

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 9 - Compulsion Orders**

273. **Part 9** provides a regime for compulsion orders made under section 57A(2) of the 1995 Act. The regime for compulsion orders which are combined with restriction orders is provided for by Part 10. This Part is similar in many ways to Chapters 3 to 7 of Part 7 (some of the provisions of which it adopts with appropriate modifications) and includes provision for the review of compulsion orders, variation, extension and revocation of them, transfer of patients subject to them and suspension of measures authorised by them.

#### ***Chapter 1: duties following making of order***

##### ***Section 137: Part 9 care plan***

274. **Section 137** makes provision for a care plan to be prepared once a compulsion order is made. Unlike the Tribunal, a criminal court does not require a care plan to be submitted before an order is made. However, it should be prepared subsequently as it will be relevant for future reviews by the Tribunal. As soon as practicable after being appointed under section 230, the patient's responsible medical officer must prepare a care plan and make sure that it is included in the patient's medical records. The section also provides for the amendment of a care plan by the responsible medical officer.

##### ***Section 138: mental health officer's duty to identify named person***

275. **Section 138** provides that as soon as practicable after a compulsion order is made, the patient's mental health officer must take reasonable steps to find out the name and address of the patient's named person.

#### ***Chapter 2: review of compulsion orders***

#### **Mandatory reviews by responsible medical officer**

##### ***Section 139: first review of compulsion order***

276. **Section 139** sets out the procedure for the first review of a compulsion order. The order requires to be reviewed at regular intervals in a similar manner to a compulsory treatment order. If it is not extended, a compulsion order will expire after 6 months (see section 57A(2) of the 1995 Act, inserted by section 133 of the 2003 Act).
277. The section provides that within the last 2 months before the compulsion order is due to expire, the responsible medical officer must:
- carry out or make arrangements for a medical examination of the patient;

- consult the mental health officer;
  - consult the persons mentioned in subsection (5) that the responsible medical officer considers appropriate;
  - consult any other persons that the responsible medical officer considers appropriate; and
  - consider whether the conditions mentioned in subsection (4) continue to apply and whether it is necessary that the order be renewed.
278. Subsection (4) sets out the conditions which the responsible medical officer is to decide either do or do not continue to apply in respect of the patient. Those conditions mirror the conditions set out in section 57A(3) of the 1995 Act which must be satisfied before the court can make a compulsion order.
279. The duty in this section exists alongside the ongoing duty on the responsible medical officer in section 142 to keep the need for the compulsion order under regular review.

#### ***Section 140: further reviews of compulsion order***

280. **Section 140** provides for further reviews of a compulsion order. If extended beyond 6 months from the date on which it was first made, the compulsion order will lapse unless it is extended again at the first anniversary and annually thereafter. Within the last 2 months before the expiry date of the order, the responsible medical officer must take the same steps to review the continuing need for the order as section 139 sets out for the first review.

#### **Revocation of order by responsible medical officer or Commission**

##### ***Section 141: responsible medical officer's duty to revoke compulsion order: mandatory reviews***

281. **Section 141** provides that if, as a result of a first review under section 139 or a further review under section 140, the responsible medical officer is not satisfied that the conditions set out in section 139(4) continue to apply or that there continues to be a need for the order, then that officer has a duty to revoke the compulsion order. The responsible medical officer must then follow the notification procedure under section 144. Revocation by the responsible medical officer does not require the approval of the Tribunal or any other person and is not subject to appeal.

##### ***Section 142: revocation of compulsion order: responsible medical officer's duty to keep under review***

282. In addition to the duties to carry out a first review of a compulsion order prior to its expiry and to carry out further reviews if the order is extended, section 142 places the responsible medical officer under a duty to consider on an ongoing basis whether the patient still meets the criteria for a compulsion order. If, having considered the views of those persons listed in section 139(3)(c), the responsible medical officer decides that the conditions for the making of a compulsion order no longer apply or that there is no longer a need for the order, then that officer has a duty to revoke the order. The responsible medical officer must then follow the notification procedure under section 144. Revocation by the responsible medical officer does not require the approval of the Tribunal or any other person and is not subject to appeal.

