

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 17 – Patient Representation

Chapter 3: detention in conditions of excessive security

521. **Chapter 3** makes provision about situations where a patient may be being detained in conditions of excessive security.

Sections 264 to 267: detention in conditions of excessive security: state hospitals

522. Under section 264(2), the Tribunal may make an order declaring that a patient, who is being detained in a state hospital under an order or direction specified in subsection (1), is being detained in conditions of excessive security; and specifying a period, not exceeding 3 months, within which certain duties are to be performed in respect of that patient.

523. The basis for deciding that security is excessive is that the statutory criterion for detention in a state hospital (that is, the patient requires to be detained under conditions of special security that can only be provided in a state hospital) is no longer met.

524. The persons who may apply for such an order are the patient, the patient's named person, guardian or welfare attorney, or the Commission (subsection (6)).

525. The duties that are to be performed when an order is made are set out in subsections (3) to (5). Where the patient is a "relevant patient" (defined in section 273 as a patient whose detention in hospital is authorised by a compulsion order and who is also subject to a restriction order or a patient whose detention is authorised by a hospital direction or a transfer for treatment direction), the "relevant Health Board" (which is to be determined in accordance with regulations made under section 273) is required to identify a hospital which is (a) not a state hospital; (b) which the Board and the Scottish Ministers (and the managers of the hospital if not the Board) agree to be one in which the patient could be detained in appropriate conditions; and (c) in which accommodation is available.

526. Where the patient is not a relevant patient, the duty on the relevant Health Board is the same, except that the agreement of the Scottish Ministers is not required. Once the relevant Health Board has identified a hospital, subsection (4) requires that it gives notice to the managers of the state hospital of the name of the hospital.

527. Subsection (7) places restrictions on when an application may be made. An application may be made only after the patient has been detained under the order or direction concerned for a period of 6 months. Subsection (8) places restrictions on multiple applications. No more than one application may be made in each consecutive 12 month period.

*These notes relate to the Mental Health (Care and Treatment) (Scotland)
Act 2003 (asp 13) which received Royal Assent on 25 April 2003*

528. Subsection (9) obliges the Tribunal to allow persons referred to in subsection (10) to make representations or provide evidence to the Tribunal before it makes an order under this section.
529. **Section 265** requires that if, at the end of the specified period, the patient has not been transferred from the state hospital, then the Tribunal must hold a hearing. At this hearing, the Tribunal can grant the Health Board a further period within which to identify a suitable hospital. The period specified may be 28 days or such longer period not exceeding 3 months as the Tribunal thinks fit. Again, before making such an order the Tribunal must allow representations or admit evidence from the persons referred to in section 264(10).
530. **Section 266** provides for a final Tribunal hearing (where the Tribunal has granted to the Board a period longer than 28 days under section 265) if the patient has still not been transferred. At that stage the Tribunal may make a final order. The effect of the final order is that the Board has 28 days to find a suitable place for the patient. The same requirement to allow representations and evidence from persons specified in section 264(10) applies.
531. It is possible that circumstances might change, so that the patient continues to require to be detained in conditions of special security. Section 267 allows the Board, the responsible medical officer (in certain cases) or Scottish Ministers (in other cases) to seek a recall of an order made under section 264, 265 or 266. This might be justified if, for example, the patient's condition deteriorated. Subsection (5) again provides that the Tribunal must allow those persons specified in section 264(10) to make representations or submit evidence before an order may be recalled.

Sections 268 to 271: detention in conditions of excessive security: hospitals other than state hospitals

532. **Sections 268 to 271** establish a scheme, in very similar terms to that in sections 264 to 266, in respect of "qualifying patients" detained in hospitals other than the State Hospital ("qualifying patient" is to be defined in regulations(section 268(11)). The provisions only apply where the qualifying patient's detention is authorised under one of the orders listed in section 268(1) in a "qualifying hospital". Section 268(11) provides that a qualifying hospital is one which is not a state hospital and is specified, or of a description specified, in regulations.

Section 272: proceedings for specific performance of statutory duty

533. Failure to comply with an order from the Tribunal under any of the sections in Chapter 3 may, ordinarily, leave the Board open to proceedings for specific performance of statutory duty under the provisions of section 45(b) of the Court of Session Act 1988. However, while subsection (1) provides that such proceedings cannot be taken at the earlier stages, where the matter still falls to be reconsidered by the Tribunal subsection (2) enables the Commission to take those proceedings where necessary once the Tribunal procedure has been exhausted. (This is without prejudice to any rights that the patient has to do so).