

# **Consultation in relation to section 268 appeals against conditions of excessive security**

**An analysis of responses**

## About this report

1. This report provides an analysis of responses to the Scottish Government's "Consultation in relation to section 268 appeals against conditions of excessive security" which closed on 25 October 2013.

## Background to the consultation

2. 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 in respect 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') to patients held in conditions of excessive security in hospitals other than the State Hospital.

3. 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. The consultation paper set this decision in context and proposed options for legislative change.

## Overview of responses

4. A total of 27 written responses<sup>1</sup> were received. Annex A contains a list of respondents. Table 1 below shows the distribution of responses. One respondent wished to remain anonymous but the content of their response has been taken into account in preparing this analysis report. 70.4% of responses were submitted by organisations with 29.6% by individuals. Dumfries and Galloway Advocacy Services replicated many of the comments made by the Scottish Independent Advocacy Alliance within their response. Not all respondents addressed every question and some respondents offered comments on matters out-with the scope of the consultation.

**Table 1: Distribution of responses**

| Respondent Category                        | Total Received | % of Responses |
|--|----------------|----------------|
|  |                |                |
| Individuals                                | 8              | 29.63          |
| Local Authority                            | 2              | 7.40           |
| NHS  | 2              | 7.40           |
| Other professional organisations           | 3              | 11.12          |
| Professional representative organisations. | 3              | 11.12          |
| Service users representative organisations | 2              | 7.40           |
| Voluntary bodies                           | 7              | 25.93          |
| <b>Total</b>                               | <b>27</b>      | <b>100</b>     |

<sup>1</sup> Link to responses on SG website <http://www.scotland.gov.uk/Publications/2013/11/6601>

5. The analysis of responses is largely qualitative. Due to the relatively low number of responses received and the fact that not every respondent answered every question the percentages quoted in this report should be treated as indicative and illustrative only.

### Summary

6. An analysis of the responses received can be found at Annex B. No clear preference was expressed for a particular proposal. Not only is there a variance of views between respondent categories but also within respondent category. The majority of respondents who answered the question felt there was a need for a wider provision for an appeal against excessive levels of security. The majority of respondents who answered the question were not in favour of having a preliminary review to consider the merits of the appeal before a full hearing. Respondents views were split evenly with regard to whether more effective use could be made of recorded matters – although over a quarter of respondents did not offer a response on this matter. The majority of respondents who answered the question felt that the Tribunal should consider levels of security as a matter of course at a two year review.

### Next steps

7. The Scottish Government will now reflect on the responses received which will help inform the formulation of proposals going forward.

### Scottish Government Proposal 1

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; the regional medium secure component of Rohallion in Tayside; and the regional medium secure component of Rowanbank in Glasgow.

Please tell us about any potential impacts, either positive or negative you feel these proposals for regulations may have

### Responses to proposal 1

Several respondents commented that they welcomed this proposal and that they agreed with the proposed classifications of a qualifying patient and hospital.

**Potentially positive impacts**, as identified by respondents, included:

- Driving up standards of care and treatment.
- A reduction in waiting lists for beds in medium secure and therefore a reduction in applications under section 64 (*Detention in conditions of excessive security: state hospitals*).
- A greater likelihood that the impact of detention on individuals relating to their own circumstances would be taken into consideration when considering reviews and when making decisions.
- Opportunities to gather evidence of entrapment in medium secure units and how well the flow of patients through forensic health services is working.
- Positive impact on the rights of patients and ensure consistency with the guiding principles of the 2003 Act.
- Reassurance that individuals can challenge decisions that impact on them and their families and that reduces stress and fear.

When identifying the **potentially negative impacts** of implementing this proposal, a number of respondents commented that the right of appeal should be for all levels of security and that the proposed criteria were therefore too narrow. One respondent commented that "*patients need to move through the system and a right of appeal at medium secure is not much use unless there is a sufficient volume of beds at low level and in the community*". Just fewer than 20% of respondents did not agree with the criterion which required a report from an approved medical practitioner as they felt this would impact unfairly on individuals who for a number of reasons may not wish to obtain such a report. Several respondents also commented that no such report was required for section 264 applications.

Other potentially negative impacts identified included:

- Increased use of private low secure services for smaller NHS Boards or NHS Boards that do not have low secure provision. This can mean patients being placed further away from home as they move to less secure settings.
- Loss of flexibility within regional and local forensic services to manage patients whose needs lie on the cusp of security levels or whose care needs to be highly individualised.
- Significant resource implications in terms of staff time preparing for appeals.
- Further stress for patients due to the complexity of the appeal process.

