

**EXPLANATORY MEMORANDUM TO THE
MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003
(CONSEQUENTIAL PROVISIONS) ORDER 2005**

2005 No. 2078 (S.9)

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1. The Mental Health (Care and Treatment) (Scotland) Act 2003 (the “2003 Act”) replaces almost all of the Mental Health (Scotland) Act 1984 (the “1984 Act”). This Order amends current references in UK primary and secondary legislation to the 1984 Act and provides for the cross-border transfer of detained patients, in consequence of the 2003 Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998 (“the 1998 Act”). The Order is, by virtue of Schedule 7 to that Act, subject to affirmative resolution procedure in both Houses of the UK Parliament. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament; in this case the Mental Health (Care and Treatment) (Scotland) Act 2003.

3.2. This Order makes consequential provisions and amendments which it would be outwith the legislative competence of the Scottish Parliament to make. The Scottish Executive intends to make all necessary consequential amendments as a matter of Scots law, which are within devolved competence, in an Order under the 2003 Act. In addition, regulations under the 2003 Act will make provision as a matter of Scots law for the cross-border transfer of patients.

3.3. Articles 2 to 12 replace the cross-border provisions of the 1984 Act, which have been rendered out of date by the 2003 Act and it is necessary to replace them. These articles have extent appropriate to the jurisdictions of the UK to which their provisions relate i.e. article 6, which relates to the removal of patients from Northern Ireland to Scotland, extends to Northern Ireland.

3.4. Articles 13 and 14 replace the provisions of the 1984 Act that dealt with persons detained in Scotland under immigration Acts who are suffering from a mental disorder, and extend to Scotland only. The provisions of the 1984 Act have been rendered out of date by the 2003 Act, and it is necessary to replace them.

4. Legislative Background

4.1. The 2003 Act comes into force on 5 October 2005.

4.2. Articles 2 to 12 reflect the provisions of the 1984 Act on the cross-border transfer of patients, which have been updated in light of the provisions of the 2003 Act. The cross-border provisions of the 1984 Act will be rendered out of date by the 2003 Act. Regulations under the 2003 Act will make provision as a matter of Scots law for the cross-border transfer of patients. This Order makes provision as a matter of English and Welsh and Northern Irish law for the cross-border transfer of patients. The 2003 Act repeals almost all of the 1984 Act, including the cross-border provisions, as a matter of Scots law (where relating to functions exercisable in or as regards Scotland). This Order repeals almost all of the 1984 Act as a matter of Scots law (where relating to functions exercisable outwith Scotland) and as a matter of English and Welsh and Northern Irish law. This Order also amends or repeals the provisions of the Mental Health Act 1983 (“the 1983 Act”) which apply to Scotland in relation to the cross-border transfer of patients.

4.3. Article 13 applies provisions of the 2003 Act on transfer of prisoners for treatment of mental disorder to persons detained under immigration legislation in Scotland. Article 14 makes provision for persons in Scotland claiming services under the 2003 Act who are excluded from benefits under section 115 of the Immigration and Asylum Act 1999. These articles re-enact provisions of the 1984 Act.

4.4. The Order to be made by the Scottish Executive under the 2003 Act will update, as a matter of Scots law, most references in reserved legislation to the 1984 Act with references to the 2003 Act. However, that Order cannot make substantive changes to reserved legislation which extends to Scotland, or make any amendment to legislation as it extends to England and Wales and Northern Ireland. Schedules 1 to 3 to this Order make amendments to and repeals of primary and secondary legislation as a matter of English and Welsh and Northern Irish law (as appropriate), which are necessary in consequence of provisions of the 2003 Act. Some provisions of Schedules 1 to 3 (as detailed in article 1(10)) make consequential amendments or repeals also as a matter of Scots law, where it would be outwith devolved competence for the Order under the 2003 Act to do so.

5. Extent

5.1. This Order has extent to England and Wales, Northern Ireland and Scotland, except where article 1(5) to (10) provides otherwise. Articles 2 to 14 have extent relevant to the jurisdictions concerned e.g. article 6, which relates to removal of patients from Northern Ireland to Scotland, extends to Northern Ireland. The modifications in Schedules 1 and 2 and the repeals in Schedule 3 have, in most cases, the same extent as the legislation modified or repealed, but excluding Scotland where it is within devolved competence for the Scottish Parliament to make an identical modification or repeal as a matter of Scots law. As explained in paragraph 4.4 above, where it would not be within devolved competence to do so, this Order provides for the modification to extend to Scotland also.

6. European Convention on Human Rights

6.1. The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 are compatible with the Convention rights.

7. Policy background

7.1. The 2003 Act represents the culmination of the process by which mental health legislation in Scotland was comprehensively reviewed for the first time in over 40 years. Since the 1984 Act merely consolidated the Mental Health (Scotland) Act 1960, its provisions no longer reflected the ways in which mental health services were delivered in the 1990s. The policy intention behind the 2003 Act was therefore to place the delivery of mental health services within a rights-based and patient-centred environment while still equipping mental health professionals with the clear and unambiguous legal tools they required to be able to provide effective care and treatment to those in need.

