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

NHS Greater Glasgow and Clyde (NHSGGC) welcomes the opportunity to comment on the government's proposals in relation to excessive security appeals legislation. This is an area which to date has had a profound effect on the flow of patients between high and medium secure hospitals in Scotland, not least Rowanbank Clinic medium secure unit in Glasgow. As such, any further legal developments in this area will have significant implications for NHSGGC and indeed forensic mental health services across Scotland.

We provide the following response in the order in which issues are considered and questions posed in the consultation document. Views have been collated from individuals working in our forensic mental health and learning disability service in particular.

Proposal 1

Firstly it should be noted that Rowanbank Clinic is a wholly medium secure hospital with both regional and national remits- there is therefore no 'medium secure component' of Rowanbank Clinic.

Secondly, a statement in page 4 (paragraph 19) of the consultation document appears to be at odds with the final Proposal 1 question where it includes persons

detained in a low level of security within the definition of a qualifying patient (the final Proposal 1 question indicates only medium level of security in this regard). We consider that clarification is therefore required here.

Undoubtedly the Section 264 appeals have been beneficial for some patients who were previously entrapped in the State Hospital (TSH) prior to the full development of the medium secure estate in Scotland. At the outset there were some very clear cut cases involving patients who had spent many years in TSH in what was most certainly excessive security for them given their level of risk. The process to date has resulted in a significant reduction in the number of such patients and has been a key factor in the ability of TSH to downsize to 140 beds. As such the legislation is often described as having been a key driver for service development, and certainly the timing of the development of the medium secure estate in Scotland is linked to it. There is now probably more transparency in the whole assessment and transfer process; and having such legislation as part of the Mental Health (Care and Treatment) (Scotland) Act 2003 appears compatible with the main principles of the Act and Human Rights legislation.

However, the NHSGGC experience of the current legislation has also included significant difficulties affecting both patients and services. These have become more problematic over time and may in fact dominate the picture if legislation is extended to include medium secure services. To understand this, it is necessary to describe some of the current undesirable effects of the legislation. Briefly these include:

Opportunity costs

Some NHSGGC consultant forensic psychiatrists have had to spend significant amounts of time preparing for and participating in excessive security appeals tribunals. For reasons that are not fully clear, it appears to be more of a West of Scotland patient issue and we are aware that this is recognised by the Tribunal itself. Our cases often seem to have more complexity and there are certainly many more of them i.e. there is a distinct 'Glasgow effect' with a disproportionate number of appeals from NHSGGC patients in TSH (where we already have the highest representation). Overall this has had a significant impact on consultant time and availability, these concerns being highlighted via consultant job planning. The tribunal hearings themselves can last several days and be part of a series of hearings. In some cases this has involved 30–40 hours work for individual consultants. Inevitably in such circumstances other clinical work has to be postponed or shifted. As such, the process can detract from patient care.

Patient flow

Patient flow has been compromised by the appeals process, latterly resulting in a comprehensive review of the configuration of the medium secure estate. The reasons for the estate's current capacity problems are multiple but one of them is the residual steady stream of Section 264 appeals. Whilst patients may be reaching medium security earlier, the gap between then and their readiness for low security has therefore widened and many now spend a longer time in medium security. Initially our expectation was that patients would spend an average of 2 years in medium security. At Rowanbank Clinic the average length of stay is 3.5 years. Again, ultimately this disadvantages patients.

Displacement of patients

In relation to patient flow and capacity, the making of a declaration of excessive security can ultimately backfire on a successful appellant due to the timescale for the responsible Health Board to place them out with high security (4-7 months). Recently NHSGGC has had to seek more and more out of area placements to comply with these timescales. Naturally there are potentially significant

disadvantages for some patients in being placed in a medium secure unit out with their home region.

