

Consultation Response

The Mental Health (Care and
Treatment) (Scotland) Act 2003
Remedial Order 2026
Draft Proposal

March 2026

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 draft proposal*.¹ The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Question 1: Do you have any views on the proposed application rights for patients and their named person?

It is proposed that both patients subject to a forensic mental health order and their named person be able to apply directly to the Tribunal to change, remove or add recorded matters.

The proposed application rights for patients and their named person are welcomed as a positive development in strengthening procedural fairness and effective participation in decision-making. Any individual or patient who is deemed to require care and treatment under the Act should not be prevented from accessing such care and treatment.

It is unjust that a patient, regardless of the process of entering the NHS Health Care system, would not receive the universal care available free for all. They should be entitled to the same rights.

All patients under the Act have a diagnosis of mental disorder. A recorded matter made in relation to an Order under the Act can have a fundamental impact upon a patient's individual care needs related to that mental disorder.

It is therefore only right that patients subject to 'Forensic' Orders including Compulsion Orders, Compulsion Orders with Restriction Orders, Hospital Directions and Transfer for Treatments have the same opportunities including access to the recorded matter process and procedure. Affording patients and

¹ [The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 Remedial Order 2026 draft proposal - Scottish Government consultations - Citizen Space](#)

their named person with the right to apply to the Tribunal to specify or modify recorded matters also provides meaningful routes to remedy; challenging gaps in care and treatment.

A patient should be entitled to such medical treatment, community care services and relevant services, treatment or care that is considered necessary irrespective of how the Order is granted i.e. being placed on an Order by a Criminal Court or by a Tribunal. This proposal also ensures greater compatibility with the European Convention of Human Rights.

Question 2: Do you have any comments on the proposed duties and powers across all parties involved in reviews, including RMOs, MHOs, Scottish Ministers, and the Tribunal?

The proposal is to introduce recorded matters for Compulsion Orders, Compulsion Orders with Restriction Orders, Hospital Directions and Transfer for Treatment Directions patients and mirror the existing process and procedure for patients subject to Compulsory Treatment Order. Responsible Medical Officers (RMOs) and Mental Health Officers (MHOs) are already aware of their duties and powers (it would appear highly unlikely, and only in the minority of cases, that a RMO and MHO does not have some interaction with Compulsory Treatment Order patients in their everyday jobs). Their duties are to consider, consult and notify proposed changes for recorded matters in relation to those under Compulsory Treatment Order. Responsible Medical Officers and Mental Health Officers would ordinarily undertake this step for their Compulsory Treatment Order patients, and it would not be overtly cumbersome for them to undertake this role in relation to those patients subject to the proposed 'Forensic' Orders.

In addition, the Tribunal have duties and powers in relation recorded matters for Compulsory Treatment Order patients. Therefore, it would seem appropriate that this is expanded to patients who may be subject to 'Forensic' Orders. Again, it would appear logical that the proposed duties and powers are extended across all patients, and it would not appear overly cumbersome or a significant amount of work to incorporate into the Tribunal's existing workload. Extending the Tribunal's powers to specify, review and modify recorded matters is particularly important, as it promotes the principles of the act.

There will be an increased burden of duties on the Scottish Ministers to propose, monitor and refer to the Tribunal in respect of recorded matters, though respectfully this appears a relatively small burden. The Scottish Ministers already have existing statutory duties to keep Compulsion and Restriction Orders, transfer for treatment directions and hospital directions under review. It would appear appropriate to incorporate recorded matters into this review without significant increase in the amount of work. Our members report that from experience recorded matters are often mentioned, suggested and discussed as potentially being appropriate during review process and procedure for all patients though noted as not being available to 'forensic' patients. Therefore, the proposed

inclusion of recorded matters may help address concerns and provide an additional avenue for collaboration with care teams, facilitating that their position, aims and involvement can be supported consistently in practice.

Question 3: What, if any, operational challenges do you foresee for services, and how might these be mitigated (e.g. training, guidance, forms)?

