

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 17 – Patient Representation

Chapter 1: named persons

Sections 250 to 257: named persons

469. These sections deal with appointing or identifying a named person to represent the interests of and support a patient subject to proceedings under the 2003 Act. Broadly speaking, the named person has similar rights to the patient to appear and be represented at Tribunal hearings concerning compulsory treatment orders, and to appeal against short-term detention. The named person is also entitled to be given information concerning compulsory measures which have been taken or are being sought where this is provided for in the 2003 Act.
470. Unlike, for example, a welfare guardian (depending on their powers), a named person does not “step into the shoes” of the patient. The named person and the patient are each entitled to act independently of the other.

Nomination of named person

471. A patient aged 16 or over may choose an individual to be his or her named person. The nomination may be made whether or not the patient is, at the time, the subject of compulsory measures. Section 250 sets out the process of nomination of a named person.
472. To be valid, a nomination must be signed by the patient and witnessed by a prescribed person. The prescribed person must certify that the patient understands the effect of making a nomination and has not been subject to any undue influence, for example that the patient has not been pressed into nominating when he or she clearly does not wish to (subsection (2)).
473. A nomination may be revoked, provided the conditions in subsection (3) are met. (These are similar to the conditions for the making of a valid nomination).
474. Subsection (5) provides that a nomination remains valid even if the person who made it subsequently becomes incapable.
475. A person nominated may refuse act as the named person. This must be done by giving notice to the patient and the local authority for the area where that patient lives (see subsection (6)).
476. Subsection (7) explains the meaning of the terms “incapable” and “prescribed person”.

Named person where no person nominated or nominated person declines to act

477. Where no named person is nominated under section 250, or the nominated person declines to act, section 251 determines who is to be the named person for a patient who is 16 or over.
478. Subsection (1) provides that the patient's primary carer, if aged 16 or over, is to be the named person. (The primary carer is defined in section 329).
479. Where the primary carer is under 16, but another carer is 16 or over, that carer is the named person (subsection (2)).
480. Where a patient has no primary carer, but has two or more carers of at least 16, those carers may agree which of them is to be the named person (subsection (3)(a)). Where the primary carer is under 16, but there are two or more carers aged 16 or over, those carers may agree which of them is to be the named person (subsection (3)(b)).
481. A named person may decline to act by giving notice in accordance with subsection (6).
482. Where a patient does not have a named person (or if the named person declines) the nearest relative, as defined in section 254, is to be the named person.

Named person in relation to child

483. [Section 252](#) provides that a named person for a patient under 16 shall be determined in accordance with subsection (1). A person, unless under the age of 16, who has parental rights and parental responsibilities in relation to that child, will ordinarily be the named person. (Parental rights has the meaning given by section 2(4) of the Children (Scotland) Act 1995 and parental responsibilities has the meaning given by section 1(3) of that Act.)
484. Where there are 2 or more persons of the relevant age with parental rights and parental responsibilities in relation to a child, subsections (2) and (3) operate so as to determine who will be the named person.
485. Where the child is in the care of a local authority by virtue of section 31 of the Children Act 1989, the authority is to be the named person.
486. Where neither of the situations in the preceding paragraphs applies, subsection (1)(c) provides that, where the child's primary carer is 16 or over, that person is the named person.

Declaration in relation to named person

487. As well as the right to nominate a named person, a patient who is 16 or over also has the right under section 253 to specify someone whom he or she would not wish to be their named person.
488. This right is to be exercised by a declaration made in accordance with subsection (2). Such a declaration remains valid even if the patient making it subsequently becomes incapable (subsection (3)). It may be revoked in accordance with subsections (4) and (5).

