POLICY NOTE

THE MENTAL HEALTH (DETENTION IN CONDITIONS OF EXCESSIVE SECURITY) (SCOTLAND) REGULATIONS 2015

SSI 2015/364

The above instrument was made in exercise of the powers conferred by section 271A of the Mental Health (Care and Treatment) (Scotland) Act 2003. The instrument is subject to affirmative procedure.

Legal Background

The Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') introduced a right for patients in The State Hospital to apply to the Mental Health Tribunal for Scotland for an order declaring that the patient is being detained in conditions of excessive security and specify a period where the relevant Health Board identifies a hospital in which the patient could be detained in appropriate conditions. It also introduced a similar scheme for "qualifying patients" detained in hospitals other than the State Hospital, with such "qualifying patients" to be defined in regulations.

Following amendments in the Mental Health (Scotland) Act 2015, section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003 allows a patient to contest the conditions in which he or she is being detained in a qualifying hospital, by means of an application to the Mental Health Tribunal for Scotland ("the Tribunal") for an order declaring that the patient is being held in conditions of security which are excessive in the patient's case, and specifying a period during which the Health Board shall identify an alternative hospital in which the patient could be detained in appropriate conditions.

Sections 269 to 271 make associated provision. Section 269 provide for further Tribunal proceedings which may follow upon its finding that a patient is being detained in conditions of excessive security. Section 271 allows the Tribunal to overturn an earlier decision that a patient is being detained in conditions of excessive security. Section 271A allows for regulations to set out the test for the purposes of the Tribunal's consideration of whether the patient is being held in conditions of excessive security. It also allows for regulations to set out the definition of "qualifying hospital".

Policy Objectives

The scheme for patients in The State Hospital became operational in 2006. However, the scheme for "qualifying patients" outwith The State Hospital has never been brought into force. In 2012 the Supreme Court ruled that the Government's failure to make regulations bringing the appeal right into force for such patients is unlawful.

By defining "qualifying hospital" and setting out the test that must be met before the Mental Health Tribunal may grant an order declaring that a patient is being detained in conditions of excessive security, these regulations will deliver the intention of the Mental Health (Care and Treatment) (Scotland) Act 2003 to give a right of appeal against being detained in conditions

of excessive security to patients in medium secure units in Scotland as well as to patients in The State Hospital.

Regulation 3 amends the 2003 Act so that an application may not be made to the Tribunal for an order declaring that the patient is being detained in conditions of excessive security unless an approved medical practitioner (as defined in section 329(1) of the 2003 Act) has expressed that view in a report accompanying the application.

These Regulations define the expression qualifying hospital (regulation 4). Qualifying hospital are the three medium secure units in Scotland - Orchard Clinic, Rowanbank Clinic and Rohallion Clinic. Rohallion consists of a low secure unit and a medium secure unit and therefore only the medium secure service is specified in the regulations. The Regulations will, therefore, allow all patients whose detention is authorised by a compulsory treatment order; compulsion order; hospital direction or transfer for treatment direction in these medium secure units to contest the conditions in which they are being detained on the ground that the test set out in the regulations is met in their case.

Regulation 5 specifies that the test to be applied under sections 268(2), 269(3) and 271(2)(a) of the 2003 Act is met in relation to a patient if detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case.

Regulation 6 elaborates on the factors that are to be considered in determining whether a patient's detention in a qualifying hospital involves the patient being subject to a level of security that is excessive in the patient's case. The Regulations mean that a patient's detention in a hospital is to be taken as excessive in the patient's case only when the security at the hospital is greater than is necessary to safely manage the risk that the patient may pose to their own safety; and the safety of any other person.

Consultation

The Scottish Government asked the Mental Welfare Commission to facilitate a consultation forum on excessive security in early 2013. The aim was to hear the views of stakeholders on the implications of this judgement before considering consultation on proposals. Representatives from the following organisations were invited to the event:

- Mental Health Tribunal for Scotland
- Service provider organisations (high, medium and low secure facilities)
- Professional organisations (medical, nursing, social work and legal)
- The Scottish Legal Aid Board
- Voluntary organisations
- Advocacy organisations
- Service user and carer organisations

There was some divergence of opinion among participants. While some consultees questioned the need to introduce regulations, the group as a whole recognised that this was not an option.

A public consultation took place from 2 August 2013 to 25 October 2013 seeking views on the way forward, it included two proposals:

- bring forward regulations which would give an effective right of appeal to patients in medium secure units ('regulations proposal');
- repeal provisions in the 2003 Act which provide for a right of appeal for patients outwith the State Hospital.

The majority of respondents who answered the relevant question felt there was a need for provision for an appeal against excessive levels of security. Several respondents commented that they welcomed the proposal to bring forward regulations as proposed. Potentially positive impacts, as identified by respondents, included a reduction in waiting lists for beds in medium secure and therefore a reduction in applications relating to detention in conditions of excessive security in The State Hospital.

In light of the provisions in the 2003 Act, and the ongoing unlawfulness of not bringing forward regulations the Scottish Government was committed to bringing forward such regulations. The question then was which patients a right of appeal against detention in conditions of excessive security to patients should be extended to. The proposal in the public consultation was to extend the right to patients in the medium secure units. While some respondents to the consultation felt that patients beyond medium secure units should have a right of appeal, the policy intention behind these regulations is to bring into effect the scheme provided for in the 2003 Act by extending the right to patients in the medium secure units.

