



mental welfare
commission for scotland

Cross-border transfers, cross-border absconding and cross-border visits under mental health law

Advice notes

June 2021



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

Cross-border transfers, cross-border absconding and cross-border visits under mental health law – guidance for practitioners

Introduction

The Commission receives frequent calls on 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, the code of practice and the Scottish Government guidance which relates to cross-border issues and provides links to these under the relevant section for ease of access.

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Summary

List of relevant legislation and regulations

- The cross-border provisions are contained in various parts of mental health law for Scotland, the UK, and other countries in the UK.
- We provide links to the relevant primary and secondary legislation (regulations).
- The reader may refer to these, but throughout this guide we refer to the legislation and explain the main provisions and processes.

Cross-border transfers

Who is covered?

This is an overview of which patients can be covered under cross-border transfer regulations:

- Patients subject to detention in hospital (including CORO patients on conditional discharge)
 - transferring from Scotland to any country
 - coming into Scotland from elsewhere in the UK, Isle of Man, Channel Islands or the EU.
- Community CTO or CO patients:
 - transferring out of Scotland (but there are only arrangements for England or Wales)
 - coming in from elsewhere in the UK, Isle of Man, Channel Islands or the EU.
- NB an application needs to be made to the Scottish Ministers to transfer an informal hospital inpatient outwith the UK.

Patients subject to detention in hospital and informal patients transferring from Scotland to outside the UK

- We give an overview of the cross-border regulations and who is covered.
- There are arrangements for all detained patients other than patients subject to pre-disposal mental health orders under the Criminal Procedures (Scotland Act) 1995.

Transfer of patients out of Scotland

- The regulations apply to patients subject to detention in hospital, and informal patients transferring from Scotland to outside the UK.
- An application needs to be made to the Scottish Ministers for a warrant for removal.
- The Restricted Patient Team coordinate this restrictedpatient@gov.scot.
- The Team is happy to be contacted early on to discuss the proposal.
- The RMO must consult the MHO and others they consider appropriate.
- They must notify the MHO, patient and others if they are going to apply for a warrant.
- There are then duties that the MHO must undertake as soon as practicable (must be done within 7 days).
- The RMO should apply to the Ministers on a TX1a form, but can't do that until the patient and others notified have had time to make representations to the RMO and the Ministers (or say they don't want to). They have up to 7 days.
- After the Scottish Ministers issue a warrant there is a standstill period before the patient can be transferred – 7 days within the UK (or 3 days if urgent); 28 days if going to the Isle of Man, Channel Islands or abroad (can be less, 7 days if urgent).
- If the patient appeals, starting with appeal to the Tribunal, they can't be transferred until the end of the appeal process.

- “Fast track removal with consent” can be applied for if the patient and any named person consent to the transfer (only applies to transfers to elsewhere in the UK, Isle of Man or Channel Islands). The Ministers can authorise the patient’s transfer before the end of the standstill period.
- A detained patient becomes subject to the nearest equivalent detention measure in the country they are transferred to *if* there is cross-border legislation that determines that. (There is for transfers from Scotland to England, Wales or Northern Ireland).

Patients transferred into Scotland

- The regulations apply to patients subject to detention in hospital being transferred to Scotland from elsewhere in the UK, the Isle of Man, Channel Islands, or the EU.
- The transfer of any such patient into Scotland needs consent from the Scottish Ministers
- The request should include a copy of the TX1b form completed by the clinician responsible for their treatment in the country they are in.
- When the patient is received in Scotland they become subject to the nearest equivalent Scottish measure.
- A TX5 form should be completed. This covers the legal requirements after arrival (including examination by RMO within 7 days, MHO requirements).

Cross-border forms are on the Scottish Government website.

<https://www.gov.scot/publications/mental-health-law-forms/>

Directions

- Scottish Ministers issue “directions” to ensure those escorting patients during the transfer have the appropriate power to do so within Scotland.
- This is needed for escorts of patients being transferred into Scotland (including Scotland-based escorts)
- For patients being removed from Scotland, this is needed for escorts from the receiving jurisdiction if they come to get them. (Not Scotland-based escorts.)

Scottish Government contacts information; cross-border forms

- The Restricted Patient Team restrictedpatient@gov.scot
- Mental Health Act forms <https://www.gov.scot/publications/mental-health-law-forms/>

Expiry dates of orders; when a T2 or T3 form is due

- For patients transferred into Scotland, the measure (order) will be deemed to have started on the date they were placed on the equivalent order in the sending country/territory they came from, not the date of transfer.
- For treatments safeguarded under part 16, we consider that the (usual) two month timing for a T2 or T3 for medication being due starts when the patient arrives.
- For people transferred out of Scotland, the measure (i.e. order) they go onto there will be deemed to have started on the day of transfer.

Patients subject to suspension of detention

- We advise against suspending detention with the requirement to stay at an address outside Scotland, pending application to vary the order.
Either:
 - make a hospital transfer to the new hospital; or
 - vary the order to a community based one and then transfer it.

Patients subject to requirements other than detention

i.e. patients on CCTOs or CCOs

- There are no applications to the Scottish Ministers.
- We explain the provisions in the regulations for the transfer of CCTO or CCO patients to England and Wales.
- The patient (or, if they are not capable, their named person) needs to request this.
- If the RMO agrees, the RMO issues a warrant to authorise the transfer
- A patient can be transferred into Scotland if they are under corresponding mental health legislation in: other parts of the UK; the Isle of Man; any of the Channel Islands.
- Such a patient can only be transferred into Scotland (and onto a CCTO or CCO) if the managers of the receiving hospital consent to receive them.

