

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Mental Health (Detention in Conditions of Excessive Security (Scotland) Regulations 2015

## **Purpose and intended effect**

- **Background**

The Mental Health (Care and Treatment) (Scotland) Act 2003 ('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 specify 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 hospitals other than the State Hospital. Such "qualifying patients" to be defined in regulations.

The scheme for patients in The State Hospital became operational in 2006. However, the scheme for "qualifying patients" outwith The State Hospital has never been brought into force. In 2012 the Supreme Court ruled that the Government's failure to make regulations bringing the appeal right into force for such patients is unlawful.

Amendments to the scheme for patients in The State Hospital and patients in hospitals other than The State Hospital were made in the Mental Health (Scotland) Act 2015 so that such schemes could operate effectively in the secure estate across Scotland. These changes including removing the term "qualifying patient" and instead patients who will have a right of appeal against being detained in conditions of excessive security will be those in a "qualifying hospital". Such "qualifying hospital" to be defined in regulations.

- **Objective**

By defining "qualifying hospital" and setting out the test that must be met before the Mental Health Tribunal may grant an order declaring that a patient is being detained in conditions of excessive security, these regulations will deliver the intention of the Mental Health (Care and Treatment) (Scotland) Act 2003 to give a right of appeal against being detained in conditions of excessive security to patients in medium secure units in Scotland as well as to patients in The State Hospital.

- **Rationale for Government intervention**

The reason behind the inclusion of a right of appeal in the 2003 Act is that a number of patients were detained in The State Hospital when they no longer required the level of security of The State Hospital. There were concerns that a similar situation might arise in the emerging medium secure estate.

## Consultation

- **Within Government**

The regulations have been developed in consultation with relevant colleagues in Health and Social Care and Legal Directorates.

- **Public Consultation**

### *Consultation Forum*

The Scottish Government asked the Mental Welfare Commission to facilitate a consultation forum on excessive security in early 2013. The aim was to hear the views of stakeholders on the implications of this judgement before considering consultation on proposals. Representatives from the following organisations were invited to the event:

- 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

There was some divergence of opinion among participants. While some consultees questioned the need to introduce regulations, the group as a whole recognised that this was not an option.

### *Public Consultation*

A public consultation took place from 2 August 2013 to 25 October 2013 seeking views on the way forward, it included two proposals:

- bring forward regulations which would give an effective right of appeal to patients in medium secure units ('regulations proposal');
- repeal provisions in the 2003 Act which provide for a right of appeal for patients outwith the State Hospital.

The majority of respondents who answered the relevant question felt there was a need for provision for an appeal against excessive levels of security. Several respondents commented that they welcomed the proposal to bring forward regulations as proposed. Potentially positive impacts, as identified by respondents, included a reduction in waiting lists for beds in medium secure and therefore a reduction in applications relating to detention in conditions of excessive security in The State Hospital.

### *Following public consultation*

In light of responses to the consultation and following further discussions with the three medium secure units and the Mental Health Tribunal for Scotland the policy intention is to implement the approach set out in the regulations proposal in the consultation.

A draft of the regulations was provided to the Health and Sport Committee of the Scottish Parliament during the process of the Mental Health (Scotland) Bill. It was published on the Committee's web pages on 24 April 2015.

- **Business**

These regulations are consequential changes as a result of the provisions in the Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended). However, the views of the three medium secure units and the Mental Health Tribunal for Scotland have been sought throughout the development of the regulations.

### **Options**

#### **Option 1: Do nothing**

Doing nothing would mean that the Scottish Government's failure to bring forward regulations so as to bring the appeal right into force for patients in 'qualifying hospitals' would continue to be unlawful. This is not an option.

#### **Option 2: Make regulations**

In light of the provisions in the 2003 Act, the only option for addressing the unlawfulness of not bringing forward regulations is to bring forward such regulations.

The question then was which patients a right of appeal against detention in conditions of excessive security to patients should be extended to. The proposal in the public consultation was to extend the right to patients in the medium secure units. While some respondents to the consultation felt that patients beyond medium secure units should have a right of appeal, the policy intention behind these regulations is to bring into effect the scheme provided for in the 2003 Act by extending the right to patients in the medium secure units.

#### **Sectors and groups affected**

All of the options will affect patients in medium secure units in Scotland. Option 1 would mean that such patients would not be able to challenge their detention in conditions of excessive security. Option 2, once regulations come into force, will enable such patients to make an application to the Mental Health Tribunal for an order declaring that they are being detained in conditions of excessive security. Service users with a longer term mental disorder are included within the protected characteristic of disability under the 2010 Equality Act.