Effects on patients' health

The whole process can also result in patients developing unrealistic expectations about moving on. Some patients can become very stressed by the whole process which is highly legalistic and difficult to understand. Excessive security tribunal hearings in particular can have an atmosphere of conflict, often between doctors and in front of the patient. This can be damaging for future therapeutic relationships. In the NHSGGC Forensic Directorate, we have noted that at times the appeals process, which should run parallel to any actual referral process, has acted instead as a testing out mechanism for the State Hospital clinical team prior to the referral itself. This leaves the assessing service in doubt as to whether the appeal is supported or not by the State Hospital RMO or whether they might change their mind on the run up to the hearing (including on the day of the hearing itself). This is a highly significant issue since available research has shown a strong association between TSH RMO support and successful appeals.

Other issues noted by NHSGGC psychiatrists and managers include the perception that the legislation is weighted in favour of successful appeals. A small number of tribunal decisions have also appeared wrongful in law to those involved in the cases.

All of these concerns about the existing appeals process are likely to apply to any extension to medium security settings but at other interfaces downstream. While there may be benefits for a small number of patients, this could easily be out weighed by the disadvantages. At Rowanbank Clinic, there is not an identified significant cohort of patients entrapped in medium security who could instead be in low secure or open conditions. If any patient flow bottleneck exists, it lies instead between high and medium security. Despite this, we anticipate that many medium security patients would still undertake excessive security appeals, often somewhat encouraged to do so by their legal representatives.

In particular, the risks of extending the legislation are:

1. Significant resource implications along the lines of what is described above.

2. The loss of flexibility within regional and local forensic services- and mental health services generally- to manage patients whose needs lie on the cusp of security levels or whose care needs to be highly individualised. Whist this may apply less to NHSGGC due to its established low secure service (at least for male patients), it would certainly provide a challenge for smaller NHS Boards or NHS Boards that do not have low secure provision. As such, whilst the legislation may be seen as a driver for the development of low secure services, the risk is that in many cases what will happen instead is increased use of the private low secure sector, often involving patients actually being placed further away from home as they move to less secure settings.

3. Further stress for patients themselves due to the complex process. For some there would be a risk of deterioration in mental health as a result.

4. The potential for unnecessary tension and conflict between intra-Board clinical teams.

Finally, NHSGGC does not have a strong view on the proposal about a supporting report from an AMP being required, although we note that this is not required for

excessive security appeals in terms of the current legislation relating to patients in high security and wonder how such a discrepancy could be justified.

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 second proposal is that the Government does not bring forward regulations but instead repeals Section 268 at the earliest opportunity. The proposal states that the government would seek a review of patient needs across the forensic estate in Scotland in terms of the issue of entrapment, and that the outcome of this could result in changes to primary legislation in early course. NHSGGC would support this proposal, including the needs analysis component.

In terms of the specific (bulleted) consultation questions:

- NHSGGC does not believe that there is the need for a wider provision for an appeal against excessive levels of security. For reasons stated above, we consider that it could disadvantage more patients than it would benefit and that it could have a detrimental effect on services.

• 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

- Regarding a preliminary review to consider the merits of the appeal before proceeding to a full hearing, then this may reduce the impact on consultant psychiatrists' time but not necessarily to any significant extent given that assessments and reports still have to be carried out. Again it would also be different from the process that applies to high security, so we do not see how it could be easily justified.

• 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

Whilst the concept of combining the 2 year review of orders with a review of levels of security in

the tribunal setting (again with the aim to reduce opportunity cost) seems a reasonable one in principle, it is not clear how it would actually work in practice.

- 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 same would apply to the use of recorded matters by the tribunal. Whilst it seems a reasonable suggestion, it is not clear how it would actually work. There also exists a view that the making of recorded matters is not particularly effective in bringing about desired outcomes.

- 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

In terms of other changes to the review system that may help with patient movement through the secure system, NHSGGC has highlighted to the Mental Health Tribunal for Scotland on a number of occasions various aspects of tribunal process which appear to add to existing administrative burden and impact on consultant psychiatrist time. We appreciate that these concerns have been listened to, but further work to streamline process in this area would be beneficial for all concerned.

Any further comments

Comments