

MENTAL HEALTH (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE STRUCTURE & A SUMMARY OF THE ACT

Part One – the 2003 Act

Section 16: Orders relating to non-state hospitals

Amendment of [section 268](#)

53. Section 268 of the 2003 Act provides patients in non-state hospitals with a right of appeal against conditions of excessive security. At present, that right extends to “qualifying patients” in “qualifying hospitals”, with the definition of what constitutes a qualifying patient or hospital to be provided in regulations. If the Tribunal is satisfied that a patient is being held in conditions of excessive security, then it may make a declaration to that effect and require the relevant Health Board to identify a hospital where the patient could be detained in conditions which would not involve the patient being subject to a level of security which is excessive in the patient’s case.
54. Section 16 of the Act makes a number of amendments to the provisions relating to appeals against excessive security for patients detained in a hospital other than a state hospital. Section 16 removes references to “qualifying” in respect of patients who may appeal under this section. Instead, any patient in a “qualifying hospital” will be able to appeal, with the meaning of “qualifying hospital” to be set out in regulations under new section 271A (inserted by subsection (5) of this section).
55. This section also adjusts sections 268 and section 269 so that notification of the proposed hospital, or hospital unit (section 18 provides that references to ‘hospital’ can include a ‘hospital unit’) to which the patient is to be moved, is given to the managers of the hospital or unit where the patient is currently resident. This is a slight change from the current requirement (to notify the managers of the ‘qualifying hospital’) to recognise the fact that notification that a patient is moving between units in a hospital may need to be given to the managers of the units as opposed to simply the overall manager of the hospital.
56. Subsections (11) to (14) of section 268, relating to the definition of qualifying patients are repealed and re-enacted (with adjustments) in section 271A. A revised definition of a relevant patient is inserted at section 273 of the 2003 Act by section 16(5) of the Act in consequence of the amendments which remove the term “qualifying” in respect of patients. The definition of “relevant patient” applies to the provisions requiring the Health Board to obtain the agreement of the Scottish Ministers to the hospital identified following an order of the Tribunal.
57. Subsections (2)(b), (3)(b) and (4)(b) of section 16 of the Act provide that the Tribunal may make an order under section 268 or 269 of the 2003 Act (as applicable) where the test specified in regulations under section 271A(2) is met, and must make an order under section 271 of the 2003 Act (recalling an order under section 268 or 269) where the Tribunal is satisfied that the test specified in regulations is not met.

New section 271A

58. Section 16(5) of the Act inserts new section 271A into the 2003 Act. Subsection (1) of inserted section 271A provides that a qualifying hospital is a hospital which is not a state hospital and which is specified or is of a description specified in regulations. Only patients who are detained in qualifying hospitals within the meaning set out in regulations made under subsection (1) will have the right to make an application to the Tribunal under section 268.
59. Subsection (2) of section 271A provides that regulations may also set out the test for the purposes of the Tribunal's consideration of whether to make an order under sections 268, 269 and 271 of the Act. The test must, by virtue of subsection (3)(a), include a requirement that the Tribunal is satisfied that detention of the patient in the hospital in question involves the patient being subject to a level of security that is excessive in the patient's case. In addition it may, by virtue of subsection (3)(b), include other requirements.
60. Subsection (4) of section 271A includes a power for Ministers to make provision in regulations about when, for the purposes of regulations made under subsection (2) and sections 268 to 271 of the Act, a patient's detention in a hospital is taken to involve the patient being subject to a level of security that is excessive in the patient's case.
61. Subsection (5) of new section 271A provides that regulations may make provision requiring that a person meet criteria besides being a medical practitioner in order to prepare a report in support of a patient's excessive security appeal for the purposes of the new requirements introduced by section 14 of the Act. This applies both in relation to a patient making an application to the Tribunal in respect of detention in a state hospital (under section 264 of the 2003 Act) or another hospital (under section 268 of the 2003 Act).