

## Mental Health (Scotland) Act 2015, Scottish Statutory Instruments

### SAMH

#### Summary:

- **We urge the Committee to reject the regulations relating to absconding.**
- **We are content with the remaining regulations, although we want to see stringent guidance to protect the rights of patients and service users.**

#### Absconding

##### Changes to the 2005 Regulations

##### **Regulation 2 – the list of specified persons who can take persons into custody if they abscond within Scotland**

SAMH set out concerns about this specific proposed legislative change in the consultation in 2016. The regulation as drafted allows the RMO to authorise any person to take someone into custody. This definition is too vague. It does not ensure that the person specified has appropriate qualifications or experience to fulfil these duties. This is especially important given that the person to be taken into custody may be distressed or confused, and may have been without their medication or other usual treatment and support for some time.

We believe there should be a prescribed list of people who can be authorised to take persons into custody.

As these regulations are subject to affirmative procedure, and cannot be amended, SAMH regrets that the wording of the regulation does not include the word 'qualified' in describing the person who can be authorised by the patient's responsible medical officer; and calls for the Committee to lodge a motion to ask the Scottish Government to amend this part of the regulation.

##### Changes to the 2008 regulations

##### **Medical treatment for people who have absconded from jurisdictions outwith Scotland.**

SAMH believes this to be the most controversial and challenging aspect of the regulations.

We welcome the express prohibition of certain treatments in Sections 234(2) and 237(3) as they would be inappropriate in the circumstances being legislated for.

However, we believe that our concerns raised during the consultation process have not been addressed and that the changes proposed do not adequately safeguard the rights of patients absconding into Scotland. **As these regulations stand, the**

**Scottish Government is proposing to treat people over several days without the same authorisation from mental health law that would be provided for someone resident in Scotland receiving treatment. People absconding into Scotland could be subject to prolonged detention and treatment without the right to appeal, which we regard as an infringement of their human rights. There is also an extension of treatment (regulation 14) beyond emergency care without observing the principle of reciprocity by extending more rights to the patient.**

Through their exclusion of provision of treatment by authorisation of the 2003 or 1995 Acts, set out in these regulations 11, 12, 13 and 14, the Scottish Government proposes to provide treatment to patients **without** such protections. In other words, patients would be treated as if they were on a Short Term Detention Certificate but would not actually be on such an order. This means they would not have the legal right to challenge treatment, there would no requirement for a Mental Health Officer to review their case and there would be no right to appeal.

In our consultation response, SAMH highlighted the following judgement by the European Court of Human Rights in the X vs Finland case in 2012, where the latter had breached the appellant's Article 8 rights. This should be noted by the Scottish Government in their proposed changes for the treatment of absconding patients from outwith Scotland:

“The Court considers that forced administration of medication represents a serious interference with a person's physical integrity and must accordingly be based on a “law” that guarantees proper safeguards against arbitrariness. In the present case such safeguards were missing. The decision to confine the applicant to involuntary treatment included an automatic authorisation to proceed to forced administration of medication when the applicant refused the treatment. The decision-making was solely in the hands of the treating doctors who could take even quite radical measures regardless of the applicant's will. Moreover, their decision-making was free from any kind of immediate judicial scrutiny: the applicant did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication and to have it discontinued. [para 220]”

As the regulations are set out, and with the accompanying policy note, there is no appeals procedure outlined, no access to a Mental Health Officer for people who will not be familiar with the law, and no mention of independent advocacy. The Mental Health Act as it stands allows for the provision of treatment of someone who has absconded into Scotland in order to prevent deterioration. If further treatment over a longer period of time is required, we believe doctors must be required to issue Short Term Detention Certificate so patients can be treated safely and have access to appeals and other rights under this law. This is the current process and we have

seen no evidence that it needs to change, particularly given the small number of people absconding into Scotland each year.

**We therefore ask the Committee to reject these draft regulations.**

### **Cross Border Transfers**

SAMH is broadly content with the technical changes set out in these regulations, which provide for consistency for patients moving to Scotland or leaving Scotland for treatment, in terms of named person notification or moving to an area within the EU rather than within the UK. SAMH is content with these provisions but notes the impact of Brexit, and the need to ensure that the quality of care and treatment and provision of rights of people are protected as part of the Brexit process; this may need to be revisited as the UK leaves the European Union. We also note that the patient's right to autonomy and privacy is protected as their permission will be sought and required before sharing information with carers or nearest relatives.

### **Reception of Patients into Scotland**

SAMH notes that there will be a period of time set out before the patient can appeal following transfer into Scotland, and we welcome the decision to treat the commencement of the order as having begun in from the date it began in the original jurisdiction. We support this decision as the least restrictive option and appropriate in the circumstances.

However, SAMH is concerned that there will no longer be a duty placed on the Mental Welfare Commission to visit a patient within six months of their reception into Scotland; we note that the commission will still have the power to make such visits and we recommend that these visits take place, to ensure that the patient fully understands and can access their rights during their care and treatment.

### **Reception of Patients from Scotland**

SAMH is content that there are sufficient safeguards in place for an agreed fast-track process. In the code of practice, we believe that there should be access to independent advocacy to improve communication and understanding at what could be a challenging and fast-moving time, and allow for the communication about last-minute changes of mind about a move. The consent and understanding of the patient should be paramount, and this must be demonstrated in such a move.

We also note the consistency of the changes bringing into line in terms of named person / family member notification, and are content with this.

We highlight the comment expressed in our original consultation response about the impact of leaving the European Union on these draft regulations in terms of the rights within ; and note this has also been highlighted by the Alliance, Scottish Recovery Network and Scottish Independent Advocacy Alliance, which we endorse.

**Overall, we accept these regulations,** however, we believe that there needs to be stringent guidance in the Code of Practice to ensure that the rights of patients or service users are fully actualised, especially when someone is moving to Scotland and may not be aware of all their rights under Scottish law.

### **Safeguards for certain informal patients**

SAMH notes this regulation allows for the provision of artificial nutrition to young people under the age of 16 who would be treated as 'informal' patients under the Mental Health (Care and Treatment) (Scotland) Act 2003.

We provided evidence to the Scottish Government during the first consultation about these draft regulations, and are generally content with the safeguards provided. In our submission we called for clear guidance in terms of the timescale and expertise of clinicians. We believe the proposal to be compliant with Articles 3, 5, 6 and 24 of the UN Convention on the Rights of the Child. It is right that the proposed safeguards are suitably stringent when these children will be treated. The provision of artificial nutrition is an intrusive and unpleasant procedure, so these safeguards must be met and shown to be met.

We welcome the Mental Welfare Commission's role in the appointment of the DMP; we believe it would be helpful for the Commission to annually report on all cases of the provision of artificial nutrition to patients under the age of 16, with and without their consent.

SAMH believes that both the young people and their parents or carers should be given as much information, support and access to advocacy as possible, as well as signposted to supporting agencies. Young people could also be encouraged and supported to make personal and advance statements, which could help to inform their treatment and act as a tool in their recovery. It is crucial young people get access to early support for eating disorders, and that all professionals who come into contact with young people with eating disorders have relevant training on this issue.

It is crucial that the guidance is helpful to clinicians in the circumstances set out for these regulations. **With that caveat, we support this regulation.**