CONSULTATION QUESTIONS

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.

Comments
It is the view of The Advocacy Project that the appeals process should apply to all people in any secure environment. In our experience, we are aware of individuals in a low secure environment who remain in that situation despite no longer requiring that level of security. This is generally due to issues of lack of resources either in the community or availability of places in rehab/acute admission wards. Even in open wards, people can remain detained not because there remains a need for a hospital based detention but due to a lack of resources e.g. suitable housing. While this may not be an issue for this consultation, it demonstrates the point that people at all levels of security can find themselves entrapped in the system and demonstrates that the Tribunal process is limited in this respect as their remit is simply to consider whether the criteria for detention is met. The qualifying process discriminates against these individuals and while it is our opinion that the numbers of people involved would not be excessive or put any added pressure on the tribunal system, it is still vital that this

route of appeal is available.

The Advocacy Project also feels that qualification dependent on a positive psychiatric report is a further infringement of patient's rights as it takes away the right to have an independent panel from various disciplines consider the appeal. Also, it is our experience that when a person seeks an independent psychiatric report it is rare that it conflicts with the opinion of the RMO in supporting a detention appeal, however this does not preclude someone successfully challenging their detention. We have attended numerous tribunals where the appeal was challenged successfully solely due to the evidence heard by the panel without the support of an independent report.

The Project is further concerned that obtaining a report from an approved medical practitioner will have implications in terms of legal aid. With recent restrictions on legal aid, would the Scottish Legal Aid Board be willing to fund such a report with no guarantee of an appeal process? This could lead to a Catch 22 situation, no report - no appeal, no guarantee of appeal - no legal aid to obtain the report. There are implications also in terms of timescales and an unnecessary prolonging of the process.

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

It is the view of The Advocacy Project that indeed section 268 is restrictive, however the Project does not agree that this justifies repealing the section altogether and is of the view that an amendment to section 268 would be more appropriate and this amendment could allow for a move from one security level to another which is often the more appropriate option for the people we work with, particularly those in low secure moving to open wards.
The project feels that section 268 should still be available even if it does apply to a relatively small number of people as outlined in point 22 of the document. However, point 25 appears to contradict this in that it refers to added pressure on the tribunal system, as previously mentioned our previous experience suggests

that such appeals would not involve significant numbers but is still a necessary route of appeal for those persons in this position.

- 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
The Advocacy Project is of the view that any appeal provision should not have a preliminary review. We feel that this differentiating from the usual tribunal process is unfair and discriminates against those persons affected by excessive security. A preliminary hearing will obviously mean no representation for the person either a legal representative, an advocacy worker or the person themselves and this concerns us that such a hearing would be a further erosion of person rights and is not in line with the Millan principle of participation. As previously indicated there are concerns around entitlement to legal aid, there was a suggestion in the MWC report (Corporate Report – Excessive security) that legal aid would fund an initial report to assess the merit of a full hearing; we feel with recent restrictions on legal aid, it is unlikely that SLAB would agree to this and therefore the only fair way to approach this would be to have a full hearing as with appeal of detentions.

- 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
The Advocacy Project is of the view that a two year review is not an adequate means to address the situation of excessive security. While it would be beneficial to broaden the tribunal's scope to consider matters other than the criteria for detention, this should not replace the right of appeal as often the two year reviews are not full tribunals, but a paper hearing, as well as this, two years is too long for a person to wait to address this issue, so there should be a right of appeal out-with this timescale. Tribunals to consider the criteria for detention can be lengthy and complex, appeals on excessive security are too important an issue to include within the review and should be a separate hearing.

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

Comments
The Advocacy Project is of the view that recorded matters are not a robust enough mechanism to deal with the issue of excessive security. It has been our experience in many circumstances that recorded matters made at a tribunal are simply not followed up by the next tribunal panel. Where the recorded matter is discussed and no

progress has been made by the care team or local authority with regard to the recorded matter, there is no redress. This in effect negates the whole purpose. One particular example demonstrates this:

A client of the Project had progressed from The State hospital to low secure and then to a rehabilitation ward. He had been in the rehab ward for many years while others around him progressed to living in the community. Patients had been advised that the rehab ward would be closing down, but no placement had been identified for any of them including our client who was understandably anxious about the situation. At his tribunal, the panel made it a recorded matter that the MHO should identify a possible placement within three months, discuss with the client and if appropriate take him to visit the identified place. By the next tribunal this had not taken place, the panel did not make any comment on this and the patient was left further disappointed and remained anxious about the situation.

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