##### ***Section 143: Commission's power to revoke compulsion order***

283. **Section 143** gives power to the Commission to revoke a compulsion order if the Commission considers that not all the conditions specified in section 139(4) are met or, even if those conditions are met, that it is no longer necessary for the patient to be subject

to the compulsion order. The Commission must then follow the notification procedure under section 144. As with the revocation of the compulsion order by the responsible medical officer, the Commission does not require the approval of the Tribunal or any other person to revoke the order and the revocation is not subject to appeal.

***Section 144: revocation of compulsion order: notification***

284. **Section 144** provides for the notification of the revocation of a compulsion order by the responsible medical officer or the Commission.

**Further steps to be taken where order not revoked**

***Section 145: mandatory reviews: further steps to be taken where compulsion order not revoked***

285. **Section 145** sets out the steps that the responsible medical officer must take and the matters that the officer needs to consider if, when carrying out a first review or a further review of a compulsion order, the officer is satisfied that the conditions in section 139(4) continue to be met and the compulsion order continues to be necessary. In particular, subsection (2) requires the responsible medical officer to comply with the requirements of subsection (3), which include a requirement to consider whether the measures authorised by the compulsion order should be varied.

**Extension of order following first review**

***Section 146: first review: responsible medical officer's duty where extension proposed***

286. **Section 146** provides that if, following the first review of the compulsion order and after having taken into consideration the views expressed by the persons mentioned in section 139(3), the responsible medical officer considers that the compulsion order should continue to apply without varying the measures authorised by it, the responsible medical officer has a duty to notify the patient's mental health officer that the responsible medical officer is proposing to make an application to the Tribunal for the order to be extended for a further 6 months.

***Section 147: proposed extension on first review: mental health officer's duties***

287. **Section 147** sets out the duties of the mental health officer on being notified by the responsible medical officer after the first review has been carried out that the responsible medical officer intends to apply to the Tribunal to have the compulsion order extended. The mental health officer must interview the patient, unless it is impracticable to do so, and provide the patient with information about the patient's rights in relation to the application and about the availability of advocacy services. The mental health officer must also take appropriate steps to make sure the patient has the opportunity to make use of those advocacy services. The mental health officer must also inform the responsible medical officer of those matters listed in subsection (2)(d), primarily whether the mental health officer agrees that the compulsion order should be extended.

***Section 148: first review: responsible medical officer's duty to apply for extension of compulsion order***

288. **Section 148** provides that, if the responsible medical officer is still satisfied, having had regard to the views of persons consulted and of the patient's mental health officer, that the compulsion order should be extended, then the responsible medical officer is under a duty to apply to the Tribunal for an extension of the order. It is only at the first review that the extension of the order is done by way of an application to the Tribunal. Subsequent extensions, where no variation of the measures authorised by the

order is required, are made by the responsible medical officer making a determination under section 152. Such extensions may, however, be reviewed by the Tribunal under section 165.

***Section 149: application to Tribunal for extension of order following first review***

289. **Section 149** sets out the information that must be included in an application by the responsible medical officer to the Tribunal for an order extending a compulsion order after the first review. The section also gives the Scottish Ministers power to make provision by regulations for other documentation to be sent with the application (section 149(b)).

**Extension of order following further review**

***Section 150: further review: responsible medical officer's duty where extension proposed***

290. **Section 150** places a duty on the responsible medical officer, where, after carrying out a review of the compulsion order (other than the first review), that officer is satisfied that the compulsion order continues to be necessary but need not be varied, to inform the mental health officer that the responsible medical officer proposes to make a determination under section 152 extending the order.

***Section 151: proposed extension of order on further review: mental health officer's duties***

291. **Section 151** sets out the duties of the mental health officer on being notified by the responsible medical officer of the intention to extend the compulsion order after a further review. The duties are similar to those under section 147 after a first review.

