

Mental Health Legislation: Detention in Conditions of Excessive Security

November 2015

MENTAL HEALTH LEGISLATION: DETENTION IN CONDITIONS OF EXCESSIVE SECURITY

Introduction

1. This guidance is non-statutory guidance for doctors, mental health officers, approved medical practitioners, and other professionals exercising statutory functions under the Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended) ('the 2003 Act'). It is intended to incorporate this guidance into the Code of Practice when it is revised. It may be of interest to others including the Mental Health Tribunal for Scotland, service users, carers and advocates.

2. This guidance deals with issues relating to Chapter 3 of Part 17 (sections 264 to 273) of the 2003 Act on detention in conditions of excess security. Sections 264 to 267 relate to patients in the State Hospital. Sections 268 to 271 relate to patients in hospitals other than the State Hospital. Section 271A provides for regulation making powers. Section 272 deals with enforcement of orders and section 273 provides for interpretation of Chapter 3.

3. Those discharging functions under the 2003 Act are reminded that they must do so having regard to the principles in sections 1 and 2 of the Act. The principles apply to any professional, such as a doctor, nurse, social worker or Mental Health Officer (MHO) who is carrying out a function or exercising a duty in relation to a patient. The Tribunal is required to have regard to the principles when making decisions about a patient.

4. In many cases a joint decision between medium and low secure teams (or high and medium secure teams) that the patient's care and treatment could be provided with a lower level of security will be made and agreement reached that the patient be moved when a bed becomes available. Where this is the case the patient should be transferred as soon as clinically desirable, after any further necessary steps have been concluded such as pre-transfer visits and pre-transfer CPA care planning meetings. In the event of an anticipated delay in bed availability, a patient may make an application to the Tribunal for an order declaring that they are being detained in conditions of excessive security.

5. Sections 264 to 273 of the 2003 Act (as amended) have been provided for ease in Annex A. The Act should be read in conjunction with subordinate legislation made under the Act. This guidance refers to the regulations, orders and directions made under the Act at appropriate points.

Transitional arrangements

6. Since 2006, the Tribunal has been able to consider applications in respect of patients in the State Hospital, for an order declaring that they are being detained in conditions of excessive security. The existing arrangements which allow for consideration by the Tribunal under sections 264, 265 and 266 of the 2003 Act will continue for applications made under section 264 before 16 November 2015. Such applications will not be made subject to the requirement to be accompanied by a supportive report prepared by an approved medical practitioner.

7. All other applications to the Tribunal for an order declaring a patient is being detained in conditions of excessive security are subject to the new arrangements detailed in this guidance. This includes applications made in respect of patients in the State Hospital on or after 16 November 2015 and applications made in respect of patients in the three medium secure units (the Orchard Clinic in Royal Edinburgh Hospital, Morningside Terrace, Edinburgh; the Rowanbank Clinic, 133C Balornock Road, Glasgow; or the Medium Secure Service, Rohallion Clinic, Murray Royal Hospital, Muirhall Road, Perth).

The right to make an application to the Mental Health Tribunal for Scotland

8. The 2003 Act provides a right for certain persons to make an application to the Tribunal for an order declaring that the patient is being detained in conditions of excessive security. From 16 November 2015, the right is available in respect of patients who meet the criteria in the 2003 Act and the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015, that is patients:

- a. who are detained in:
 - i. the State Hospital;
 - ii. the Orchard Clinic in Royal Edinburgh Hospital, Morningside Terrace, Edinburgh;
 - iii. the Rowanbank Clinic, 133C Balornock Road, Glasgow; or
 - iv. the Medium Secure Service, Rohallion Clinic, Murray Royal Hospital, Muirhall Road, Perth.
- b. whose detention is authorised by:
 - i. a compulsory treatment order;
 - ii. a compulsion order (this includes patients subject to a compulsion order and restriction order);
 - iii. a hospital direction; or
 - iv. a transfer for treatment direction.
- c. whose detention under the order or direction has been authorised for more than 6 months.
- d. in respect of whom no application for an order declaring that the patient is being detained in conditions of excessive security has already been made:
 - i. during the period of 12 months beginning with the day on which the order, or direction, authorising the patient's detention in hospital is made; or
 - ii. during any subsequent period of 12 months that begins with, or with an anniversary of, the expiry of the period mentioned in paragraph (i) above.
- e. whose application to the Tribunal is accompanied by a supportive report prepared by an approved medical practitioner.