Rights of Appeal following transfer for patients on CTO/CCTO or CO/CCO into Scotland

- Patients on a CTO or CCTO can appeal to the Tribunal at any time after their arrival.
- Patients on COs or CCOs do not have the right to appeal against the Order prior to the first mandatory review (4-6 months after their arrival).
- If a patient CO or CCO wants to appeal sooner, they can contact the Commission and we will consider whether to make a reference to the Tribunal.

Cross-border transfer out of Scotland of informal patients in hospital

- To a place outwith the UK – apply to the Scottish Ministers as above.
- Within the UK - RMO should arrange directly with the receiving hospital.

Cross-border absconding

Persons who can take into custody and return patients who have absconded cross-border from Scotland, or during cross-border transfer from Scotland

- Later in the guidance we cover circumstances where patients:
 - abscond cross-border from Scotland to elsewhere in the UK;
 - abscond during cross-border transfer from Scotland;and legislative authorities to take them into custody
- In this section we provide details of the persons who can take these patients into custody, if there is authority to take them into custody and return them to Scotland.
- This differs slightly between patients subject to MHA and CP(S)A orders.
- Both include:
 - a constable (i.e. police);
 - MHO (or, elsewhere in the UK, an approved social worker i.e. local equivalent to a MHO);
 - a member of staff of any hospital .
- We detail others who can take MHA and CP(S)A patients into custody, including some patients on suspension of detention or CCTOs or COs.

Absconding during cross-border transfer

Patients subject to detention in hospital

- If a patient subject absconds during transfer **from** Scotland:
 - Within Scotland, they can be taken into custody and dealt with in accordance with:
 - s301-303 of the MHA; or
 - the regulations made under s310 (these cover absconded CP(S)A patients).
 - In any other part of the UK, they can be taken into custody and returned to Scotland.
- If a patient during transfer **to** Scotland, and absconds within Scotland, they can be taken into custody.
- They can be returned to their escorts or, if not practicable, taken to the receiving hospital or another place considered appropriate by the RMO.
- We detail who can take the patient into custody.

Patients subject to requirements other than detention in hospital

i.e. patients on CCTOs or CCOs

- For the situation where a patient subject absconds during transfer **from** Scotland, we explain that we do not think it is clear in the regulations what authority there may be to take the patient into custody (or not).
- If these circumstances occur, we would advise the RMO to seek legal advice.
- If a patient absconds during transfer **to** Scotland, and absconds within Scotland, they can be taken into custody
- They can be returned to the custody of their escorts or, if not practicable, taken to any place considered appropriate by the RMO.
- We detail who can take the patient into custody.

Cross-border absconding absent from Scotland

Patients subject to detention in hospital (and those on suspension of detention)

- A patient subject to detention in a hospital in Scotland can be taken into custody and returned from any other part of the UK.
- Some patients on suspension of detention can be taken into custody and returned. These are patients who have breached particular requirements, which we explain.
- There is no authority to return an absconded patient to Scotland from a country outside the UK.

Patients subject to requirements other than detention in hospital

i.e. patients on CCTOs or CCOs

- A patient on a CCTO or CCO can be taken into custody in Scotland, or taken into custody and returned from any other part of the UK, if:
 - their order includes a measure that they must reside in a specified place, and they have breached that measure; or
 - their order includes a requirement for approval of their MHO to change address, and they have breached that measure.

Effect of absconding on expiry dates of orders

- If a patient absconds, the RMO should clarify how long there will be authority to take the patient into custody and return them.
- This varies between orders and, depending when the patient absconded, the authority may last beyond the date on which the order would otherwise have expired.

Cross-border absconding - absent from other jurisdictions

- Patients subject to corresponding compulsory measures in England, Wales, Northern Ireland, the Isle of Man or the Channel Islands can be taken into custody in Scotland. This includes:
 - Patients on unauthorised absence from a hospital can be taken into custody and taken to any place that is considered to be appropriate by the RMO or another medical practitioner.
 - Some patients on suspension of detention. These are patients who have breached particular requirements, which we explain.
 - Patients who have breached measures corresponding to CCTO, interim CCO or CCO requirements to reside at a specified place or gain the approval of a MHO to change address. Or an interim CCTO requirement to reside at a specified place.
 - We detail who can take these patients into custody.
- Should a patient require compulsory medical treatment in hospital in Scotland, this will require consideration of a STDC.
- The Scottish Ministers consider that a patient cannot be removed from Scotland under cross-border absconding provisions if they have been detained under Scottish legislation.
- In that case, a cross-border transfer application should be made if it is proposed to transfer them out of Scotland.

Cross-border visits

Visits to Scotland from other parts of UK, the Isle of Man, any of the Channel Islands or any member State of the EU.

- Patients on measures corresponding to 2003 Act and 1995 Act orders can come to Scotland on escorted leave of absence for short term visits from:
England, Wales, Northern Ireland, the Isle of Man, any of the Channel Islands or a member State of the EU.
- We cover the procedures for arranging this.
- We outline the powers to take the patient into custody if they abscond from their escorts, and who can do this (this includes the authorised escorts themselves).

Visits from Scotland to England & Wales

- Patients subject to detention in hospital in Scotland can make short term visits to England and Wales.
- They need to be on suspension of detention with a condition that they remain in the custody of a person authorised in writing for this by the RMO.
- Patients subject to COROs or other restriction orders in Scotland require permission from the Scottish Ministers http://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf.
- Patients subject to community-based orders require the approval of their RMO.

