MWC Response to Consultation on Cross Border Transfers and Absconding Patients

The following is a response by the Mental Welfare Commission to the Scottish Government's consultation on the implementation of certain sections of the Mental Health (Scotland) Act 2015 and associated regulations (Part 2).

You can read the full consultation here

Question 1

Yes - we are generally in agreement with the proposals for streamlining the process, where possible, without diminishing the safeguards in place. We would make a few points with regard to this.

Transfer of patients from Scotland - Notification of application for transfer

After consulting the patient's MHO, we agree that the RMO should give notice to the patient, their named person (and where they are an informal patient being transferred outwith the UK their primary carer), any guardian, welfare power of attorney and the MHO that an application is to be made to Scottish Ministers for a warrant for a cross border transfer. As the 2015 Act provides a right of appeal, where there is no named person, to the primary carer (if any) and the nearest relative of such a person, these people should also be included in notification, if there is no named person. This is a safeguard for those who may lack capacity to appeal and have no named person, guardian or power of attorney.

Seven day period between notification and application to the Scottish Ministers

We agree that the seven day period may be shortened where the MHO has carried out their duties and representations have been made by all parties to the RMO or the patient may additionally have made his/her wishes known to the Scottish Ministers. This will require the RMO to ascertain that there **is** agreement with the move by all parties including the patient and that no representations are going to be made and this should be confirmed in writing by him/her.

Appeals against transfer out with Scotland

We welcome the extension of the right to appeal against a transfer out of Scotland to named persons and where there is no named person to listed persons.

We agree with proposals to clarify the process for reissuing a warrant for transfer if there has been an unsuccessful appeal.

There appear to be no time limits on Scottish Ministers to consider applications. We have had recent experience of significant delays in processing applications by Scottish and UK Government officials causing considerable difficulties for patients. We would like to see processes in place to ensure all such transfers are considered as quickly as possible.

Question 2

We agree that the regulations should introduce a right to apply to the Tribunal for a CTO to be varied or revoked in the circumstances that have been outlined.

The Mental Welfare Commission (MWC) would want to retain the right to make reference to the MHTS under s98/162, which may assist in unforeseen circumstances.

Question 3

Notification of transfer into Scotland by the hospital managers post assessment by RMO

We think the parties notified of the matters set out in reg.41(2) of SSI 2005 No. 467 and 28 of SSI 2008 No356 should be extended to mirror those notified of the application for a warrant for those going out of Scotland. In addition to the MWC, the MHTS and the Scottish Ministers (where appropriate) this would be the patient, the named person, the MHO, guardian, welfare attorney (and cross border equivalents) and where there is no named person the primary carer (if any) and the nearest relative. Again this is a safeguard for those who may lack capacity and have no named person, guardian or power of attorney.

Information given

We believe that any guardian or welfare attorney or equivalent should receive all the information provided to the named person, whether or not there is a named person. Where there is no named person, guardian or welfare attorney, it would be sufficient to give more limited information to the primary carer and the nearest relative (name and address of sending and receiving hospital, date of transfer and name and contact details of RMO).

Question 4

Currently a Designated Medical Practitioner (DMP) opinion for 'treatments given over period of time etc' (S240) is required two months after a cross border transfer. However the cross border patient may have been on the treatment for a period of time in another jurisdiction without the safeguard of a DMP or equivalent opinion. We consider it would be in the patient's interest to have a DMP opinion within the first four weeks of coming to Scotland. This would give some time for the RMO to review the treatment but also ensure that the patient does not have to wait two months for an opinion. If a DMP opinion is carried out within the first four weeks, we do not think a further DMP opinion would be necessary at two months.

A DMP opinion will still be required from the outset of treatment with artificial nutrition, medication to reduce sex drive or other treatment specified in the regulations made under s240(3)(d).

Question 5

MWC duty to visit following transfer into Scotland

Reg. 45 SSI 2005 No. 467 and 32 of SSI 2008 No. 356 require the MWC to visit the patient within six months of transfer. Although the MWC usually aims to visit within four weeks, we do not consider that there is benefit in visiting every cross border transfer. Additionally the 2015 Act will extend the patient's right to appeal to the MHTS within the first three months after transfer when certain conditions are met. This makes a visit by the MWC and the timing of a visit less significant.

We therefore consider that the MWC should have the right to visit but that should be at the discretion of the MWC having made initial enquiries into the circumstances of the move. This would allow us to target our resources more appropriately.

Question 6

We agree that where all parties indicate their assent in writing to a transfer outwith the UK, the 28 day period could be waived to three days.

There will be cases where the patient is too unwell to give competent consent to this waiver but it may be still be in their interests to move before the 28 day period has elapsed. We consider such an early transfer should be possible where it has been demonstrated to the satisfaction of Scottish Ministers that appropriate care and treatment is available to the patient as soon as they transfer, and an early transfer is in the best interests of the patient.