## Scottish Government Proposal 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.

Only a few respondents offered specific comments on the proposal to repeal section 268. Those not in favour commented that this would be grossly unfair as this provision was included in the 2003 Act by the Millan committee and it would be an unfortunate and inappropriate response to the *RM v Scottish Ministers* case. A couple of respondents commented that the two proposals need not be mutually exclusive and it should be possible to implement regulations and undertake a review. The general consensus was that section 268 should be retained and amended to make it “fit for purpose”.

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?**

| Type                                       | Number of respondents |          |          |            |           |
|--|-----------------------|----------|----------|------------|-----------|
|  | Yes                   | No       | Mixed    | No comment | Total     |
| Individuals                                | 3                     | 2        |          | 3          | 8         |
| Local Authority                            | 1                     |          |          | 1          | 2         |
| NHS  | 1                     | 1        |          |            | 2         |
| Other professional organisations           | 2                     |          | 1        |            | 3         |
| Professional representative organisations. | 2                     |          | 1        |            | 3         |
| Service users representative organisations | 1                     |          |          | 1          | 2         |
| Voluntary bodies                           | 6                     |          | 1        |            | 7         |
| <b>Total</b>                               | <b>16</b>             | <b>3</b> | <b>3</b> | <b>5</b>   | <b>27</b> |

Circa 68% of respondents who answered this question agreed there is a need for a wider provision here. Reasons given included: section 268 is restrictive and there is no requirement for rehabilitation within the settings; will likely have a positive impact on individuals; should enable transfers within wards.

## Annex A

A small number of respondents (just under 14%) did not agree there was such a need and amongst the reasons given were that: this could disadvantage more patients than it would benefit and it could have a detrimental effect on services; and there is no published evidence that there is a need to widen the provision.

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?**

| Type                                       | Number of respondents |           |          |            |           |
|--|-----------------------|-----------|----------|------------|-----------|
|  | Yes                   | No        | Mixed    | No comment | Total     |
| Individuals                                | 2                     | 5         | 1        |            | 8         |
| Local Authority                            |                       | 1         |          | 1          | 2         |
| NHS  |                       |           | 1        | 1          | 2         |
| Other professional organisations           | 1                     | 2         |          |            | 3         |
| Professional representative organisations. | 1                     | 1         |          | 1          | 3         |
| Service users representative organisations | 2                     |           |          |            | 2         |
| Voluntary bodies                           |                       | 5         | 1        | 1          | 7         |
| <b>Total</b>                               | <b>6</b>              | <b>14</b> | <b>3</b> | <b>4</b>   | <b>27</b> |

Circa 61% of those who answered this question did not agree there was a need for a preliminary review. A variety of reasons were given which included: a lack of clarity around what was envisaged so this appears to be an unnecessary procedural step; such reviews are not held for patients appealing under section 264 or patients appealing against compulsory treatment orders so why discriminate against this specific group of patients; concerns expressed about the adverse impact on the workload of the Tribunal service and the staff who provide representations; it is entirely inappropriate for the Tribunal service to have a gate keeping role; and concerns expressed about the availability or otherwise of legal aid for a preliminary hearing.

26% of those who responded were in favour of holding a preliminary review. Amongst the reasons given were: it would better incorporate considerations of the impact of excessive security on individuals; and it would help establish if the reason for a patient being held in conditions of excessive security is a bottleneck caused by lack of suitable accommodation and of housing,

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?**

## Annex A

| Type                                       | Number of respondents |          |          |            |           |
|--|-----------------------|----------|----------|------------|-----------|
|  | Yes                   | No       | Mixed    | No comment | Total     |
| Individuals                                | 3                     | 5        |          |            | 8         |
| Local Authority                            | 1                     |          |          | 1          | 2         |
| NHS  | 1                     |          | 1        |            | 2         |
| Other professional organisations           | 3                     |          |          |            | 3         |
| Professional representative organisations. | 2                     |          | 1        |            | 3         |
| Service users representative organisations | 2                     |          |          |            | 2         |
| Voluntary bodies                           | 3                     | 3        | 1        |            | 7         |
| <b>Total</b>                               | <b>15</b>             | <b>8</b> | <b>3</b> | <b>1</b>   | <b>27</b> |

The majority of comments made related to the first part of the question and there was little comment on the accompanying right of appeal. 58% of those who answered this question were in favour of this proposal and amongst the comments offered were: security is a huge part of a detained person's life and it should be regularly reviewed to make sure it is accurate and beneficial to the patient; this would ensure appropriate weight was given to levels of security in assessing risk and decisions are closely tied to the risk posed and this would build the right into the process and remove much of the doubt and distress.