List of relevant legislation and regulations

1. Mental Health (Care and Treatment) (Scotland) Act 2003 - 'the 2003 Act'
<http://www.legislation.gov.uk/asp/2003/13/contents>
2. Criminal Procedure (Scotland) Act 1995 - 'the 1995 Act'
<http://www.legislation.gov.uk/ukpga/1995/46/contents>
3. Adult Support and Protection (Scotland) Act 2007
<http://www.legislation.gov.uk/asp/2007/10/contents>
4. Mental Health Act 1983 (England and Wales)
<http://www.legislation.gov.uk/ukpga/1983/20/contents>
(with amendments made by Mental Health Act 2007)
5. Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 Scottish Statutory Instrument 2005 No. 2078
<http://www.opsi.gov.uk/si/si2005/20052078.htm>
6. Mental Health (Care and Treatment)(Scotland) Act 2003 Code of Practice Volume 1 pp190-203
<http://www.scotland.gov.uk/Publications/2005/08/29100428/04289>
7. Mental Health (Cross-border Transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005. Scottish Statutory Instrument 2005 No. 467.
<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050467.htm>

amended by
The Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017. Scottish Statutory Instrument 2017 No. 229.
<http://www.legislation.gov.uk/ssi/2017/229/contents/made>
8. Scottish Government Mental Health (Cross-border Transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 NHS HDL (2005) 43.
https://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf

9. Mental Health (England and Wales Cross-border Transfer: patient subject to requirements other than detention) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 356
http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi_20080356_en_1

amended by

The Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017. Scottish Statutory Instrument 2017 No. 232.

<http://www.legislation.gov.uk/ssi/2017/232/contents/made>

(The 2017 regulations provide for Scottish Statutory Instrument 2008 No. 356 to be officially cited as the "Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008")

10. Regulations made under s310 of the MHA.
Scottish Statutory Instrument 2005 No. 463 Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005
<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050463.htm>

11. Mental Health (Absconding Patients from Other Jurisdictions) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 333
<http://www.legislation.gov.uk/ssi/2008/333/made>

12. Mental Health (Cross-border Visits) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 181
<http://www.legislation.gov.uk/ssi/2008/181/contents/made>

Regulations came into force on 30 June 2017 that changed some arrangements for cross-border transfers (these regulations, referred to above, amended the pre-existing regulations).

The Scottish Government issued interim informal guidance on cross-border transfers for patients requiring the approval of Scottish Ministers.

<https://www.gov.scot/publications/mental-health-law-in-scotland-interim-guidance-on-cross-border-transfers/>

Cross-border transfers

Who is covered?

The Mental Health (Care and Treatment) (Scotland) Act 2003 provides the legislative framework for regulations to be made covering:

- The transfer out of Scotland of patients subject to detention in hospital to other parts of the UK or any other country. (This includes CORO patients who are on conditional discharge to the community).
- The transfer into Scotland of patients subject to detention in hospital under corresponding mental health legislation in other parts of the UK, the Isle of Man, the Channel Islands or a member State of the European Union.
- The transfer out of Scotland of patients subject to requirements other than detention to other parts of the UK or any other country (but regulations have only been made for transfer to England and Wales).
- The transfer into Scotland of patients subject to requirements other than detention under corresponding mental health legislation in other parts of the UK, the Isle of Man, the Channel Islands, or a member State of the European Union.
- The transfer of informal inpatients from Scotland to a place outwith the UK.

Patients subject to detention in hospital and informal patients transferring from Scotland to outside the UK

The relevant section of the 2003 Act covering these transfers is Section 290, via the making of regulations.

- http://www.opsi.gov.uk/legislation/scotland/acts2003/asp_20030013_en_1

Within the UK, these regulations interact with other cross-border legislation for transfers:

- between Scotland and England + Wales in sections 80 – 80D of the Mental Health Act 1983
<http://www.legislation.gov.uk/ukpga/1983/20/contents>
- from Scotland to and from Northern Ireland in the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 SSI 2005 No. 2078 (S.9)
<http://www.opsi.gov.uk/si/si2005/20052078.htm>

The Scottish regulations that 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.
<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050467.htm>

Amendments to these regulations were made in 2017:

- The Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017. Scottish Statutory Instrument 2017 No. 229.
<http://www.legislation.gov.uk/ssi/2017/229/contents/made>

(The 2017 changes included applying Part 3 of these regulations for patients to be transferred into Scotland who are subject to detention in hospital under corresponding mental health legislation in member States of the European Union other than the UK (which was a member state at that time). These patients can now be received under Part 3 and become subject to the nearest equivalent Scottish order.)

These regulations detail the process for arranging transfers.

- **Part 1** of these regulations outlines **who is covered by the regulations** (those subject to detention in hospital, which includes those on suspension of detention and on conditional discharge). Also, informal patients it is proposed to transfer from Scotland to a place outwith the UK.
Part 1 also outlines those **who are excluded by the regulations** (those on the following provisions under criminal procedures legislation: assessment orders, treatment orders, interim compulsion orders, temporary compulsion orders or those remanded for inquiry under S 200(2) (b) of 1995 CPSCA Act).
A reciprocal exclusion from transfer (into Scotland) applies to people under equivalent orders in the rest of the UK, the Isle of Man, the Channel Islands or a member State of the European Union.
- **Part 2** of these regulations set out in detail 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 to outwith the UK. It covers the roles and responsibilities of Scottish Ministers and the professionals concerned, the patient's right of appeal, the powers of escorts and absconding during transfer.
- **Part 3** of these regulations sets out the same in relation to patients **being received into Scotland** who are subject to detention measures elsewhere in the UK (or the Isle of Man or any of the Channel Islands) or a member State of the European Union.
This includes those on conditional discharge.