***Section 152: further review: responsible medical officer's duty to extend compulsion order***

292. **Section 152** places a duty on the responsible medical officer to extend a compulsion order for 12 months, where the officer is satisfied that it will continue to be necessary for the patient to be subject to the order but the order need not be varied. The responsible medical officer need not apply to the Tribunal although the extension may be reviewed by the Tribunal in the circumstances set out in section 165.

***Section 153: determination extending compulsion order: notification***

293. **Section 153** provides that the responsible medical officer must make a record of the determination extending a compulsion order following a further review. The content of the record and the notification procedure is detailed in subsection (2). The responsible medical officer need not send a copy of the record to the patient if doing so would put the patient or anyone else at risk of significant harm. The responsible medical officer is also under a duty to make a statement of the matters mentioned in subsection (5) (which relate to whether a copy of the record is being sent to the patient) and send the statement to the Tribunal, the patient's named person, the mental health officer and the Commission.

**Extension and variation of order**

***Section 154: responsible medical officer's duty where extension and variation proposed***

294. **Section 154** provides for what the responsible medical officer must do if the officer decides, on carrying out a first review or a further review of a compulsion order, that it is appropriate to extend the order and that it should be varied by modifying the measures authorised by it. The responsible medical officer must notify the patient's mental health

officer that the responsible medical officer is proposing to apply to the Tribunal for an order extending the compulsion order in an amended form. Subsection (3) provides that the responsible medical officer must give notice to the mental health officer of the changes to the measures authorised by the order which the responsible medical officer is proposing.

***Section 155: mental health officer's duties: extension and variation of compulsion order***

295. **Section 155** sets out the duties of the mental health officer on being notified by the responsible medical officer that an application is going to be made to the Tribunal for the extension and variation of the compulsion order. The duties are similar to those set out in section 147, with the addition in subsection (4) of the duty to inform the patient of the details of the variation of the order proposed.

***Section 156: responsible medical officer's duty to apply for extension and variation of compulsion order***

296. **Section 156** imposes a duty on the responsible medical officer to apply to the Tribunal for the extension and variation of a compulsion order, where that officer is satisfied that it will be necessary for the patient to be subject to the order and that the measures authorised by it should be varied.

***Section 157: application for extension and variation of compulsion order: notification***

297. **Section 157** places a duty on the responsible medical officer, where the officer intends to apply to the Tribunal for the extension and variation of a compulsion order, to notify the persons listed in that section before making the application.

***Section 158: application to Tribunal for extension and variation of compulsion order***

298. **Section 158** sets out the information that must be included in an application by the responsible medical officer to the Tribunal for an order extending and varying a compulsion order. It also gives power to the Scottish Ministers to make provision by regulations for other documentation to be sent with the application.
299. The 2004 Order modifies section 158 to provide that the Tribunal is to be advised if the mental health officer disagrees that the application should be made, of the reasons for that view.

**Variation of order**

***Section 159: responsible medical officer's duties: variation of compulsion order***

300. **Section 159** imposes a duty on the responsible medical officer to consider on an ongoing basis whether the measures specified in a compulsion order require to be varied. Subsection (3) provides that, if it appears to the responsible medical officer that the measures authorised by the order should be varied, the officer must carry out the steps listed in subsection (4), which include assessing the patient's needs and consulting the patient's mental health officer. Where, after doing so, the responsible medical officer is still satisfied that the order should be varied, subsection (5) imposes a duty on the officer to apply to the Tribunal for variation of the order.
301. The 2004 Order amends this section to provide for steps which the mental health officer is to take on being notified by the responsible medical officer that an application to the Tribunal is proposed. These steps include interviewing the patient and providing information to the patient about various matters, including available advocacy services

and how to access those, as well as on the patient's rights in relation to such an application to the Tribunal.

302. Corresponding changes are made to section 161 (see paragraph 304 below).

***Section 160: application for variation of compulsion order: notification***

303. **Section 160** places a duty on the responsible medical officer to notify the persons listed in section 157 before making an application to the Tribunal for the variation of a compulsion order.

