POLICY NOTE

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) (NO. 2) AMENDMENT RULES 2015

SSI 2015/334

1. The above instrument was made in exercise of the powers conferred by sections 21(4) and 326 of, and paragraph 10 of schedule 2 to, the Mental Health (Care and Treatment) (Scotland) Act 2003. The instrument is subject to negative procedure.

Legal Background

2. 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.

3. Following amendments in the Mental Health (Scotland) Act 2015 ("the 2015 Act"), section 268 of the 2003 Act allows a patient to challenge 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.

4. Sections 269 to 271 of the 2003 Act, once amended by the 2015 Act, will 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 recall an earlier decision that a patient is being detained in conditions of excessive security.

5. Section 271A, to be inserted into the 2003 Act by virtue of section 16(5) of the 2015 Act, 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".

6. Draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 laid in Parliament on 31 August 2015 set out the test for the purposes of the Tribunal's consideration of whether the patient is being held in conditions of excessive security and defines a "qualifying hospital". These Regulations are to come into force on 16 November 2015.

7. The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules are similarly proposed to come into force on 16 November 2015.

This will coincide with the proposed commencement date of section 14 of the 2015 Act, which inserts the requirement for a medical report prepared by an approved medical practitioner in relation to certain applications into the 2003 Act.

Policy Objectives

8. These Rules are consequential to Draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015.

9. These Rules amend rules 17A to 17C of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 (S.S.I. 2005/519) ("the principal Rules"). At present, Rules 17A to 17C of the principal Rules only extend to patients detained in a state hospital. These Rules amend the principal Rules in order to make provision in relation to patents detained in "qualifying hospitals".

10. Rule 2(2) amends rule 2 (interpretation) of the principal Rules in order to make provision as to who is a party in such proceedings. Rule 2(3) and (4) amends rule 17A to make provision in relation to an order under section 268(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (detention in conditions of excessive security: hospitals other than state hospitals).

11. Rule 2(5) inserts a new rule 17AA, which prescribes that any application against detention in conditions of excessive security under section 264 or 268 of the 2003 Act must be accompanied by a report prepared by an approved medical practitioner. This new rule reflects the inclusion of a new subsection (7A) into both sections 264 and 268 of the 2003 Act by virtue of section 14 of the 2015 Act once commenced. In addition to providing the information to be required under section 264(7A) and 268(7A) of the 2003 Act, the report must state the name of the approved medical practitioner who prepared it, the section of the 2003 Act in accordance with which the hearing is to be held, and in which list complied and maintained under section 22(1) of the 2003 Act (approved medical practitioners) the practitioner is included.

12. Rule 2(6) substitutes a new rule 17B. This extends the application of rule 17B to include hearings held in relation to a "qualifying hospital" held in accordance with section 269(2) of the 2003 Act (orders under section 268: further provision).

13. Rules 2(8) and (9) amends rule 17C to extend that rule so that it applies in relation to an application under section 271(2) of the 2003 Act for recall of an order made under section 268(2) or 269(3) of the 2003 Act.

14. Rule 3 is a saving provision relating to on-going applications by patients in the State hospitals so that the amendments proposed by these Rules, and the repeal of section 266 of the 2003 Act, do not apply to any relevant proceedings in connection with an application made under section 264(2) of the Act. For the purpose of the saving provision, relevant proceedings under the 2003 Act includes a hearing held in accordance with section 266(2) and an application to the Tribunal under section 267(2) for recall of an order made under section 266(2).

Consultation

15. The most recent set of amendments to the principal Rules were the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2012 (S.S.I. 2012/132). Those Rules were made following a consultation with the Administrative Justice and Tribunals Council and its Scottish Committee in accordance with section 44(2) of, and paragraph 24(1) of Schedule 7 to, the Tribunals, Courts and Enforcement Act 2007. The Administrative Justice and Tribunals Council was abolished by the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 (S.I. 2013/2042) ("the 2013 Order"). Paragraphs 33 and 36 of Schedule 1 to the 2013 Order repealed the duty of the Scottish Ministers to consult with the Administrative Justice and Tribunals Council and its Scottish Committee prior to making any amendments to the principal Rules.

16. No replacement statutory consultation requirement was enacted following the repeal of section 44(2) of, and paragraph 24(1) of Schedule 7 to, the Tribunals, Courts and Enforcement Act 2007. Nonetheless, these Rules have been developed following discussions with the Legal Secretary to the Mental Health Tribunal for Scotland, These Rules reflect those discussions.

Impact Assessments

17. The summary of the equality impact assessment for the Mental Health Bill, which included provisions related to excessive security 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

18. These Rules are not expected to lead to costs or savings for business, third or public sector organisations, regulators or consumers. These Rules reflect the provisions relating to appeals against conditions of excessive security by patients in "qualifying hospitals" in accordance with sections 268 to 271 of the 2003 Act as proposed by the draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015. A BRIA has been produced for the regulations that have already been laid in Parliament which include estimates of costs for public sector organisations. As a result a Business and Regulatory Impact Assessment (BRIA) is not required for these Regulations.

Scottish Government
Directorate for Population Health Improvement

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