Mental Health (Care and Treatment) (Scotland) Act 2003
Consultation in relation to section 268 appeals against conditions of excessive security

The Scottish Government
Riaghaltas na h-Alba

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003 CONSULTATION IN RELATION TO SECTION 268 APPEALS AGAINST CONDITIONS OF EXCESSIVE SECURITY

INTRODUCTION

This consultation is in response to the Supreme Court decision in the case of M v Scottish Ministers[1]. The consultation seeks views on the way forward following that decision.

BACKGROUND

1. In November 2012, the Supreme Court heard the case of RM, a patient held in a low secure facility in Scotland. RM had raised a judicial review against the Scottish Ministers of Ministers' alleged failure to introduce regulations to give a right of appeal under the Mental Health (Care and Treatment)(Scotland) Act 2003 (' the 2003 Act')[2] to patients held in conditions of excessive security in hospitals other than the State Hospital.

2. The Court found in favour of RM stating that the relevant provisions of the 2003 Act created a statutory duty to make regulations under section 268 of the Act in time for the coming into force of that part of the Act in May 2006 and that Scottish Ministers' failure to bring forward regulations under section 268 of the 2003 Act by that date was and is unlawful. The Court however did not opine on whether any patient's rights were being infringed as a result of the failure to make regulations. A full summary of the case is attached in an annex to the consultation.

3. This consultation paper will set this decision in context and propose options for legislative change. References to sections within legislation are to be read as references to sections of the 2003 Act unless stated otherwise.

POSITION PRIOR TO 2003

4. Section 264 of the 2003 Act provides for a right of appeal against levels of excessive security for persons detained within the State Hospital. The reason for an appeal against levels of excessive security was to address the issue of entrapped patients within the State Hospital.

5. At the time of publication of the Millan report, the independent report on which the 2003 Act was based, the issue of entrapped patients was significant. The Millan Report described an entrapped patient as a patient who was detained in the State Hospital, but who no longer required the level of security provided by the State Hospital but for whom appropriate local services were no longer available. The concern was that persons may meet the security criteria at the time of admission, but

[1] M v The Scottish Ministers [2012] UKSC 58 : 2013 SLT 57

[2] 2003 asp 13

not necessarily throughout the duration of his or her stay in hospital. There was however no option other than to appeal for a discharge which was quite a leap from high security.

6. Millan recommended there should be a right of appeal against a level of security for those persons detained in the State Hospital. This recommendation resulted in sections 264 to 267 of the 2003 Act (Chapter 3 of Part 17) which provide for appeals against detention in conditions of excessive security, and were commenced on 5th October 2005 when the 2003 Act came into force.

7. The Millan report was clear that the issue at the time was with patients entrapped in the State Hospital but also stated –

'It is possible that the same difficulties could arise in future in respect of patients in medium secure services who are not able to move to low security settings'

8. This resulted in sections 268 to 274 of the 2003 Act – creating in principle a right of appeal from places other than the State Hospital, but given there was no evidence at that time of entrapment at lower levels of security, a regulation making power was created to provide for appeals against levels of security in hospitals other than the state hospital. This power to date has not been used .Ministers were of the view that Parliament had given them the discretion to make regulations should that be necessary. The judgement of the Supreme Court, in declaring that Ministers' failure to bring forward regulations was unlawful, has changed this position.

CHANGES SINCE 2003

9. The landscape has changed significantly since the 2003 Act was commenced. The creation of an appeal against levels of excessive security in the State hospital has been a significant factor in achieving improved movement throughout the secure estate. But in addition the development of forensic psychiatry provision has, in conjunction with the 2003 Act, meant that management of patients in need of compulsory measures of detention has changed significantly since the report of the Millan committee and the development of the Act.

10 .Forensic psychiatry provision in Scotland was progressed from the late 90s, following a series of consultations on "The Health, Social Work and Related Services for Mentally Disordered Offenders in Scotland" policy document (1999).[3]Until 2000, there were no medium secure units in Scotland and mentally disordered offenders were instead managed in intensive psychiatric care unit (IPCU) settings. Since that 1999 policy document, and the consultations on it, the Scottish Government has continued to work with NHS Boards, Regional Planning Groups and the Forensic Network to plan and provide appropriate medium secure services within the framework set out in the 2006 circular ' Forensic Mental Health Services'.[4]

[3] NHS MEL(1999) 5
[4] HDL(2006)48

11. HDL (2006) 48 on Forensic Mental Health Services which was issued in June 2006 set out the Government's assessment of the needs for the future provision at high, medium and low in the secure forensic estate based on the understanding at that time of patients numbers and demand at each level of security.

