Law Society of Scotland

Consultation Response

A consultation of implementation of certain sections of the Mental Health (Scotland) 2015 and associated regulations (Part 2)

October 2016

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Cross-border transfer regulations

1. Do you agree with these proposals? Please state if you have any concerns or suggestions for changes to the proposal.

   Yes, we agree with the proposals. We welcome the extension of a right of appeal against transfer of a patient from Scotland to Named Persons. We also welcome a right of appeal where the patient does not have a Named Person and lacks capacity to initiate the appeal to listed persons.

   Where the patient does not have a named person and lacks capacity to initiate the appeal we consider that (a) the RMO should be required to give notice to listed persons under Section 257A of the Mental Health (Care and Treatment) Act 2003 that an application is to be made to Scottish Ministers for a warrant that would allow a cross border transfer and (b) there should be a requirement to inform listed persons of Scottish Ministers decision whether or not to grant a warrant.

2. Do you agree that a right to apply to the Tribunal as set out in this section should be introduced? Please state if you have any concerns or suggestions for changes to the proposal. Are there any related circumstances where such a right to apply to the Tribunal should be introduced?

   Yes, we agree that a right to apply to the Tribunal within three months of the date of the original Order should be introduced as proposed. However, we are concerned that the circumstances "That the patient did not have an appeal heard against transfer ahead of transfer" may lack clarity.

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3. Do you agree with the proposal that limited information about the transfer should be provided to any guardian or welfare attorney or equivalent where there is no named person? Do you consider it appropriate for the guardian or welfare attorney to receive all of the information listed in this section, or should they only receive this in part? Where there is no named person, or guardian or welfare attorney, should information be provided to the primary carer?

   No, we do not agree with this proposal. We consider that information about the transfer should be provided to any guardian or attorney with relevant powers or equivalent in other jurisdictions (whether or not there is a named person). Where there is no named person and the patient lacks capacity to initiate an appeal, information should be provided to listed persons.

4. Do you think there should be changes made to the timescale after which a DMP should visit a patient who has transferred to Scotland to authorise the continuation of 'treatments given over a period of time'? If so, what timescale would you suggest and should this apply in all circumstances or are there specific circumstances where it should apply? Do you agree that if the DMP has visited within the first two months, a DMP visit after two months should not be required?

   We support the shortening of the timescale within which a DMP opinion is required to 4 weeks. When this takes place we do not consider that a further DMP opinion would be necessary within two months of the transfer.

5. Overall, are there any further changes that you think should be made to these regulations in relation to the reception of patients into Scotland?

   No

6. Do you agree with this proposed change? Please state if you have any concerns or suggestions for changes to the proposal.

   Yes, we agree with this proposal.

7. Are there circumstances where the regulations should allow a cross border transfer for a patient whose detention is suspended? If so, should there be any variation to the process for other cross-border transfers? Do you consider there should be any additional information required or different safeguards?

   In respect of this question, we agree with the Mental Welfare Commission's position as stated in their response.

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8. Do you agree with these proposals? Please state if you have any concerns or suggestions for changes to the proposal. Are there any additional safeguards or alternative ways of amending the regulations that should be considered?

   In respect of this question, we agree with the Mental Welfare Commission's position as stated in their response.

9. Overall, are there any further changes that you think should be made to these regulations in relation to the transfer of patients from Scotland?

   No

10. Do you consider that the same process should apply for reception of patients from other EU countries as does for reception of patients from elsewhere in the UK? Are there any additional safeguards that should apply? Is there any additional information that should be provided to Scottish Ministers, including in relation to possible arrangements or concerns following discharge of the patient from hospital?

    We consider that the same process should apply for reception of patients into Scotland from other EU countries as it applies for reception of patients from elsewhere in the UK.

