Mental Health Act - Cross Border Legislation, Regulations and Guidance

Cross border transfers, cross border absconding and cross border visits under mental health law – a fact sheet for practitioners

Introduction

The Commission receives frequent calls regarding cross-border issues. These relate to planned transfers of patients, cross-border visits and cross-border absconding. Often professionals have difficulty accessing the correct statutory legislation and guidance detailing the information they require.

This fact sheet outlines the appropriate sections of the legislation, the regulations and the Scottish Government guidance which relates to cross-border issues, and provides links to these, under the relevant sections for ease of access.

List of relevant legislation and regulations

1. Mental Health (Care and Treatment) (Scotland) Act 2003.
3. Mental Health (Cross-border Transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 Scottish Statutory Instrument 2005 No. 467.
7. Mental Health (Cross-border Visits) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 18.1
Cross-border transfers

Who is covered?
The Mental Health (Care and Treatment) (Scotland) Act 2003 provides the legislative framework for:

- the transfer in and out of Scotland of patients subject to detention to other parts of the UK, and the transfer out of Scotland to countries beyond the UK
- the transfer in and out of Scotland of patients subject to requirements other than detention to other parts of the UK
- the transfer of informal patients from Scotland outwith the UK

Patients subject to detention in hospital

The relevant section of the 2003 Act covering these transfers is Section 290. http://www.opsi.gov.uk/legislation/scotland/acts2003/asp_20030013_en_1

In addition the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 SSI 2005 No. 2078 (S.9 ) covers the interaction with the law of all UK jurisdictions, and makes provision consequential to the law of England, Wales and Northern Ireland, in respect of the reception and removal of Scottish patients. http://www.opsi.gov.uk/si/si2005/20052078.htm

The regulations which cover the transfer of patients subject to detention in hospital are Scottish Statutory Instrument 2005 No.467 - The Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005. These clearly detail the process for arranging transfers. http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050467.htm

Part 1 of these regulations outlines who is covered by the regulations i.e. (those subject to detention in hospital, which includes those on suspension of detention and on conditional discharge). It outlines those who are excluded by the regulations (those on assessment, treatment, interim compulsion, temporary compulsion orders or those remanded for inquiry under S 200(2) (b) of 1995 CPSA Act).

Part 2 of these regulations very clearly set out the steps professionals should take in planning and executing, the removal from Scotland of restricted and non-restricted patients, to another part of the UK or elsewhere, and the removal of informal patients outwith the UK. It covers the roles and responsibilities of the professionals concerned, the patient’s right of appeal, the powers of escorts, and absconding during the transfer.

Part 3 of these regulations sets out the same in relation to patients who are subject to detention measures being received into Scotland, which includes those on conditional discharge.
The Health Dept of the Scottish Government in **NHS HDL (2005)43 sets out in detail the correct procedures** to follow to get authorisation from the Scottish Ministers for such transfers. Transfers without this authorisation are not valid. Please note that the phone numbers at the end of NHS HDL (2005) 43 have changed and are as follows:-

Non-restricted patients 01312445668  
Restricted patients (Surnames A-Go) 0131 244 2459  
Restricted patients (Surnames Gr-Ma-including Mac and Mc) 0131 244 2546  
Restricted patients (Surnames Me-Z) 0131 244 1818


**The relevant forms** can be found on the Scottish Government website.

http://www.scotland.gov.uk/Topics/Health/Services/Mental-Health/Law/Forms

**TX1a** Application to Transfer a Patient to a Hospital outside Scotland  
**TX1b** Request for the Transfer of a Patient into Scotland  
**TX4** Appeal Against Cross-border Transfer  
**TX5** Review of a Patient following Cross-border Transfer into Scotland

When patients are transferred out of Scotland, STDC and CTO revocation forms (REV 1 and 2 respectively) should be completed. Patients transferred to and from Scotland will be subject to the nearest equivalent measure that applied before their removal.

Where someone is on suspension of detention and is moving on a permanent or semi-permanent basis to another part of the UK, we would advise that, to avoid complications, it is more appropriate to either;

a) make a hospital transfer to the new hospital  
   or  
   b) vary the order to a community based one and then transfer it

**Expiry dates of orders**

For **people coming into Scotland**, the expiry dates of any measures to which the patient is subject remain the same as if they had not been removed. It is important to ensure that, where necessary, there is sufficient time for application for a new order to be made for the transferred patient, where their current order is approaching its expiry date. The Scottish Government will not therefore authorise transfer unless, there is a minimum of 10 days, and where possible 14 days left before the expiry dates of the patient’s existing detention order.