9. The application may be made by the patient, the patient's named person, any guardian or welfare attorney of the patient, or the Mental Welfare Commission.

10. Where the patient's Responsible Medical Officer is aware that the patient intends to make an application, it would be best practice for them to discuss the application and its potential outcomes with the patient and, where applicable, with any named person, guardian or welfare attorney, before the application is made to ensure as far as possible that the implications of making the application are known beforehand. In this case, the patient should be aware that the only consideration is the level of security under which the patient is being detained and that if successful, the application may result in the patient being moved to a hospital or hospital unit with a lower level of security, but the patient, named person, guardian or welfare attorney, the Commission and the Tribunal do not determine where that hospital or hospital unit is located. That is for the Health Board to determine, with the agreement of the Scottish Ministers in the case of relevant patients, that is "restricted patients". So the patient may be moved, but not necessarily to a hospital of their choice.

11. The Mental Health (Scotland) Act 2015 amends the 2003 Act so that for the purposes of sections 264 to 273 of the 2003 Act, a reference to a hospital may be read as a reference to a hospital unit, where "hospital unit" means any part of a hospital which is treated as a separate unit. Without this change a successful appeal against being detained in conditions of excessive security would have required identification of suitable accommodation in another hospital. Individual wards are not treated as separate units.

A supportive report prepared by an approved medical practitioner

12. The Mental Health (Scotland) Act 2015 (as modified by the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015) introduced a requirement for a report prepared by an approved medical practitioner to accompany an application to the Tribunal for an order that the patient is being detained in conditions of excessive security. This applies to applications from patients in the State Hospital as well as patients in Orchard Clinic, Rowanbank Clinic and the Medium Secure Service, Rohallion Clinic.

13. The person making the application can either instruct a solicitor to obtain the report or instruct the report directly.

14. Only approved medical practitioners who are approved for that purpose and listed by a Health Board or the State Hospitals Board under section 22 of the 2003 Act can prepare reports to accompany an application to the Tribunal. The patient's Responsible Medical Officer (RMO) can provide the report or alternatively it may be provided by the local service psychiatrist or other psychiatrist. The Scottish Government publishes a list of approved medical practitioners by NHS Board area every month - <http://www.sehd.scot.nhs.uk/index.asp>

15. An excessive security application may only proceed if the report that accompanies it states that in the practitioner's opinion the patient meets the relevant test (that is either the test in section 264 for State Hospital applications or the test in

the regulations for all others), and sets out the practitioner's reasons for being of that opinion. The report should be based on the patient's position at the time the report is being produced. In the State Hospital the test relates to the special conditions of security that can be provided only there and in the medium secure units the test relates to the level of security that is required to manage the risks posed by the patient.

16. If, after considering the matter, the approved medical practitioner is not of the opinion that the test is met in relation to the patient, then it would be best practice to inform the patient, named person, guardian or welfare attorney or Commission who requested the report that they cannot support the application and provide the reasons for being of that opinion.

Excessive Security

17. Both the Tribunal and an approved medical practitioner must consider the same tests. Before considering in detail the requirements for patients in the State Hospital and those in the medium secure units specified in the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 there is a general point to be made.

18. The conditions of special security that can be provided only in a state hospital should be considered as a whole package. The same is the case for the security at the medium secure hospital or hospital unit where the test is designed to establish whether or not the overall level of security at the place in which the patient is detained is greater than is necessary. The test does not relate to individual measures of security which the patient may be made subject to from time to time, but which are not an inherent feature of detention in that place. There is no option for the Tribunal to make an order to adjust or remove individual measures of security. The only remedy for the patient, if successful in their application, is for the relevant Health Board to identify an alternative hospital or hospital unit, in which the patient could be detained in appropriate conditions and to which the patient could be moved.