***Section 161: application to Tribunal by responsible medical officer***

304. **Section 161** sets out the information that must be included in an application to the Tribunal by the responsible medical officer for an order varying a compulsion order. It also gives power to the Scottish Ministers to make provision by regulations for other documentation to be sent with the application.
305. The 2004 Order amends into the section a requirement that the Tribunal be advised when the mental health officer disagrees that the application is required, of the reasons for that view.

**Reference to Tribunal by Commission**

***Section 162: Commission's power to make reference to Tribunal***

306. **Section 162** gives power to the Commission to refer the case of a patient subject to a compulsion order to the Tribunal for review, where it considers it appropriate to do so. Section 171 provides what the Tribunal can do on such a reference.

**Applications to Tribunal by patient etc.**

***Section 163: application to Tribunal by patient etc for revocation of determination extending compulsion order***

307. **Section 163(1)** gives the patient and the patient's named person the right to apply to the Tribunal for the revocation of a determination, made by the responsible medical officer under section 152, extending a compulsion order.
308. Subsection (2), however, provides that, where the Tribunal is required by section 165 to review the determination, neither the patient nor the patient's named person can apply for a revocation.

***Section 164: application to Tribunal by patient etc for revocation or variation of compulsion order***

309. **Section 164** gives the patient and the patient's named person the further right to apply to the Tribunal for an order to either revoke the compulsion order or to modify the measures authorised by it. Such an application cannot be made during the initial 6 months following the court's making of the compulsion order (subsection (4)(a)). In addition, no application can be made within 3 months of an order being made by the Tribunal in respect of the compulsion order under section 166 or 167 (subsection (4)(b)).
310. Subsection (5) provides that, where an application under this section to revoke the order is refused, the person who made the application is entitled to make only one more application within the time-scale set out in subsection (7). Subsection (5) also makes the same provision where an application under this section to vary a compulsion order has been made (whether that application was successful or not).



311. Subsection (6) makes similar provision where an application (under section 163) for revocation of a determination under section 152 is refused.

## **Review by Tribunal of determination extending order**

### ***Section 165: Tribunal's duty to review determination under section 152***

312. **Section 165** provides that the Tribunal must, in certain circumstances, review the section 152 determination by the responsible medical officer to extend the compulsion order. Those circumstances are-
- the responsible medical officer's record (prepared under section 153) states that-
    - there is a change in diagnosis of the type (or types) of mental disorder that the patient has from the type which was recorded in the compulsion order; or
    - the mental health officer either disagrees with the determination or has not carried out that officer's duties under section 151(2)(d)(i); or
  - no review has been made by the Tribunal of the compulsion order, which would have been in force for 2 years ending with the day on which the order, had it not been extended, would have ceased to authorise the measures specified, either under this section or under section 167.

## **Powers of Tribunal**

### ***Section 166: powers of Tribunal on review under section 165***

313. **Section 166** sets out the powers of the Tribunal on a review under section 165 of a responsible medical officer's determination to extend a compulsion order. Before it makes a decision, the Tribunal must allow the patient, the patient's named person, the responsible medical officer and the other persons listed in subsection (3) the opportunity to make representations or to lead or produce evidence. The Tribunal may revoke or confirm the determination. Where it revokes the determination, it may also revoke the compulsion order. Where it confirms the determination, it may also vary the compulsion order.

### ***Section 167: powers of Tribunal on application under section 149, 158, 161, 163 or 164***

314. **Section 167** provides for the powers of the Tribunal on the following applications, namely:
- applications under section 149 by the responsible medical officer for the first extension of a compulsion order (see subsection (1));
  - applications under section 158 by the responsible medical officer for the extension and variation of a compulsion order (see subsection (2));
  - applications under section 163 by a patient or patient's named person for revocation of a determination by the responsible medical officer under section 152 (see subsection (3));
  - applications under section 164(2)(a) by a patient or patient's named person for revocation or variation of a compulsion order (see subsection (4)); and
  - applications under section 161 or 164(2)(b) by the responsible medical officer or the patient or patient's named person respectively for the variation of a compulsion order (see subsection (5)).
315. Before making any decision on an application, the Tribunal must give the persons listed in section 166(3) and any person appearing to the Tribunal to have an interest,

the opportunity of making written or oral representations and of leading or producing evidence (subsection (6)).