Meaning of "nearest relative"

489. The nearest relative of a patient is identified in accordance with section 254.
490. Subsection (2) lists the persons who may be the nearest relative. This list should be read along with subsections (7) and (8) which explain the entries at paragraphs (b) and (j). The patient's spouse is disregarded for these purposes where the couple are separated or there is a continuing desertion (subsection (3)). Similarly disregarded, are those under 16 years old and, where a patient is ordinarily resident in the UK, Channel Islands or

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the Isle of Man, relatives living elsewhere. Subsection (6) provides that half-relations are generally treated in the same way as whole relations (so, for example, a half-sister is included in paragraph (e) of subsection (2)) and a step-child is treated as a child.

491. Where, in relation to a patient, only one person falls within the list, that person is the nearest relative (see subsection (1)).
492. Where, however, two or more persons fall within the list, the nearest relative is, ordinarily, the person who appears in the first paragraph in the list (e.g. where the person has a spouse and a child, the named person would be the spouse). Where two or more persons fall within the first paragraph of the list, subsection (4) determines which of them is the nearest relative.

Section 255: named person: mental health officer's duties

493. This section places a duty on a mental health officer, in discharging a function under the 2003 Act or the 1995 Act, where it is necessary for that purpose to establish whether the patient has a named person, to take steps to find out whether a person has a named person and if so, who it is (subsections (1) and (2)).
494. Subsections (3) to (5) address the situation where the officer is unsuccessful. The officer is required to record the steps taken to identify the named person and must then give a copy of the record to the Tribunal and the Commission.
495. Where the officer does identify the named person but considers that the person is inappropriate, the officer must apply to the Tribunal for an order under section 257 appointing another person to be the named person (subsection (6)).
496. Subsection (7) empowers a mental health officer, when discharging any function under the 2003 Act in relation to a patient who has no named person, or where the named person seems inappropriate, to apply to the Tribunal for an order under section 257.

Section 256: named person: application by patient

497. Certain persons, other than the mental health officer, have a power apply to the Tribunal for an order under section 257 by virtue of section 256. Those persons are listed in subsection (2) (as read with subsection (3)). Such persons may apply where: the patient has no named person (subsection (1)(a)); the nominated named person appears to the applicant to be inappropriate to act in that role (subsection (1)(b)); or in such other circumstances as may be prescribed in regulations made by the Scottish Ministers (subsection (1)(c)).

Section 257: named person: Tribunal's powers

498. **Section 257** gives the Tribunal power to make certain orders about named persons. Subsection (1) deals with applications in respect of patients who have no named person. The Tribunal may make an order appointing a specified person to be the patient's named person. Subsection (2) deals with applications in respect of inappropriate named persons. The Tribunal may make an order declaring that the acting named person is not the named person or substituting the person specified in the application as the named person for the acting named person. In relation to applications made under section 256(1)(c), the Tribunal may make such order as it thinks fit, although it cannot appoint a person under 16 years of age to be a patient's named person (subsection (4)).

Chapter 2: Advocacy

Advocacy

Section 259: advocacy

499. **Section 259(1)** confers on every patient a right of access to independent advocacy.

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500. It places a duty on each local authority and health board to ensure the provision of independent advocacy services to patients within their areas. The duty requires local authorities and health boards to collaborate with each other. Where local authority and health board boundaries are not the same, each health board must collaborate with each local authority in its area and vice versa (see subsections (2) and (3)).
501. Subsection (1) also requires each local authority and health board to take steps to ensure that patients in its area have the opportunity of making use of the independent advocacy services provided.
502. “Advocacy services” is defined in subsection (4) as “services of support and representation made available for the purpose of enabling the person to whom they are available to have as much control of, or capacity to influence, that person’s care and welfare as is, in the circumstances, appropriate”. Such services are considered to be independent for these purposes where they are provided other than by someone mentioned in the list set out in subsection (5).
503. In addition, subsection (7) requires the State Hospitals Board for Scotland to secure independent advocacy services for patients detained in a state hospital, and to take steps to enable those patients to use the services.
504. Subsection (8) deals with the situation of a patient who, having been detained in a state hospital by virtue of section 127 or 193(7), is no longer detained there. In this case, a duty lies with the State Hospitals Board for Scotland along with the local authority and Health Board in whose area such a patient resides, to secure the availability of independent advocacy services.

