

# **The Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023**

**Business and Regulatory Impact Assessment**

**October 2023**

## **Title of Proposal**

The Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (“the 2023 Regulations”).

## **Purpose and Intended Effect**

### **Background**

The National Secure Adolescent Inpatient Service (NSAIS), Foxgrove, in Irvine, is the first medium secure mental health inpatient service for children and young people in Scotland. It is expected to open in January 2024.

The NSAIS will initially have four beds. Its purpose will be to deliver high quality mental health care and treatment for children and young people aged between 12 and 17 years, who meet all of the following criteria:

- are subject to measures for compulsory care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) or part VI of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”)
- have a mental disorder (as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”)
- present a significant risk to themselves or other people
- require a medium secure level of security in order to meet their needs.

The significant risk of harm, either to themselves or to other people, that patients in medium secure services present means such services must have an adequate level of safety and security measures to ensure the safety of both patients and those involved in their care and security or good order of the hospital.

In order to apply the measures of medium security required, and to ensure that NSAIS patients will have the right of appeal against conditions of excessive security, the 2023 Regulations make changes to:

- The Mental Health (Safety and Security) (Scotland) Regulations 2005 (“the 2005 Regulations”)
- The Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 (“the 2015 Regulations”)

The changes mean that the same safety and security measures, subject to protections and safeguards, that are available in other medium secure inpatient settings can be applied where necessary in the NSAIS. Children and young people detained in the NSAIS will also have the same right of appeal against detention in conditions of excessive security as those detained in other medium secure inpatient settings.

## Detention in Conditions of Excessive Security

Section 268 of the 2003 Act makes provision for an application to be made to the Mental Health Tribunal for Scotland (“the Tribunal”), contesting the level of security a patient is being held under for patients detained in a “qualifying hospital”. The right to make such an application to the Tribunal exists where the patient is subject to a compulsory treatment order, a compulsion order, a hospital direction, or a transfer for treatment direction.

The 2023 Regulations add the NSAIS to the list of qualifying hospitals in regulation 4 of the 2015 Regulations. This will allow a patient detained in the NSAIS, their named person, welfare attorney, guardian, or the Mental Welfare Commission for Scotland (“the Commission”) to apply to the Tribunal for an order declaring that the patient is being detained in conditions of excessive security.

The Tribunal, if satisfied that the patient is being detained in conditions of excessive security, is able to make an order which requires the relevant health board to identify a suitable hospital for the patient to transfer into. A suitable hospital will be a hospital which the health board considers is a hospital in which the patient could be detained in conditions that would not involve a level of security that is excessive in the patient’s case.

## Safety and Security

The 2005 Regulations, made in exercise of the powers in section 286(1), (2), and (3) of the 2003 Act, authorise measures, subject to conditions, to protect the safety and security of patients and others in hospital. The measures can be applied to a patient who is detained in hospital by virtue of the 2003 Act or the 1995 Act and who is a “specified person”. A patient is a specified person if:

- they are either:
  - detained in a hospital listed in regulation 2(2)(a), or
  - detained in a non-listed hospital and their responsible medical officer (“RMO”) has recorded a reasoned opinion as mentioned in regulation 2(2)(b) of the 2005 Regulations, and
- the condition in regulation 2(3) is met, and
- the condition in regulation 2(4) is met.

Currently the hospitals listed in regulation 2(2)(a) are the State Hospital and the existing medium secure services. The 2023 Regulations add the NSAIS to the list of secure services in regulation 2(2)(a) of the 2005 Regulations. The consequence of this addition is that all children and young people detained at the NSAIS will be classed as specified persons (provided also that the conditions in regulation 2(3) and (4) are met). Therefore the measures in the 2005 Regulations, summarised below, can be applied to them.

The 2005 Regulations authorise the following measures in respect of specified persons:

- the searching of patients and anything they have with them in the hospital

- taking certain types of samples of bodily fluid or tissue
- placing restrictions on the kinds of things which patients may have with them in hospital, and the removal from them of articles kept in breach of such restrictions
- placing restrictions and prohibitions on the entry and the conduct of visitors to these patients
- the surveillance of those patients and their visitors
- the searching of visitors and anything they bring with them into hospital

Being designated as a specified person does not dictate how the measures will be applied, or that they will be carried out. Regulation 5 of the 2005 Regulations sets out the “General Conditions” on the authorisation of the measures that must be met whenever the measures are applied in a particular care setting. These include that a measure may only be applied in respect of any specified person where, in the opinion of the patient’s RMO, not to apply them would pose a significant risk to the health, safety or welfare of any person in the hospital or the security or good order of the hospital. There are also additional conditions that must be met in respect of particular measures, set out in regulations 6 to 11.

