Draft Regulations laid before the Scottish Parliament under section 326(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003, for approval by resolution of the Scottish Parliament.

D R A F T S C O T T I S H S T A T U T O R Y I N S T R U M E N T S

2017 No.

MENTAL HEALTH

The Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017

Made - - - -	*2017*
Coming into force - -	*30th June 2017*

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The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 289 of the Mental Health (Care and Treatment) (Scotland) Act 2003(**a**) and all other powers enabling them to do so.

In accordance with section 326(4) of that Act(**b**), a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

PART 1

Introductory

Citation

1. These Regulations may be cited as the Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017.

Commencement

2. These Regulations come into force on 30th June 2017.

Meaning of "principal Regulations"

3. In these Regulations, "the principal Regulations" means the Mental Health (England and Wales Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008(**c**).

Saving provision in relation to reception of patients in Scotland

4. The amendment made to the principal Regulations by regulation 10(4) does not apply in relation to a request for consent to the reception of a patient in Scotland made before 30th June 2017.

(**a**) 2003 asp 13; section 289 is amended by S.S.I. 2004/533, by the Adult Support and Protection (Scotland) Act 2007 (asp 10), section 71(1), and by the Mental Health (Scotland) Act 2015 (asp 9), section 32. Section 326(2) of the 2003 Act makes further provision about the exercise of the powers conferred by section 289.

(**b**) Section 326(4) is relevantly amended by the Adult Support and Protection (Scotland) Act 2007 (asp 10), section 71(4); and is modified by the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10), schedule 3, paragraph 5.

(**c**) S.S.I. 2008/356.

PART 2

Amendments to the principal Regulations

CHAPTER 1

Amendments to Part 1 (General)

Amendment of regulation 1

5.—(1) Regulation 1 of the principal Regulations (citation, commencement and interpretation) is amended as follows.

(2) After paragraph (1) insert—

"(1A) These Regulations may also be cited as the Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008.".

(3) In paragraph (2)—

(a) omit the definition of "the appropriate national authority";

(b) after the definition of "relevant requirement" insert—

""relevant territory" means—

(a) England;

(b) Wales;

(c) Northern Ireland;

(d) any of the Channel Islands;

(e) the Isle of Man; or

(f) a member State of the European Union (apart from the United Kingdom);".

Amendment of regulation 2

6.—(1) Regulation 2 of the principal Regulations (application of Regulations) is amended as follows.

(2) In paragraph (3), for "England or Wales" substitute "a relevant territory".

(3) In paragraph (4), for "England or Wales" substitute "a relevant territory".

CHAPTER 2

Amendment to Part 2 (Removal of patients from Scotland)

Amendment of regulation 6

7. In regulation 6 of the principal Regulations (notification of decision), after paragraph (d) insert—

"(da) the patient's primary carer;".

New regulation 8A

8. After regulation 8 of the principal Regulations (appeal to Tribunal) insert—

"**Ability to initiate appeal if no named person**

8A.—(1) An appeal under regulation 8 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;

(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).".

Amendment of regulation 9

9.—(1) In regulation 9 of the principal Regulations (appeal from Tribunal), 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(**a**) (ability to act if no named person) is to be ignored.".

CHAPTER 3

Amendments to Part 3 (Reception of persons in Scotland)

Amendment of regulation 14

10.—(1) Regulation 14 of the principal Regulations (reception in Scotland: consent) is amended as follows.

(2) In paragraph (1), for "England and Wales" substitute "a relevant territory".

(3) In paragraph (3)(a), for "England and Wales" substitute "the territory from which the request is made".

(4) In paragraph (4), after sub-paragraph (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;".

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

(5) In paragraph (5)(b), for "appropriate national authority informing them" substitute "person who made the request stating".

Amendment of regulation 15

11. In regulation 15 of the principal Regulations (directions), for "the appropriate national authority" substitute "anyone".

Amendment of regulation 19

12.—(1) Regulation 19 of the principal Regulations (reception in Scotland: general) is amended as follows.

(2) In paragraph (1), from the beginning to "if that", substitute "Once a patient has been received in Scotland, the patient is to be treated as if the".

(3) In paragraph (2), for "relevant measure" substitute "corresponding requirement".

Amendment of regulation 20

13.—(1) Regulation 20 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 19, 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 specified 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 26 revoking the order.".

Amendment of regulation 22

14. In regulation 22(2)(a) of the principal Regulations (powers of escorts)—

(a) for "England and Wales under the law of that territory" substitute "the territory from which the request for consent to the patient's reception in Scotland was made";

(b) for "England and Wales" in the second place it occurs (or what would be the second place were it not for paragraph (a) of this regulation) substitute "that territory".

