Information about Legal Services Agency's Mental Health Representation Projects

Legal Services Agency (LSA), Scotland's National Law Centre, is a registered charity and public service organisation. Its objectives are to assist disadvantaged persons in Scotland by undertaking casework to a high volume and quality, by conducting legal research and by providing legal education and training.

LSA runs two specialist Mental Health Legal Representation Projects comprising of eight solicitors and one Solicitor Advocate based in Glasgow and Edinburgh. The Projects provide specialist legal advice, assistance and representation to people with mental health problems, acquired brain injury and dementia, their families and carers in these areas. The Projects, generally, aim to provide a holistic legal advice, assistance and representation service on all aspects of civil law relevant to the needs of their client group specifically in the areas of mental health and incapacity law and where there is an interface with other aspects of civil law the Projects look to provide the service in those areas for example family law, reparation, debt, housing, community care etc. The primary areas of activity of the Projects are, however, in the areas of detention, compulsory treatment and guardianship.

The Projects are widely regarded as two of Scotland's main providers of legal advice, assistance and representation in the field of Mental Health and Incapacity Law.

CONSULTATION QUESTIONS

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.

We welcome the proposal to bring forward regulations to enact s268 of the 2003 Act. We agree with the proposal that for the purposes of s268 of the 2003 Act a 'qualifying patient' should be an individual subject to detention in a hospital operating at a medium level of security. We also agree that for current purposes it is appropriate for a 'qualifying hospital' to be a medium secure facility.

We believe there will be a positive impact as a result of the above provisions being enacted. It is clear that there is a direct link between the excessive security provisions and a decrease in the number of patients in the State Hospital. However there are some patients who remain entrapped in high security and anecdotal evidence which we have received on an informal basis from both clinicians and service users is that there appears to be an increase in the use of s265 and s266 of the 2003 Act which in our opinion suggests a difficulty in terms of through flow of patients throughout the forensic network. This in our view is an ever present feature of forensic care. It appears to us that a situation has developed whereby patients are not able to move on to lower levels of security from the State Hospital without making an application to the Tribunal under s264 without an unreasonable waiting time. This difficulty is compounded in the West of Scotland.

We hope that enacting the right of appeal in terms of s268 of the 2003 Act will continue to improve the through flow of patients through the forensic secure network with a focus on developing and improving forensic services at low secure and community levels to ensure patients are not detained in higher levels of security than they require. We are of the view that improving the through flow of patients in medium secure care will have a positive effect on patients detained in the State Hospital in conditions of excessive security by reducing waiting lists for beds in medium secure facilities thus reducing the number of applications to the Tribunal under s264 and the accompanying legislation. Most importantly however this will have a positive impact on the rights of patients and will ensure consistency with the guiding principles of the 2003 Act including the principle of minimum necessary restriction of freedoms and compliance with the European Convention on Human Rights (ECHR).

We do not agree that it is appropriate for there to be a requirement for individuals to have a report from a section 22 approved AMP which supports the view that the detention of the patient involves the patient being subject to excessive level of security. We strongly feel that this would have a negative impact on individuals. We would consider the inclusion of such a requirement to be prejudicial and would impact directly on individuals who for a number of reasons may not wish to obtain a report or indeed may have another basis on which to make the application. It would also create a discrepancy in the application of excessive security legislation as applications under s264 of the Act do not require that a second opinion report be obtained nor do appeals against detention under the Act. We do consider such an imposition to be incompatible with the ECHR.

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?

We are of the view that the issues of security levels within the same hospital setting is a separate and distinct matter to the consideration of rights of appeal in terms of s268 of the Act. We do not feel at the current time that there is enough evidence as to whether there is a need for wider provision for an appeal against excessive levels of security within the same hospital. We do however believe that this issue merits further consideration and we would welcome further consultation on this issue.

- 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?

We are of the view that it would not be appropriate, if additional appeal provisions were created, for a preliminary review to consider the merits of the appeal before proceeding to a full hearing. We hold the view that it is entirely inappropriate for the Mental Health Tribunal Service to have a gate keeping role and that such a proposal would be fraught with difficulties. In particular we would not consider such provisions to be compliant with the ECHR.

- 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?

We would welcome a requirement for statutory reviews to consider levels of security as a matter of course and for Tribunals to make greater use of recorded matters in this regard. This would ensure that in cases where patients do not have capacity to instruct a solicitor, do not wish to instruct a solicitor or do not take active steps to challenge their detention, there would be an independent and regular review mechanism.

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

We refer to our comments above.

- 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?

We would further add that the use of recorded matters for levels of security is particularly pertinent where patients are detained in the State Hospital. The majority of patients within the State Hospital are subject to detention under Compulsion Orders and Restriction Orders yet there is no mechanism at the current time for recorded matters to be made by the Tribunal in cases where patients are detained under Compulsion Orders and Restriction Orders. We believe that the introduction of such a mechanism would support the effective movement of patients through the secure system.

Any further comments

In the case of RM v Scottish Ministers the Supreme Court stated that failure to make regulations in terms of section 268 of the Mental Health (Care and Treatment)(Scotland) Act 2003 which would implement the right of appeal for patients held in excessive security in hospitals other than the State hospital was unlawful. The Supreme Court went as far as to say that the failure to make regulations which would implement a right of appeal for patients held in excessive security had “thwarted the intention of the Scottish Parliament” because “it is for Parliament, not the Executive – unless Parliament confers the necessary power upon it - to determine when an enactment comes into force”.

Essentially the excessive security provisions contained within the 2003 Act were born out of the Millan Report. We agree that the Millan Committee’s primary focus was on patients entrapped in the State Hospital however their Report also addressed the position of patients detained in medium secure hospitals. The Millan Committee recommended that patients should have a right of appeal to be transferred from the State Hospital or a medium secure facility to conditions of lower security. The proposal to recall s268 of the 2003 Act is contrary to the terms of the Millan Report.