With regard to **safeguarded treatments under part 16**, our interpretation is that the period of two months referred to in “treatments given over a period of time”, starts when the person is received into Scotland, but it would be best practice to ask for a DMP opinion at the **earliest opportunity**.

For **people transferred out of Scotland to England or Wales**, the order will be deemed to have started on the day of transfer. See section 80B (2) of the Mental Health Act 2007:  
Patients subject to suspension of detention

We advise against suspending detention with the requirement to stay at an address in England, pending application to vary the order. While the Act appears to allow this, there is no agreed mechanism for transferring the conditions of a suspended hospital CTO, from Scotland to England. The best advice we can give is to apply for a warrant to transfer the person to an English hospital, and then they will decide whether to grant leave of absence, or varying the order to a community based order prior to transfer.

Patients subject to requirements other than detention

The regulations which cover the transfer to and from England and Wales, of patients who are subject to requirements other than detention, are Scottish Statutory Instrument 2008 No 356 The Mental Health (England and Wales Cross-border transfer: patients subject to requirements other than detention)(Scotland) Regulations 2008.

These were drawn up in response to the Mental Health Act 2007 for England and Wales, which introduced Community Treatment Orders. The regulations can be accessed via the following link;

http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi_20080356_en_1

Other areas of the UK do not as yet have measures other than detention.

**Part 1** outlines **who the regulations apply to** (those on Community TO/Community CO) and **who is excluded** from them, (those patients subject to interim orders or patients in breach of a CTO or CO).

**Part 2** covers the **removal to England and Wales of patients subject to a requirement other than detention**. A pro forma warrant for the transfer of patients on community orders from Scotland to England or Wales can be accessed by using the link below;

http://www.scotland.gov.uk/Topics/Health/Services/Mental-Health/Law/Forms

The warrant is granted by the RMO, who notifies the relevant parties as set out in the regulations.

**Part 3** covers the **reception of patients from England and Wales** subject to similar requirements. Again the regulations are very detailed and clear and do not require repetition here.

**Calculation of dates etc are exactly the same as for hospital detention (see above)**

**Right of Appeal following transfer for patients on CTO/CO/CCTO/CCOS to Scotland**

S100 states there is no right of appeal in the first 3 months following transfer. We consider this is not compliant with ECHR Article 5, as the order in England is not granted by a court or tribunal. We have raised this with the Scottish Government.

A partial remedy allows the MWC to make reference to the MHTS under s98/162
and any transferred patient can contact us to request this reference in the first 3 months. This reference does not affect patient’s and Named Person’s rights to 2 applications to the MHTS, for revocation of the order within the period of the order (though not within the first 3 months).

**Informal patients in hospital being transferred outwith the UK**

The Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 apply in the same way as for patients detained in hospital. 

The relevant forms can be found on the Scottish Government website. 
http://www.scotland.gov.uk/Topics/Health/Services/Mental-Health/Law/Forms

**TX1a Application to Transfer a Patient to a Hospital outside Scotland**

**TX4 Appeal Against Cross-border Transfer**

Where informal patients are being transferred within the UK, arrangements are made by the RMO directly with the receiving hospital.
Cross-border absconding

Absconding during cross-border transfer

Where any patient subject to detention in hospital absconds during transfer from Scotland, Regulations SSI 467 Article 22 states that Sections 301-303 of the 2003 Act will apply;


Under Section 303 the patient is liable to be taken into custody, and can be returned to the hospital where previously detained or the place where previously required to reside, taken to the hospital where they were to be detained or taken to any other place, considered appropriate by the RMO. Those who may take the patient into custody are the Police, MHO, member of staff of any hospital or a person authorised by the RMO.

Where any patient subject to detention in hospital absconds during transfer to Scotland and absconds within Scotland, Regulations SSI 467 Article 32 applies. This states the patient will be liable to be taken into custody, and returned to the custody of the escorts or, if not practicable, taken to the receiving hospital or any other place considered appropriate by the RMO.


Where any patient subject to requirements other than detention in hospital absconds during transfer from Scotland, Regulations SSI 356 Article 12 state that Sections 301-303 of the 2003 Act will apply.