11. Do you have any other comments to make about cross border transfers, either in law, guidance or in practice?

    No

Chapter 3 – Absconding regulations

12. Do you agree with this proposal? Please state if you have any concerns or suggestions for changes to the proposal.

    We agree with the proposal that the provisions of Part 16 which authorise treatment for those patients who are capable of consenting and consent to that treatment are applied to patients who have absconded to Scotland from other jurisdictions. However, where the patient lacks capacity and/or does not consent, we consider that the patient's rights are most appropriately protected by being treated under a Short Term Detention Certificate.

13. Do you agree that these regulations should allow patients to be treated under section 243 of the 2003 Act ? Please state if you have any concerns or suggestions for changes to the proposal.

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We do not agree that regulations should allow patients who have absconded to Scotland from other jurisdictions to be treated under Section 243 of the 2003 Act. We consider that the patient's rights are most appropriately protected by being treated under a Short Term Detention Certificate.

14. Do you consider that there might be situations where it would be of benefit for a patient to receive treatment that may not fit under the criteria of section 243? If so, please describe them and any exemptions or safeguards that you would expect to be included.

    As previously stated, we consider that the patient's rights are most appropriately protected by being treated under a Short Term Detention Certificate.

15. Do you agree that guidance should be set out for these circumstances? What timescales and other protections do you think would be most appropriate for the guidance?

    We do not agree that additional statutory guidance is necessary or appropriate. As previously stated we consider that the patient's rights are most appropriately protected by being treated under a Short Term Detention Certificate.

16. Are there any circumstances where you consider that a patient who has absconded from another jurisdiction should not be returned to the original hospital or country of origin? Are there any safeguards that you consider should be part of the regulations in relation to patients who have absconded from other jurisdictions?

    In respect of this question, we agree with the Mental Welfare Commission's position as stated in their response.

17. Do you agree with this proposal? Please state if you have any concerns or suggestions for changes to the proposal. Should the regulations or guidance specify anything related to the process for this authorisation?

    Yes, we agree with the proposal.

18. Do you agree with this proposal? Please state if you have any concerns or suggestions for changes to the proposal.

    Yes, we agree with the proposal.

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Chapter 4 – Transitional and savings provisions

19. Do you agree with the proposals set out? Please state if you have any concerns or suggestions for changes to the proposal.

    Yes, we agree with this proposal.

20. Do you agree with the general approach to savings and transitional provisions set out in this section? Please state if you have any concerns or suggestions for changes to the proposal.

    Yes, we agree with the general approach adopted.

21. Do you have any views on the proposals for individual sections as set out at Annex A?

    No.

22. We will ensure that these changes are supported by clear guidance for practitioners, service users and others in relation to transitional and savings provisions, to ensure it is clear how and when each section of the 2015 Act applies. Do you have any views about specific information that should be contained in the guidance in relation to transitional and savings provisions? Do you have any views on how best this guidance should be targeted, including to specific groups of practitioners?

    No.

Chapter 5 – Impact Assessments

23. Do you think any of the proposals set out in this consultation will have an impact, positive and negative, on equalities as set out above and if so, what impact do you think that will be?

    No response submitted.

24. What implications (including potential costs) will there be for business and public sector delivery organisations from these proposals?

    No response submitted.

25. Do you think any of these proposals will have an impact, positive and negative, on children's rights and if so, what impact do you think that will be?

    No response submitted.

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26. Do you think any of these proposals will have an impact, positive and negative, on privacy and if so, what impact do you think that will be?

    No response submitted.

Chapter 6 – Other aspects of implementation

27. Question 27 – Do you have any other suggestions, comments or views about the implementation of Parts 1 and 2 of the 2015 Act that were not covered by other chapters of this consultation or by the first consultation?

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The Law Society of Scotland welcomes the opportunity to consider and respond to the Scottish Government's consultation on the implementation of certain sections of the Mental Health (Scotland) Act 2015 and associated regulations (Part 2). This has been considered by our Mental Health and Disability Sub-Committee.
If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General Comments:

The Committee is generally supportive of the proposals set out in the consultation paper and our comments should be read in light of this position.

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