There would appear to be minimal operational challenges for services specifically as recorded matters are relevant in relation to Compulsory Treatment Order patients. The duties and responsibilities would simply be extended. There would be a need to provide updated training and guidance to appropriate Mental Health Officers, Responsible Medical Officers and to Tribunal Members. There would also be a need for guidance to be prepared in respect of proposed recorded matters however this would be relatively limited. There may be a need for additional documentation and forms to be prepared and available however this should be minimal as it would involve small adaptations. There may be more extensive operation challenges for the Tribunal service to facilitate hearings in relation to recorded matters, arising from a potential increase in Tribunal applications relating to recorded matters. However, whilst this may be significant initially, we anticipate that the additional workload would diminish over a period of time.

Ensuring services specified in recorded matters can be delivered, particularly where community placements or specialist forensic services are limited, may also be an aspect that needs to be considered.

Question 4: What impacts - positive or negative - do you anticipate for people with lived experience, families and carers?

We consider that the proposed changes will have a positive impact upon patients, their families and carers. Specifically, we anticipate that there will be improved service delivery as recorded matters are to ensure the patient's needs are met, leading to better service delivery and patient outcomes, upholding the principles enshrined with mental health legislation and promoting reciprocity and transparency in care and treatment. A recorded matter promotes transparency in the Mental Health Care system, allowing patients to have a voice in their care and treatment, strengthening participation. A recorded matter can hold health care providers accountable for the provision of care which can lead to improved care, practices and patient safety. Support for families is facilitated through recorded matters as it enables family involvement in the care of patients providing additional support and resources for families. Any recorded matters can also be used to plan for long term care needs, ensuring that patients have a clear understanding of their care goals and preferences.

Question 5: In relation to the Interim Equality Impact Assessment, please tell us about any potential impacts you think there may be on protected characteristics?

We consider that the proposals will positively impact upon those who may have protected characteristics. The proposals will ensure that there is a fair and equal treatment to all regardless of the means of entering or becoming subject to mental health legislation. A patient should not receive a poorer service or receive a worse experience because of any protected characteristic. The proposals will enable for more or fuller consideration for all patients and tackle discrimination proactively, ensuring full integration.

Question 6: In relation to the Child Rights and Wellbeing Impact Assessment, please tell us about any potential impacts you think there may be on children's wellbeing?

A child under the age of 18 can be made subject to 'Forensic' Orders under the Mental Health (Care & Treatment) (Scotland) Act therefore the proposal may directly impact on that patient's care and treatment (there requires to be consideration given to the effect of the detention on the child and to ensure that all other options have been fully explored). Alternatively, a child's rights and wellbeing may be indirectly impacted through connection with a patient under the Mental Health (Care & Treatment) (Scotland) Act, i.e. a relative. Consequently, a patient's better access to medical treatment, community care services and relevant services, treatment or care by virtue of a recorded matter, may positively promote the wellbeing of the child. The ability for patients and their named person to apply to the Tribunal may also strengthen participation and voice, consistent with the principles of the UN Convention on the Rights of the Child.

Question 7: In relation to the Partial Business Regulatory Impact Assessment, please tell us about any potential impacts you think there may be to particular businesses or organisations?

We have no specific comments.

Question 8: What do you think about how the changes will be introduced and when they will start?

Introducing the changes through a remedial order allows the identified human rights concerns to be addressed promptly while maintaining continuity within the legislative framework. The earliest implementation possible would be an advantage so long as there is an opportunity for training, guidance and preparation for all relevant parties, especially the Scottish Ministers. Early implementation with reasonable notice would allow organisations to update policies, training and documentation. Early engagement with stakeholders and service users, including clinicians, MHOs, advocacy organisations and Tribunal members, would also support smooth implementation.



Question 9: In your view, are there any unintended consequences that could arise as a result of changes to the 2003 Act?

The ability to apply to the Tribunal regarding recorded matters may increase Tribunal applications, potentially placing pressure on existing processes and resources.

Question 10: Do you have any other comments on the 2026 Proposed Draft Order?

Overall, the draft Order represents an important step in addressing inequality within the existing legislative framework and strengthening the rights of individuals subject to forensic mental health orders. Aligning provisions on recorded matters with those applying to other patients promotes fairness, transparency and consistency.

To maximise the benefits of the reform, implementation should be supported by clear guidance, professional training and accessible information for patients and families. Ongoing monitoring and engagement with patients, those with lived experience, carers and advocacy will also help ensure the proposal achieves its intended aims.



For further information, please contact:

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