

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10 - Compulsion Orders and Restriction Orders

328. Part 10 provides the regime for a compulsion order made under section 57A(2) of the 1995 Act which is combined with a restriction order made under section 59(1) of that Act.

Chapter 1: preliminary

Section 181: mental health officer's duty to identify named person

329. Section 181 provides that as soon as practicable after a compulsion order combined with a restriction 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 orders

Annual review of orders

Section 182: review of compulsion order and restriction order

330. Where a compulsion order is combined with a restriction order, it continues to have effect indefinitely unless some positive action is taken to bring it to an end. Section 182 provides for the responsible medical officer to carry out an annual review of the compulsion order and restriction order. The first review must be carried out during the 2 month period ending with the first anniversary of the making of the compulsion order. Further reviews must be carried out annually thereafter, again during the last 2 months of each 12 month period. The review carried out under this section is similar to the review carried out under section 139 in Part 9, with the addition (in subsection (3)(b) (ii) and (iv)) of two new criteria. They are-

- whether the patient's mental disorder is such that detention in hospital is necessary to protect any other person from serious harm, whether the patient would receive medical treatment there or not; and
- whether it continues to be necessary for the patient to be subject to the restriction order.

Consequences of annual review

Section 183: responsible medical officer's report and recommendation following review of compulsion order and restriction order

331. **Section 183** makes provision for the procedure following reviews under section 182. The responsible medical officer must submit a report to the Scottish Ministers recording that officer's views on:
- whether the conditions set out in section 182(4) (that the patient has a mental disorder etc) continue to apply;
 - whether it is necessary to detain the patient in hospital to protect any other person from serious harm;
 - whether it continues to be necessary for the patient to be subject to the compulsion order; and
 - whether it continues to be necessary for the patient to be subject to the restriction order.
332. Depending on those views and taking account of the mental health officer's views, the responsible medical officer will recommend to the Scottish Ministers:
- that the compulsion order should be revoked;
 - where not satisfied that the patient has a mental disorder or otherwise that the restriction order is necessary, that the restriction order should be revoked and the compulsion order varied so that the patient is no longer detained in hospital; or
 - that both orders should continue but that the patient should be discharged subject to conditions ("conditional discharge").

Responsible medical officer's duty to keep orders under review

Section 184: responsible medical officer's duty to keep compulsion order and restriction order under review

333. **Section 184** provides that the responsible medical officer is under a continuing duty to keep the compulsion order and restriction order to which the patient is subject under review. Whenever the responsible medical officer reviews the order, he or she must submit a report to the Scottish Ministers complying with the requirements of section 183 and containing his or her recommendations.

Reference to Tribunal by Scottish Ministers

Section 185: duty of Scottish Ministers on receiving report and recommendation from responsible medical officer

334. Where the responsible medical officer submits a report to the Scottish Ministers under section 183(2) or 184 which contains a recommendation (section 184 reports are submitted only where there is a recommendation by the responsible medical officer to change the orders applicable), the Scottish Ministers must refer the patient's case to the Tribunal. Notice of the proposed reference must be given to the persons listed in subsection (2) before it is made. The reference must state the information set out in subsection (3).

Section 186: Commission's power to require Scottish Ministers to make reference to Tribunal

335. **Section 186** gives power to the Commission to require the Scottish Ministers to refer the compulsion order and restriction order to which a patient is subject to the Tribunal,

if the Commission considers that such a reference is appropriate. The Commission must notify the Scottish Ministers of this requirement in writing and include its reasons for making the request.

Section 187: duty of Scottish Ministers to refer to Tribunal if required to do so by Commission

336. **Section 187** provides that, where the Commission has notified the Scottish Ministers under section 186, the Scottish Ministers have a duty to refer the case to the Tribunal. Notice of the reference must be given to the persons listed in paragraphs (a) to (g) of section 185(2) and it must state the information set out in section 187(4). The Scottish Ministers should, if possible, notify those persons before making the reference.