The Health Department of the Scottish Government in **NHS HDL (2005) 43 sets out in detail procedures** to follow to get authorisation from the Scottish Ministers for such transfers. Transfers without this authorisation are not valid.

https://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf

Please note that this HDL is out of date in places. The Government's interim informal guidance on cross-border transfers for patients requiring the approval of Scottish Ministers should also be consulted.

<https://www.gov.scot/publications/mental-health-law-in-scotland-interim-guidance-on-cross-border-transfers/>

Transfer of patients out of Scotland (Part 2 of the regulations)

A TX1a form should be used to apply to the Ministers for authorisation to transfer a patient out of Scotland (rather than the old proforma at the end of NHS HDL (2005) 43).

Cross-border transfer applications are managed by Scottish Government's Restricted Patient Team. The Responsible Medical Officer (RMO) can contact the Team to inform them about a proposed transfer and for advice. The Team prefer the initial contact to be made by e-mail: restrictedpatient@gov.scot

If the RMO considers that it may be appropriate to apply for a warrant for cross-border transfer out of Scotland, they must consult with the MHO and anyone else they consider appropriate. If, after having regard to any views, the RMO continues to consider that the patient should be transferred, they must make notifications that an application for a warrant is to be made.

The RMO is required to notify the MHO, the patient and others in writing of the proposed transfer, and that they have the right to make representations on this to the RMO and to the Scottish Ministers within 7 days. In addition to the patient, the RMO must notify: the patient's named person (if they have one); any welfare attorney or welfare guardian; their primary carer (if there is no named person); and their nearest relative (if no named person and if known).

There are duties the **MHO** must undertake as soon as practicable after they are notified by the RMO. The regulations require that these are undertaken within seven days:

- to interview the patient
- to inform the patient of the patient's rights in relation to such an application
- to inform the patient of the availability of independent advocacy services
- to take appropriate steps to ensure that the patient has the opportunity of making use of those services
- to inform the RMO:
 - whether the MHO agrees, or disagrees, that the proposed application should be made
 - if the mental health officer disagrees, of the reason why
 - of any other matters that the MHO considers relevant.

The TX1a form helps guide the RMO through the application process.

For a cross-border transfer application that is not urgent or an application for fast-track removal with consent (see below), the TX1a cannot normally be completed and submitted until after the seven days during which patient and any other(s) have the right to make representations. For the application to be submitted earlier, there would need to be discussion with the Restricted Patient Team and signed statements from all those with rights to make representations that they did not intend to make representations, or that they had made all representations they were going to (this would not apply to the patient if they lacked capacity to make such representations).

Should Scottish Ministers consent to the transfer they will notify the RMO, the patient and others as soon as possible after they have made the decision. They will then seek authorisation from the receiving country/territory to accept the patient. Once this authorisation has been received the Scottish Ministers will issue the warrant to remove the patient from Scottish jurisdiction. The period between the Scottish Ministers issuing a warrant for removal, and that warrant conferring authority to transfer the patient, is called the "standstill period":

- For transfer within the UK: the end of the seventh day after the warrant is issued (or, where transfer is urgent, the end of the third working day).
- For transfer to the Isle of Man, the Channel Islands or another country: the end of the 28th day after the warrant is issued (or, where transfer is urgent, the end of seven days). Also, in some circumstances where it is proposed to transfer the patient abroad, the Scottish Ministers can specify a date so the standstill period is >7 days and <28 days).

Urgent transfers

If the Scottish Ministers consider it necessary that the patient be transferred urgently, they can issue a warrant and the standstill period is the end of three working days instead of seven days within the UK (seven days if it is proposed to transfer the patient abroad). For this to be done, the Commission needs to agree that this is necessary before a warrant can be issued.

The “Fast-track removal with consent” provision, introduced in 2017

For transfer within the UK, Isle of Man or Channel Islands, the transfer can happen before the end of the standstill period if:

- The patient has given written consent to be transferred (removed) before the end of the standstill period (and an AMP other than the RMO certifies that they are capable of giving that consent).
- The named person has given written consent to the patient being removed before the end of the standstill period (if the patient has a named person).
- The RMO has informed the Commission that they are making the application for fast-track removal before the application to the Scottish Ministers is made.
- More than three days have elapsed since the RMO informed the Commission of making the application.
- Neither the patient, their named person nor a listed initiator have appealed to the Tribunal against the proposed transfer (see the next section “Appeal against transfer”).
- The Commission has not given notice of making a reference to the Tribunal in respect of the proposed transfer.

Where the conditions are met and the Ministers issue a warrant authorising fast-track removal with consent, the standstill period remains the same (although the warrant authorises the patient’s removal before the end of the standstill period). This authority is subject to the patient continuing to consent to the transfer, and there being no appeal to the Tribunal made or reference made by the Commission to the Tribunal. If the patient indicates an unwillingness to be removed from Scotland before the end of the standstill period, they cannot be transferred until then.

Appeal against transfer

As soon as the Ministers have given notice that they have decided a patient should be removed from Scotland, the patient or their named person, if they have one, can appeal to the Tribunal against the transfer.

If the patient is aged over 16, has no named person, and is incapable of deciding whether to initiate an appeal, a listed initiator can do so on their behalf. This can be any welfare guardian, any welfare attorney, their primary carer and their nearest relative (unless, for the latter two, the patient has made a written declaration precluding them from doing so).

(The Commission also has the right to make a reference to the Tribunal).