31% of those who answered this question were not in favour of this proposal and amongst the comments made were: patients would have to wait for 2 years for their level of security to be discussed – simply not fair on the individuals involved; and appropriate level of security is a different issue from whether criteria for compulsion are met or not.

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

| Type                                       | Number of respondents |          |          |            |           |
|--|-----------------------|----------|----------|------------|-----------|
|  | Yes                   | No       | Mixed    | No comment | Total     |
| Individuals                                | 2                     | 5        | 1        |            | 8         |
| Local Authority                            | 1                     |          |          | 1          | 2         |
| NHS  |                       |          | 1        | 1          | 2         |
| Other professional organisations           | 2                     |          |          | 1          | 3         |
| Professional representative organisations. |                       | 1        | 1        | 1          | 3         |
| Service users representative organisations | 1                     |          |          | 1          | 2         |
| Voluntary bodies                           | 2                     | 3        |          | 2          | 7         |
| <b>Total</b>                               | <b>8</b>              | <b>9</b> | <b>3</b> | <b>7</b>   | <b>27</b> |

40% of those who answered this question were in favour of the proposal whilst 45% were not. 26% of respondents did not answer this question.

Comments from those in favour included: by accessing recorded matters from previous tribunals this would allow for progress to be followed and lead to possible reduction in security levels; recorded matters could be useful way of highlighting obstacles (lack of beds, delays in reports being written).

Comments from those not in favour included: would be of no help to individuals on a CORO or CO, therefore again leading to discrimination amongst patients; this is not seen as an effective remedy for patients in this context, largely because there is no enforcement mechanism; and why should such patients have to rely on the weaker mechanism of recorded matters whilst a similar patient detained in high security has the advantage of the more powerful appeal procedure.

### **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?**

A number of respondents offered comments, a flavour of which can be found below:

- Issue of excessive security should be more integral to the CPA (Care Programme Approach) process.
- Further work to streamline the Tribunal process to reduce the existing burden and impact on consultant psychiatrist time.
- Introduction of a mechanism whereby recorded matters can be made to Tribunals in cases where patients are detained under Compulsion Orders and Restriction Orders.
- Extension of a scheme such as that in sections 264 and 268 to patients seeking to move from hospital into the community would assist with the through flow of patients.
- Housing departments should be involved at an earlier stage in a person's rehabilitation and more funding for suitable housing should be available.
- Two years is too long to wait for a CTO review and if a patient or their family would like this reviewed more regularly then this should be done.
- Levels of security for all should be reviewed on an on-going basis and not just at a two year juncture.
- A mapping of treatment availability against geographic area.

### **Any further comments**

A number of respondents used this section to summarise points made throughout their responses whilst other respondents offered comments on more general mental health matters. Comments below cover material pertinent to the consultation but not referred to elsewhere in this analysis.

- When considering amendments to the 2003 Act, regard should be given to the widest possible support to patients who are moving towards their eventual release from detention. This may include placing further duties on local authorities in this regard.
- Although most unusual, a recent situation arose where there was no medium secure place available in Scotland. It may therefore be premature to conclude that "entrapment" in medium secure units will not happen at some point.



## **LIST OF RESPONDENTS**

### **Individuals**

Mr D Campbell  
Dr Dyer  
Miss C Fotheringham  
Mr J A L Miller  
Miss R Moore  
Miss L Robertson  
Miss Louis Whitehill

### **Local Authority**

Argyll and Bute  
Midlothian

### **Voluntary bodies**

Advocard – Individual Advocacy Services  
Advocacy Project  
Autism Rights  
Circles Network Forensic Advocacy Project  
Dumfries and Galloway Advocacy Service  
Patients Advocacy Service  
Scottish Independent Advocacy Alliance

### **NHS**

Glasgow City CHP  
NHSGGC Psychology

### **Professional representative organisations**

British Psychological Society  
Faculty of Advocates  
Royal College of Psychiatrists in Scotland

### **Other professional organisations**

Equality and Human Rights Commission  
Legal Services Agency  
Mental Welfare Commission

### **Service users representative organisations**

People First (Scotland)  
Support in Mind

**1 anonymous response**



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