The 2005 Regulations provide for monitoring and supervision of the use of measures in respect of specified persons. This will also apply to the use of these measures in respect of patients at the NSAIS. Regulation 5 requires that where a measure is applied, the reasons for and the outcome of applying the measure shall be recorded. Regulation 12 specifies all hospitals as being required to provide statements about the implementation of the 2005 Regulations to the Scottish Ministers and the Commission. Regulation 13 confers power on the Commission to make a direction which may prohibit the implementation of the measures in respect of certain patients for a period of up to 6 months unless implemented under the supervision of or with the permission of the Commission.

The type of patient who can be the subject of a direction is one in respect of whom the Commission has reviewed the implementation of the regulations. The Commission may also direct that the patient’s named person has to be notified that any of regulations 4 to 11 of the 2005 Regulations has been implemented in this way.

## **Objective**

The NSAIS is currently being built to medium secure care standards and will provide mental health care and treatment to children and young people aged between 12 and 17 years, in a secure inpatient facility. The unit will be the national CAMHS secure inpatient unit and will sit within the wider mental health network of secure inpatient services. The objective of the proposal is to ensure this new service has the same legal standards as other medium secure units in Scotland.

## **Rationale for Government intervention**

With the opening of the new NSAIS, there is no reasonable justification as to why patients in the NSAIS should not be provided the right to appeal conditions of excessive security. In

keeping with the section 2 principles of the 2003 Act, children and young people should be afforded the same right as others detained in the same security setting.

Ensuring the service is able to implement the safety and security measures for all in the NSAIS helps facilitate a secure and effective care environment for both patients and those involved in their care and for the security and good order of the hospital. The measures will be applied when necessary, and they will be proportionate to the potential risk.

## Consultation

### Short Targeted Consultation

Between September and October 2022, the Scottish Government conducted a short targeted consultation on the proposed changes to the 2005 and 2015 Regulations. The aim of the consultation was to seek the views of a key group of stakeholders, with an interest in forensic mental health and CAMHS care, on the implications of extending the provisions and measures to children and young people to be detained in the NSAIS. The consultation provided an explanation of the proposed changes.

The following questions were posed to stakeholders in the written consultation:

Q1. Taking into account this overarching duty to secure the welfare of persons under 18, should the measures be authorised for Foxgrove as they stand or are there particular conditions needed specifically because the measures will apply to young people? If so, what conditions should apply to which measures?

Q2. Please use this opportunity to provide any further comments you may have on secure inpatient services for young people and safety and security or appeals against detention in conditions of excessive security.

The stakeholders who responded were:

- The Mental Health Tribunal for Scotland
- The Forensic Network
- Centre for Mental Health and Capacity Law, Napier University
- Forensic Directorate, NHS Greater Glasgow and Clyde
- Children and Young People's Commissioner Scotland
- National Youth Justice Advisory Group
- Children and Young People's Centre for Justice
- The Clinical Director of NSAIS, Foxgrove and Clinical Lead for West of Scotland CAMHS Network, on behalf of the clinical team at NSAIS, Foxgrove
- An individual response from a child and adolescent psychiatrist

### Reponses - Excessive Security Appeals

There was broad agreement from stakeholders on the need to provide patients with the right to appeal conditions of excessive security. Several respondents commented that a successful

appeal may result in the transfer of a patient to another jurisdiction (e.g. England) and that finding a suitable placement may be difficult. However, the lack of alternative services in Scotland, in which young people could be placed following a successful appeal, should not necessarily impede their right to make such an appeal.

## Responses - Safety and Security Measures

Some stakeholders raised concerns with the measures being applied to children and young people, due to the different levels of maturity and developmental stage support they require. Their comments highlighted concerns around a child consenting, and the capacity to consent, to certain security measures. Some of the comments highlighted communication difficulties, past experiences, trauma and taking these into consideration when applying the measures. Other comments focused on applying the least restrictive practices possible and the appeals with regards to the measures.

Some stakeholders were accepting of the measures being applied to the new service. The justification for this was that the measures being applied to the new service would allow for the effective management and care of those posing a serious risk to themselves or others.

## Business

The addition of the NSAIS to the existing regulations are a consequential change as a result of the development of the new service. The views of stakeholders, and the clinical team at the NSAIS, have been sought throughout the work to develop the 2023 Regulations.

