

Health, Social Care and Sport Committee

33rd Meeting, 2023 (Session 6), Tuesday, 7 November 2023

Subordinate legislation – Affirmative SSI

1. This paper invites the Committee to consider the following affirmative instrument:

- [Mental Health \(National Secure Adolescent Inpatient Service: Miscellaneous Amendments\) \(Scotland\) Regulations 2023](#)

Parliamentary procedure:

2. The affirmative procedure means that an instrument cannot be made and come into force unless the Parliament has voted to approve it (rule 10.6.1 of standing orders).
3. Affirmative instruments are first looked at by the DPLR Committee before being considered by the lead committee (usually the committee which examined the Bill for the Act that the SSI is made under or whose remit is most aligned).
4. It is usual practice for the lead committee to take evidence from the relevant Scottish minister in advance of considering the instrument. The committee can ask the minister and any officials questions about the SSI.
5. During its formal consideration, a member of the Scottish Government proposes, by motion, that the lead committee recommend that the instrument or draft instrument be approved. The committee has up to 90 minutes to debate the motion.
6. The lead committee must report its recommendation to Parliament within 40 days of the SI being laid. If the committee agrees the SSI should be approved, the whole of the Parliament then gets a chance to vote on it in the Chamber. If the lead committee decides the SSI should not be approved, the Parliamentary Bureau decides whether MSPs should vote on it in the Chamber.

Title of Instrument: **Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023**

Laid Date: **19 September 2023**

Reporting deadline: **13 November 2023**

Type of instrument: **Affirmative**

Purpose

7. The instrument amends the Mental Health (Safety and Security) (Scotland) Regulations 2005 in order to add the National Secure Adolescent Inpatient Service (NSAIS), Foxgrove, to the list of secure mental health services in those regulations. The instrument also adds the NSAIS, Foxgrove to the list of qualifying hospitals in the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015.
8. The policy note is included at **Annexe A**.

Delegated Powers and Law Reform Committee consideration

9. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on [3 October 2023](#) and [draws the instrument to the attention of the Parliament](#). Extracts from the Committee's report are included at **Annexe B**.
10. The Committee draws the instrument to the attention of the Parliament on the general reporting ground, in that the title of the instrument is not in line with standard drafting practice.
11. The Committee also draws its correspondence with the Scottish Government to the attention of the Health, Social Care and Sport Committee, for its information, in relation to the additional material provided by the Scottish Government in its response to the Committee. This correspondence is included at **Annexe C**.

For decision

12. The Committee must decide whether or not to agree the motion, and then report to Parliament accordingly, by 13 November 2023.

Clerks to the Committee

2 November 2023

ANNEXE A

POLICY NOTE

THE MENTAL HEALTH (NATIONAL SECURE ADOLESCENT INPATIENT SERVICE: MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2023

SSI 2023/XXX

The above instrument was made in exercise of the powers conferred by sections 271A(1) and 286(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

The instrument is subject to affirmative procedure.

Summary Box

The purpose of the instrument is to amend the Mental Health (Safety and Security) (Scotland) Regulations 2005 in order to add the National Secure Adolescent Inpatient Service (NSAIS), Foxgrove, to the list of secure mental health services in regulation 2(2)(a) of the those Regulations.

The instrument also adds the NSAIS, Foxgrove to the list of qualifying hospitals in regulation 4 of the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015.

Policy Objectives

Background

The National Secure Adolescent Inpatient Service (NSAIS), Foxgrove, 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 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, this instrument makes 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.

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,
- 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. This instrument adds 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 Mental Welfare Commission for Scotland (“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.

Excessive Security Appeals

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.

This instrument adds 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 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 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.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

In accordance with section 286(6) of the 2003 Act, the Scottish Ministers have consulted with such persons as they considered appropriate about the proposed amendment of the 2005 Regulations and the 2015 Regulations.

A short targeted consultation was undertaken between 28 September 2022 and 12 October 2022. The consultation gave stakeholders an opportunity to provide their views on adding the NSAIS to the list of hospitals in which these regulations can be applied or whether additional conditions on the measures should be applied to children and young people in a medium secure service. A total of nine responses were received from individuals and organisations.

Table 1 provides a list of respondents.

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 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

Table 1 — consultation respondents

Follow up meetings were held with respondents to allow further discussion of their responses. Key themes in the consultation responses and follow up discussions included: a range of issues related to the wider implementation and deployment of operational measures relating to safety and security; the issue of children and young people consenting and having capacity to consent to and fully comprehend the measures; and issues around parental rights, least restrictive intervention, and guidance. Responses indicated broad support for the proposed amendment to the 2015 regulations.

Officials have carefully considered the responses from stakeholders and the existing provisions within the 2003 Act, and the Regulations. In our view, 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 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 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.

Impact Assessments

The following impact assessments have been completed: Equality Impact Assessment (EQIA); Islands Communities Impact Assessment (ICIA); and Business and Regulatory Impact Assessment (BRIA). A pre-screening questionnaire for a Child Rights and Wellbeing Impact Assessment (CRWIA) was also completed. Due to the fact these regulations could already be applied to children and young people in Scotland in specific mental health settings it was agreed a full CRWIA was not necessary at this stage. A pre-screening for the Strategic Environmental Assessment (SEA) has also been completed.

Financial Effects

A BRIA has been published for this instrument, providing estimates of its financial effects.