State Hospital

19. For patients in the State Hospital, an excessive security application to the Tribunal must be accompanied by a report which states that in the practitioner's opinion the patient does not require to be detained under conditions of special security that can be provided only in a state hospital and sets out the practitioner's reasons for being of that opinion.

20. Neither the 2003 Act nor regulations define 'conditions of special security that can be provided only in a state hospital'. Scottish Ministers take a broad, holistic approach to what is meant by "conditions of special security which can only be provided in a state hospital" in which "conditions of special security" refers not just to the individual security measures, but to the self contained nature of the State Hospital – which is not replicated in medium security – and which is key to its role as a high secure hospital in preventing the need for those detained there to have access to community facilities on a day to day basis.

21. The question for the approved medical practitioner is whether the patient continues to require detention within the highly secure, controlled and self-contained environment of the State Hospital, or whether they are ready to begin accessing facilities within the community from a medium secure unit. Key considerations will be evidence regarding the patient's current mental state compared with his condition at the time of the index offence, and risk assessment in terms of whether the risks posed have improved sufficiently to allow the patient to begin to have access to the community (initially on an escorted basis, but with a reasonable prospect of progression to unescorted). If, for example, therapy is outstanding which is relevant to the identification and reduction of risk then it may remain appropriate for the patient to remain in the State Hospital until such time as they have completed the therapy. These are therefore the sort of matters that the approved medical practitioner should consider in their report.

22. In making their decision as to whether to provide a supportive report, the approved medical practitioner should take into account existing risk assessments but should exercise their own independent judgement in assessing the risks posed by the patient and whether detention in conditions of special security is necessary to manage those risks.

23. In forming their opinion the approved medical practitioner does not have to consider the conditions of security in other hospitals or hospital wards, they are not asked to identify a suitable alternative hospital or hospital unit. The approved medical practitioner is required to take account of (1) the conditions of special security that can only be provided in a state hospital; and (2) the risks the patient may pose to themselves or others. Based on this information, the approved medical practitioner must decide whether in their opinion the patient requires to be detained under conditions of special security that can only be provided in a state hospital.

24. If the opinion of the approved medical practitioner is that the patient is being detained in conditions of excessive security then the report should include a clear statement that:

"I [name], an approved medical practitioner included in the list compiled and maintained under section 22(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 by [Health Board], am of the opinion that [patient's name] does not require to be detained under conditions of special security that can be provided only in a state hospital".

25. The approved medical practitioner must also provide reasons for being of that opinion in the report.

Medium Secure Units

26. For patients in the qualifying medium secure units, an excessive security application to the Tribunal must be accompanied by a report which states that in the practitioner's opinion the test specified in regulations made under section 271A(2) of the 2003 Act is met in relation to the patient and set out the practitioner's reasons for being of that opinion.

27. The Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 specify that the test is met if detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case. It is to be taken to involve a level of security that is excessive only when the security at the hospital is greater than is necessary to manage the risk that the patient may pose to –

- The patient's own safety; and
- The safety of any other person.

28. The approved medical practitioner and the Tribunal must consider the level of security of the hospital or hospital unit in which the patient is being detained. This refers to the level of security which detention in the hospital or hospital unit necessarily involves, in other words the level of security is an integral part of detention there. It is not relevant for the purposes of the test to consider the appropriateness of individual measures that may (but need not be) applied to the patient at any given time, only those measures which are inherent in or are unavoidably applied by virtue of being detained there.

29. Again, as with patients in the State Hospital, there is no requirement to consider the level of security in other hospitals or hospital units. The approved medical practitioner is not asked to identify a suitable alternative hospital or hospital unit and is therefore only required to take account of the measures of security which are inherent in or are necessarily applied by virtue of being in the patient's current hospital or hospital unit.

30. The approved medical practitioner and the Tribunal must also consider the risks that the patient may pose to the patient's own safety and the safety of any other person. This includes other patients, staff, visitors and the general public. The risks the patient may pose will change over time, in different contexts (that is in medium security, in low security, in the community with 2, 1 or no escorts) and will also be different for each patient.

31. In considering the risks, the approved medical practitioner should take into account existing risk assessments but should exercise their own independent judgement in assessing the risks posed by the patient and whether detention in medium security is necessary to manage those risks.

