

## POLICY NOTE

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

SSI 2023/356

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 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*