Organisations affected are the three medium secure units in Scotland whose patients will have a right of appeal as well as Health Boards who will have a duty to identify a hospital in which the patient could be detained in appropriate conditions. Scottish Ministers are affected where patients who are detained under a Compulsion Order and Restriction Order are successful in an application to the Tribunal as Scottish Ministers are required to agree that the hospital identified by the Health Board is one where the patient could be detained in appropriate conditions.

### **Benefits**

The only option being considered is Option 2. The potentially positive impacts, as identified by respondents in the public consultation, 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 264 (*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.

It is difficult to quantify these benefits to patients and their care and treatment.

### **Costs**

The impact of this policy will largely be for Health Boards, the Mental Health Tribunal and the Legal Aid Board. There are some set up costs related to staffing and training for the Mental Health Tribunal.

The ongoing costs are estimated to be £11,000 a case across Health Boards, the Mental Health Tribunal and Legal Aid Board. This is based on costs for existing appeals by patients in The State Hospital under section 264 of the 2003 Act and breaks down as follows:

- £2,250 Mental Health Tribunal cost of panel hearings (£1,500 per day with an average of 1.5 panel hearings per day);
- £2,000 Central Legal Office costs per hearing for solicitors representing Health Boards preparation and appearance at hearings;
- £951 Scottish Legal Aid Board average costs per Mental Health Tribunal case;
- £3,000 estimated average Responsible Medical Officer/Mental Health Officer/Security staff member and two nurse escort costs per hearing for preparation for and attendance at a hearing;
- £2,500 Health Board costs per hearing associated with assessment of the patient's suitability for low secure services, preparation for and attendance at

the hearing (where the patient is not detained in a medium secure hospital within his home health board area).

### *Medium Secure Units*

The Mental Health Inpatient Beds Census, published on 29 June 2015, provides data on patients as at 29 October 2014 and indicates that there were 127 patients in medium secure units.

Of these, not all patients will be eligible to appeal. Firstly, the appeal right only applies once the order has been in place for 6 months. At any point there will be a certain number of patients who would not be able to apply. The census data indicates around 21% of patients had been detained for less than 6 months. Secondly, not all patients will wish to exercise the right of appeal. Thirdly, not all patients will get a supportive report from a medical practitioner that must accompany their application and without which they will not be able to apply. It is difficult to estimate the percentage of patients who will not get a supportive report but between a third and two thirds of patients in The State Hospital who appealed under section 264 of the 2003 Act for each year were unsuccessful or withdrew the appeal. It is reasonable to assume that a high proportion of patients eligible to appeal would not be able to obtain a supportive report from an approved medical practitioner and therefore would not be able to make an application to the Tribunal. This would indicate a potential number of 67 appeals ( $127 - 21\% = 100$ ,  $100 - 33\% = 67$ ). For those patients who sought to obtain an independent report in order to make an application but the report was not supportive, estimated costs would be limited to approximately £600 per patient (in legal aid costs) instead of the full tribunal cost of £11,000.

This analysis would indicate costs to all public bodies of around £740k per annum ( $£11,000 \times 67$ ). If every patient in medium secure units was to apply the costs would be around £1.4m per annum ( $£11,000 \times 127$ ). In addition to this, it is estimated that there would be legal aid costs of around £20,000 per annum for those patients in medium secure units who sought to obtain an independent report in order to make an application but the report was not supportive ( $£600 \times 33$ ).

These costs are subject to a significant margin of uncertainty given that we cannot, with any certainty, predict the number of patients who will wish to obtain an independent report in order to make an application or the number of those who will obtain a supportive report in order for the appeal to proceed. Costs will vary depending on the complexity of the case and, for example, whether the patient is a restricted patient (detention authorised by a Compulsion Order and Restriction Order). If Health Boards do not identify more appropriate accommodation for patients who successfully win their appeal and move the patient within the timeframe set by the Tribunal there will be additional costs for second hearings.

### *Beyond medium secure units*

The costs of extending the right of appeal to patients in low secure units on the same

calculations as above would be between approximately £1.7m per annum (£11,000 x 151<sup>1</sup>) and £3.1m per annum (£11,000 x 285). With up to an additional £44,000 per annum for those whose report was not supportive (£600x74).

A right of appeal to all patients outwith The State Hospital and the medium secure units could be between approximately £21.3m per annum (£11,000 x 1938<sup>2</sup>) and £40.3m per annum (£11,000 x 3661). With up to an additional £572,000 per annum for those whose report was not supportive (£600x954).

### **Scottish Firms Impact Test**

These regulations are consequential changes as a result of the provisions in the Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended). However, the views of the three medium secure units and the Mental Health Tribunal for Scotland have been sought throughout the development of the regulations.