32. The approved medical practitioner in considering whether a patient in a medium secure unit is being detained in conditions of excessive security may not take into account any other factors. The only consideration is whether the security at the hospital or hospital unit in which the patient is detained is greater than is necessary to manage the risks the patient may pose.

33. In summary, the approved medical practitioner is required to take account of (1) measures of security which are inherent in or necessarily applied by virtue of the patient's current detention in the medium secure hospital or hospital unit; and (2) the risk the patient may pose to their own safety and that of others. Based on this information, the approved medical practitioner must decide whether in their opinion

the test specified in regulations made under section 271A(2) of the 2003 Act is met in relation to the patient.

34. If the opinion of the approved medical practitioner is that the patient is being detained in conditions of excessive security then the report should include a clear statement that:

“I [name], an approved medical practitioner included in the list compiled and maintained under section 22(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 by [Health Board], am of the opinion that detention of [patient’s name] in [name of hospital or hospital unit] involves the patient being subject to a level of security that is excessive in the patient’s case. The security at [name of hospital or hospital unit] is greater than is necessary to manage the risk that [patient’s name] may pose to the patient’s own safety; and the safety of any other person.

35. The approved medical practitioner must also provide reasons for being of that opinion in the report.

Mental Health Tribunal

36. On receipt of the application, the Mental Health Tribunal (‘the Tribunal’) will check that it is accompanied by a report by an approved medical practitioner, which includes that Practitioner’s name and in which list compiled and maintained under section 22(1) of the Act the practitioner is included as well as the necessary statement and reasons. There will be no substantive assessment of the content of the report, that will be a matter for the Tribunal to consider alongside all other evidence before it in determining the application.

37. The Mental Health Tribunal may only make an order declaring that the patient is being detained in conditions of excessive security if they are satisfied that a patient in the State Hospital does not require to be detained under conditions of special security that can only be provided in a state hospital or in the case of patients in medium security that the test specified in regulations made under section 271A(2) of the 2003 Act is met in relation to the patient.

38. An application cannot be made without a supportive report by an approved medical practitioner, but the Tribunal is not bound by the opinion of that practitioner. The report is one of the pieces of evidence it will consider in determining the application.

39. Even where the Tribunal is of the same view as the approved medical practitioner and is satisfied that a patient is being detained in conditions of excessive security it retains the discretion not to make an order. The Tribunal retains the power to consider other factors in all cases in deciding whether or not to make an order, but must always have regard to the principles in sections 1 and 2 of the 2003 Act. A Tribunal panel has to take into account the particular facts and circumstances of individual cases and weigh the evidence of risk as well as apply the principles of the 2003 Act.

Health Board

40. The Health Board receives notice of the application so may oppose the application before the tribunal.

41. Where the Tribunal makes an order declaring that a patient is being detained in conditions of excessive security, that order will specify a period not exceeding 3 months during which the relevant Health Board has to identify a hospital in which the patient could be detained in appropriate conditions and in which accommodation is available to the patient. Where the patient is a restricted patient, Scottish Ministers' agreement is needed to the choice of hospital (see paragraph 47).

42. Under the Mental Health (Relevant Health Board for Patients Detained in Conditions of Excessive Security) (Scotland) Regulations 2006, the relevant Health Board means—

(a) in relation to a patient who resided ordinarily in Scotland immediately before the making of the compulsory treatment order, compulsion order, hospital direction or transfer for treatment direction by which their detention in hospital is authorised, the Health Board which, immediately before that order or, as the case may be, direction was made, would have had the function in accordance with article 2(1)(a) of the Functions of Health Boards (Scotland) Order 1991(2) to provide for the health care of the patient; and

(b) in relation to a patient who did not reside ordinarily in Scotland immediately before the making of such an order or, as the case may be, direction by which their detention in hospital is authorised, the Health Board for the area in which the hospital where the patient is detained is situated.

43. A hospital with appropriate conditions must be a hospital or hospital unit with a level of security that would not be excessive in the patient's case. For patients in the high security of the State Hospital, appropriate conditions may be in medium or low security hospitals or hospital units. For patients in medium security units, this is likely to be in low security hospitals or hospital units. As set out in paragraph 11, a hospital unit is a part of a hospital which is treated as a separate unit, for example a medium secure unit within the grounds of a hospital, and does not extend to individual wards. Applications cannot therefore be made seeking a move from one ward within a medium secure unit to another ward within the same medium secure unit.

