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CORPORATE REPORT

Excessive security

Mental Welfare Commission for Scotland

Report to Scottish Government

Section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003: consultation forum to advise on production of regulations following the Supreme Court judgement.

Background

The Scottish Government asked the Commission to facilitate a consultation forum on this topic. This followed a judgement by the UK Supreme Court that Scottish Ministers had acted unlawfully by failing to produce regulations in terms of section 268 of the 2003 Act. This section and the implications of the ruling are discussed in further detail below.

The Government wished to hear the views of stakeholders on the implications of this judgement. Before considering any consultation on proposals, the Government wanted stakeholders to consider this issue and generate ideas as to how regulations may be framed. The Commission facilitated this process in a neutral capacity but made clear that it would provide its own views to the Scottish Government separately from this event.

How the event was held

By agreement with the Scottish Government, the Commission invited the following stakeholders to nominate representatives for the event:

- Scottish Government
- Mental Health Tribunal for Scotland
- Service provider organisations (high, medium and low secure facilities)
- Professional organisations (medical, nursing, social work and legal)
- The Scottish Legal Aid Board
- Voluntary organisations
- Advocacy organisations
- Service user and carer organisations

The programme followed this agenda

- Background, section 268 of the 2003 Act and the Supreme Court Ruling.
- Excessive security cases – the Tribunal's role, functions and experiences
- Current experiences – How well does the current system work for State Hospital patients
- How excessive is excessive? Levels of security and numbers affected
- Round table discussions on principles and practicalities
- Summing up of ideas for regulations

It was agreed that the Commission would provide an account of this event with suggestions on how regulations might be drafted.

Account of the consultation event

1. Section 268 and the Supreme Court Ruling

Kirsty McGrath from the Scottish Government presented this item. The ruling concerned the case of an individual, RM detained in a low secure ward in Leverndale Hospital, Glasgow. RM considered that he was being detained in conditions of excessive security and that his quality of life, liberty and prospects for release would be improved if he was transferred to an open ward.

Under the 2003 Act, there are processes for individuals detained in the State Hospital to appeal against detention in conditions of excessive security. These are covered by sections 264-266. Briefly, the Tribunal may rule that the patient is detained in conditions of excessive security and require the NHS Board responsible (i.e. the Board area where the patient previously resided) to identify a hospital suitable for the patient.

The Act, in sections 268-271, also makes provision for appeals against detention in conditions of excessive security where patients are detained in other hospitals. The wording is that a “qualifying patient” in a “qualifying hospital” may apply to the Tribunal, who could rule that security is excessive in that patient’s case. The Tribunal can require the NHS Board to identify a hospital where the patient can be detained in conditions where security is not excessive. Regulations would determine what constitutes a qualifying patient and a qualifying hospital. No regulations have been drafted so the provisions of section 268 cannot be used.

The Court of Session was persuaded that Ministers were entitled not to bring forward regulations but this judgement was overturned by the Supreme Court. It ruled that Scottish Ministers acted unlawfully by not bringing forward regulations by 1st May 2006 and that their continued failure to do so was unlawful.

The Government is now looking for an appropriate, proportionate and cost-effective solution to this problem.

2. The Tribunal Process

Dr Joe Morrow, Tribunal President, described the current procedure and statistics for appeals from the State Hospital.

It is the Tribunal that makes the decision as to whether or not a patient is detained in conditions of excessive security in the State Hospital. Under section 264, the Tribunal may determine that the patient is detained in conditions of excessive security. This gives the NHS Board responsible for the patient a period of three months to identify an alternative appropriate placement.

If the patient has not been transferred within that period, the case automatically returns to the Tribunal. If the Tribunal is still satisfied that security is excessive, it may order that the patient be transferred within 28 days or, alternatively, allow a longer period up to a maximum of three months.

In the latter case, the case again returns to the Tribunal if no transfer has taken place. If still satisfied re excessive security, the Tribunal must make a final 28 day order under section 266.

If the NHS Board fails to comply with a 28 day order under either section 265 or 266, the patient or the Commission have the option of applying to the Court of Session to enforce compliance. As yet, no such cases have reached this stage.

There is a procedure, on application to the Tribunal, for the order to be recalled. This is covered by section 267 of the 2003 Act.

