POLICY NOTE

THE MENTAL HEALTH (CROSS-BORDER TRANSFER: PATIENTS SUBJECT TO REQUIREMENTS OTHER THAN DETENTION) (SCOTLAND) REGULATIONS 2017

SSI 2017/xxx

The above instrument was made in exercise of the powers conferred by section 289 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 (England and Wales Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008 to take account of provisions in the Mental Health (Scotland) Act 2015, alongside some amendments to the regulations to improve their operation. The 2008 regulations set out the process for the transfer of patients on community-based orders between Scotland and England or Wales.

Provisions derived from the Mental Health (Scotland) Act 2015

The 2015 Act allows for the regulations to extend provisions for receiving patients to Scotland to patients from other EU member states. The regulations allow the reception of patients from other UK and EU jurisdictions where the patient is subject to an order corresponding to a community-based order in Scotland.

Other changes

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

The 2008 regulations require that if the patient, or the patient's named person (if the patient is not capable) notifies their Responsible Medical Officer (RMO) that they wish to be removed from Scotland, the RMO must determine whether to grant a warrant authorising removal. If the RMO decides not to grant the warrant, then this decision can be appealed by the patient or named person to the Mental Health Tribunal for Scotland. Changes in the 2015 Act mean that patients will have more choice as to whether to have a named person. To ensure that there is no disadvantage to any patient who does not have a named person, and then does not have capacity to make an appeal, in such circumstances the patient's guardian, welfare attorney, primary carer or nearest relative would be able to initiate an appeal on their behalf. This is in line with provisions brought in by section 25 of the 2015 Act. A subsequent appeal against the decision of the Tribunal is also included.

Any patient transferring to Scotland under these regulations will be placed on a corresponding order, which will be treated as having begun from the date the order in the original jurisdiction was made. This means that the patient cannot apply to the Tribunal to have their order reviewed except within the first four weeks after the order is granted or until three months after the order was granted. The regulations remove the three month time bar. This is to provide a safeguard to patients whose order may not have been granted with the

same safeguards if it had been granted in Scotland, for example it may not have been granted by a court or Tribunal or equivalent. It also provides a safeguard where the patient does not consider the order they have been placed on in Scotland to be equivalent to their original order.

Regulation 28 of the 2008 regulations requires certain information to be shared with certain parties, such as the date of transfer and name and contact details of the patient's RMO following transfer. 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 latter two parties 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 cross-border transfer 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 consultation focused on proposed changes to the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 and the proposals put forward in the consultation were widely supported. The proposals put forward in the consultation were widely supported. As a result of comments in the 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 20 of the 2008 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 28 of the 2008 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

11 May 2017