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.

1.1 Comments1. In regard to the proposals for regulations relating to the consultation, our concerns would be:

1.2 - That any individual who is subject to an order requiring them to be detained in a hospital, should have access to a right of appeal in both medium and low secure settings, as they may benefit most from such provision. As well as being a point of natural justice, it is AdvoCard's experience that the most vulnerable people can get stuck in the mental health system and who are unable to move on due to resource issues (either from medium to low security, or from low security on to community).

1.3 -The issue of having a supportive report from an approved medical practitioner which identifies the potential need for change in level of security to a lower level is a complex one. AdvoCard's experience indicates that tribunal panels have previously rejected applications without supportive reports. Individuals do not always feel that the 'independence' of the professional second opinion is necessarily evidenced, especially when the clinician spends little face to face time with the patient and appears to base their report on historical clinical detail. The concern is that those without a supportive report may be denied a hearing and could therefore be disadvantaged.

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 potential impacts that such proposals may have are:
1.4 –It would prove beneficial for individuals to have the right and choice of appeal, in order that they are not retained in inappropriate security level settings for excessive periods, or sent to a setting that places them away from family or known landscapes.
1.5- It would be beneficial for tax payers for the right of appeal to remain, in that higher levels of security require greater state resources than lower ones.

- 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?

1.6 Comments-It could be argued that any provision of a preliminary review of an appeal could be advantageous, or not, depending on the circumstances. Individuals sometimes do not want to discuss the breadth of circumstance they are experiencing until the actual formal hearing, but then there are also instances where aspects of evidence may be missing from an application that could be put in place prior to the formal scheduling, if they are identified at a preliminary review point.

- 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?

1.7 Comment-The level of security is of upmost importance to the detained person, as the type of detention in each setting can limit the opportunities for them to move on for lengthy periods of time. There is also recognition that some environments are very risk averse and this can further hamper the ability for an individual to effectively prove themselves able.

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

1.8 Comments -The use of recorded matters is generally seen as ineffective, primarily because there is no sanction attached to their not being achieved. If a sanction, or directed process is in place, then there should be accountability built in to the system in the event that they are not complied with. There are inconsistencies in that one panel can put a sanction in place and another panel deems them unnecessary. Recorded matters are also not universally open to all orders (eg CORO) and so it could be argued that there is an already inbuilt discrimination in the proposal.

• 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?

1.9 Comments-It remains the case that, with any two year review process, where a person has not had a previous tribunal in the lead up to the review, that there is no requirement on the review paperwork for the RMO to alert advocacy to the review being applied for. This can lead to little or no notification taking place and hence, on occasions, no advocacy being involved in the process. Levels of security for all should be reviewed on an ongoing basis for individuals and not just at a two year juncture, as each situation is unique.

1.10 -Any tribunal needs to be scheduled at a time that meets with the ability and needs of the individual, as medication can impact on a person's ability to function effectively. We have had situations where individuals who do not function effectively in the morning, have ended up with curators being unnecessarily appointed, or their inclusion needs not being effectively addressed for them to take part.

1.11 As we understand it, the tribunal process was not put in place to manage or determine a lack of resource. However, it would appear that this is the case, judging by the number of people who are potentially unnecessarily held in more restrictive environments. This is something that should be directed back to Government ministers for resolution.

Any further comments

1.12 Comments AdvoCard takes the view that the current provisions and rights under Section 268 of the act should be effectively implemented and where necessary, amended and strengthened, as opposed to being repealed.