***Section 168: interim extension etc of order: application under section 149***

316. **Section 168** gives power to the Tribunal to make an interim order to extend or extend and vary a compulsion order for a period of up to 28 days where it has received an application from the responsible medical officer under section 149 to extend the order. It is open to anyone with an interest in the proceedings to ask the Tribunal to make an interim order. In addition, the Tribunal has power to make the order on its own initiative. The Tribunal may make an interim order only where it considers that it will not be able to come to a decision on the application before the compulsion order would cease to have effect and that it is appropriate to make the order. The Tribunal's power is subject to the restriction set out in section 170.

***Section 169: interim variation of order following application, reference or review under Chapter***

317. **Section 169** provides the Tribunal with power to make an interim order to vary a compulsion order for a period of up to 28 days where it has received an application or reference mentioned in subsection (1)(a) or (b) or where it is reviewing a determination made under section 165. Any person with an interest in the proceedings can ask the Tribunal to make an interim order or the Tribunal can do so on its own initiative. The Tribunal can make an interim order only where it considers it appropriate to do so pending its decision on the application, reference or review. The Tribunal's power is subject to the restriction in section 170.

***Section 170: limit on power of Tribunal to make interim order***

318. **Section 170** provides that the maximum continuous period of time that interim orders can be in force under sections 168 and 169 cannot exceed 56 days.

***Section 171: powers of Tribunal on reference under section 162***

319. **Section 171** provides powers to the Tribunal on receiving a reference from the Commission under section 162, to vary or revoke the compulsion order. Before it makes any order, the Tribunal must give the persons listed in section 166(3) and any other person appearing to the Tribunal to have an interest the opportunity of making representations or leading or producing evidence.

***Section 172: Tribunal's order varying compulsion order***

320. **Section 172** sets out what the Tribunal must specify when it makes an order under section 166, 167 or 171 varying a compulsion order. It must specify the modifications that it has made to the measures specified in the compulsion order. In addition, the Tribunal may specify measures which were not sought in the application to which its order relates.

***Section 173: applications to Tribunal: ancillary powers***

321. **Section 173** gives power to the Scottish Ministers to make regulations to prescribe circumstances in which the Tribunal can require the responsible medical officer and the mental health officer to submit reports to the Tribunal; and to prescribe the matters which those reports must cover.

***Section 174: effect of interim orders: calculation of time periods in Chapter***

322. The section provides that, if the Tribunal has extended, or extended and varied, an order under section 168, the period of time for which that order was extended will not be



taken into account in the calculation of the day on which the order ceases, will cease or would have ceased.

## **Meaning of “modify”**

### ***Section 175: meaning of “modify”***

323. The section provides the definition of "modify" in respect of a compulsion order as meaning amending, removing or adding to any of the measures specified in it.

### ***Chapter 3: applications of Chapters 5 to 7 of Part 7***

## **Breach of order**

### ***Section 176: medical treatment: failure to attend***

324. **Section 176** makes provision for breach of a compulsion order where the patient fails to attend for medical treatment. It applies the provisions in section 112 with regard to compulsory treatment orders to compulsion orders but with certain minor modifications (see paragraph 157 of these Notes).

### ***Section 177: non-compliance generally with compulsion order***

325. **Section 177** relates to non-compliance generally with a compulsion order. It lists the various sections relating to compulsory treatment orders in Chapter 5 of Part 7 that apply to compulsion orders but with the modifications set out in subsections (2) and (3).

## **Transfers**

### ***Section 178: transfers***

326. **Section 178** applies the provisions in sections 124 to 126 (regarding transfers of patients who are subject to compulsory treatment orders) to patients who are subject to compulsion orders which authorise detention in hospital (see paragraphs 170 to 178 of these Notes).

## **Suspension of measures**

### ***Section 179: suspension of measures***

327. **Section 179** applies the provisions of section 127 regarding the suspension of detention requirements, the suspension of any other compulsory measure in section 128, and the revocation of any such suspension in section 129, to a patient who is subject to a compulsion order but with certain minor modifications.