### **Competition Assessment**

In our view, having applied the Competition and Markets Authority competition filter, the regulations will have a limited impact on competition. These regulations limit the number or range of suppliers and limit the ability of suppliers to compete for the provision of a supportive report to accompany an application to the Tribunal as the regulations restrict the provision of these reports to approved medical practitioners, defined under section 22 of the 2003 Act. Approved medical practitioners have to meet certain levels of qualification and experience as well as be approved by a Health Board. The regulations do not reduce suppliers' incentives to compete vigorously.

### **Test run of business forms**

There are existing forms for appeals by patients in The State Hospital. These forms will be amended to extend to appeals by patients in the medium secure units. They will then be made available for comment by mental health stakeholder organisations before being introduced in November 2015.

### **Legal Aid Impact Test**

The right of appeal against detention in conditions of excessive security was introduced in the 2003 Act. These regulations do not create a new right but will give effect to the right in the 2003 Act for patients in medium secure units.

Without regulations, patients outwith The State Hospital have not been able to appeal against detention in conditions of excessive security. These regulations, once they come into force, will allow the scheme created in 2003 for patients outwith The State Hospital to be brought into operation. This will have legal aid implications.

These cases are funded by a type of legal aid called assistance by way of representation (ABWOR), which is granted by the solicitor without any merits test.

<sup>1</sup> The mental health beds census indicates 285 patients in low secure units at 29 October 2014.  $285 - 21\% = 225$  and  $225 - 33\% = 151$ .

<sup>2</sup> The mental health beds census indicates 3,909 patients in total, with 121 in The State Hospital and 127 in medium security that leaves 3661 patients at 29 October 2014.  $3661 - 21\% = 2892$  and  $2892 - 33\% = 1938$ .

The average cost of a Mental Health Tribunal case now is £951. The Scottish Legal Aid Board has therefore given an estimated cost to the Legal Aid Fund of around £64,000 per year for hearings in relation to the estimated 67 cases. Expenditure from the Legal Aid Fund is demand led so the actual figure will vary from year to year depending on the number and nature of cases.

As above, there would be legal aid costs in relation to those patients in medium secure units who sought to obtain an independent report in order to make an application but the report was not supportive. The estimated costs would be approximately £600 per patient instead of the full tribunal cost of £11,000 – around £20,000 per annum for the estimated 33 cases.

**Enforcement, sanctions and monitoring**

These regulations do not create any new enforcement or monitoring mechanisms. The scheme provided for in the 2003 Act allows for a further Tribunal hearing if a Health Board does not identify a suitable hospital or hospital unit. Ultimately, if the Tribunal consideration of the matter for an individual patient has been exhausted and the patient has not been transferred to a suitable hospital or hospital unit then it is open to the Mental Welfare Commission to take the matter to court.

**Implementation and delivery plan**

The intention is for the regulations to come into force on 16 November 2015.

**Post-implementation review**

The Scottish Government will review the impact of this legislation within 10 years through analysis of data on the number and outcome of applications to the Mental Health Tribunal for Scotland.

**Summary and recommendation**

Option 2 is the only viable option.

• **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	None	None
2	<ul style="list-style-type: none"> <li>• Driving up standards of care and treatment;</li> <li>• A reduction in waiting lists for beds in medium secure and therefore a reduction in applications under section 264 (<i>Detention in conditions of excessive security: state hospitals</i>);</li> <li>• 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;</li> <li>• Opportunities to gather evidence of</li> </ul>	<p>The impact of this policy will largely be for Health Boards, the Mental Health Tribunal and the Legal Aid Board. There are some set up costs related to staffing and training for the Mental Health Tribunal and it is likely that there will be a higher number of appeals initially. However, the ongoing costs are estimated to be £11,000 a case across these public bodies.</p> <p>We expect around 67 cases a year. This analysis would indicate costs to these public bodies of around £740k per annum (£11,000 x 67). If all 127</p>

	<p>entrapment in medium secure units and how well the flow of patients through forensic health services is working;</p> <ul style="list-style-type: none"> <li>• Positive impact on the rights of patients and ensure consistency with the guiding principles of the 2003 Act;</li> <li>• Reassurance that individuals can challenge decisions that impact on them and their families and that reduces stress and fear.</li> </ul>	<p>patients in medium secure units appealed then the cost would be around £1.4m per annum (£11,000 x 127).</p> <p>In addition to this, we estimate legal aid costs of around £20,000 per annum for those patients in medium secure units who sought to obtain an independent report in order to make an application but the report was not supportive (£600 x 33).</p>
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**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**



**Date: 31 August 2015**

**Jamie Hepburn  
Minister for Sport, Health Improvement and Mental Health**

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