12. The commissioning structure recognised that it was not reasonable to expect each NHS board to provide services at each level in light of the relatively small numbers of patients involved and the specialised nature of the services and staff required to care for and treat these groups of patients. The expectation was that a consortium of NHS Boards would collaborate to plan the provision of some services on a regional basis, which could not be provided, in a sustainable way by any individual health board. The NHS 2006 paper on configuration of mental health services[5] defines which services should be planned on a regional as opposed to health board basis.

13. Provisions in the 2003 Act came into effect on 1 May 2006 enabling patients in the State Hospital to appeal to the Mental Health Tribunal for Scotland against being held in conditions of excessive security. At the time of the Bill's consideration there were around 30 patients who were detained in the State Hospital but who could have been moved to conditions of lesser security if accommodation had been available for them.

14. Around the same time, the Forensic Way Forward Group was established to performance manage the flow of patients from the State Hospital, monitor appeals made by patients in the State Hospital and have an oversight of the development by the regional planning groups of forensic services. The Group helped ensure the progress of transfers for patients for whom there was clinical agreement that they did not require the security of the State Hospital.

15. Patients transferring from the State Hospital are now moved to both medium and low secure facilities depending on their specific needs. In general patients were anticipated to spend approximately 2 years in a medium secure environment prior to rehabilitation. Given the evolving nature of the Scottish medium estate, there has been a varying experience in the 3 regional services. For example in the west of Scotland there has been an increased length of stay in medium security but this is considered to be due to case complexity in the main, rather than the lack of available low secure services.

16. The right of appeal for State Hospital patients against being held in conditions of excessive security has therefore, in our opinion, had a noticeable effect on the whole mental health system as patients have moved on, to free up beds for patients being transferred.

17. Notwithstanding the improvement in patient flow , which it could be argued , mitigates the need for regulations providing a right of appeal against excessive security, the Supreme Court judgement clearly cannot be ignored. Therefore we propose to consult on regulations . In the absence of concrete evidence to indicate whether or not there is an issue of entrapment in respect of persons held in medium

[5] NHS CEL (2006) 48

or low secure units, we consider it sensible to draw on the analysis of appeals against detention within the State Hospital to support regulations against levels of security within medium secure units, that would address the issue of unlawful acting by Scottish Ministers, without placing undue pressure on clinicians and the Mental Health Tribunal.

18. The analysis undertaken by the Forensic Network of the first 100 appeals brought under section 264 of the 2003 Act indicated that an application was far more likely to be successful if the patient was already on the transfer list and the RMO (Responsible Medical Officer) supported the application. Those under civil orders had a relatively greater chance of appealing successfully. Following successful appeals, roughly equal numbers were transferred to medium and low secure facilities. And even where the application was withdrawn or the case cancelled, several patients were still transferred out of the State Hospital .The study suggests that being on a transfer list and having support of an RMO are the likeliest indicators of a successful appeal.

19. Using this analysis as a guide our proposal for regulations for consultation is that we bring forward a discrete set of regulations, identifying which patients would be eligible to raise appeal provisions under section 268. In the absence of evidence suggesting a wide pool of individuals that require this change, we propose that regulations provide that:

- **Persons who are subject to an order requiring them to be detained in a hospital which operates a medium or low level of security; and**

- **Have a report from an approved medical practitioner as defined by section 22 of the 2003 Act, who is not the patient's current RMO, supporting 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;**

are to be treated as qualifying patients for the purposes of section 268(11),

- **the Orchard Clinic, and the medium regional secure component of Rohallion and Rowanbank are qualifying hospitals for the purposes of section 268(12)**

20. Accordingly only this small set of individuals would be eligible to raise an appeal against a level of excessive security. With this narrow set of regulations, we would meet the concerns of the Supreme Court, and we would have a further benchmark by which to assess whether the current flow of patients, down through the levels of security, is working or not.

PROPOSALS FOR REPEAL AND REVIEW

21. The power to make regulations for persons within secure settings other than the State Hospital was created over ten years ago. Since that time much has changed and we are concerned that section 268, with its narrow scope, is no longer fit for purpose. It was drafted prior to the opening of the medium secure units at Rowanbank and Rohallion and does not take into account the very wide ranging security provisions across the medium and low estate, often within the same hospitals. Tribunals considering any appeals would require to hear oral evidence from a number of alternative hospitals before reaching a decision on whether, in light of the security measures in place in the alternative hospitals, the security measures to which the patient was currently subject were excessive or not. Regulations made under section 268, because of the nature of the provision, would not allow for the removal or reduction of excessive measures of security of a patient without a need for transfer to another hospital, which may be unnecessary as well as detrimental to the patient.

22. Furthermore, we do not have information at present to suggest there is a significant issue with entrapped patients held within lower levels of security. The National Forensic Network is currently reviewing patients detained within the high, medium and low secure estate. This will systematically review whether there is any problem for patients being held in conditions of excessive security outwith a high secure environment. The outcome of this review would assist in informing appropriate changes in legislation.