Amendment of regulation 25

15. In regulation 25 of the principal Regulations (assessment of patients: post transfer), omit paragraph 5.

New regulation 25A

16. After regulation 25 of the principal Regulations insert—

"**Interpretation of regulation 25(3): conflict of interest**

1.—(1) For the purposes of regulation 25(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 25(3).

(3) In this regulation, "the Conflict of Interest Regulations" means the Mental Health (Conflict of Interest) (Scotland) Regulations 2017(**a**).".

Amendment of regulation 28

17.—(1) Regulation 28 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 32

18. Omit regulation 32 of the principal Regulations (visits to patients: duty on Commission).

Name
Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
Date

(**a**) S.S.I. 2017/xx.

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Regulations make provision about the transfer to and from Scotland of mental health patients who are not subject to a detention requirement.

In this note, "the principal Regulations" means the Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008.

Initiating appeals against decision to refuse transfer from Scotland

Regulation 8 amends the principal Regulations to allow certain individuals to initiate an appeal under regulation 8 of the principal Regulations if the patient lacks capacity to do so personally. An appeal under regulation 8 of the principal Regulations is an appeal to the Mental Health Tribunal for Scotland against a refusal by a patient's responsible medical officer to authorise the patient's transfer from Scotland.

Regulation 9 further amends the principal Regulations to ensure that the individuals enabled to appeal to the Tribunal by virtue of regulation 8 can also initiate subsequent appeals in the courts.

The persons who may be able to initiate an appeal on a patient's behalf by virtue of regulation 8 are the patient's guardian, welfare attorney, primary carer and nearest relative. Those terms are defined in section 329 of the Mental Health (Care and Treatment) (Scotland) Act 2003, with the exception of "nearest relative" which is defined in section 254 of that Act.

Informing primary carer of decision regarding transfer from Scotland

Regulation 7 amends the principal Regulations by adding a patient's primary carer to the list of people who have to be notified of the patient's responsible medical officer's decision about whether or not to authorise the patient's transfer from Scotland.

Transfers into Scotland from places other than England or Wales

Prior to regulations 5(2)(b), 6 and 10 coming into force, the principal Regulations only allowed patients to be transferred into Scotland from England or Wales. Regulations 5(2)(b), 6 and 10 amend the principal Regulations to allow patients to be transferred into Scotland from Northern Ireland, any of the Channel Islands, the Isle of Man or another European Union member State.

As a result of this change, the words "England and Wales" in the title of the principal Regulations give an unduly narrow impression of those Regulations' reach. Regulation 5(1) therefore allows the principal Regulations to be officially cited by a new name which does not include those words.

The amendments made to the principal Regulations by regulations 5(2)(a), 11, 12 and 14 are made in consequence of its becoming possible for patients to be transferred into Scotland from places other than England and Wales.

Requirements for request for consent to transfer into Scotland

Regulation 10(4) amends the principal Regulations so that requests for consent to transfer a patient into Scotland have to include details of any guardian or welfare attorney appointed to the patient.

Regulation 4 stops the amendment made by regulation 10(4) applying to requests for consent made before the Regulations come into force. This means that a request will not be ignored because it does not include details of a patient's guardian or welfare attorney if the request was made before it became a requirement for those details to be included.

Appeal against compulsory treatment order following transfer into Scotland

Regulation 13 amends the principal Regulations so that a patient who has been transferred into Scotland and is being treated as if subject to a compulsory treatment order can appeal to the Mental Health Tribunal for Scotland against the order earlier than would be the case had the patient become subject to a compulsory treatment order on the transfer date under the ordinary domestic process (as opposed to the cross-border transfer process).

Conflicts of interest

Regulations 15 and 16 amend the principal Regulations in consequence of the revocation of the Mental Health (Conflict of Interest) (Scotland) (No. 2) Regulations 2005(**a**) by the Mental Health (Conflict of Interest) (Scotland) Regulations 2017.

Notice following transfer into Scotland

Under regulation 28 of the principal Regulations, following a patient's transfer into Scotland the managers of the hospital which assumes responsibility for the patient must give notice of various things (including the date on which the transfer took place) to certain persons. Regulation 17 extends the list of persons to whom that notice is to be given to include any guardian or welfare attorney of the patient and, unless the patient objects, the patient's nearest relative and primary carer.

Mental Welfare Commission visits following transfer into Scotland

Regulation 32 of the principal Regulations placed the Mental Welfare Commission for Scotland under a duty to arrange a visit to every patient transferred into Scotland within 6 months of the transfer taking place. That duty is abolished by regulation 18.

The Commission continues to have the power under section 13 of the Mental Health (Care and Treatment) (Scotland) Act 2003 to arrange for a visit to be made to a patient transferred into Scotland at any time the Commission considers appropriate.

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