## Options

### Option 1: Do nothing

This would mean the Scottish Government would fail in allowing a specific group of our society, namely vulnerable children and young people, access to a right of appeal. This would have a negative impact on their ability to seek care and treatment at facility that might be better suited to their needs.

A lack of safety and security measures for the new unit could mean an increase in the risk of prohibited objects being brought into the service. This in turn would increase the potential risk of a serious incident involving patients, staff and others involved in their care. Failure to have the measures in place could also cause significant disruption to the service and the care and treatment patients receive.

We do not consider this to be a viable option given the significant human rights impact this would have on children and young people detained in the service and the potential implications it could have on their safe care.

### Option 2: Amend both sets of regulations to include the NSAIS

There was agreement from stakeholders that patients detained in the new service should be provided the right to appeal against being held in conditions of excessive security. Some comments did focus on the potential care pathway a successful appeal would bring, such as a

cross border transfer to another jurisdiction, but respondents felt that this should not impede their right to appeal.

As has been highlighted above, the views of stakeholders were mixed regarding the addition of the NSAIS to the 2005 Regulations, concerning safety and security. However, ensuring patients detained in the new service are subject to certain security measures will allow for the safe and secure management of those at risk of violence or causing harm to others and themselves.

The safety and security measures will only be applied if there is a significant risk posed to the health, safety or welfare of the patient or others in the hospital, or a significant risk to the security or good order of the hospital. Prior to the application of a particular measure, consent will be sought from the patient, and if the patient refuses, the clinical team will discuss the associated risks and confirm if the measure is necessary. The manner in which any such measure is applied will be undertaken with care and respect for the dignity of the child or young person. In addition, the measures will be applied in such a way they are individualised and specific to the care needs of the patient. Incidents involving the application of the measures will be reviewed and recorded appropriately, as required by the 2005 Regulations.

We have carefully considered the comments of stakeholders and the existing provisions within the 2003 Act, and in the 2005 and 2015 Regulations. In our view, there is no reasonable justification as to why patients in the NSAIS should not be provided the right to appeal against being held in conditions of excessive security. In keeping with section 2 principles of the 2003 Act, children and young people should be afforded the same right as others detained in the same security setting. Ensuring the service is able to implement the safety and security measures to all in the NSAIS helps facilitate a secure and effective care environment that is necessary for the risk level of those detained in the service. The measures contained in the 2005 Regulations are subject to conditions and safeguards, will be applied when necessary and properly justifiable, and they must be applied in a manner which is proportionate to the potential risk. Section 2 principles also require those discharging all of these functions to have regard to doing so in a manner involving the minimum restriction on the freedom of the patient necessary in the circumstances. And functions must be discharged in a manner that best secures the welfare of the patient.

## **Sectors and groups affected**

Both options will affect patients detained in the NSAIS.

Option 1 would mean that such patients would not be able to challenge their detention in conditions of excessive security. This would have significant child rights and human rights implications. Furthermore, the safety of the new unit, patients and those involved in their care would be negatively impacted if the service did not have the necessary legal framework to apply procedural security measures.

Option 2. Once regulations come into force, it will grant patients detained in the NSAIS the right to make an application to the Tribunal for an order declaring that they are being detained

in conditions of excessive security. Procedural security measures, where necessary, proportionate and justifiable, would be available to help facilitate a secure and effective care environment.

Those affected will include:

- Patients detained in the NSAIS who would have a right of appeal against the level of security to which they are subject. The health board would also be affected as they have a duty to identify a hospital in which the patient could be detained in appropriate conditions if such an appeal is successful.
- The Tribunal will be affected in terms of organising and overseeing the appeals process. There may be additional costs associated with an increased workload.
- Staff at the NSAIS who will be involved in applying the procedural security measures.

## **Benefits**

We have given careful consideration to the two options presented. The only option being considered is option 2. The benefits of option 2 include: a positive impact on the rights of patients and ensuring consistency with the guiding principles of the 2003 Act; reassurance that individuals can challenge decisions that impact on them; and protection of the safety and security of patients, and others at the NSAIS.