Initial draft regulations were provided to the Health and Sport Committee during the passage of the Mental Health Bill and were published on the Scottish Parliament's website on 24 April 2015. Attention to the initial draft regulations was drawn to the Scottish Association for Mental Health; the Scottish Human Rights Commission; Scottish Independent Advocacy Alliance; the Centre for Mental Health and Incapacity Legislation, Rights and Policy, Napier University; the Law Society for Scotland; Mental Welfare Commission for Scotland; Mental Health Tribunal for Scotland; the Faculty of Advocates; the Equality and Human Rights Commission and the Forensic Network.

Following publication of the initial draft regulations, meetings took place with the Scottish Association for Mental Health; the Scottish Human Rights Commission; and the Equality and Human Rights Commission. Some respondents drew attention to the provision in the draft regulations relating to when a hospital's level of security is excessive which meant that a patient's detention in hospital was excessive when the security at the hospital is greater than is necessary to safely manage any risk to the patient's safety that other persons may pose. While it was recognised that the concern was the patient's own safety, the view was that the patient should not be detained in conditions of excessive security due to the risks posed by other persons. It was felt that the risks posed to the patient needed to be managed. These regulations take account of this view and reference to harm to the patient's safety has been removed from the regulations.

Impact Assessments

The summary of the equality impact assessment for the Mental Health Bill, which included provisions related to excessive security including the regulation making power for these regulations, was published on the 24 June 2015. The equality impact assessment for these regulations rely on the assessment for the Bill. This assessment found that as service users with a longer term mental disorder are included within the protected characteristic of

disability under the 2010 Equality Act it is therefore likely that any effects that the Bill provisions, including changes to excessive security, have on service users will particularly impact the protected characteristic of disability. The assessment found that, with certain exceptions, none of the provisions in the Bill (including those related to excessive security) specifically relate to the other protected characteristics. For characteristics relating to gender, age and race, there is some evidence that certain groups are represented in relation to certain aspect of mental health legislation disproportionately to their representation in the population as a whole. No statistics were found on this in relation to religion or belief, sexual orientation or gender identity.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed.

The impact of this policy will largely be for Health Boards, the Mental Health Tribunal and the Legal Aid Board. There are some set up costs related to staffing and training for the Mental Health Tribunal.

The ongoing costs are estimated to be £11,000 a case across Health Boards, the Mental Health Tribunal and Legal Aid Board. This is based on costs for existing appeals by patients in The State Hospital under section 264 of the 2003 Act and breaks down as follows:

- £2,250 Mental Health Tribunal cost of panel hearings (£1,500 per day with an average of 1.5 panel hearings per day);
- £2,000 Central Legal Office costs per hearing for solicitors representing Health Boards preparation and appearance at hearings;
- £951 Scottish Legal Aid Board average costs per Mental Health Tribunal case;
- £3,000 estimated average Responsible Medical Officer/Mental Health Officer/Security staff member and two nurse escort costs per hearing for preparation for and attendance at a hearing;
- £2,500 Health Board costs per hearing associated with assessment of the patient's suitability for low secure services, preparation for and attendance at the hearing (where the patient is not detained in a medium secure hospital within his home health board area).

The Mental Health Inpatient Beds Census, published on 29 June 2015, provides data on patients as at 29 October 2014 and indicates that there were 127 patients in medium secure units.

Of these, not all patients will be eligible to appeal. Firstly, the appeal right only applies once the order has been in place for 6 months. At any point there will be a certain number of patients who would not be able to apply. The census data indicates around 21% of patients had been detained for less than 6 months. Secondly, not all patients will wish to exercise the right of appeal. Thirdly, not all patients will get a supportive report from a medical practitioner that must accompany their application and without which they will not be able to apply. It is difficult to estimate the percentage of patients who will not get a supportive report but between a third and two thirds of patients in The State Hospital who appealed under section 264 of the 2003 Act for each year were unsuccessful or withdrew the appeal. It is reasonable to assume that a high proportion of patients eligible to appeal would not be able to obtain a supportive report from an approved medical practitioner and therefore would not

be able to make an application to the Tribunal. This would indicate a potential number of 67 appeals (127-21%=100, 100-33%=67). For those patients who sought to obtain an independent report in order to make an application but the report was not supportive, estimated costs would be limited to approximately £600 per patient (in legal aid costs) instead of the full tribunal cost of £11,000.

This analysis would indicate costs to all public bodies of around £740k per annum (£11,000 x 67). If every patient in medium secure units was to apply the costs would be around £1.4m per annum (£11,000 x 127). In addition to this, it is estimated that there would be legal aid costs of around £20,000 per annum for those patients in medium secure units who sought to obtain an independent report in order to make an application but the report was not supportive (£600 x 33).

These costs are subject to a significant margin of uncertainty given that we cannot, with any certainty, predict the number of patients who will wish to obtain an independent report in order to make an application or the number of those who will obtain a supportive report in order for the appeal to proceed. Costs will vary depending on the complexity of the case and, for example, whether the patient is a restricted patient (detention authorised by a Compulsion Order and Restriction Order). If Health Boards do not identify more appropriate accommodation for patients who successfully win their appeal and move the patient within the timeframe set by the Tribunal there will be additional costs for second hearings.

Scottish Government
Directorate for Population Health Improvement

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