Scottish Ministers' duty to keep orders under review

Section 188: duty of Scottish Ministers to keep compulsion order and restriction order under review

337. **Section 188** provides that the Scottish Ministers are under a duty to keep the compulsion order and restriction order to which the patient is subject under review by considering the matters set out in subsection (2). Subsections (3) to (7) set out the series of tests that the Scottish Ministers must apply when reviewing a compulsion order and restriction order.
338. Depending on their views, the Scottish Ministers may be required to apply to the Tribunal to have the compulsion order revoked, to have the restriction order revoked, to have the compulsion order varied or to have the patient conditionally discharged.

Section 189: reference to Tribunal by Scottish Ministers

339. **Section 189** imposes a duty on the Scottish Ministers to refer a patient's case to the Tribunal two years after the making of the compulsion order and restriction order if no reference or application has been made to the Tribunal during that period.
340. In addition, at the end of each year thereafter, the Scottish Ministers have a duty to review the previous 2 years and refer the patient's case to the Tribunal if no reference or application has been made to it during that 2 year period.
341. In order to ensure that the Tribunal reviews the compulsion order and restriction order at least once every 2 years, subsection (3) provides that, in assessing whether there has been an application or reference to the Tribunal in a 2 year period, any reference under this section during the first year of that period is ignored.
342. Notice of the reference to the Tribunal must be given by the Scottish Ministers to the persons listed in paragraphs (a) to (g) of section 185(2) and the reference must state the information set out in section 189(5).

Section 190: application by Scottish Ministers: notification

343. **Section 190** provides that where the Scottish Ministers make an application to the Tribunal as a result of section 188, they must notify the persons listed in paragraphs (a) to (g) in section 185(2). They should, if possible, notify those persons before making the application.

Section 191: application to Tribunal

344. **Section 191** sets out the information which must be provided by the Scottish Ministers when applying to the Tribunal for an order under section 193. Section 191(b) gives the Scottish Ministers power to prescribe by regulations the documents which must accompany the application.

Application by patient etc

Section 192: application to Tribunal by patient and named person

345. Section 192 gives a patient subject to a compulsion order combined with a restriction order and the patient's named person the right to apply to the Tribunal for any of the following orders-
- conditional discharge;
 - revocation of the restriction order;
 - revocation of the restriction order and variation of the compulsion; and
 - revocation of the compulsion order (the restriction order will automatically fall when the compulsion order falls (see section 197)).

346. The patient and the patient's named person can each apply once in the period beginning with the day 6 months after the compulsion order was made and ending on the anniversary of the order; and once in any subsequent 12 month period. However, neither of them can apply within a three month period after the Tribunal has conducted any review of the compulsion order and restriction order to which the patient is subject, and this includes where the Tribunal has carried out such a review and decided to make no order. The patient's named person must give notice to the patient if the named person makes an application under this section.

Proceedings before Tribunal

Section 193: powers of Tribunal on reference under section 185(1), 187(2) or 189(2) or application under section 191 or 192(2)

347. Section 193 sets out the powers of the Tribunal on an application by the Scottish Ministers under section 191, an application by a patient or a patient's named person under section 192(2) or a reference by the Scottish Ministers under section 185(1), 187(2) or 189(2). Before making a decision, the Tribunal must hold a hearing and allow the persons listed in subsection (9) the opportunity to make representations and give evidence.
348. Under subsection (2), where the Tribunal is satisfied that the patient has a mental disorder and that the effect of the mental disorder makes it necessary, in order to protect others from serious harm, that the patient continues to be detained in hospital, whether for treatment or not, the Tribunal shall make no order. The compulsion order and restriction order continue to have effect.
349. Under subsection (3), where the Tribunal is not satisfied that the patient has a mental disorder it must revoke the compulsion order. Under subsection (4), where the Tribunal is satisfied that there is a mental disorder but it is not satisfied that the effect of that disorder makes it necessary, in order to protect others from serious harm, for the patient to continue to be detained in hospital and is not satisfied that the criteria in section 182(4)(b) and (c) are met, it shall revoke the compulsion order.
350. Under subsection (5), where the Tribunal is satisfied that the conditions in section 182(4) continue to be met and that it is necessary for the patient to be subject to the compulsion order but it is not satisfied that the patient needs to be detained in hospital in order to protect others from serious harm and that the restriction order is no longer necessary, the Tribunal shall revoke the restriction order.
351. Subsection (6) provides the circumstances when the Tribunal can vary the measures authorised by a compulsion order.
352. Under subsection (7), where the Tribunal is satisfied that the compulsion order and restriction order continue to be necessary, but is not satisfied that as a result of the

patient's mental disorder, it is necessary to continue to detain the patient in hospital in order to protect any other person from serious harm, it can conditionally discharge the patient, imposing whatever conditions it sees fit.

