CONSULTATION QUESTIONS

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1. Proposals for regulations

Our first proposal for legislative change is that we bring forward regulations in the following terms:

Section 268 of the 2003 Act gives a right of appeal against levels of excessive security for qualifying patients in qualifying hospitals. We propose that a qualifying patient would be -

- an individual who is subject to an order requiring them to be detained in a hospital which operates a medium level of security; and

- who has a report from an approved medical practitioner (as defined by section 22 of the 2003 Act, who is not the patient's current RMO,)which supports the view that detention of the patient in the qualifying hospital involves the patient being subject to a level of security which is excessive in the patient's case.

A qualifying hospital would be one of the following-

- the Orchard Clinic in Edinburgh, and the regional medium secure component of Rohallion in Tayside and Rowanbank in Glasgow

Please tell us about any potential impacts, either positive or negative you feel these proposals for regulations may have.

See my separate response

2 .Our second proposal is that we do not bring forward regulations but instead repeal section 268 at the earliest opportunity. At the same time we will consider the review undertaken by the National Forensic Network of patients detained in the high, medium and low secure estates, which we hope will clarify whether there is an issue with entrapped patients held in these settings. The outcome of this could result in changes to primary legislation in early course. To take that proposal forward we seek views on the following:

- The current appeal provision in section 268 is restrictive and in particular does not allow for a change in security levels within the same hospital setting. Is there a need for a wider provision for an appeal against excessive levels of security?

Comments

- If an additional appeal provision is created, do we need to provide for a preliminary review to consider the merits of the appeal before proceeding to a full hearing?

Comments

- Compulsory Treatment orders, compulsion and restriction orders and transfer treatment directives are currently reviewed by the Mental Health Tribunal at least once every two years. Levels of security are not necessarily discussed at these reviews. Should there be a requirement for the Tribunal to consider levels of security as a matter of course, with an accompanying right of appeal if the question of level of security has not been considered?

Comments

- Can more effective use be made of recorded matters by the Tribunal with regard to levels of security in Compulsory Treatment Order cases ?

Comments

- Are there other changes to the review system that you consider may help to support and develop further the effective movement of patients through the secure system?

Comments

Any further comments

Comments

Consultation in relation to Section 268 appeals against conditions of excessive security

Response to Discussion Paper from the Scottish Government

by

Dr J A T Dyer OBE, FRCPsych.

Introduction

I am a Medical Member of the Mental Health Tribunal for Scotland (MHTS), *but this response is given in a personal capacity and does not represent the view of MHTS.*

I am also a former Director of the Mental Welfare Commission for Scotland (MWC). I was formerly a member of the Millan Committee which produced proposals which led to the Mental Health (Care and Treatment) (Scotland) Act 2003 (the Act). As Director of the MWC, I led its input into the development of the 2003 Act; after the Millan Committee reported, it was the Commission and the Law Society which took the lead outside Parliament in promoting inclusion in the Act of an appeal against detention in conditions of excessive security.

Response

General Comment

I am concerned that there appears to be an unusually grudging tone in this consultation paper, perhaps attributable both to the loss by Ministers of the case appealed by a patient to the Supreme Court[1] and to practitioners' fears of increased workload. It is interesting to recall that Ministers were similarly reluctant in relation to the original Millan[2] proposals regarding appeal against detention in conditions of excessive security. The Millan proposals were not carried over into the Bill introduced to Parliament and were only inserted by amendment at Stage 3 after the MWC and the Law Society had persuaded the Health Committee of their importance and the Health Committee pressed the Government on the point.

It is understandable that Ministers would be disappointed that the Supreme Court rejected their arguments in the RM appeal. But to move now to repeal sections 268 to 271 would be an unfortunate and inappropriate response. I can say as one closely involved at the time, that the Millan Committee had intended that excessive security appeal measures appropriate to medium secure units should be brought into force in time, once medium secure units had become more established[3]. I believe that those involved as the 2003 legislation was passed believed that this intention was being put into effect. One can see in retrospect, and from the lucid Judgment of Lord Hope[4], that the mistake, arguably by both Parliament and the then Government [who accepted a Member's amendment that became section 333(2) of the Act], was to accept that the whole of Chapter 3 of Part 17 of the Act – as opposed to the State Hospital provisions only - should come into effect by 1 May 2006 at the latest. Had the

[1] RM *v* The Scottish Ministers. [2012] UKSC 58.
[2] Scottish Executive (2001). *New Directions. Review of the Mental Health (Scotland) Act 1984.* SE/2001/56. See Chapter 27.
[3] *ibid. See Para 91 and Recommendation 27.19.*
[4] RM *v* The Scottish Ministers. [2012] UKSC 58.

commencement of Sections 268 to 271 been left open to the discretion of Ministers instead, the problems which led to the successful Supreme Court appeal would have been avoided.

It is necessary to bear firmly in mind the important human rights principles which underlie the excessive security appeal provisions in the Act, particularly the principle of least restrictive alternative, which is expressed in the Act at section 4 where it requires that *"... the person shall discharge the function* [by virtue of the Act] *in the manner that appears to the person to be the manner that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances."*

The consultation paper tends to talk as though the primary purpose of the provisions had been to release obstruction to the free flow of patients within a system. Paragraph 4 states baldly that *"The reason for an appeal against levels of excessive security was to address the issue of entrapped patients within the State Hospital."* While it is true that patient entrapment in the State Hospital was a major motivating factor for the Millan Committee's proposals, it was the infringement of human rights aspects of this that were to the fore, not a blockage in a system. There would have been other ways of easing the flow for entrapped patients, e.g. placing a statutory duty on boards to commission local medium and low secure services, as argued for at the time by the State Hospital[5].

