POLICY NOTE

THE MENTAL HEALTH (ABSCONDING) (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2017

SSI 2017/XXX

The above instrument was made in exercise of the powers conferred by sections 309, 310 and 326(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The instrument is subject to affirmative procedure.

Policy Objectives

This instrument is made using powers in the 2003 Act that are amended by the Mental Health (Scotland) Act 2015 ("the 2015 Act"). This instrument amends the Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005 ("the 2005 Regulations") and the Mental Health (Absconding Patients from Other Jurisdictions) (Scotland) Regulations 2008 ("the 2008 Regulations").

The 2005 Regulations

Section 310 of the 2003 Act gives power to make regulations in relation to patients who are subject to certain orders and directions who then abscond or otherwise fail to meet the requirements imposed upon them. Section 310, and regulations made under that section, only applies to such patients who abscond within Scotland. Section 310 is amended by the 2015 Act to allow those regulations to specify persons authorised by the patient's responsible medical officer as being persons who may take such patients into custody and take other steps**.**

Regulation 2 of this instrument, then, adds to the list of specified persons in the 2005 Regulations to make provision for such authorised persons.

This regulation makes provision similar to that in section 303(3)(a)(iv) of the 2003 Act which applies for civil patients.

The 2008 Regulations

Medical treatment

The overriding intention in amending the 2008 Regulations is to allow medical treatment to be given to persons from elsewhere in the UK, the Isle of Man, the Channel Islands and other European Union (EU) member states who have absconded and are subsequently taken into custody in Scotland. Such treatment would be given to them prior to them being returned to the place from which they have absconded**.**

Where a patient absconds from a hospital or other such place in Scotland, the patient will be taken back to the hospital or other address in accordance with existing legislation and the order or certificate to which they are subject continues to run. Accordingly, authority to treat the patient continues under the original order or certificate and Part 16 of the 2003 Act will apply to the giving of such treatment. However, there is no provision to authorise the giving

of treatment to a person who absconds from detention in another jurisdiction and who is in custody pending return.

The 2015 Act amends the 2003 Act so that provision (through regulations) can be made to allow for treatment of persons who have absconded to Scotland. Scottish Ministers may make regulations applying sections of Part 16 with modifications, with the exception of treatments in sections 234(2) or 237(3) i.e. electro-convulsive therapy and certain surgery. They are expressly forbidden.

This instrument inserts a new **regulation 8** into the 2008 Regulations which defines the relevant corresponding measures or requirements that an absconding person must be subject to, before consideration can be given to any form of treatment being provided under Part 16. The categories all relate to the person being detained, because of a mental disorder, in the home jurisdiction. There are also requirements in new regulation 8 for the person to be examined by an approved medical practitioner who, among other things, needs to consider that there would be risks (to the absconding person or to others) if treatment was not given.

In most cases, it is expected that the person will be returned to their home jurisdiction within a few days. During that time, there may be a need to give medical treatment to that person to treat their mental disorder. Part 16 of the 2003 Act covers medical treatment and was introduced because there are some treatments for mental disorder where further safeguards are justified particularly, but not only, in the circumstances where the treatment is given without consent – this part makes provision for such safeguards of treatment. In applying provisions from Part 16 the aim is to provide for any required medication or treatment to be given so that the person is well enough to travel to the original jurisdiction.

New **regulations 9 to 14** make modifications to the sections of Part 16 as they apply to absconding persons.

New regulation 9 makes modifications in the application of section 233 which relates to the role of medical practitioners who are used, for example, to provide independent second opinions on matters relating to medical treatment. **New regulations 10** to **12** make modifications in the applications of sections 238, 240 and 241. These sections place restrictions on how certain types of treatment can be given (section 240 covers medication given for the purpose of reducing sex drive, provision of nutrition by artificial means and any other medicine). These types of medical treatment can only be given with the person's informed consent (section 238) or under section 241 where the patient refuses to consent or is incapable of consent with the approval of a second opinion by an independent medical practitioner.

New regulation 13 makes modifications in the application of section 242 which covers treatment not mentioned elsewhere under Part 16. It gives the medical practitioner authority to treat either with consent or without consent, after having regard to the likelihood of the treatment's alleviating, or preventing deterioration in the person's condition.

It is in line with the principles of the 2003 Act for the regulations to allow urgent treatment under section 243, providing the treatment is necessary and would be to prevent the person's condition seriously deteriorating, self-harm or threat to others, saving the person's life or to alleviate serious suffering.

In such cases section 243, as modified, could be relied upon if the person is capable and does not consent or is not capable of consent. The effect of new **regulation 14** is that there is provision for necessary urgent medical treatment.

Other amendments to the 2008 Regulations

Regulation 3(2) of this instrument amends the 2008 regulations so that jurisdictions covered are extended to include member states of the EU (other than the UK). **Regulation 3(3)** of this instrument makes minor amendments to regulation 7(e) of the 2008 regulations by adding in the category of interim compulsory treatment order (ICTO). Regulation 7 of the 2008 Regulations makes modifications to section 303 of the 2003 Act as it applies to absconding persons. Section 303 sets out the procedures to be followed once a patient has absconded, including the taking into custody and return of the patient. The addition of interim compulsory treatment order to this provision of the 2008 Regulations flows from an amendment to section 303 made by the 2015 Act.

Code of Practice

Scottish Ministers are under a duty to prepare, publish and revise a Code of Practice ("the Code"). Medical practitioners, mental health officers and others exercising statutory functions, are under a duty to have regard to the Code. The revised Code is in draft and includes updated and enhanced sections which relate to "absconding provisions". In particular clear guidance is giver that practitioners have a duty to inform a person and their families of their rights.

Consultation

Public consultations took place during 2016.

The draft policy proposals were discussed with stakeholders before those proposals were finalised. Given the nature and number of issues, it was not practicable to run a single consultation. In order to maximise responses 2 separate consultations were conducted. The aim was to minimise pressure on stakeholders given that there were over a dozen separate issues which require consideration. By adopting this approach, respondents were afforded appropriate time to prepare a full and considered response.

Part 2 of the consultation on implementation was open between 25 July and 17 October 2016 and proposals relating to absconders were included in that Part. For the most part, respondents were generally supportive of the principles underpinning the proposals and many supported detailed proposals. There was consensus that absconding persons' rights need to be protected. The intention was to replicate those safeguards currently in place for patients who abscond from detention in Scotland and are subsequently detained within Scotland.

The responses to the public consultation contributed to the development of policy on specific issues, as well as an understanding of practical impacts of legislative provisions and policy decisions (both in relation to the impact on the absconding person and the service and cost implications).

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.

Policy officials also set up a Reference Group which not only helped shape the form of the consultations but also focussed on the implementation of the 2015 Act itself. The Reference Group consists of a range of stakeholders (for example the Mental Health Tribunal for Scotland, Mental Welfare Commission for Scotland, professional groups, service providers, rights, advocacy and service user representation organisations) and has had a key role in providing advice and recommendations.

Impact Assessments

This instrument forms part of a package which will come into force on 30 June 2017.

Longer term mental disorder falls within 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 impact the protected characteristic of disability.

This particular instrument does not in itself result in any implications which should be considered in impact assessments.

Financial Effects

The provisions in this instrument were considered as part of the consultation process and this instrument is not expected to lead to costs or savings for business, third or public sector organisations, regulators or consumers.

Scottish Government
Population Health Directorate
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