If an appeal is made to the Tribunal against the transfer before the end of the standstill period, the transfer cannot take place. If an appeal is made after the end of the standstill period but before the transfer takes place, the standstill period remains at an end but a patient should not be transferred in these circumstances until the appeal has been decided. If an appeal is made before the end of the standstill period, the standstill period continues until the Scottish Ministers give notice that the standstill period has ended (at the time when they can, in accordance with the regulations). The standstill period ends at the end of the day on which the notice is given by the Ministers.

If, at the appeal hearing, the Tribunal refuses to make an order that the proposed removal of the patient should not take place:

- The patient can appeal against that Tribunal decision within 21 days, to the sheriff principal. (Any named person or, if applicable, listed initiator can also appeal).
- If the patient and their named person (if they have one) give written consent to the transfer without delay and an AMP who is not the RMO certifies that the patient is capable of giving consent, the Ministers can give notice that the standstill period has ended and the patient can be transferred.
- Otherwise, the standstill period continues. If an appeal is not made to the sheriff principal within 21 days, the Ministers can then give notice that the standstill period has ended.
- If an appeal is made before the end of the standstill period, the standstill period continues.
- If an appeal is made to the sheriff principal and the appeal to the Tribunal was made before the end of the standstill period, the standstill period cannot end until 21 days after the sheriff principal decides the appeal.
- An appeal could be made to the Court of Session against the decision of the sheriff principal during that time.
- If an appeal is made to the Court of Session and the appeal to the Tribunal was made before the end of the standstill period, the standstill period continues until the Court has finally determined that appeal.

Patients subject to a CORO, hospital direction or transfer for treatment direction would appeal against a decision of the Tribunal to the Court of Session.

The RMO, MHO and Scottish Ministers also have rights of appeal which they could exercise if the Tribunal made an order that the patient should not be transferred (appeal to the sheriff principal, and onwards to the Court of Session).

The “transfer window” after the standstill period ends

The patient can be transferred until the end of the seventh day following the last day of the standstill period. If the patient is not transferred within the seven day transfer window, a new application for transfer will be required. This is true for all transfers including standard, urgent and fast-track.

A patient might decide to appeal after the standstill period ends and transfer is being arranged. Although a warrant would allow a patient to be transferred in circumstances where an appeal is made after the standstill period, the Scottish Government’s strong advice to RMOs is that no patient should be transferred while an appeal is outstanding.

Detention status after transfer out of Scotland

Patients transferred from Scotland only *automatically* become subject to the nearest equivalent measure in the country they are transferred to *if* cross-border legislation exists that determines that. (This is the case for transfers of patients subject to detention from Scotland to England, Wales or Northern Ireland). The Scottish measure ceases when the patient becomes subject to the relevant measure in the receiving jurisdiction.

Patients transferred into Scotland (Part 3 of the regulations)

Part 3 relates to patients being received into Scotland who are subject to detention measures elsewhere in the UK, the Isle of Man, the Channel Islands) or a member State of the European Union.

Where it is proposed to transfer a patient subject to detention in hospital into Scotland, a request should be made to the Scottish Ministers for their consent to the transfer. For transfers from within the UK, the Channel Islands and the Isle of Man, the application to transfer the patient should be first sent to the relevant Health Department for consideration. Should they agree to the transfer they will approach Scottish Ministers for consent to accept the patient into Scotland. The request should include a copy of the TX1b form completed by the clinician responsible for their treatment in the country they are in. No such patient can be received in Scotland without the consent of the Scottish Ministers.

Patients transferred into Scotland will be subject to the nearest equivalent Scottish measure to that which they were subject to in the country they were transferred from once they are received in Scotland.

The RMO requires to assess the patient within seven days post-transfer and consider whether the grounds for ongoing detention under the relevant order are met. If not, they should revoke the detention (or make a recommendation to the Scottish Ministers if the patient is subject to a CORO, hospital direction or transfer for treatment direction).

The RMO is required to give notifications to the patient, named person, MWC and others within 14 days of the patient’s admission. This needs to include details of the transfer and the outcome of their assessment of the patient. The TX5 form should be used for this. It contains information about what the RMO should include, and who the form should be sent to.

Directions

The Scottish Ministers will issue “directions” to ensure those escorting patients during the transfer have the appropriate power to escort the patient within Scotland.

For transfers out of Scotland, this applies to any escorts who come from the receiving jurisdiction to escort the patient while they are in Scotland. Scotland-based escorts do not require directions to be able to escort the patient within Scotland.

For transfers into Scotland, directions are required for escorts from the sending jurisdiction as well as any Scotland-based escorts.

The Scottish Ministers require to be provided with the names of the escorts in advance of the transfer. The “directions” do not need to be issued at the same time as the warrant and can be issued close to the date of transfer. A patient should not be transferred if “directions” have not been issued.

Scottish Government contacts information; cross-border forms

Contact phone numbers at the end of NHS HDL (2005) 43 have changed.

As mentioned above, the Restricted Patient Team prefer initial contact to be made via e-mail: restrictedpatient@gov.scot

The Team checks this e-mail address throughout the working day.

The relevant forms can be found on the Scottish Government website:

- <https://www.gov.scot/publications/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
 - **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.

Expiry dates of orders; when a T2 or T3 form is due

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 (i.e. the measure (order) will be deemed to have started on the date they were placed on the equivalent order in the sending country/territory, not the date of transfer). 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. Scottish Ministers would normally require a minimum of 10 days, but preferably 14 days, remaining before the expiry date of the patient’s existing compulsory order in order to allow for this.

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” (s240) starts when the person is received into Scotland – an earlier DMP opinion would not be legally valid. It would be best practice to ask for a local second opinion at the earliest opportunity where someone

has been on medication for some time. Subsequently a DMP opinion should be requested approaching the two month period following transfer.