Scottish Government
Mental Health Directorate

15 September 2023

Extract from the [Delegated Powers and Law Reform Committee report](#) published on 4 October 2023

Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

4. The instrument relates to a new “medium secure” mental health hospital which is due to open in January 2024 - the National Secure Adolescent Inpatient Service in Irvine.
5. It will be a hospital for children and young people aged 12 to 17 inclusive who are subject either to compulsory care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003, or are subject to a relevant order made by a criminal court (Part VI of the Criminal Procedure (Scotland) Act 1995).
6. In correspondence with the Scottish Government, the Committee asked for more information on whether consideration had been given to the appropriateness of applying to under 18s, without modification, a set of conditions for the right of appeal against being held in excessive security which appeared to have been designed with adults in mind.
7. Having considered the Scottish Government's response, the Committee was satisfied that due consideration had been given to this matter.
8. The Committee also highlighted that the title of the instrument appears unusual, particularly the use of a colon.
9. In its response, the Scottish Government stated that the use of the colon is a suitable choice because it links the two sections of connected text. Nevertheless, the Committee considered that it is unusual to use a colon in the title of the instrument and that this should be discouraged. The Committee considered that consistency in the naming conventions of instruments is desirable, and that it would have been more usual to have brackets around “Miscellaneous Amendments”.

Recommendations from the Delegated Powers and Law Reform Committee report published on 4 October 2023

12. The Committee draws the instrument to the attention of the Parliament on the general reporting ground, in that the title of the instrument is not in line with standard drafting practice.
13. The Committee also draws its correspondence with the Scottish Government to the attention of the Health, Social Care and Sport Committee, for its information, in relation to the additional material provided by the Scottish Government in its response to the Committee's first question.

ANNEXE C

Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

On 22 September 2023, the Committee asked the Scottish Government:

1. Regulation 3 of the instrument designates the NSAIS as a “qualifying hospital” for the purposes of section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Under section 268 there is a statutory right to apply to the Mental Health Tribunal to challenge the level of security under which a patient in a qualifying hospital is being held. It appears that the other qualifying hospitals are for adults, or in any event that NSAIS will be the first qualifying hospital which is exclusively for children and young people (aged 12 to 17 inclusive). Under the instrument, the conditions for an appeal set out in section 268, as they apply to adults, will apply without modification to children and young people. This includes the restriction that only one application may be made per year in respect of the same patient (s. 268(8)). The documents accompanying the instrument do not mention if consideration was given to whether these are the appropriate conditions for an appeal by a child or young person. Could further information be provided in this regard?
2. The title of the instrument appears unusual, particularly the use of the colon. Is this in line with current standard drafting practice?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 26 September 2023, the Scottish Government responded:

1. The proposal to apply section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003, enabling children and young people held in the new National Secure Adolescent Inpatient Service (“NSAIS”) to apply for a declaration that they are being held in conditions of excessive security, was included in a targeted consultation in Autumn 2022. At present, children and young people detained in conditions of medium security in “qualifying hospitals” may make such applications. The consultation responses were thoroughly reviewed. On the issue of extending the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 to patients in the NSAIS, stakeholders expressed broad support. DPLRC/S6/23/27/2 14 Careful consideration was given to this and other aspects of the policy proposals and the Scottish Government considers them lawful and appropriate.

Treatment interventions for children and young people who require this level of security will not be brief interventions, with the average length of stay within the NSAIS being 12-18 months. The appeal process is a rigorous and thorough process and the timeframes suggested within current regulations seem appropriate and proportionate and therefore no further amendments would be required for children and adolescents at the NSAIS. If an appeal against excessive security is not upheld then this means all evidence relating to the clinical decision for a child or young person requiring medium secure inpatient care has been acquired and examined and deemed appropriate. Education, psychological interventions and other therapies require longer term interventions. The process of

ensuring all care needs are met and risks are reduced with a view to ensuring robust discharge plans or transfer of care arrangements are by themselves involved processes.

This would be in keeping with the Getting It Right For Every Child (GIRFEC) National Practice Model which sets out a shared framework and approach to identification, assessment and analysis of a child or young person's wellbeing needs. Under UNCRC right 25. If you are being looked after away from home. Your situation should be regularly reviewed to make sure you are getting good treatment and care - The NSAIS will be well equipped with a huge focus on education and psychological interventions and ensuring best care, tailored to individual needs and above all safeguarding the child and others from harm. This supports right 23 If you have a mental or physical disability you should get the education, care and support you need to lead a full and independent life to the best of your ability.

Care and treatment of each individual will be managed under the Care Programming Approach which is a legal framework requiring regular review and holds accountability for RMOs, local authorities and all disciplines and agencies to clearly outline the care plan and justification for any restrictive measures with a clearly defined progress plan.

2. The title of the instrument briefly and accurately reflects its content, and incorporates all elements necessary in the title of an instrument. It therefore reflects current drafting practice. The National Secure Adolescent Inpatient Service is a new service, and its name accurately reflects its function. Inclusion of the name of the service in the title of the instrument is considered helpful for the user of the legislation. The use of the colon in the title is also considered appropriate. It is a suitable choice as it links the two sections of connected text. The miscellaneous amendments made to two sets of Regulations are effected as part of the creation of the National Secure Adolescent Inpatient Service.

3. No corrective action is proposed.