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.

Comments
The Faculty welcomes the opportunity to comment on these proposals. We begin with a number of general points. We consider that section 268 and associated sections properly reflect the general scheme of the 2003 Act, and in particular that individuals should be subject to the minimum restriction on liberty necessary in the circumstances of the individual case. We suggest that it is desirable in principle that individuals who are detained in conditions of excessive security are afforded the opportunity to challenge their detention and to obtain an effective remedy, whether or not they are detained at the State Hospital. We would also observe that affording patients at the State Hospital a right to challenge the level of security imposed upon them without affording an equivalent and effective remedy to patients at lower levels of security may amount to discriminatory treatment within the scope of Article 8 taken together with Article 14 of the ECHR. Section 264 appears to have achieved its aims. It has been effective in moving on patients from the State Hospital who no longer require the conditions of special security there. Section 264 is perceived as being a

driving force behind patients being moved from the State Hospital. Its effectiveness is not necessarily limited to the making and granting of applications. The Faculty's view, informed by the experience of members practising in this area, is that the fact that section 264 exists is perceived as being a positive influence on moving patients to lower security levels without the need in some cases for an application to be made at all. It helps to support a culture whereby the Responsible Medical Officer requires to keep in mind the level of security at which the patient is detained.

Against that background, the effective implementation of section 268 is a welcome step.

It is perhaps stating the obvious to point out that making regulations for the purposes of section 268 would assist patients who are detained in conditions of excessive security outwith the State Hospital to move on through the mental healthcare system – which is the entire point of the excessive security provisions of the 2003 Act.

We would also observe that if there is no problem with entrapment at the level of medium secure facilities then there are unlikely to be supportive medical reports on which to base applications. In short, if there is no difficulty then the mechanism would be little used. On the other hand if there is a difficulty then those patients who are suffering as a consequence will be able to seek effective relief.

The impression of some members practising in this area is that there has been, to a certain extent, a "displacement" of the problem of excessive security from the State Hospital to hospitals with lower security levels. There is an effective driving force for those patients detained at the State Hospital. There is no effective driving force for those patients detained in medium security.

Turning to the detail of the proposals, while the Faculty favours the proposal that a supportive report from an authorised medical practitioner should accompany an application, it is not apparent why the patient's Responsible Medical Officer should be precluded from providing a report. Although perhaps uncommon, it is not difficult to envisage circumstances in which a patient's Responsible Medical Officer might be of the view that a patient was perhaps detained in conditions of excessive security, but might conclude that he or she was not in a position to obtain appropriate alternative facilities. In those circumstances it would seem unnecessary to require a different authorised medical practitioner (who would almost certainly be less familiar with the patient and his or her case) to become involved and provide a report. It is possible that this would result in an overall costs saving in some cases.

Equally, it is not apparent why the proposed regulations are restricted to patients at medium secure facilities. It seems likely that any "displacement" of the issue that has happened from the State Hospital to the medium secure units is also likely to occur at lower levels. Members of Faculty have experience of patients at lower levels of security having difficulties with being detained at excessive levels of security - particularly in moving from locked wards to open wards, and from hospitals into the community. We note that the

patient in the case of RM sought to move from a locked ward in a low security hospital to an open ward also in a low security hospital.

It is at least possible that limiting review of excessive security to patients in medium secure facilities will not necessarily solve the problem but merely result in a further displacement of the problem to the next lower level of security i.e. in the case of the proposed regulations to the level of low security.

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

First of all, we would observe that although the proposals are suggested in the alternative there is nothing to prevent the Government from implementing the regulations in terms of the first proposal and also undertaking a review to increase mobility through the secure forensic estate more generally. It is our view that this would be a desirable approach, and the Faculty would not support repeal of section 268 without a workable alternative scheme being implemented as a replacement.

We agree that, as section 268 is presently drafted, it is questionable whether patients can be transferred intra-hospital in pursuance of the excessive security provisions. For example, the Rohallion clinic is composed of both a medium secure and low secure element, though both would be likely to be the same hospital in terms of the Act.

It would seem that comparatively simple amendments to the 2003 Act would permit this. If the provisions in respect of orders authorising detention could authorise detention in specified parts of a hospital rather than necessarily just a hospital and that the duty in section 268 et seq was to find an appropriate part of a hospital, where security was not excessive, then transfer within the same hospital would be possible and could be regulated by the Tribunal. Other provisions (in respect of appeals against transfer, for example) might also be so amended.

As noted above, members of Faculty have experience of patients who were detained within lower security levels who had problems with the levels of security that were imposed upon them by virtue of being in one ward rather than another (as in the case of RM). In our view, the amendments proposed would have the effect of permitting transfer from one part of the hospital to another.

Also as noted above, members of Faculty have experienced cases in which patients are considered to be suitable for community care by their hospital care team or by the Tribunal, but adequate provision is not provided by the local authority in respect of that

care. At the moment the only effective mechanism to try to enforce the obligations of the local authority is by judicial review. It is a matter for consideration whether a procedure, based on section 268, might usefully be introduced to the 2003 Act for the benefit of such patients.

- 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

It is not entirely clear what is envisaged here. It would appear to be an unnecessary procedural step. If there were to be a precondition such as an expert report as proposed in the first option in the consultation, there would seem to be no need for a preliminary review.

- 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

In our view, there is something to be said for the idea that there be automatic review of levels of security as a part of the periodic review of compulsory treatment orders, compulsion and restriction orders and transfer for treatment directions. In the experience of members of Faculty practising in this area, it is those patients with least capacity or those with the most profound difficulties who benefit most from the automatic review provisions. It would be unfortunate if those patients were unable to benefit from provisions for review of excessive security.

In our view, introducing automatic review of security levels would require amendment of the 2003 Act. Moreover, it would only be worthwhile if there was some sort of enforcement mechanism – there is little point in the Tribunal requiring to consider the issue of excessive security if it is unable to provide a remedy for it.

However, such automatic review does not fit with the requirement within the current proposal for regulations requiring an applicant to obtain a supportive expert medical report, nor would it seem to fit with the idea of a preliminary review (if that proposal were implemented). It also seems likely that any amendment would require to address the powers of the Tribunal dealing with the review.

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

Comments

While in general the ability for the Tribunal to make a recorded matter is a welcome facility, we would observe that in the experience of some members of Faculty,

recorded matters are not seen as being an effective remedy for patients in this context, largely because there is no enforcement mechanism.

We would also observe that they are not applicable to patients subject to transfer for treatment directions, hospital orders or compulsion orders (with or without a restriction order).

- 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

We have little doubt that the extension of the right of appeal against excessive security to a greater number of patients would help to support and develop the flow of patients through the system. In that context the regulations proposed are a welcome step.

The extension of a scheme such as that in sections 264 and 268 to patients who are seeking to move from hospital into the community would also assist in the flow of patients through the secure system.

Any further comments

Comments

Any provisions that require amendment of the 2003 Act, or otherwise require Parliamentary authority, might usefully be included in the forthcoming Mental Health Bill.