For **people transferred out of Scotland to England, Wales or Northern Ireland**, the measure (i.e. order) they go onto there will be deemed to have started on the day of transfer.

For England and Wales, see section 80B(2) of the Mental Health Act 1983:

- <http://www.legislation.gov.uk/ukpga/1983/20/contents>

For Northern Ireland, see Article 4(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 Scottish Statutory Instrument 2005 No. 2078:

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

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. 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.

Patients subject to requirements other than detention i.e. patients on CCTOs or CCOs

Section 289 of the 2003 Act sets out the power to make regulations covering transfers of people subject to requirements other than detention (i.e. community-based compulsory treatment).

England and Wales have provisions for requirements other than detention, Northern Ireland does not.

The regulations which cover the transfer of such patients to England and Wales, or receiving their transfer into Scotland from elsewhere in the UK, the Isle of Man, the Channel Islands or a member State of the European Union, are:

- Mental Health (England and Wales Cross-border Transfer: patient subject to requirements other than detention) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 356
http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi_20080356_en_1

Amendments to these (principal) regulations were made in 2017 by:

- The Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017. Scottish Statutory Instrument 2017 No. 232. <http://www.legislation.gov.uk/ssi/2017/232/contents/made>

The 2017 regulations provide for Scottish Statutory Instrument 2008 No. 356 to be officially cited as:

- The “Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008”.

This is because the regulations now cover transfers into Scotland from countries beyond England and Wales alone.

Part 1 outlines **who the regulations apply to** (those on a Community CTO/Community CO in Scotland, or corresponding requirements in other countries covered in the regulations) and **who is excluded** from them (patients subject to interim community orders or patients detained in hospital following non-compliance with community based CTO or CO measures).

Part 2 covers the **removal to England and Wales of patients subject to a requirement other than detention**.

The person themselves must have notified their RMO that they wish to be removed or, if they are incapable of doing so, their named person must have notified the RMO that they consider this would be in the patient’s best interests.

There is no application to the Scottish Ministers to authorise the requested cross-border transfer. The regulations contain details of the notifications the RMO must make (that the transfer has been requested), and what they need to have regard to when deciding whether to authorise the transfer. This includes notifying the MHO, who is required to interview the patient and inform the RMO whether they agree or disagree with the proposed transfer.

If the RMO does decide to authorise the patient’s transfer out of Scotland, the RMO grants a warrant to authorise this themselves, and notifies the relevant parties as set out in the regulations.

A pro forma warrant for the RMO to issue for the transfer of patients on community orders from Scotland to England or Wales can be accessed by using this link:

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

Part 3 deals with **the reception into (transfer into) Scotland of patients subject to requirements other than detention** under corresponding mental health legislation in: other parts of the UK; the Isle of Man; any of the Channel Islands; or a member State of the European Union.

Part 3 can, therefore, only be applicable to a patient who is in a country that has similar community-based requirements in its’ mental health legislation, and who is subject to those requirements.

A request for the reception of such a patient into Scotland can be made if, in the territory from which the request is made, there are provisions for this to be done. (England and Wales have such provisions - in section 80ZA of the Mental Health Act 1983)

The request is made to the managers of the receiving hospital for consent to the reception of the patient. The patient cannot be transferred without this consent. There is no application to be made to the Scottish Ministers.

The regulations contain details of the process for making this request, and the requirements after a patient's transfer into Scotland. The requirements are much the same as for patients subject to detention in hospital after cross-border transfer. A TX5 form should be completed.

Calculation of expiry dates, timing for T2 or T3 forms being due, etc, after transfer are exactly the same as for patients subject to detention in hospital (see above).

Rights of Appeal following transfer for patients on CTO/CCTO or CO/CCO into Scotland

Section 100(5) of the Mental Health (Scotland) Act says that an appeal against a CTO cannot be made in the first three months after the CTO was granted (i.e. an appeal by the patient, named person or a listed initiator).

The 2017 Regulations allow for a patient transferred into Scotland, who becomes subject to a CTO or CCTO, to appeal to the Tribunal within the first 3 months after their order commenced in the country from which they came. Patients who have been on their order for longer have the right to appeal as before. Appeals can also be made by a named persons or listed initiators (if the patient does not have a named person).

Patients on COs or CCOs do not have the right to appeal against the Order prior to the RMO making an application to extend the order after the first mandatory review. There is no provision in the Regulations for a patient in this situation after cross-border transfer to appeal against the CO or CCO sooner than they could have done had their order commenced in Scotland.

If a patient is transferred into Scotland on a CO or CCO, and wants to appeal sooner than they are able to, we would invite them to inform the MWC about their circumstances. We would consider whether we think their circumstances are such that it might be appropriate for us to make a reference to the Tribunal. The patient's named person could also contact us (if they have one), or a listed initiator could do so if the patient lacks capacity to do so themselves.

Cross-border transfer out of Scotland of informal patients in hospital

We have already covered the process for applying to the Scottish Ministers for a warrant to transfer an informal inpatient to a place outwith the UK.

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

Cross-border absconding

Persons who can take into custody and return patients who have absconded cross-border from Scotland, or during cross-border transfer from Scotland

The following sections in this guidance include different circumstances when patients:

- abscond cross-border from Scotland to elsewhere in the UK;
- abscond during cross-border transfer from Scotland.