44. Having identified a hospital or hospital unit with appropriate accommodation the Health Board must as soon as possible give notice to the managers of the hospital in which the patient is currently accommodated. When the patient has been transferred to the hospital or hospital unit the Health Board should give notice to the Tribunal that this has been done.

45. If the Tribunal has not been notified of the transfer of the patient within the period specified in the order declaring that the patient is being detained in conditions of excessive security a further Tribunal hearing will be held. If the Tribunal remains satisfied that the patient is being detained in conditions of excessive security and makes a further order, this order will specify a period of 28 days or another period not exceeding 3 months within which the Health Board has to identify a hospital in which the patient could be detained in appropriate conditions and in which accommodation is available to the patient.

46. If the Health Board has not, within that period, identified an appropriate hospital to which the patient could be transferred it is open to the Mental Welfare Commission for Scotland and the patient to take the matter to court.

Scottish Ministers

47. An additional requirement applies when an order declaring that a patient who is subject to a compulsion order and a restriction order; a hospital direction or a transfer for treatment direction is being detained in conditions of excessive security. Such patients are termed 'relevant patients' in the 2003 Act. Scottish Ministers receive notice of the application in respect of 'relevant patients' so may oppose the application before the tribunal. For such patients, Scottish Ministers must separately give consent that the hospital identified by the Health Board is a hospital in which the patient could be detained in appropriate conditions, in terms of section 264(3)(b) (for State Hospital patients) or section 268(3)(b) (for patients outwith the State Hospital) of the 2003 Act, before transfer can take place.

Mental Health and Protection of Rights Division
November 2015

Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended)

CHAPTER 3

DETENTION IN CONDITIONS OF EXCESSIVE SECURITY

State hospitals

264 Detention in conditions of excessive security: state hospitals

(1) This section applies where a patient's detention in a state hospital is authorised by—

- (a) a compulsory treatment order;
- (b) a compulsion order;
- (c) a hospital direction; or
- (d) a transfer for treatment direction;

and whether or not a certificate under section 127(1) (either as enacted or as applied by section 179(1) of this Act) or 224(2) of this Act has effect in relation to the patient.

(2) On the application of any of the persons mentioned in subsection (6) below, the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order—

- (a) declaring that the patient is being detained in conditions of excessive security; and
- (b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed.

(3) Where the Tribunal makes an order under subsection (2) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in appropriate conditions; and
- (c) in which accommodation is available for the patient.

(4) Where the Tribunal makes an order under subsection (2) above in respect of a patient who is not a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board considers, and its managers if they are not the Board agree, is a hospital in which the patient could be detained in appropriate conditions; and
- (c) in which accommodation is available for the patient.

(5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3) or, as the case may be, (4) above, give notice to the managers of the state hospital of the name of the hospital so identified.

(6) The persons referred to in subsection (2) above are—

- (a) the patient;
- (b) the patient's named person;
- (c) any guardian of the patient;
- (d) any welfare attorney of the patient; and
- (e) the Commission.

(7) An application may not be made under subsection (2) above—

- (a) if the compulsory treatment order that authorises the patient's detention in hospital has not been extended;
- (b) during the period of 6 months beginning with the making of the compulsion order that authorises the patient's detention in hospital; or
- (c) before the expiry of the period of 6 months beginning with the making of—
 - (i) the hospital direction; or
 - (ii) the transfer for treatment direction,that authorises the patient's detention in hospital.

(7A) An application may not be made under subsection (2) above unless it is accompanied by a report prepared by an approved medical practitioner which—

- (a) states that in the practitioner's opinion the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, and
- (b) sets out the practitioner's reasons for being of that opinion.

(8) No more than one application may be made under subsection (2) above in respect of the same patient—

- (a) during the period of 12 months beginning with the day on which the order, or direction, authorising the patient's detention in hospital is made;
- (b) during any subsequent period of 12 months that begins with, or with an anniversary of, the expiry of the period mentioned in paragraph (a) above.