In reaching any decision, the three member Tribunal panel will hear submissions on evidence and law from a range of people, depending on individual circumstances and whether or not it is being contested. The Tribunal will consider the need for physical security, procedural security and relational skills. At all times, it will consider the principles of the 2003 Act.

The time taken for each hearing varies depending on complexity from half a day to several days. Dr Morrow presented Tribunal statistics for the last three years.

Section 264 applications

	Received	(Withdrawn)
2010	30	(9)
2011	30	(6)
2012	43	(14)

Section 265, 266 and 267 hearings

	s265	s266	s267
2010	6	2	3
2011	9	6	3
2012	8	4	0

3. Current experiences in the State Hospital

Professor Lindsay Thomson, Medical Director, The State Hospital, described the experience so far of appeals against excessive security.

The Forensic Network defined the levels of security as high, medium and low, broadly on the following basis if risk:

- High security is the level of security necessary only for those patients who pose a grave and imminent danger to others if at large;
- Medium security is the level of security necessary for patients who represent a serious but less immediate danger to others;
- Low security is the level of security deemed necessary for patients who present a less serious physical danger to others..... Security measures are intended to impede rather than completely prevent absconding.

Since the Act was implemented, the outcome of appeals against excessive security in the State Hospital has been:

Submitted	265
Heard	158
Approved	97
Declined	61
Current	60

The time commitment was impossible to measure retrospectively. There is a Tribunal nurse. The hearing would involve the patient, two members of nursing staff, the RMO and the MHO. Other practitioners, e.g. psychologists, may need to give evidence. The time commitment also involves preparation and debrief as well as attendance.

Professor Thomson presented an account of the first 100 patients to appeal under section 264. Ninety-five were male, mean age was 41 and mean length of stay was seven years. Thirteen were from outside Scotland. Just under half of the individuals were from Greater Glasgow and Clyde. In relation to offending behaviour, 89 had at least one previous conviction and 62 had restricted status. Most (62) had a diagnosis of schizophrenia. Learning disability (17) was the next highest group.

The outcomes were:

- 44 approved
- 23 rejected
- 23 withdrawn
- 7 cancelled
- 3 adjourned

The application was far more likely to be approved if the patient was already on the transfer list and the RMO supported the application. Women and individuals detained

under civil orders had relatively greater chances of appealing successfully. After approval, roughly equal numbers were transferred to medium and low secure facilities. Where the application was withdrawn or the case was cancelled, several patients were still transferred out of the State Hospital. Of the 23 rejected cases, one patient was still subsequently transferred.

This study suggests that legislation can drive service change and that being on a transfer list and having RMO support are the likeliest indicators of a successful appeal.

4. How excessive is excessive?

Dr Donald Lyons, Chief Executive of the Commission, outlined the scale of the issue and introduced the round table discussion.

Around 1600-1700 people are subject to long term orders authorising hospital detention under either mental health or criminal justice legislation. Of these approximately:

- 135 are detained in the State Hospital
- 156 will be in medium secure units
- The number in low secure cannot be accurately determined but is likely to be around 150-200:
- 150 are in intensive psychiatric care units
- The remained are in other wards, some of which may still be temporarily or permanently locked, or have their detention suspended.

Note – information from Orchard Clinic received after the meeting was that, of all present patients in the clinic:

- *Average length of stay is 616 days*
- *Median length of stay is 240 days*
- *56% were admitted less than a year ago*
- *Less than a third were detained in the clinic for more than 2 years*

Given the Supreme Court ruling, the requirements of the 2003 Act, the available levels of security, the principles of the Act and the articles of the European Convention on Human Rights, the participants were invited to consider the principles and practicalities of regulating under section 268 and produce suggestions on how they might be framed.

Round table discussions

Officers of the Commission facilitated discussions in small groups. The main points were then fed back to a plenary session. The Commission endeavoured to collect all the points raised, while providing an overview of the main issues for Ministers to consider when making regulations.