Where those patients can be taken into custody and returned to Scotland, the people who can do this are:

- **For patients on civil MHA orders** – the persons in s303(3)(a) of the MHA.
 - a constable (i.e. police)
 - MHO (or, elsewhere in the UK, an approved social worker i.e. local equivalent to a MHO)
 - a member of staff of any hospital
 - where the patient is subject to a CTO or an interim CTO with a condition that they reside in an establishment with the address specified in the order, a member of staff of that establishment
 - a person authorised by the RMO
 - (and, if the patient is on suspension of detention with a condition that they be kept in charge of a person, that person may take them into custody and resume charge of them. Or, if that is not appropriate or practicable, take them to any place considered appropriate by the RMO).

- **For patients on CP(S)A orders** – the persons in Regulation 3 of the Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005. Scottish Statutory Instrument 2005 No. 463.

<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050463.htm>

(These are regulations made under s310 of the MHA. These cover the taking into custody and returning of patients on assessment, treatment, temporary compulsion, interim compulsion and compulsion orders, COROs, hospital directions and transfer for treatment directions.)

- a constable (i.e. police)
- MHO (or, elsewhere in the UK, an approved social worker i.e. local equivalent to a MHO)
- member of staff of any hospital
- where the patient is subject to a CO with a condition that they reside in an establishment with the address specified in the order, a member of staff of that establishment
- a person authorised to escort the patient during cross-border transfer
- (and, if the patient is on suspension of detention with a condition that they be kept in charge of a person, that person may take them into custody and resume charge of them.)

Patients who are liable to be taken into custody in Scotland under s301-303 of the MHA or the regulations made under s310 (referred to above) can be taken into custody in, and returned to Scotland from, any other part of the UK.

This authority is in Article 8 of The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005. Statutory Instrument 2005 No. 2078 (S.9)

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

Article 8 determines that, elsewhere in the UK, the above lists of people who can take the patient into custody and return them is expanded, as "mental health officer" includes any approved social worker in England, Wales or Northern Ireland (within the meaning of the Mental Health Act 1983 or the Mental Health (Northern Ireland) Order 1986 respectively).

Absconding during cross-border transfer

Patients subject to detention in hospital

Where any patient subject to detention in hospital absconds during transfer **from** Scotland, Regulations SSI 467 Regulation 22 provides that, if they are in Scotland, they may be taken into custody and dealt with in accordance with s301-303 of the MHA or the regulations made under s310 (which cover absconded CP(S)A patients).

<http://www.legislation.gov.uk/ssi/2005/467/contents/made>

Article 8 applies, and the patient can be taken into custody in, and returned to Scotland from, any other part of the UK.

(i.e. Article 8 of the The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005).

See the above section *Persons who can take into custody and return patients who have absconded cross-border from Scotland, or during cross-border transfer from Scotland*.

Where any patient subject to detention in hospital absconds during transfer **to** Scotland and absconds within Scotland, Regulations SSI 467 Regulation 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.

<http://www.legislation.gov.uk/ssi/2005/467/contents/made>

The persons who can take the patient into custody are:

- a constable (i.e. police)
- MHO
- A member of staff of any hospital
- Any other person authorised for the purposes by the RMO

Patients subject to requirements other than detention in hospital, i.e. patients on CCTOs or CCOs

Where any patient subject to requirements other than detention in hospital absconds during transfer **from** Scotland to England or Wales, there would appear to be an intention in the regulations that they could be taken into custody.

SSI 356 Regulation 12

<http://www.legislation.gov.uk/ssi/2008/356/contents/made>

However, we do not think the wording of regulation 12 is clear, and we are unsure what authority there may be to take the patient into custody (or not). If these circumstances occur, we would advise the RMO to seek legal advice (if within the NHS, from the Central Legal Office).

We have mentioned this to the Scottish Government's Restricted Patient Team, who plan to review these provisions.

Where any patient subject to requirements other than detention in hospital absconds during transfer **to** Scotland and absconds within Scotland, Regulations SSI 356 Regulation 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.

<http://www.legislation.gov.uk/ssi/2008/356/contents/made>

The persons who can take the patient into custody are:

- a constable (i.e. police)
- MHO
- A member of staff of any hospital
- Any other person authorised for the purposes by the RMO

Cross-border absconding absent from Scotland

Patients subject to detention in hospital (and those on suspension of detention)

There are legislative arrangements for the return to Scotland of patients subject to detention in hospital in Scotland who have absconded to any other part of the UK.

Patients who are liable to be taken into custody in Scotland under s301-303 of the MHA or the regulations made under s310 (which cover absconded CP(S)A patients) can be taken into custody in, and returned to Scotland from, any other part of the UK.

This authority is in Article 8 of The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005. Statutory Instrument 2005 No. 2078 (S.9)

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

Patients on suspension of detention who can be taken into custody and returned are those with a requirement (which the patient has breached) to be kept in charge of an authorised person, reside at a specified place, or to return to hospital after the occurrence of a specified event.

See the above section *Persons who can take into custody and return patients who have absconded cross-border from Scotland, or during cross-border transfer from Scotland*.

There is no authority to return an absconded patient to Scotland from a country outside the UK.

Patients subject to requirements other than detention in hospital, i.e. patients on CCTOs or CCOs

A patient on a CCTO or CCO can be taken into custody in Scotland under s301-303 of the MHA or the regulations made under s310, respectively, if:

- their order includes a measure that they must reside in a specified place, and they have breached that measure; or
- their order includes a requirement for approval of their MHO to change address, and they have breached that measure.

If this is the case, the patient can be taken into custody in, and returned to Scotland from, any other part of the UK.

See the above section *Persons who can take into custody and return patients who have absconded cross-border from Scotland, or during cross-border transfer from Scotland*.