Question 7

Cross border transfers for patients on suspension of detention

In principle, we favour the maximum flexibility to ensure that regulations do not impede appropriate care and treatment, so would not argue that cross border transfers while people are on suspension of detention should be impossible. However, there are some complex issues to address.

The most significant is that the cross border regime is based upon transferring to a broadly similar order in the receiving jurisdiction. Leave of absence appears to be granted for much shorter periods in England than in Scotland - guidance suggests that responsible clinicians need to consider whether a Supervised Treatment Order should be considered after seven consecutive nights on leave of absence. If this length of leave of absence is inappropriate and leave of absence is needed for a longer period, the reasons must be stipulated for this. It also appears to need to be renewed on a monthly basis and there is no maximum period of time stipulated as to how long it can continue overall. Similarly in the Mental Capacity Act (N. Ireland) there appears to be no maximum period in the primary legislation that a patient can be granted 'permission for absence' (s27).

Suspension frequently depends on conditions set by the RMO. It may be difficult to know if these conditions would be equally applicable in the new setting, or how any change in conditions would affect the acceptability of the arrangement for the patient.

There is also a difference in the transfer procedures between patients subject to detention and those subject to a community-based CTO. The initiative for transferring a detained patient rests with the RMO. For people on CCTOs, it is the *patient* who makes the choice to move (see Part 2 of SSI 2008/356). People on suspension of detention sit somewhere between these two situations.

In many cases, we believe it would be preferable for a hospital to hospital transfer to take place, or for the CTO to be varied to a community based order and for the patient then to seek a transfer to a Supervised Treatment Order.

However, provided Ministers are satisfied that, in an individual case, the different legal framework or potential changes to conditions will not disadvantage the patient, and the patient is aware of how the differences in orders between jurisdictions may affect their decision as to the transfer, we believe that transfers should be possible.

We would also be inclined to favour a system closer to CCTOs, so that it is for the patient or the patient's representative to initiate the transfer, rather than for them to have a right of appeal against it.

Question 8

We agree that provided the patient has capacity and the patient and the named person (if applicable) agree to transfer to another part of the UK, the mandatory period after the effective date of the warrant could be waived.

We think that the warrant for transfer should still only allow transfer to a specific ward or hospital to ensure that those needing specialist care are safeguarded against being moved to a more general psychiatric service.
If there was some discretion for the Scottish Ministers to then amend the warrant to another ward or hospital at short notice, where an alternative was shown to meet their needs, this would be welcomed.

Question 9

No

Question 10

Following the change in the UK's status within the EU, it may be that we will have to make individual arrangements with individual states in the EU.

Meantime we agree that the process, safeguards and information required for arranging cross border transfers from other EU countries should be the same as that for transfers within the UK. We agree that Scottish Ministers may require further information from another EU state on the basis for detention etc before agreeing a transfer.

In addition, due to the likely variation between Scottish orders and orders from other EU countries, we consider there should be a right to appeal to the MHTS about the equivalence of the order that the person is placed on when they arrive in Scotland.

Question 11

No

Question 12

If a patient is capable of consenting, and is consenting, and is on an appropriate order elsewhere that would cover the treatment, then allowing them to consent to treatment would seem the least restrictive option.

However where the patient does not consent, we think a short term detention certificate offers the most appropriate safeguard, if treatment is needed, even if this is for a short period of time before return to their home area.

Question 13

We consider that in the circumstances outlined, a short term detention offers more protection to the rights of the patient. We do not consider that the granting of a STDC is an unduly burdensome process to authorise a new urgently required treatment, treatment to facilitate travel or to authorise continuing medication.

Question 14

As already stated, we consider that a short term detention offers easier and better protection in all circumstances where treatment is being given that the patient does not or cannot consent to, rather than the alternative proposed (further statutory guidance setting out good practice etc.)

Question 15

We do not consider there is a need for extra statutory guidance that may or may not be followed and would need to be monitored, rather than arranging a STDC - a system that people already know.

Question 16

There may be exceptional circumstances where a patient may claim they have been abused in hospital or community care and treatment services in other parts of the UK or EU that may require to be investigated in terms of adult support and protection legislation before the person is returned. Where such allegations have some plausibility, an adult support and protection referral to the local authority may be necessary in order to investigate such allegations and safeguard the patient, and the transfer should be put on hold pending the outcome.

Question 17

We agree with the proposed change to the regulation.

Question 18

The MWC would want to be informed of any patients subject to COROs, hospital directions, or transfer for treatment directions who abscond, as well as any patients who abscond from high and medium secure units.

Whilst we do not normally investigate such cases, or collate these figures as part of our monitoring role, it is useful in alerting of us of any pattern to absconding, in highlighting possible deficiencies in care and in dealing with the media.

Question 19

Yes

Question 20

Yes

Question 21

No

Question 22

We have no specific suggestions, but would be happy to discuss ideas with officials or with the Reference Group, and to use our own website and contacts to share information.