23. We therefore consider it necessary to look at repealing section 268, and as soon as they are available, consider the results of the review undertaken by the National Forensic Network to establish whether there is an issue of entrapped patients held in hospitals operating medium and low levels of security. Thereafter we will, if it is considered necessary or desirable, bring forward proposals for reform of the way levels of security are considered across the range of orders supervised by the Mental Health Tribunal. This way forward has been developed following the consultation event held by the Mental Welfare Commission in March 2013. [6]

24. At that event, a number of attendees questioned the need for an additional appeal against levels of security, given the lack of concrete information about whether individuals are being held in inappropriate levels of security, and the options that exist for practitioners to vary levels of security within a given setting.

25. There was also significant concern about the negative impact additional appeals would place on practitioners' time and the added pressure on the Tribunal system. Suggestions to mitigate this included a preliminary hearing prior to a full appeal to ascertain whether there is an arguable case to put before a full Tribunal Any such changes however must be of course be wholly compliant with the principles of the 2003 Act, which must continue to apply in all circumstances.

[6] Corporate Report on Excessive security – April 2013.www.mwcscot.org.uk

26. Over and above the question of an additional appeal provision, a number of suggestions were made around the role of the Tribunal in reviewing orders generally and the greater use of recorded matters to ensure patients move down through the levels of security appropriately. For example a patient's level of security is not necessarily considered at a review hearing. An option would be to require the Tribunal to consider levels of security as a matter of course.

27. We have considered the issues raised at the consultation event and seek views on the following:

- **The 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 levels of excessive security?**

- **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?**

- **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 we require levels of security to be considered by the Tribunal as a matter of course, with an accompanying right of appeal if the question of security has not been addressed?**

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

- **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?**

28. We consider that these questions, in conjunction with a review of the secure estate to consider whether patients held in hospitals operating medium and low levels of security are subject to excessive levels of security, will help us to establish what changes may be necessary to ensure that all patients are treated and managed at the level of security appropriate for their needs. It would mean taking forward a repeal of section 268 at the earliest legislative opportunity, followed, if necessary or desirable, in early course by changes to primary legislation .

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.

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?

- 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?

- 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?

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

- 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?

Please tell us about any potential impacts, positive or negative that you feel any or all of the proposals may have on a particular group or groups of people

RESPONDING TO THE CONSULTATION PAPER

We are inviting written responses to this consultation paper by Friday, 25 October 2013.

This paper asks a number of consultation questions on which we would welcome your views. Please respond to as many or as few of the questions as you wish, indicating in your response which questions your comments relate to. Please give reasons for your views and information from your own experience where appropriate.

Please send your response to the consultation questions along with your completed respondent information form (see "handling your response") to:

mentalhealthlaw@scotland.gsi.gov.uk or

Kirsty McGrath
Scottish Government Health Directorate
Mental Health and Protection of Rights Division
Head of Mental Health Law Team
3-ER St Andrews House
Regent Road
Edinburgh
EH1 3DG

If you have any queries please contact Kirsty McGrath on 0131 244 2599.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult

complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

HANDLING YOUR RESPONSE

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please therefore also complete and return the respondent information form (provided along with this consultation paper and the Report) which forms part of the consultation, as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and will treat it accordingly, subject always to any legal requirements on the Scottish Government to disclose the information.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under that Act for information relating to responses made to this consultation exercise.

NEXT STEPS IN THE PROCESS

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library by 31 December 2013. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

WHAT HAPPENS NEXT?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on whether we should bring forward regulations under section 268 of the Mental Health (Care and Treatment)(Scotland) Act 2003 to provide a right of appeal against conditions of excessive security for qualifying patients detained within qualifying hospitals or whether we should repeal the relevant sections in the l the 2003 Act, and following consideration of the review of patients detained within the high medium and low estate, bring forward proposals for changes to primary legislation in respect of appeals against levels of security, if this is considered necessary or desirable. We aim to issue our conclusions on this in 2013. If Scottish Ministers decide to proceed with amending legislation, Regulations will be required to be taken forward in the Scottish Parliament within a future legislative programme.

COMMENTS AND COMPLAINTS

If you have any comments about how this consultation exercise has been conducted, please send them to Mental Health and Protection of Rights Division at the contact details shown above (under 'Responding to this consultation paper').

The Mental Health (Care and Treatment)(Scotland) Act 2003
Consultation in relation to section 268 appeals against conditions of excessive security

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ ***Please tick as appropriate***

Surname

Forename

2. Postal Address

Postcode	**Phone**	**Email**

3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** ☐

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ☐ **Yes** ☐ **No**

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate ☐ **Yes** ☐ **No**

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Comments

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Comments

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

Comments

- 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

Any further comments

Comments

ISBN: 978-1-78256-786-8 (web only)

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Produced for the Scottish Government by APS Group Scotland
DPPAS14550 (07/13)

Published by the Scottish Government, July 2013

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