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 Commission is of the view that the proposed criteria for what constitutes a qualifying patient as well as a qualifying hospital are too narrow and may be in contravention of the principles of the 2003 Act, the ECHR and UNCRPD.

We suggest that the pool of individuals eligible to raise an appeal should be construed widely. One of the conclusions of the recent Mental Welfare Commission for Scotland's Corporate Report on Excessive Security, which followed the UKSC judgment in RM v Scottish Ministers [2012] UKSC58, was that the single most important factor in determining who may exercise the right of appeal under section 268 is 'the disadvantage to the patient of remaining in the present secure conditions' and hence it was recommended that 'a qualifying patient' is one 'who is disadvantaged by the present level of security'. 'Many factors' it was said 'may impact on the presence and extent of that disadvantage, including family contact, leave arrangements and therapeutic benefit'.

By contrast, in the Consultation document, in para 19, the set of individuals identified as eligible to raise an appeal is small. One reason given for the

narrowly construed eligibility criterion is a lack of evidence suggesting a wide pool of individuals being held in inappropriate levels of security in medium or low secure units. However, to use this as an argument against a right of appeal against excessive levels of security in such units seems circular. If patients have no means of having the appropriateness of security assessed by way of appeal, one consequence might indeed be that their situation does not get recorded as an issue and therefore might result in a lack of evidence of this as an issue. One cannot automatically conclude from the absence of data that there is no problem of entrapment of patients in low security.

The Commission agrees with the Mental Welfare for Scotland's recommendation.

The Supreme Court found in RM that the relevant provisions of the 2003 Act created a statutory duty to make regulations under s. 268 of the Act. We are mindful of the fact that the appellant in RM v the Scottish Ministers [2012] UKSC58, the matter that triggered this consultation exercise, was detained in a low security ward in Leverndale Hospital. He believed that he was being detained under conditions of excessive security and wished to be transferred to an open ward, which he considered would improve the quality of his life, increase his level of liberty and advance the prospects of his eventual release from detention. Under the first proposal, RM would still not be able to challenge the conditions of his detention.

Other agencies are better placed to comment on the exact eligibility criteria for qualifying patients and if only patients on certain orders should be able to appeal.

A guiding principle of the 2003 Act (Section 1(4)) is that any restrictions on individual freedom are the minimum necessary to keep the person safe. Also, any restrictions on individual freedom should be balanced with the benefit to the individual.

The qualified rights to liberty (Article 5 ECHR), and to private and family life (Article 8 ECHR), apply to all patients in the Secure Estate. Of relevance is also Art 3 (prohibition against inhuman and degrading treatment and punishment) ECHR. Any limitation in these qualified rights must be justified on the basis of risk, by balancing the conflicting rights of other patients, staff and the general public. When considering prolonging restrictions on an individual's liberty, what amounts to a deprivation of liberty depends on the circumstances of each individual case (see HL v UK; the "Bournewood" case). In the Bournewood case, the ECHR also found a violation under Art 5 (4) of the ECHR and said that Article 5(4) gives "The right to an individual deprived of his liberty to have the lawfulness of that detention reviewed by a court in the light, not only of domestic law requirements, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by paragraph 1."

The least restrictive treatment principle is also an established principle under international human rights law. The UK is a party to the UN Convention on the

Rights of Persons with Disabilities 2006 (UNCRPD) and its optional protocol, and is bound by its UNCRPD obligations under international law. Article 14 UNCRPD identifies the right to liberty (it was for example mentioned in connection with Art 5 ECHR in DD v Lithuania [2012]). Articles 15 and 17 UNCRPD identify the prohibition against inhuman and degrading treatment and respecting the integrity of the person. UNCRPD expands the concept of least restriction beyond the notion of physical liberty toward the concept of the 'physical and mental integrity of the individual' (Article 17).

All of these principles require the definition of "qualifying patient" under s. 268 to be construed widely.

Regarding the question of whether a report from an approved medical practitioner should be a prerequisite for giving the right to appeal as per s. 268 of the 2003 Act, the Commission is of the view that such a report should not stand in the way of a right to appeal to an independent tribunal but should rather form part of the appeal process itself. The Mental Welfare Commission for Scotland's "Corporate Report on Excessive Security" identified as one of the risks for patients, the issue that some psychiatrists providing independent reports may not have sufficient relevant clinical experience. This should be less of a problem with approved medical practitioners. However, the fact remains that medical assessments are to some degree subjective, clinicians do disagree and hence a report based on such as assessment should not bar the possibility of an appeal.

In terms of qualifying hospital, the Commission is of the view that, following from our position set out above there should not be an exclusive list of three such hospitals. The regulations should apply not just to medium security institutions – as suggested in the consultation paper - , but also to low secure institutions and IPCUs.

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

The Commission does not agree with the option of a repeal of section 268.

The principles of the 2003 Act, particularly the principle of least restrictive treatment as set out above, and the obligations under ECHR and UNCRPD all mean that an

individual who is subject to an excessive measure must have a right to appeal against such treatment. This right should be granted as soon as possible, regardless of how many people might be affected by the issue of entrapment in medium and low security units.

The Commission feels that a review of the extent of the right to appeal may well be of assistance and that a widening of the appeal provision in section 268, and particularly the allowing for a change in security levels within the same hospital setting may be advisable. However that should not stop regulations being made now.

- 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

See comments made under Question 1. The merits of the appeal should be considered at the hearing.

- 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
Creating such a requirement would provide a useful additional layer of review of whether the level of security is still appropriate and justified. It however could never replace a free-standing right of appeal, as might otherwise constitute a violation of article 5(4) ECHR (Article 5(4) ECHR requires that a detained person has swift access to a court to challenge e.g. the lawfulness of detentions

- 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 Commission is not in a position to comment on this.

- 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

The Commission is not in a position to comment on this question.

Any further comments

Comments

When considering amendments to the 2003 Act, regard should be given to the widest possible support to patients who are moving towards their eventual release from detention. This may include placing further duties on local authorities in this regard.