The patient can be taken into custody and returned to the place where they were previously required to reside, or to any other place considered appropriate by the patient’s RMO.

Where any patient subject to requirements other than detention in hospital absconds during transfer to Scotland and absconds within Scotland, Regulations SSI 356 Article 23 applies. This allows the patient to be taken into custody and returned to the custody of the escorts or, if not practicable, to be taken to any place considered appropriate by the patient’s RMO.


Cross-border absconding - absent from Scotland

Patients absent from hospital or with a residence requirement in Scotland, or a requirement for approval of their MHO to change address may be taken into custody, and returned to Scotland from any other part of the UK, as set out in Articles 8 and 10 Statutory Instrument 2005 No. 2078(S.9) The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005.

http://www.opsi.gov.uk/si/si2005/20052078.htm

Article 8 states that ‘any person who can be taken into custody in Scotland under Sections 301-303 of the 2003 Act, or under regulations made under Section 290 or 310 of the Act, can be taken into custody, and returned to Scotland from any other part of the UK.'
Section 301 covers patients subject to a CTO.  
Section 302 covers patients detained on other civil detention orders.  
Regulations made under Section 290 covers patients detained under the 2003 Act or 1995 Act.  
Regulations made under Section 310 covers those on assessment, treatment, temporary compulsion, interim compulsion and compulsion orders and hospital directions and transfer for treatment directions.

Article 8 also applies to those on suspension of detention of the above measures, or on conditional discharge, or with an order with a residence requirement or requirement for MHO approval for changing address.

Where a patient is on a CTO or CO which has an attendance requirement and an access requirement, but no detention or residence requirement, and has gone from Scotland to England, the patient cannot be regarded as having absconded and cannot be forced to return to Scotland. They are in breach of their CTO/CO requirements, which if in Scotland, would be dealt with under Section 113 of the 2003 Act. Once outside Scotland there does not appear to be any legislative provision to impose their return to Scotland. The effects of such unauthorised absence on a compulsory treatment order a STDC, Section 114(2) or Section 115(2) are set out in Section 304-308 of the Act.

The effects of unauthorised absence on orders or directions in relation to MDOs is set out in Article 9 Scottish Statutory Instrument 2005 No. 463 The Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005.


Cross border absconding - absent from other jurisdictions

Under Section 309 of the 2005 Act, patients from other jurisdictions and subject to corresponding compulsory measures in England, Wales, N Ireland, the Isle of Man or the Channel Islands, may be dealt with in Scotland under Sections 301-303. This covers patients detained in hospital under the 2003 Act and the 1995 Act and includes those who are on suspension of detention or conditional discharge. It also includes those on a CTO or CO where there is a residence requirement. They can be taken into custody and returned to the hospital where they were previously detained, or the place where they are required to reside, or taken to any place that is considered to be appropriate by the RM, someone acting in the equivalent role in the relevant territory, or any medical practitioner. The applicable regulations are The Mental Health (Absconding from Other Jurisdictions) (Scotland) Regulations 2008 SSI2008 No.333


Should a patient require compulsory medical treatment before their return to their country of origin, this will require consideration of a STDC.
Cross-border visits

Visits to Scotland

The relevant section of the 2003 Act is Section 309(a). This amendment of Section 309 is set out in Section 72 of the Adult Support and Protection (Scotland) Act 2007.

http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070010_en_8#pt4-l1g72

The regulations which apply are The Mental Health (Cross-border Visits) (Scotland) Regulations 2008 SSI 2008 No.181


These regulations allow patients detained under the 2003 Act or the 1995 Act or those on suspension of detention, to come to Scotland from other parts of the UK on escorted leave of absence for short term visits. The regulations state that Sections 301-3 apply. Escorts responsible for conveying those patients have the power to restrain and retake such patients, in the event they abscond. Escorts with the approval of the RMO may be relatives or friends, as well as health or social care professionals.

Visits from Scotland to England & Wales

The Mental Health Act 2007 made similar provisions to enable patients in Scotland to make short term escorted visits to England and Wales. This is set out in Section 39(1) which adds two new sections to Section 17 of the 1983 Act.


http://www.legislation.gov.uk/ukpga/1983/20/contents  Section 17

Patients subject to COROs or similar orders in Scotland require permission from the Scottish Ministers in the usual way (NHS HDL 2005(41)


Patients subject to other orders require the approval of their RMOs.