

POLICY NOTE

THE MENTAL HEALTH (SCOTLAND) ACT 2015 (COMMENCEMENT NO. 1, TRANSITIONAL AND SAVING PROVISIONS) ORDER 2015

SSI 2015/361 (C. 46)

The above instrument was made in exercise of the powers conferred by sections 61(2) and (3) of the Mental Health (Scotland) Act 2015. The instrument is subject to no procedure.

Legal Background

The Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act')

The 2003 Act introduced a right for patients in The State Hospital to apply to the Mental Health Tribunal for Scotland for an order declaring that the patient is being detained in conditions of excessive security and specifying a period where the relevant Health Board identifies a hospital in which the patient could be detained in appropriate conditions. It also introduced a similar scheme for “qualifying patients” detained in “qualifying hospitals” other than the State Hospital, with such “qualifying patients” and “qualifying hospitals” to be defined in regulations.

Following amendments in the Mental Health (Scotland) Act 2015 ('the 2015 Act'), section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003 allows a patient to contest the conditions in which he or she is being detained in a qualifying hospital, by means of an application to the Mental Health Tribunal for Scotland (“the Tribunal”) for an order declaring that the patient is being held in conditions of security which are excessive in the patient’s case, and specifying a period during which the Health Board shall identify an alternative hospital in which the patient could be detained in appropriate conditions.

Sections 269 to 271 make associated provision. Section 269 provide for further Tribunal proceedings which may follow upon its finding that a patient is being detained in conditions of excessive security. Section 271 allows the Tribunal to overturn an earlier decision that a patient is being detained in conditions of excessive security. Section 271A allows for regulations to set out the test for the purposes of the Tribunal’s consideration of whether the patient is being held in conditions of excessive security. It also allows for regulations to set out the definition of “qualifying hospital”.

The Mental Health (Scotland) Act 2015 ('the 2015 Act')

Section 14 of the 2015 Act introduces a requirement for all applications to the Mental Health Tribunal for Scotland in relation to detention in conditions of excessive security to be accompanied by a supportive medical report. Section 15 of the 2015 Act repeals section 266 of the 2003 Act to remove the third-stage hearing where the Tribunal has found that a patient is being detained in a state hospital in conditions of excessive security, and makes consequential amendments. That section also repeals section 270 of the 2003 Act, which made equivalent provision for a third-stage hearing in relation to non-state hospital applications. Section 16 of the 2015 Act amends sections 268, 269 and 271 of the 2003 Act in relation to applications by patients detained in hospitals other than a state hospital, and introduces new powers (new section 271A of the 2003 Act) for Ministers to make provision

by regulations in relation to such applications. Section 18 of the 2015 Act provides that, for the purposes of Chapter 3 of Part 17 of the 2003 Act, references to a hospital may be read as a reference to a hospital unit.

Draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 laid in Parliament on 31 August 2015 set out the test for the purposes of the Tribunal's consideration of whether the patient is being held in conditions of excessive security. It also allows for regulations to set out the definition of "qualifying hospital", and modify sections 264 and 268 of the 2003 Act to provide that the supportive report introduced by section 14 of the 2015 Act must be provided by an approved medical practitioner. The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2015 provide for the Tribunal's handling of applications against detention in conditions of excessive security. These Regulations and amendments to the Tribunal Rules are to come into force on 16 November 2015.

Policy Objectives

This order brings into force sections 14, 15, 16 and 18 of the Mental Health (Scotland) Act 2015 ("the Act") which amend Chapter 3 of Part 17 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) ("the 2003 Act"), in relation to detention in conditions of excessive security.

Article 2 provides that the appointed day for the purposes of this order is 16th November 2015.

Articles 3, 4 and 5 make saving provision to ensure that the requirement for a supportive medical report, introduced by section 14 of the Act, applies only to applications made on or after the appointed day; to retain the third-stage hearing in section 266 for applications made before that day; and to ensure that orders under section 266, whenever made, continue to be able to be recalled or enforced on and after the appointed day. Article 6 sets out when an application is to be taken as having been made, for the purposes of the saving provisions.

Saving provision is required in relation to applications from patients in the State Hospital under section 264 of the 2003 Act which have been possible under that Act since 2006. The policy objective was to ensure clarity for patients, the Mental Health Tribunal and mental health practitioners. The approach taken ensures that all applications against detention in conditions of excessive security by patients in the State Hospital made before 16 November 2015 will continue to be dealt with under the existing arrangements. Applications made on or after 16 November 2015, by such applicants will be dealt with under the new arrangements: they will require a supportive medical report; and there will only be a two-stage hearing process.

Consultation

This order has been developed in liaison with the Secretary to the Mental Health Tribunal for Scotland.

Impact Assessments

The summary of the equality impact assessment for the Mental Health Bill, which included provisions related to excessive security was published on the 24 June 2015. The equality impact assessment for this order rely on the assessment for the Bill. This assessment found that as service users with a longer term mental disorder are included within the protected characteristic of disability under the 2010 Equality Act it is therefore likely that any effects that the Bill provisions, including changes to excessive security, have on service users will particularly impact the protected characteristic of disability. The assessment found that, with certain exceptions, none of the provisions in the Bill (including those related to excessive security) specifically relate to the other protected characteristics. For characteristics relating to gender, age and race, there is some evidence that certain groups are represented in relation to certain aspect of mental health legislation disproportionately to their representation in the population as a whole. No statistics were found on this in relation to religion or belief, sexual orientation or gender identity.

Financial Effects

This order is not expected to lead to costs or savings for business, third or public sector organisations, regulators or consumers. It commences the relevant provisions in the 2015 Act. A BRIA has been produced for the draft Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 that have already been laid in Parliament which include estimates of costs for public sector organisations. As a result a Business and Regulatory Impact Assessment (BRIA) is not required for this order.

Scottish Government
Directorate for Population Health Improvement

29 October 2015