A patient who is on a CCTO or CCO and has left Scotland and gone elsewhere in the UK is **not** regarded as on “unauthorised absence” and **cannot** be forced to return to Scotland **unless** their order includes a measure that they must reside in a specified place or a requirement for approval of their MHO to change address, and they have breached that measure.

A patient on a CCTO or CCO who has not breached either of those measures, and has left Scotland, may be in breach of other CCTO/CCO measures. If so, they could be dealt with under Section 113 of the 2003 Act if they return to Scotland. While they are outside Scotland there is no legislative provision to impose their return to Scotland.

Effect of absconding on expiry dates of orders

If a patient absconds, the RMO should clarify how long there will be authority to take the patient into custody and return them. This varies between orders and, depending when the patient absconded, the authority may last beyond the date on which the order would otherwise have expired.

The effects of unauthorised absence on a CTO, 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 for mentally disordered offenders are set out in Regulation 9 of the Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005. Scottish Statutory Instrument 2005 No. 463

<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050463.htm>

Cross-border absconding - absent from other jurisdictions

Regulations made under section 309 of the 2003 Act allow patients subject to corresponding compulsory measures in England, Wales, N Ireland, the Isle of Man or the Channel Islands to be dealt with while in Scotland under Sections 301-303 (as modified by the Regulations).

The applicable regulations are The Mental Health (Absconding Patients from Other Jurisdictions) (Scotland) Regulations 2008 SSI2008 No.333

<http://www.legislation.gov.uk/ssi/2008/333/made>

These regulations cover patients subject to detention in hospital corresponding to detention under the 2003 Act and the 1995 Act, including those who are on suspension of detention or conditional discharge.

A patient who is on unauthorised absence from a hospital can be taken into custody and taken to any place that is considered to be appropriate by the person acting in the equivalent role to RMO in the relevant territory, or any medical practitioner.

A patient on suspension of detention who has failed to reside in a specified place can be taken into custody. So can a patient who has failed to comply with a suspension of detention condition to return to the hospital they were detained in, or go to another place, on or after the occurrence of a specified event.

- These patients can be returned to the specified place they failed to reside at (if applicable)* or taken to any place considered appropriate by the RMO-equivalent person, or any medical practitioner.

*NB this is unlikely to be an address in Scotland, and the powers within these regulations are only applicable within Scotland.

The regulations also cover patients who have breached requirements corresponding to CCTO, interim CCO or CCO requirements to reside at a specified place or gain the approval of a MHO to change address. They cover patients who have breached an interim CCTO requirement to reside at a specified place.

- Such patients can be returned to the specified place they failed to reside at (if applicable)* or taken to any place considered appropriate by the RMO-equivalent person, or any medical practitioner.

*NB this is unlikely to be an address in Scotland, and the powers within these regulations are only applicable within Scotland.

The persons who can take the patient into custody are:

- a constable (i.e. police).
- MHO.
- A member of staff of any hospital.
- If the patient is subject to (a corresponding measure to a) CCTO or CCO with a condition that they reside in an establishment with the address specified in the order, a member of staff of that establishment.
- Any other person authorised for the purposes by the RMO.

Should a patient require compulsory medical treatment before their return to their country of origin, this will require consideration of a STDC. The Scottish Ministers have made it clear to us during recent discussions that they consider that a patient cannot be removed from Scotland under cross-border absconding provisions if they have been detained under Scottish legislation. In that case, a cross-border transfer application to the Scottish Ministers should be made if it is proposed to transfer them out of Scotland.

Cross-border visits

Visits to Scotland from other parts of UK, the Isle of Man, any of the Channel Islands or any member State of the EU.

Regulations made under section 309A of the 2003 Act allow patients subject to corresponding provisions in a “relevant territory” to come to Scotland on escorted leave of absence for short term visits.

This includes measures corresponding or similar to 2003 Act and 1995 Act orders.

“Relevant territory” means England, Wales, Northern Ireland, the Isle of Man, any of the Channel Islands or a member State of the EU.

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

<http://www.legislation.gov.uk/ssi/2008/181/contents/made>

Amended in 2017 to include other member States of the EU by Scottish Statutory Instrument:

<http://www.legislation.gov.uk/ssi/2017/230/contents/made>

The patient must be granted leave of absence (from their detention in hospital) under the law of the territory they are visiting from. This needs to include a condition corresponding or similar to that in section 127(6)(a) of the 2003 Act i.e. that “during the period specified in the certificate, the patient be kept in the charge of a person authorised in writing for the purpose by the patient’s responsible medical officer”.

If the patient absconds from their escort(s), they can be taken into custody by:

- a constable (i.e. police)
- MHO
- a member of staff of any hospital
- a person authorised for the purpose by the RMO
- the person authorised to have charge of the patient i.e. their escort(s).

The person who is authorised to have charge of the patient may resume charge of them. Or, if that is not appropriate or practicable, the patient can be taken to any place considered appropriate by the person who granted the leave of absence in the territory they came from, or any medical practitioner.

The authorised escorts have the power to restrain the patient to retake them in the event that they abscond. Authorised escorts can be relatives or friends, as well as health or social care professionals.

Visits from Scotland to England & Wales

There are provisions for patients subject to detention in hospital in Scotland to make short term visits to England and Wales on suspension of detention with a condition that they remain in the charge (custody) of a person authorised in writing for this purpose by the RMO.

These provisions were made in the Mental Health Act 2007 (England and Wales). This added two new sections to Section 17 of the 1983 Act – s17(6) and (7).

<http://www.legislation.gov.uk/ukpga/1983/20/section/17>

Patients subject to COROs or other restriction orders in Scotland require permission from the **Scottish Ministers** in the usual way (NHS HDL 2005(43)).

http://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf

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



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