7.2. The 2003 Act gives effect to a set of principles (often referred to as “the Millan Principles”) and defines the duties and powers of local authorities, Health Boards and the Mental Welfare Commission and the Mental Health Tribunal for Scotland. It provides compulsory detention powers (the circumstances in which a person with a mental disorder may be detained on a compulsory basis for the purpose of receiving treatment for mental disorder). The 2003 Act also provides for the way in which persons with mental disorder who are in the criminal justice system are dealt with and subsequently cared for and provides the rights which can be exercised by a person with a mental disorder as well as the safeguards put in place to protect their rights.

7.3. This Order makes provisions in a number of areas:

- **Removal to England and Wales of patients from Scotland:** Where patients are removed from Scotland to England and Wales, article 2 provides that they will become subject to the order or direction in England and Wales which most closely corresponds to the order or direction to which the patient was subject in Scotland. Provisions are also made about the handling of sentencing on transfer where patients are liable to detention by virtue of certain directions, the expiry of certain directions on transfer, and that directions given by the Scottish Ministers shall have force of law in England and Wales. This policy continues the policy on which the 1984 Act and 1983 Act were based. Article 2 substantially replaces provisions of the 1984 Act and includes an additional provision to allow directions given by the Scottish Ministers about the removal of patients to have effect in England and Wales.
- **Transfer of patients to England and Wales from Scotland:** Article 3 provides for patients subject to a restriction order and conditional discharge in circumstances where the patient is transferred from Scotland to England and Wales. On transfer, the order and conditional discharge will be treated as if they were made under the relevant enactment in force in England and Wales.
- **Removal to Northern Ireland of patients from Scotland and the transfer of patients to Northern Ireland from Scotland:** Articles 4 and 5 make similar provision in respect of Northern Ireland to that described above for England and Wales. These articles substantially replace provisions of the 1984 Act and include an additional provision to allow directions given by the Scottish Ministers about the removal of patients to have effect in Northern Ireland.
- **Removal to Scotland of patients from Northern Ireland:** Article 6 replaces provisions of the 1984 Act and empowers the Department of Health, Social Services and Public Safety in Northern Ireland or the Secretary of State to authorise the removal to Scotland of patients detained under the Mental Health (Northern Ireland) Order 1986 (the “1986 Order”).

- **Transfer of patients to Scotland from Northern Ireland:** Article 7 replaces provisions of the 1984 Act and empowers the Secretary of State to transfer patients to Scotland where the patient was subject in Northern Ireland to a restriction order and a conditional discharge under the 1986 Order.
- **Patients absent from hospitals in Scotland:** Article 8 makes provision in connection with any person who may be taken into custody under the 2003 Act or under regulations made under the 2003 Act to allow patients who are absent from hospitals in Scotland to be taken into custody in any other part of the UK and returned to Scotland. This provision replaces a similar provision of the 1984 Act.
- **Patients absent from hospitals in Northern Ireland:** Article 9 makes provision for any person who is liable to be detained in hospital for treatment for a mental disorder in Northern Ireland and who is taken into custody in Scotland to allow such a person to be returned to Northern Ireland by any person authorised to take him into custody by or by virtue of regulations made under the 2003 Act. This provision replaces a provision of the 1984 Act.
- **Assisting patients to absent themselves without leave:** Article 10 replaces provisions of the 1984 Act and makes it an offence in England and Wales and Northern Ireland to do anything that would constitute an offence under the 2003 Act, of inducing or assisting a patient to abscond or harbouring a patient who is subject to the 2003 Act, if done in Scotland.
- **Provision as to custody, removal and detention:** Article 11 provides that where patients are being conveyed to any place in England, Wales or Northern Ireland, by virtue of the 2003 Act they will be in legal custody while being conveyed through England, Wales or Northern Ireland. Persons taking patients into custody or conveying them or detaining them by virtue of the 2003 Act will have all the powers etc. of a constable.
- **Protection for acts done under this Order:** Article 12(1) provides for protection from civil and criminal proceedings for acts done in Scotland in pursuance of this Order. For the rest of the UK, article 12(2) applies the protection given by section 139 of the 1983 Act to acts done under this Order.
- **Persons detained under immigration law:** Article 13 applies provisions of the 2003 Act about the transfer of prisoners for treatment of mental disorder to persons detained under immigration legislation. The provisions allow for the removal of prisoners to hospital for medical treatment. This replaces a similar provision of the 1984 Act.
- **Mental health services provided by local authorities:** Article 14 replaces provisions of the 1984 Act and provides that persons excluded from benefits under section 115 of the Immigration and Asylum Act 1999 will not be entitled to care and support services and other facilities under the 2003 Act solely because they are destitute.

7.4. This Order is being brought forward at this time for the coming into force of the Mental Health (Care and Treatment) (Scotland) Act 2003 on 5 October 2005.

8. Impact

8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2. There will be no impact on the public sector.

9. Contact

Clare Jones at the Scotland Office, e-mail: clare.jones@scotland.gsi.gov.uk, can answer any queries regarding the instrument.