(9) Before determining an application under subsection (2) above, the Tribunal shall—

- (a) afford the persons mentioned in subsection (10) below the opportunity—
 - (i) of making representations (whether orally or in writing); and
 - (ii) of leading, or producing, evidence; and
- (b) whether or not any such representations are made, hold a hearing.

(10) Those persons are—

- (a) the patient;
- (b) the patient's named person;
- (c) the relevant Health Board;
- (d) the patient's responsible medical officer;
- (e) the managers of the state hospital in which the patient is detained;
- (f) the mental health officer;
- (g) any guardian of the patient;
- (h) any welfare attorney of the patient;
- (i) any curator *ad litem* appointed by the Tribunal in respect of the patient;
- (j) the Commission;
- (k) in the case of a relevant patient, the Scottish Ministers; and
- (l) any other person appearing to the Tribunal to have an interest in the application.

265 Order under section 264: further provision

(1) This section applies where—

- (a) an order is made under section 264(2) of this Act in respect of a patient; and
- (b) the order is not recalled under section 267 of this Act;

and whether or not a certificate under section 127(1) (either as enacted or as applied by section 179(1) of this Act) or 224(2) of this Act has effect in relation to the patient.

(2) If the relevant Health Board fails, during the period specified in the order, to give notice to the Tribunal that the patient has been transferred to another hospital, there shall be a hearing before the Tribunal.

(3) Where such a hearing is held, the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order—

- (a) declaring that the patient is being detained in conditions of excessive security; and
- (b) specifying—
 - (i) a period of 28 days; or
 - (ii) such longer period not exceeding 3 months as the Tribunal thinks fit,

beginning with the day on which the order is made during which the duties under subsections (4) to (6) below shall be performed.

(4) Where the Tribunal makes an order under subsection (3) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in appropriate conditions; and
- (c) in which accommodation is available for the patient.

(5) Where the Tribunal makes an order under subsection (3) above in respect of a patient who is not a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board considers, and its managers if they are not the Board agree, is a hospital in which the patient could be detained in appropriate conditions; and
- (c) in which accommodation is available for the patient.

(6) Where the Tribunal makes an order under subsection (3) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (4) or, as the case may be, (5) above, give notice to the managers of the state hospital of the name of the hospital so identified.

(7) Before making an order under subsection (3) above, the Tribunal shall afford the persons mentioned in section 264(10) of this Act the opportunity—

- (a) of making representations (whether orally or in writing); and
- (b) of leading, or producing, evidence.

266 Order under section 265: further provision - repealed

267 Order under sections 264 or 265: recall

(1) This section applies where an order is made under section 264(2) or 265(3) of this Act in respect of a patient.

(2) On the application of any of the persons mentioned in subsection (4) below, the Tribunal—

- (a) shall, if satisfied that the patient requires to be detained under conditions of special security that can be provided only in a state hospital, recall the order;
- (b) may, on any other grounds, recall the order.

(3) Where the order is recalled, the relevant Health Board ceases to be subject to the duties under section 264(3) to (5) or 265(4) to (6) to which it became subject by virtue of the making of the order.

- (4) The persons referred to in subsection (2) above are—
- (a) the relevant Health Board;
 - (b) in the case of a relevant patient, the Scottish Ministers;
 - (c) in the case of a patient who is not a relevant patient, the patient's responsible medical officer.
- (5) Before determining an application under subsection (2) above, the Tribunal shall—
- (a) afford the persons mentioned in section 264(10) of this Act the opportunity—
 - (i) of making representations (whether orally or in writing); and
 - (ii) of leading, or producing, evidence; and
 - (b) whether or not any such representations are made, hold a hearing.

Other hospitals

268 Detention in conditions of excessive security: hospitals other than state hospitals

(1) This section applies where a patient's detention in a qualifying hospital is authorised by—

- (a) a compulsory treatment order;
- (b) a compulsion order;
- (c) a hospital direction; or
- (d) a transfer for treatment direction;

and whether or not a certificate under section 127(1) (either as enacted or as applied by section 179(1) of this Act) or 224(2) of this Act has effect in relation to the patient.