The points raised were:

Purpose and necessity

- Some participants questioned the need to provide for appeals under section 268 at all while others considered that it might help to keep the entire secure care system fluid. For example, there is no data on entrapped patients in low security, but absence of data does not necessarily mean that there is no problem.
- The Millan Committee's original intention was to address the issue of "entrapped patients" in the State Hospital. Do we have evidence that there are similar entrapment problems in other levels of security? And what came first: the Act or the commitment to develop regional facilities?
- Also, the entrapment issue may be different in medium and low secure because more individuals are granted suspension of detention.
- Do patients understand the differences among the various "appeals"? Level of security, transfer and detention all have different routes of appeal
- Appeals may have a useful purpose if lack of provision or delays in funding result in higher security than necessary for longer periods of time. Views of participants on the extent of this problem varied, perhaps reflecting variability of service across Scotland.
- Appeal provision may therefore be a driver for improved service provision in some parts of Scotland.
- Case law resulting from successful or failed appeals may help clarify appropriateness in law of the different levels of security.
- While acknowledging that individuals in acute adult wards, dementia wards and learning disability wards may be unable to leave the units for various reasons, it was considered that it was not the intention for excessive security provisions to extend to these groups. Other remedies, e.g. section 291, intervention by the Commission, are available.

Principles of the 2003 Act

- The principle of minimum necessary restriction of freedom. For example, detention may be suspended for escorted and unescorted outings from hospital. Opportunities to integrate with the community may mitigate against the restriction of physical security.
- Maximum benefit: centrality of clinical benefit to address need, consideration that move out of a forensic service may not benefit the patient and may be detrimental;
- Principles of reciprocity: the duty to provide care and treatment that will help the patient move to a lower level of security;

- Information for patient and carers. Importance of good communication about different levels of security.
- Participation. Important that the individual understands the process and has input to the care plan.

Articles of the European Convention on Human Rights (ECHR)

- Right to liberty: while detention (with appeal process) is allowed by article 5, the proportionality of deprivation of liberty is also important. Also, paradoxically, liberty can be reduced by step-down from the State Hospital with extensive grounds to smaller medium or low secure units with more restricted outside space.
- Also, right of appeal is enshrined in article 5 and right to fairness in the process enshrined in article 6. Important that individuals are not discouraged from appealing because of a perception that they may be seen as "difficult" and may suffer sanctions as a result.
- Deprivation of liberty involves not just the conditions of this deprivation but the length of time. As a result, there was a view that provisions should extend to medium and low secure units but not IPCUs. Usually, IPCU care is short-term but there may be individuals who spend longer periods in IPCUs, especially those units that also carry out low secure functions.
- Right to private and family life: an important consideration in step down especially from national or regional services to local units with more opportunities for visits.
- Also, transfer from medium secure unit to a national low secure unit in the independent sector can result in greater distance from family and friends
- Particular issues for children, people with learning disability or people with autistic spectrum disorders who may need care and treatment outside Scotland.
- Linked to respect for private and family life is the issue of being a "specified person". Some suggested that the status of being a specified person should be a criterion for appeal. Others argued that not being a specified person, e.g. in low secure wards, may suggest that the level of security is excessive.

Risk issues: as regards the patient

- Risk to others is greatest in high security, less in medium and low security and less likely to be as prominent as risk to self in IPCUs.
- Level of security must depend on assessed level of risk.
- Less robust support when patient exits the forensic service;
- There may be a risk if transfer is too early: it may result in greater restriction of liberty, e.g. lack of access to hospital grounds, and a poorer quality of life.
- May be disadvantage in moving from e.g medium to low security if patient has good relationship with staff and staff know patient well. Some can be

discharged to community settings from medium secure wards. Moves from high to medium to low to open ward to community may extend stay. It must be possible to bypass some of these steps.
- Victim issues – location may need to be at distance from victim or victim's family

Risk issues: as regards the process

- Perception that some solicitors may encourage individuals to appeal where the individual does not understand the implications.
- Risk that some psychiatrists providing independent reports may not have sufficient relevant clinical experience.
- Risk of distress to patients (and families) from repeated tribunal hearings where appeals are unsuccessful and frustrating.
- Risk to clinical care if more staff time is taken up by appeal process and tribunal hearings – remembering that it is not just the hearing, it is also preparation of reports, preparing and supporting the patient.
- Frequent adversarial hearings can damage relationship between staff and patients.
- Airing disagreements between clinicians working in different levels of security in different areas may be detrimental to care.

