

Mental Health (Scotland) Act 2015, Scottish Statutory Instruments

Mental Welfare Commission

Health and Sport Committee call for views – Mental Health (Scotland) Act 2015

This is a response on behalf of the Mental Welfare Commission to the call for views on a series of SSIs which have been laid in the Scottish Parliament, in relation to the bringing into force of the Mental Health (Scotland) Act 2015.

The Committee asked: **Are you content with the proposals in these Scottish Statutory Instruments on the Mental Health (Scotland) Act 2015 or are there issues that you would wish the Committee to raise with the Scottish Government during its scrutiny of the instruments?**

We confirm that we are generally content with the SSIs. We have been consulted on the policy intentions behind the regulations, and our comments have generally been taken into account. However, we have a few points which we invite the Committee to consider raising with the Scottish Government.

Mental Health (Absconding) (Miscellaneous Amendments) (Scotland) Regulations 2017

These regulations widen the application of regulations to deal with ‘absconding’ patients, i.e. those who are subject to compulsory treatment in another jurisdiction and have come to Scotland without permission. The current regulations apply to the UK, and these regulations extend that to the rest of the EU.

We agree that it is helpful to have a mechanism to return people who need treatment and are subject to compulsory measures to another EU country, but there need to be adequate safeguards. We are not convinced that those safeguards are sufficiently clear in the regulations.

During its consultation, the Scottish Government said that:

‘Orders in other EU jurisdictions may not be fully equivalent with those in Scotland, for example they may have different criteria for detention. We would not expect any patient to be detained if they did not also meet the criteria for detention under the 2003 Act and we are considering if the regulations should set out any specific safeguards.’

There do not appear to be any such safeguards in the regulations, and the Committee may wish to seek clarification from the Government as to why they believe they are not necessary. Not every EU jurisdiction has mental health legislation which is as modern and rights-based as the Scottish Act.

An even greater concern is that there appears to be no safeguard against the patient being returned to their host country in situations where there may be serious

concerns about the quality of care in the home country or suspicion of abuse, ill-treatment or unlawful detention.

We accept that it is reasonable that patients subject to mental health detention in the UK be returned home, as already happens. But we are not sure this should apply across the EU without at least a backstop safeguard. We suggest that Ministers should be empowered to prevent the patient being returned in situations where further investigation is required.

The regulations make provision to authorise medical treatment to be given to people who have absconded to Scotland from elsewhere in the EU. Where medication is given for mental disorder without the patient's consent, the treatment will normally require to be authorised by a Designated Medical Practitioner (DMP) appointed by the Mental Welfare Commission.

We do not oppose this, but the Committee might want to ask the Scottish Government about the situations where they believe the safeguard will be of value.

In most cases, the absconding patient will be returned to their home jurisdiction within a few days. This would generally not be enough time to arrange for a DMP visit. If the responsible doctor believes treatment is urgently necessary, there is authority to do this without DMP approval under section 243 of the Act, as applied by regulation 14.

Where the patient will be in Scotland for a longer period, and treatment is felt to be necessary but not sufficiently urgent to meet the s243 test, the doctor appears to have an alternative route, of detaining the patient under a Scottish short-term detention (Part 6 of the 2003 Act), which would provide a treatment authority without the need for DMP approval.

Mental Health (Safeguards for certain Informal Patients) (Scotland) Amendment Regulation 2017

We support these regulations in principle. They provide the additional safeguard of a DMP authorisation in the case of a child who may be too immature to consent to naso-gastric feeding, where that treatment is authorised on the basis of parental consent.

However, we think that the drafting has created a difficulty. Regulation 5 provides that, where the treatment is extremely urgent, and the child is resisting or objecting, the treatment may proceed without prior DMP consent. But if the child is *not* resisting or objecting, there seems to be no means to avoid the requirement for DMP consent, however urgent the situation. This appears to be a perverse and unintended outcome. It is unlikely to apply often, but could cause difficulties in some rare but urgent cases.

Regulation (2B) allows notification to the Commission to be dispensed with in urgent cases. We would like some reassurance that the Code of Practice will make it clear that, in such cases, we should be notified after the treatment has been given.

Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017

Mental Health (Cross-border transfer: patients subject to detention requirements or otherwise in hospital (Scotland) Amendment Regulations 2017

Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017

We are generally content with these regulations, which will smooth the path in relation to patients who require urgent transfers to other jurisdictions, particularly where highly specialised care is needed.

We have occasionally come across cases where urgent transfers have been held up while awaiting the approval of Ministers. We do not suggest the regulations need amending, but the Committee might wish to ask Ministers what assurances they can give that transfers will be processed expeditiously.

The Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017

These regulations appear to correct an earlier oversight: that references in the Mental Health (Care and Treatment) (Scotland) Act to probation orders were not amended when those orders were replaced by community payback orders. We have no issues with making this correction.