However Millan went on to say *"We have considerable sympathy with the position of the State Hospital on this point. However, we have decided that, in terms of our core remit of reviewing the Mental Health (Scotland) Act 1984, it would be more appropriate for us to propose another means of addressing this problem, which is more directed at the rights of individual patients. This is that patients should have a continuing right to appeal against the level of security to which they are subjected[6]."*

"It seems to us that to detain a patient unnecessarily in conditions of high security is inconsistent with respect for the patient's rights, and our general principle of <u>least restrictive alternative</u>. Furthermore, the proposed development of medium secure units would seem to make it more likely that such an appeal right would be practicable[7]".

The excessive security appeal provisions of the Act flow from the principle of least restrictive alternative. The Principles of the Act are mentioned once only in this consultation paper, at the end of Para 25.

It is with these considerations in mind that I address the consultation questions.

[By the way, there is an error in the discussion paper where it says in Para 6 that the provisions in section 264 to 267 of the Act came into effect on 5 October 2005. The correct position is stated in Para 13.]

Proposals for regulations

[5] Scottish Executive (2001). *New Directions. Review of the Mental Health (Scotland) Act 1984.* SE/2001/56, chapter 27, Para 82.
[6] *ibid.* Chapter 27 Para 83.
[7] *ibid.* Chapter 27 Para 84.

I agree that the next step should be to make regulations relevant to medium secure units, and not beyond that to lower levels of security. That is what was envisaged by Millan[8]. I am aware that there does not appear to be a situation with entrapped patients in medium security equivalent to that which previously prevailed at the State Hospital (although there is currently considerably difficulty in admitting patients to Rowanbank). However, if one is arguing from a position of principle (least restrictive alternative) and not optimal system flow, it is right that patients in medium stay settings as well as in high security should be able to appeal if they consider that they are being kept in excessive security.

It might be argued that that principle should also apply to low security and other locked facilities. However, appeals against excessive security in such circumstance would be much more akin to appeals against detention *per se*, already provided for in the Act, while both medium security and high security are sufficiently distinct from other settings as to justify a specific appeal.

I do not agree that an extra and arbitrary barrier should be set in the way of such an appeal in the form of the need to have a favourable report from an approved medical practitioner. This would discriminate against patients in medium security exercising a right to appeal against excessive security in comparison to any other patient appealing under the Act. I understand concerns about increased tribunal workload for practitioners, but I think that principles have to come first and appropriate resources brought to bear to allow them to be implemented.

Proposal to repeal section 268
As explained in my introductory comments, I believe it would be an unfortunate and inappropriate response to RM *v* the Scottish Ministers[9] to repeal section 268. To repeat, the argument for an appeal from medium security is one based on human rights and Principles of the Act, and not primarily one based on optimal flow within a system (though the two things are of course related). The infringement of human rights is a matter of concern whether the inappropriate conditions of detention affect few or many.

However, section 268 would require amendment to get round the problem that it envisages a move to another hospital in the event of a successful security appeal. This was clearly an oversight in drafting the Act and applying the arrangements for section 264, where leaving the State Hospital is the appropriate outcome, to section 268, forgetting that medium secure units are contained within hospitals with facilities at lower levels of security. It is not another hospital that would need to be identified under Section 268 but another unit with lower security in the same or another hospital.

Need for a provisional review to consider the merits of an appeal
This is an unattractive suggestion. Again, it would discriminate against patients in medium security making excessive security appeals in comparison with other patients making appeals under the Act. And since it would add another process, unless it was an undemanding paper exercise it would not deal substantially with the workload issue.

Merge excessive security consideration with Tribunal two year reviews
This is not a satisfactory proposal. Appropriate level of security is a different issue from whether criteria for compulsion are met or not. Where both 2 year reviews and an appeal

[8] Scottish Executive (2001). *New Directions. Review of the Mental Health (Scotland) Act 1984.* SE/2001/56, Chapter 27 Recommendation 27.19.
[9] RM *v* The Scottish Ministers. [2012] UKSC 58.

against excessive security are both being pursued by a patient around the same time, the Tribunal sometimes conjoins the hearings, with workload benefits for most of those involved, but this is different from both being part of the same process. I have argued above that the settings of high and medium security are sufficiently restrictive of liberty and distinct from other psychiatric settings as to justify the special appeal against excessive security in its own right.

More effective use of recorded matters

This is not an appropriate solution. Recorded matters are relevant to the provision of treatments or care services[10], and express the principle of reciprocity, not that of least restrictive intervention. Millan[11] defined reciprocity in the following way: *"When society imposes an obligation on an individual to comply with a programme of treatment and care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services, including on-going care following discharge from compulsion."*

Also, why should a patient who considers him- or her- self excessively restricted by being in medium security have to rely on the weaker mechanism of recoded matters while a similar patient detained in high security has the advantage of the more powerful appeal procedure?

Dr J A T Dyer
21 October 2013

[10] See Mental Health (Care and Treatment) (Scotland) Act 2003, Section 64 (4) (ii).
[11] Scottish Executive (2001). *New Directions. Review of the Mental Health (Scotland) Act 1984.* SE/2001/56, Chapter 3 Para 13.