Practicalities

- Decisions must be independent and proportionate
- Extra tribunals will impose further demands on practitioners with a resulting impact on patient care (this was raised by many participants)
- Process before the level of a Tribunal hearing may help. Clear procedural rules needed.
- Lack of low secure facilities in some small NHS Board areas. Numbers may not justify low secure provision.
- Lack of supported accommodation to facilitate move from low secure.
- Need for preparatory visits before move takes place.
- Difficult issue for responsible medical officers (RMOs). For example, the RMO in the State Hospital may support a patient's appeal, but the onus for identifying a placement will fall on a different NHS Board. If an RMO supports an appeal in medium or low secure conditions, the onus may fall on the Board that employs the RMO. May risk the perception of independence of the RMO's opinion.
- In some cases, NHS Boards pay for placements in other settings, e.g. independent low secure facilities on an individual contract. This may not always apply in medium secure, depending on placement/funding arrangements. State Hospital funding is entirely separate. Funding issues may have an impact.

- Limit needed on frequency of appeals

Suggestions

- Make more use of the two-year review by the Tribunal for all long-term orders;
- Right of appeal if issue of security not addressed at the review;
- Requirement to have completed and responded to treatment in medium or low secure facilities, resulting in lower risk and higher protective factors
- Requirement to demonstrate disadvantage by being detained in a higher security setting (common theme among many participants)
- Moving from low secure may require an imposition of responsibilities on local authorities as well as NHS Boards, noting that health and social care integration may have some impact here;
- Sifting procedure before application is forwarded for a full hearing. The Tribunal should have the option of rejecting an appeal without progressing to a full hearing.
- Possible requirement for support from a suitably qualified medical practitioner, e.g. on the relevant specialist register.
- Legal aid could fund an independent report but only fund an appeal if report is supportive.
- More use of recorded matters to address security issues, although recognised that they do not carry the same weights as decisions under excessive security provisions and they do not at present apply to compulsion orders or COROs.
- It is rare at present for the named person or the Commission to instigate an appeal. Possible role for the Commission where the individual does not appeal because he/she does not want to "rock the boat"
- Possible phased implementation e.g. qualifying hospital is medium secure and qualifying patient is one where there is demonstration of disadvantage via a sifting procedure.
- Patients in IPCUs may qualify if they have been there for an extended period of time.

Conclusions and recommendations

While there was some divergence of opinion among participants, the following points had most agreement. The Scottish Government should give these greatest consideration, as well as considering all the points contained in this report.

The mains points of agreement were:

1. The purpose of section 268 is different from the original purpose of section 264 and the process of appeal against continued detention in the State Hospital. There is much less of a problem with "entrapped patients" but a need to ensure that principles of the 2003 Act and articles of ECHR apply

where there are significant security measures. While some consultees questioned the need to introduce regulations, the group as a whole recognised that this was not an option for Ministers.

2. 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. Therefore, “qualifying patient” is more important than “qualifying hospital”.
3. A qualifying patient is one who is being disadvantaged by the present level of security. Many factors may impact on the presence and extent of that disadvantage, including family contact, leave arrangements and therapeutic benefit.
4. There should be a requirement to demonstrate evidence that there may be disadvantage before the Tribunal conducts a full hearing. Mechanisms to demonstrate such disadvantage could include some or all of the following:
    - An independent report by a suitably qualified psychiatrist, e.g. one on a relevant specialist register.
    - An assessment by the Tribunal at a two year review that such an application is merited, or possibly a decision on excessive security at the same time, if appropriate application is made.
    - A procedural hearing by a convenor to determine if the case should progress to a full hearing.
5. Qualifying hospitals should include medium secure, low secure and IPCUs. In the last of these, only those detained for a period of time (e.g. 3 months or 6 months) would qualify.
6. The number of extra Tribunal hearings, based on this process, is hard to quantify. Because of cost, including opportunity cost of staff time, the Government may wish to consider phasing the implementation by starting with medium secure units, but the consultees emphasise again the primacy of disadvantage and the greater importance of the definition of a qualifying patient.
7. While the present legislation imposes duties on NHS Boards, there are also important duties on local authorities in order to help patients move from secure facilities, now and in a possible future integrated service. Transfer to open wards is not always appropriate because staff and patients are familiar with each other and develop therapeutic relationships. Regulating under section 268 may also require duties for local authorities. This should be borne in mind when amending the 2003 Act and when considering health and social care integration.
8. *Not considered by the group but an issue to consider from Orchard Clinic figures, should the length of stay in medium secure be a factor in deciding who qualifies?*

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