(2) On the application of any of the persons mentioned in subsection (6) below, the Tribunal may, if satisfied that the test specified in regulations made under section 271A(2) of this Act is met in relation to the patient, make an order—

- (a) declaring that the patient is being detained in conditions of excessive security; and
- (b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed.

(3) Where the Tribunal makes an order under subsection (2) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and

- (c) in which accommodation is available for the patient.
- (4) Where the Tribunal makes an order under subsection (2) above in respect of a patient who is not a relevant patient, the relevant Health Board shall identify a hospital—
- (a) which is not a state hospital;
 - (b) which the Board considers, and its managers if they are not the Board agree, is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and
 - (c) in which accommodation is available for the patient.
- (5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3) or, as the case may be, (4) above, give notice of the name of the hospital so identified to the managers of the hospital in which the patient is detained.
- (6) The persons referred to in subsection (2) above are—
- (a) the patient;
 - (b) the patient's named person;
 - (c) any guardian of the patient;
 - (d) any welfare attorney of the patient; and
 - (e) the Commission.
- (7) An application may not be made under subsection (2) above—
- (a) if the compulsory treatment order that authorises the patient's detention in hospital has not been extended;
 - (b) during the period of 6 months beginning with the making of the compulsion order that authorises the patient's detention in hospital; or
 - (c) before the expiry of the period of 6 months beginning with the making of—
 - (i) the hospital direction; or
 - (ii) the transfer for treatment direction,that authorises the patient's detention in hospital.
- (7A) An application may not be made under subsection (2) above unless it is accompanied by a report prepared by an approved medical practitioner which—
- (a) states that in the practitioner's opinion the test specified in regulations made under section 271A(2) of this Act is met in relation to the patient, and
 - (b) sets out the practitioner's reasons for being of that opinion.
- (8) No more than one application may be made under subsection (2) above in respect of the same patient—
- (a) during the period of 12 months beginning with the day on which the order, or direction, authorising the patient's detention in hospital is made;

(b) during any subsequent period of 12 months that begins with, or with an anniversary of, the expiry of the period mentioned in paragraph (a) above.

(9) Before determining an application under subsection (2) above, the Tribunal shall—

(a) afford the persons mentioned in subsection (10) below the opportunity—

(i) of making representations (whether orally or in writing); and

(ii) of leading, or producing, evidence; and

(b) whether or not any such representations are made, hold a hearing.

(10) Those persons are—

(a) the patient;

(b) the patient's named person;

(c) the relevant Health Board;

(d) the patient's responsible medical officer;

(e) the managers of the hospital in which the patient is detained;

(f) the mental health officer;

(g) any guardian of the patient;

(h) any welfare attorney of the patient;

(i) any curator *ad litem* appointed by the Tribunal in respect of the patient;

(j) the Commission;

(k) in the case of a relevant patient, the Scottish Ministers; and

(l) any other person appearing to the Tribunal to have an interest in the application.

269 Order under section 268: further provision

(1) This section applies where—

(a) an order is made under section 268(2) of this Act in respect of a patient; and

(b) the order is not recalled under section 271 of this Act;

and whether or not a certificate under section 127(1) (either as enacted or as applied by section 179(1) of this Act) or 224(2) of this Act has effect in relation to the patient.

(2) If the relevant Health Board fails, during the period specified in the order, to give notice to the Tribunal that the patient has been transferred to another hospital, there shall be a hearing before the Tribunal.

(3) Where such a hearing is held, the Tribunal may, if satisfied that the test specified in regulations made under section 271A(2) of this Act is met in relation to the patient, make an order—

(a) declaring that the patient is being detained in conditions of excessive security; and

(b) specifying—

- (i) a period of 28 days; or
- (ii) such longer period not exceeding 3 months as the Tribunal thinks fit,

beginning with the day on which the order is made during which the duties under subsections (4) to (6) below shall be performed.

(4) Where the Tribunal makes an order under subsection (3) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and
- (c) in which accommodation is available for the patient.