## **Costs**

The predicted costs arising from this proposal relate to the right of NSAIS patients to contest the level of security they are being held under. This policy will mainly impact on the NHS, the Tribunal and the Scottish Legal Aid Board. The ongoing costs are estimated to be £9,941 per appeal, with those costs spread across health boards, the Tribunal and the Scottish Legal Aid Board. This is based on costs for existing appeals and breaks down, per appeal, as follows:

- £1,941 Mental Health Tribunal cost of panel hearing for excessive security appeals
- £1,500 NHS National Services Scotland Central Legal Office costs per hearing for solicitors representing the health board (preparation and appearance at hearings)
- £1,500 Scottish Legal Aid Board average costs
- £5,000 health board costs associated with assessment of the patient's suitability for low secure services

The NSAIS is to initially open with 4 beds available for patients. Plans are in place to increase this to 12 in the future. The appeal right only applies once the order for compulsory care or treatment has been in place for 6 months. Therefore, at any point there will be a certain number of patients who would be ineligible to make an application.



According to the Scottish Government's Inpatient Census, 2022, the average (median) length of stay for a patient currently held under orders for compulsory care or treatment was just under 8 months.

Furthermore, not all patients will wish to exercise the right of appeal. Not all patients will get the supportive report from an approved medical practitioner which must accompany their application and without which they will be unable 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 (detention in conditions of excessive security: state hospitals) 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. On the basis of 4 beds at the NSAIS, a reasonable estimate of appeals would be 2 appeal cases per year.

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 £1,500 per case (in legal aid costs).

This analysis would indicate total costs (spread across the public bodies set out above) of around £19,882 per annum (£9,941 x 2).

If the NSAIS has 12 beds, all occupied, that cost could rise to an estimated total of £59,646 per annum (based on an estimate of 6 appeal cases per year, spread across the public bodies set out above).

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. If the health board does not identify more appropriate accommodation for patients who successfully win their appeal and then move the patient within the timeframe set by the Tribunal, then there will be additional costs for second hearings.

## **Regulatory and EU Alignment Impacts**

### **Intra-UK Trade**

These proposals have no impact on intra-UK trade.

### **International Trade**

These proposals have no impact on international trade and investment.

### **EU Alignment**

These proposals have no impact on the Scottish Government's policy to maintain alignment with the EU.

## **Scottish Firms Impact Test**

### **Competition Assessment**

In our view, having applied the Competition and Markets Authority competition filter, the proposals will have a limited impact on competition. The 2015 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 in section 22 (approved medical practitioners) of the 2003 Act. Approved medical practitioners have to meet certain levels of qualification, training and experience as well as be approved by a health board. Neither the 2015 Regulations, the 2005 Regulations, nor these proposals reduce suppliers' incentives to compete vigorously.

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

There are existing forms for appeals by patients.

## **Legal Aid Impact Test**

The right of appeal against detention in conditions of excessive security was introduced in the 2003 Act. Adding the NSAIS to the 2015 Regulations does not create a new right but will give effect to the right in the 2003 Act for patients in the NSAIS.

Patients in the NSAIS will have access to legal aid and therefore, the amendments made by the 2023 Regulations 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.

The average cost to the Tribunal of hearing an appeal is £1,941. The Scottish Legal Aid Board has given an estimated cost to the Legal Aid Fund of £1,500 per appeal.

The NSAIS will initially have 4 patients in the service, with the possibility of 12 beds being available in the future. 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 the NSAIS who sought to obtain an independent report in order to make an application but where the report was not supportive.

## **Enforcement, Sanctions and Monitoring**

### **Excessive Security**

These regulations do not create any new enforcement or monitoring mechanisms. The scheme provided for in the 2003 Act allows, under section 269 (order under section 268: further provision) for a further Tribunal hearing if a Health Board does not identify a suitable hospital or hospital unit. Ultimately, if the Tribunal's 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 Commission under section 272 (proceedings for specific performance of statutory duty) of the 2003 Act to take the matter to court.

### **Safety and Security**

Similarly the 2023 Regulations do not create any new enforcement or monitoring mechanisms. The measures for monitoring are already set out in the 2005 Regulations.

## **Implementation and Delivery Plan**

The intention is for the NSAIS to open in January 2024 with the 2023 Regulations in force by that time.

### **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 Tribunal. The use of the safety and security provisions will be monitored in line with the provisions of the 2005 Regulations.

## **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	<p>Positive impact on the rights of patients and ensure consistency with the guiding principles of the 2003 Act.</p> <p>Reassurance that individuals can challenge decisions that impact on them.</p> <p>Protection of the safety and security of patients, and others in the NSAIS.</p>	<p>The impact of this policy will largely be on the NHS, the Tribunal and the Scottish Legal Aid Board. The ongoing costs across these bodies are estimated to be £9,941 per appeal case. This is based on costs for existing appeals.</p>

## Declaration and Publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:** MAREE TODD, Minister for Social Care, Mental Wellbeing and Sport

**Date:** 2/10/23

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