Section 260: provision of information to the patient

505. Section 260 contains requirements for appropriate persons, as defined in subsection (5), to take steps to ensure that, at various stages throughout the operation of compulsory measures, patients are aware of their situation and their rights.
506. The patients with which this section is concerned are listed in subsection (1). They fall into two broad categories: patients detained under the 2003 Act or the 1995 Act; and patients who, although not detained, are subject to compulsory measures.
507. Subsection (2) places duties on the appropriate persons who are the managers of the hospital in which the patient is detained, or would be detained but for suspension of the order, or in any other case the managers of the hospital specified in the order.
508. The appropriate person must take reasonable steps:
- to ensure that the patient understands the “relevant matters”, as specified in subsection (5), which are matters concerning the patient’s status and rights, at a series of relevant times (which are set out in subsection (3));
 - to ensure that the patient is supplied with material appropriate to their needs to enable the patient to refresh their understanding of the relevant matters (subsection (2)(a)(ii)). The material must be given in a form that is appropriate to those needs and permanent. Reasonable steps must be taken to ensure that the patient’s named person is given a copy of any such material, in a form that is appropriate to the needs of the named person (subsection (4)); and
 - to take reasonable steps to inform the patient of the availability of independent advocacy services at each of those relevant times.
509. In addition, the appropriate person requires to take reasonable steps to ensure the patient has the opportunity to use these services.

Section 261: provision of assistance to patient with communication difficulties

510. **Section 261** applies in respect of patients subject to the same sorts of measures as those covered by section 260. Subsection (1) lists those patients. If such a patient has difficulty in communicating generally (for example as a result of their mental disorder, any physical or sensory impairment, or literacy difficulties) or where their first language is not English, then the section imposed further duties upon the appropriate person. (“Appropriate person” has the same meaning here as in section 260(5) (see paragraph 507 of these Notes)).
511. Subsection (2) requires the appropriate person to take all reasonable steps to secure that appropriate arrangements are made, or assistance provided, to enable the patient to communicate effectively at any Tribunal proceedings, any review of the patient’s detention, or any medical examination carried out to assess the patient’s mental disorder.
512. No particular form of assistance is specified. What will be appropriate will depend on the needs of the particular patient. For example, arrangements might include the provision of interpreters or translators, or of appropriate equipment.
513. The steps taken in implementing the duty in subsection (2) must be recorded by the appropriate person in a written record (see subsection (5)).

Sections 262 to 263: access to medical practitioner and inspection of medical records

514. **Section 262** enables a medical practitioner to visit a patient detained under the 2003 Act or the 1995 Act at any reasonable hour and to carry out a medical examination.
515. The visit must be for one of the purposes mentioned in subsection (2). The first of these is to advise the patient (or the patient’s named person) about the making of applications to the Tribunal. The second is to provide information to the patient (or the patient’s named person) about the patient’s condition for the purpose of any such application or any other proceedings before the Tribunal in which the patient (or the named person) is participating.
516. The medical practitioner must be authorised by the patient or the patient’s named person (subsection (4)). An authorisation by the named person may be rescinded by the patient at any time when the patient is capable (subsections (5) and (6)).
517. **Section 263** enables a medical practitioner to obtain certain records of a patient.
518. Where a person holds records relating to a patient whose detention in hospital is authorised under the Act or the 1995 Act, a duly authorised medical practitioner may require that person to produce records relating to the patient’s detention or medical treatment (subsection (1)).
519. A person who holds records concerning medical treatment of a patient who is subject to a compulsory treatment order, or a compulsion order, which does not authorise detention in hospital, may be required to produce those records for inspection by a duly authorised medical practitioner (subsection (2)).
520. The records must be required for one of a list of purposes, which are set out in subsection (3) and are the same as those applying in relation to a medical examination under section 262 (see paragraphs 514 to 516 of these Notes).

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.
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

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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).