(5) Where the Tribunal makes an order under subsection (3) above in respect of a patient who is not a relevant patient, the relevant Health Board shall identify a hospital—

- (a) which is not a state hospital;
- (b) which the Board considers, and its managers if they are not the Board agree, is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and
- (c) in which accommodation is available for the patient.

(6) Where the Tribunal makes an order under subsection (3) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (4) or, as the case may be, (5) above, give notice of the name of the hospital so identified to the managers of the hospital in which the patient is detained.

(7) Before making an order under subsection (3) above, the Tribunal shall afford the persons mentioned in section 268(10) of this Act the opportunity—

- (a) of making representations (whether orally or in writing); and
- (b) of leading, or producing, evidence.

270 Order under section 269: further provision - repealed

271 Orders under sections 268 or 269: recall

(1) This section applies where an order is made under section 268(2) or 269(3) of this Act in respect of a patient.

(2) On the application of any of the persons mentioned in subsection (4) below, the Tribunal—

- (a) shall, if satisfied that the test specified in regulations made under section 271A(2) of this Act is not met in relation to the patient, recall the order;

- (b) may, on any other grounds, recall the order.
- (3) Where the order is recalled, the relevant Health Board ceases to be subject to the duties under section 268(3) to (5) or 269(4) to (6) to which it became subject by virtue of the making of the order.
- (4) The persons referred to in subsection (2) above are—
 - (a) the relevant Health Board;
 - (b) in the case of a relevant patient, the Scottish Ministers;
 - (c) in the case of a patient who is not a relevant patient, the patient's responsible medical officer.
- (5) Before determining an application under subsection (2) above, the Tribunal shall—
 - (a) afford the persons mentioned in section 268(10) of this Act the opportunity—
 - (i) of making representations (whether orally or in writing); and
 - (ii) of leading, or producing, evidence; and
 - (b) whether or not any such representations are made, hold a hearing.

Process for orders: further provision

271A Regulation-making powers

- (1) A hospital is a “qualifying hospital” for the purposes of sections 268 to 271 of this Act if—
 - (a) it is not a state hospital, and
 - (b) it is specified, or is of a description specified, in regulations.
- (2) Regulations may specify the test for the purposes of sections 268(2), 269(3) and 271(2)(a) of this Act.
- (3) Regulations under subsection (2) above specifying the test—
 - (a) must include as a requirement for the test to be met in relation to a patient that the Tribunal be satisfied that detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case, and
 - (b) may include further requirements for the test to be met in relation to a patient.
- (4) Regulations may make provision about when, for the purposes of—
 - (a) any regulations made under subsection (2) above, and
 - (b) sections 268 to 271 of this Act, a patient's detention in a hospital is to be taken to involve the patient being subject to a level of security that is excessive in the patient's case.
- (5) Regulations may modify sections 264 and 268 of this Act so as to provide that a person must meet criteria besides being a medical practitioner in order to prepare a report for the purpose of subsection (7A) in each of those sections.

Enforcement: civil proceedings

272 Proceedings for specific performance of statutory duty

(1) The duties imposed by virtue of—

- (a) an order under section 264(2) of this Act, or
- (c) an order under section 268(2) of this Act,

shall not be enforceable by proceedings for specific performance of a statutory duty under section 45(b) of the Court of Session Act 1988 (c. 36).

(2) Without prejudice to the rights of any other person, the duties imposed by virtue of—

- (a) an order under section 265(3) of this Act, or
- (c) an order under section 269(3) of this Act,

shall be enforceable by proceedings by the Commission for specific performance of a statutory duty under section 45(b) of that Act of 1988.

Interpretation of Chapter

273 Interpretation of Chapter

In this Chapter—

(1) “relevant Health Board” means, in relation to a patient of such description as may be specified in regulations, the Health Board, or Special Health Board—

- (a) of such description as may be so specified; or
- (b) determined under such regulations; and

“relevant patient” means a patient whose detention in hospital is authorised by—

- (a) if the patient is also subject to a restriction order, a compulsion order,
- (b) a hospital direction, or
- (c) a transfer for treatment direction.

(2) In this Chapter, a reference to a hospital may be read as a reference to a hospital unit.

(3) For the purposes of this Chapter, “hospital unit” means any part of a hospital which is treated as a separate unit.



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