353. Subsection (10) repeats the effect of sections 64(C1) and 66(1C) of the 1984 Act. Section 102 of the National Health Service (Scotland) Act 1978 (as amended) states that state hospitals must be provided for persons detained under the 2003 Act or the 1995 Act who *require medical treatment* under conditions of special security. The Tribunal may decide under this section to make no order (and so continue the compulsion order and restriction order) because the patient must be kept in hospital, even if the practical effect is that the patient will be detained in a state hospital.

Section 194: Tribunal's powers etc when varying compulsion order

354. Section 194 provides that if, under section 193(6), the Tribunal revokes the restriction order and varies the compulsion order, it must specify the modifications made by its order to those measures in the compulsion order.

Section 195: deferral of conditional discharge

355. Where the Tribunal orders the conditional discharge of the patient under section 193(7), section 195 gives the Tribunal power to defer the discharge to allow necessary arrangements to be made. Such arrangements could relate, for instance, to the provision of suitable medical treatment in the community.

Effect of modification or revocation of orders

Section 196: general effect of orders under section 193

356. Section 196 provides that where the Tribunal makes any of the orders listed in subsection (1), those orders shall not take effect until the occurrence of the earliest of the events listed in subsection (2), which relate to appeals against those orders.

Section 197: effect of revocation of compulsion order

357. Section 197 provides that, where the Tribunal revokes a compulsion order, the restriction order automatically falls with it.

Section 198: effect of revocation of restriction order

358. Section 198 provides that, where the Tribunal revokes a restriction order but not the compulsion order, then the patient is treated as if the compulsion order had been made without a restriction order. Part 9 will apply to the patient as if the compulsion order had been made on the date on which the restriction order was revoked.

Meaning of “modify”

Section 199: meaning of “modify”

359. Section 199 provides the definition of “modify” in respect of a compulsion order as amending, removing or adding to any of the measures specified in it.

Chapter 3: conditional discharge

Section 200: variation of conditions imposed on conditional discharge

360. Section 200 gives the Scottish Ministers power to vary the conditions imposed by the Tribunal on a patient who has been conditionally discharged. If they do so, they must notify the persons listed in subsection (3) of the variation.

Section 201: appeal to Tribunal against variation of conditions imposed on conditional discharge

361. **Section 201** allows the patient and the patient's named person to appeal to the Tribunal against any variation imposed by the Scottish Ministers under section 200(2). The appeal must be lodged with the Tribunal within 28 days of the notice being given under section 200(3).
362. Subsection (3) provides that the Tribunal will treat an appeal under this section as an application for conditional discharge. Section 193 therefore applies and the Tribunal has the options that are available under that section.

Section 202: recall of patients from conditional discharge

363. **Section 202** provides that the Scottish Ministers can, by warrant, recall a conditionally discharged patient to hospital if they are satisfied that it is necessary for the patient to be detained in hospital.

Section 203: effect of recall from conditional discharge

364. **Section 203** provides that if, under section 202, the Scottish Ministers recall a patient to a hospital that is different to the one specified in the compulsion order, the hospital to which the patient is recalled shall effectively be substituted for the one specified in the order.

Section 204: appeal to Tribunal against recall from conditional discharge

365. **Section 204** provides that the patient and the patient's named person can appeal to the Tribunal against recall to hospital within 28 days of the recall from conditional discharge taking effect.
366. Subsection (3) provides that the Tribunal will treat an appeal under this section as an application for conditional discharge. Section 193 therefore applies and the Tribunal has the options that are available under that section.