (Regulation 5)
- Where the patient's RMO is so satisfied that suitable arrangements are in place and has also taken account of: the best interests of the patient, the risk to the safety of any person, the views of those consulted, and has notified the receiving RMO and authorities of any recorded matter specified in the patient's order, he or she may agree to the transfer taking place. The RMO is then responsible for issuing the transfer warrant and notifying the patient's MHO and others. After the transfer has taken place the RMO must notify the MHO and the Mental Welfare Commission (MWC). (Unlike the section 290 regulations regime for hospital based patients, there is no role for Scottish Ministers in making the decision about transfer or issuing the warrant for community based patients under these regulations). (Regulations 5, 6, 7, 8)
- There is no provision for an appeal to the Mental Health Tribunal for Scotland (MHTS) against the decision to transfer the patient (because the patient, or, where appropriate, their named person, has initiated the request for transfer). However, regulation 8 and 9 provide for a right of appeal to the patient and the patient's named person to the Tribunal against refusal by the RMO of a request, and onwards from the Tribunal to the Court.
- The regulations make appropriate provision for the patient to be escorted to England or Wales where the RMO considers this is appropriate and for appropriate action to be taken by any such escort should the patient abscond or fail to appear at the agreed destination. (Regulations 11 and 12).

Patients transferring from England or Wales to Scotland:

- The managers of the receiving hospital are responsible for liaising with the managers of the sending hospital in England or Wales and agreeing (or not agreeing) to accept the patient on transfer. (Regulation 14)
- Unlike the section 290 regulations regime for hospital based patients, there is no role for Scottish Ministers in approving transfers from England or Wales.
- The managers of the receiving hospital or the RMO appointed by them for the patient may make arrangements for the patient's transfer to their destination in Scotland where they consider this necessary. It is not essential to make such arrangements where the RMO does not consider them necessary. (Regulation 15)
- The hospital managers are responsible for notifying the appropriate local authority of the details of the patient's planned transfer. (Regulation 16)

- The regulations make provision that an RMO and MHO should be appointed for the incoming patient and appropriate duties carried out (as for any patient who becomes subject to a new CTO or CO). (Regulation 18)
- Any patient on an SCTO in England or Wales being transferred to Scotland will become subject to a CTO or CO (as appropriate) in the community under the 2003 Act on transfer and be subject to measures which most closely correspond or are similar to those in place while the patient was on the SCTO prior to transfer. (Regulation 19, 20, 21)
- Provision is made for any escorts of the patient to have appropriate powers (although it is not essential that the patient is escorted). Should the patient abscond while being escorted then appropriate provisions are made for the patient to be apprehended. (Regulation 22 and 23)
- The patient's MHO, once appointed, must carry out the duties required by the Act to identify the patient's named person and inform the RMO. (Regulation 24)
- The new RMO when appointed must carry out an assessment of the patient within 7 days and take the appropriate action: –
 - to inform the hospital managers of the outcome of the assessment;
 - to discharge the patient where they consider the patient does not meet the criteria for compulsion; or
 - to draw up a care plan etc where they consider the patient does meet the criteria for compulsion. (Regulations 25, 26, 27, 28 and 29)
- The managers of the hospitals must notify the parties listed of the outcome of the assessment and whether or not the patient remains subject to the provisions of the 2003 Act. (Regulation 28)
- Once transferred the patient becomes subject to the full provisions of the 2003 Act, including review and the MWC will be required to visit each transferred patient within 6 months. (Regulations 30 to 32)

Like the regime under the section 290 regulations, these regulations make provision within Scotland. UK Government legislation (SI 2005/2078, an Order made under section 104 of the Scotland Act 1998 consequential on the 2003 Act) makes complementary provision in respect of the law of England and Wales and Northern Ireland as regards the reception of patients from Scotland and the removal of patients to Scotland. In particular: article 2 of that Order provides that where patients are removed from Scotland to England and Wales they will become subject to the measure in England and Wales which most closely corresponds to the measure to which the patient was subject in Scotland, and, where the patient is subject to a prison sentence the sentence will be treated as if it were imposed in a court in England and Wales; article 8 thereafter provides that any person who may be taken into custody in Scotland under the 2003 Act or regulations made thereunder may be taken into custody in any other part of the UK and returned to Scotland. The Mental Health Act 2007 amends that existing statutory regime, from 3rd November 2008, such that article 2 of that Order is now revoked and replaced with similar arrangements for reception of patients within section 80C of the Mental Health Act 1983 for community patients, whilst article 8 of the Order is now

amended to include specific reference to regulations made under section 289 of the 2003 Act in anticipation of these regulations being brought forward.

Consultation

The following have been consulted on a draft of the instrument:

- Responsible Medical Officers (RMOs) and psychiatric staff via Medical Directors of NHS Boards;
- Mental Health Officers via the Association of Directors of Social Work;
- The Royal College of Psychiatrists;
- The Mental Health Tribunal for Scotland; and
- The Mental Welfare Commission for Scotland.

Responses were received on behalf of NHS Grampian, NHS Lothian, the Association of Directors of Social Work and the Royal College of Psychiatrists. All respondees were in favour of the proposed regulations.

The Mental Health Tribunal for Scotland and the Mental Welfare Commission for Scotland were additionally consulted on the proposed content of the draft of the instrument before the draft regulations themselves were issued for the wider consultation.

Financial Effects

The instrument has no financial effects on the Scottish Government or any other organisation.

Primary and Community Care Directorate|
Mental Health Division
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