

## **Cross border transfers, cross border absconding and cross border visits under mental health law – a factsheet 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.

### **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 2007 (England and Wales)  
<http://www.legislation.gov.uk/ukpga/2007/12/contents>
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>

8. Scottish Government Mental Health (Cross-border Transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 NHS HDL (2005) 43 [http://www.sehd.scot.nhs.uk/mels/HDL2005\\_43.pdf](http://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf)

9. Mental Health (England and Wales Cross-border Transfer: patient subject to other than detention) (Scotland) Regulations 2008 Scottish Statutory Instrument 2008 No. 356 [http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi\\_20080356\\_en\\_1](http://www.opsi.gov.uk/legislation/scotland/ssi2008/ssi_20080356_en_1)

10. 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>

## **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 to 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](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** (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 the following provisions under criminal procedure legislation: assessment orders, treatment orders, interim compulsion orders, temporary compulsion orders or those remanded for inquiry under S 200(2) (b) of 1995 CPSA Act). A reciprocal exclusion from transfer applies to people under equivalent orders in the rest of the UK coming to Scotland

**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 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 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 0131 244 5668

Restricted patients (Surnames A-Go) 0131 244 2170

Restricted patients (Surnames Gr-Ma-including Mac and Mc) 0131 244 6929

Restricted patients (Surnames Me-Z) 0131 244 2545

[http://www.sehd.scot.nhs.uk/mels/HDL2005\\_43.pdf](http://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf)

**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.

### **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. Scottish Ministers would normally require a minimum of 10 days and, where possible, 14 days left before the expiry dates 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 or Wales (or N. Ireland, Isle of Man or Channel Isles)**, the order will be deemed to have started on the day of transfer. See section 80B (2) of the Mental Health Act 1983:

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

### **Named Person- right of appeal against transfer of patient subject to detention**

In the regulations SSI 2005 No 467 (Regulation 13) it is only the patient that can appeal against transfer and the MHTS is unable to accept an appeal from the named person. This may be a drafting error, since we cannot identify any policy reason to bar the named person from appealing, given that the named person can appeal against a transfer between Scottish hospitals. If the named person wishes to appeal, they can contact us and we will make a reference to the tribunal as per regulation 17. We would normally do this, given the apparent gap in the legislation. The timescale

for this is tight as it must be done within 7 days.

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

### **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**

Section 289 of the 2003 Act sets out the power to make regulations covering transfers of people subject to community based compulsory treatment.

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](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 CTO/Community CO) and **who is excluded** from them (those patients subject to interim community orders or patients in breach of a community based 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** deals with 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(5)(CTOs) and S164(4)(b)(COs) state an application for revocation of the order cannot be made in the first 3 months of the making of the order. We are concerned about whether this limit on appeal rights is justified for patients who have been transferred to Scotland, given the requirements of ECHR Article 5, particularly when the order in England is not granted by a court or tribunal. 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 of the order being in place. This reference does not affect the patient's and the named person's rights to apply to the MHTS for revocation of the order within the period of the order after 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.

<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050467.htm>

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 Regulation 22 states that Sections 301- 303 of the 2003 Act will apply

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

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 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>

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

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

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 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>

## **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 Regulations 8 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>

Regulation 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 in 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 22 of Scottish Statutory Instrument 2005 No 467 authorises taking a patient who absconds during transfer into custody if they are in Scotland and regulation 8 of Scottish Statutory Instrument 2005 No 2078 extends that power to absconding patients in other parts of the UK. Scottish Statutory Instrument 2005 No.463 are the regulations made under Section 310 and cover the taking into custody and returning those on assessment, treatment, temporary compulsion, interim compulsion and compulsion orders and hospital directions and transfer for treatment directions. Again regulation 8 of Statutory Instrument 2005 No 2078 extends the power to absconding patients in other parts of the UK.

Regulation 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 CCTO or CCO which has an attendance requirement or 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 CCTO/CCO 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.

## **Effect of absconding on expiry dates of orders**

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 in relation to mentally disordered offenders are set out in Regulation 9 Scottish Statutory Instrument 2005



No. 463 The Mental Health (Absconding by mentally disordered offenders) (Scotland) Regulations 2005

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

### **Persons specified to take the patient into custody and return**

This differs between those on civil orders and those on CPSA orders

Civil orders - MHO, constable, member of staff of any hospital, person authorised by RMO ( Section 303(3)(a)) <http://www.legislation.gov.uk/asp/2003/13/section/303>

CPSA orders – MHO, constable, member of staff of any hospital, person who was authorised in writing to have charge of person whilst on SUS, or escort of patient when absconded. (SSI 2005 No 463 Regulation 3)

<http://www.legislation.gov.uk/ssi/2005/463/regulation/3/made>

### **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 CCTO or CCO 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 RMO, someone acting in the equivalent role in the relevant territory or any medical practitioner. 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>

Should a patient require compulsory medical treatment before their return to their country of origin, this will require consideration of a STDC. They are returned under absconding regulations, not cross border transfer regulations, and the STDC should be revoked before they move.

## Cross-border visits

### Visits to Scotland from other parts of UK

The relevant section of the 2003 Act is Section 309A. This addition to Section 309 is set out in Section 72 of the Adult Support and Protection (Scotland) Act 2007 <http://www.legislation.gov.uk/asp/2007/10/section/72>

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

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

These regulations allow patients subject to corresponding provisions in other UK jurisdictions to come to Scotland 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 responsible medical officer (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/section/17>

<http://www.legislation.gov.uk/ukpga/2007/12/section/39>

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

[http://www.sehd.scot.nhs.uk/mels/HDL2005\\_43.pdf](http://www.sehd.scot.nhs.uk/mels/HDL2005_43.pdf).

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