

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 16 – Medical Treatment

423. **Part 16** contains provisions relating to the giving of medical treatment to patients. The expression “medical treatment” is defined in section 329(1).
424. Patients who are subject to short-term detention certificates and offenders subject to various orders imposed by the criminal courts (including treatment orders and interim compulsion orders) are liable to be given medical treatment compulsorily. A patient subject to a compulsory treatment order or an interim compulsory treatment order is liable to be given medical treatment compulsorily only if that is specified as a measure in the order. In the case of an offender made subject to a compulsion order, the sentencing court must specify whether the order authorises the giving of medical treatment.
425. In addition to the specific requirements set out in this Part, any medical practitioner giving treatment must have regard to the principles set out in section 1, and to any advance statement made by the patient (see sections 275 and 276).

Designated medical practitioners

Section 233: designated medical practitioners

426. Subsection (1) of section 233 requires the Commission to maintain a list of medical practitioners (referred to in the 2003 Act as “designated medical practitioners”) who will perform functions under this Part. As well as having such qualifications and experience as the Commission considers appropriate, designated medical practitioners must undergo training if required to do so by the Commission.
427. The Commission is required to include child specialists on the list. Part 16 requires that such a specialist should be involved in certain treatment decisions about a child or young person which attract special safeguards.
428. Subsection (4) confers certain powers on designated medical practitioners to allow them to perform the functions given to them under this Part, namely powers to:
- interview the patient in private;
 - carry out a medical examination of the patient in private;
 - require those holding the relevant medical records to produce them; and
 - inspect the records produced.
429. There is provision in subsection (6) for the Commission to pay fees, expenses or allowances to designated medical practitioners.

Sections 234 to 236: safeguards for certain surgical operations etc

430. Sections 234 to 236 apply to any patient irrespective of whether the giving of medical treatment to a particular patient is authorised by virtue of the 2003 Act or the 1995 Act.
431. Subsection (1) of section 234 provides that the types of medical treatment mentioned in subsection (2) may be given to a patient only in accordance with the safeguards set out in sections 235 and 236. Subsection (2) specifies any surgical operation that destroys brain tissue or the functioning of brain tissue (generally known as neurosurgery for mental disorder) and enables the Scottish Ministers to consult appropriate persons before making regulations specifying other types of medical treatment that will attract the same special safeguards.

Patients capable of consenting

432. Subsections (2) and (3) of section 235 set out the conditions that must be met before the medical treatments specified in section 234 may be given to patients who are capable of consenting to treatment.
433. Under subsection (2), a designated medical practitioner must confirm both that the patient is capable of consenting and has done so in writing, and that the treatment is in the patient's best interests, having regard to the test set out in paragraph (c) of that subsection.
434. Two lay persons appointed by the Commission for the purpose, who may interview the patient in private, must certify that the patient is able to consent and has done so in writing (subsection (3)).
435. If the patient is aged under 16, subsection (6) modifies the operation of subsection (2) so that if the patient's responsible medical officer is not a child specialist (as defined in section 249) then the certificate under subsection (2), confirming that the patient is capable of consenting and that the treatment is in their best interests, must be given by a designated medical practitioner who is a child specialist.

Patients incapable of consenting

436. Section 236 sets out the conditions that must be met before neurosurgery for mental disorder or other treatments specified in regulations under section 234 can be given to patients who are incapable of consenting.
437. The effect of subsections (1) and (2) is as follows. A patient who opposes the treatment, either by stating an objection or by resisting treatment, may not be given such treatment. Where a patient does not resist or object to receiving the treatment, but is unable to consent, a designated medical practitioner must certify that this is the case and that the treatment is in the patient's best interests. Two lay persons appointed by the Commission must certify in writing that the patient is incapable of consenting and that the patient does not object to the treatment. In addition, the responsible medical officer must apply to the Court of Session for an order authorising the treatment specified. The Court of Session may authorise the treatment only if satisfied that, having regard to the likelihood of the treatment alleviating, or preventing a deterioration in, the patient's condition, it is in the best interests of the patient, and the patient does not object to the treatment.
438. If the patient is aged under 16, subsection (6) sets out special rules which must be complied with in relation to the certification under subsection (2).

Sections 237 to 241: safeguards for other medical treatment

Electro-convulsive therapy etc

439. Subsections (1) and (2) of section 237 provide that the types of medical treatment mentioned in subsection (3) may be given to patients to whom the giving of medical treatment is authorised by virtue of the 2003 Act or the 1995 Act, only in accordance with the safeguards set out in sections 238 and 239. Subsection (3) mentions electro-convulsive therapy (ECT) and other types of treatment to be specified in regulations made by the Scottish Ministers, after consultation with appropriate persons.
440. The section is subject to section 243 which allows urgent medical treatment for patients detained in hospital (see paragraphs 457 to 460 below).

Patients capable of consenting and not refusing consent

441. Subsection (1) of [section 238](#) sets out the conditions that must be met before medical treatment under sections 237 and 240 may be given to patients who can and do consent. The patient must consent in writing and either the responsible medical officer or a designated medical practitioner must certify that this consent has been given and that the treatment is in the patient's best interests having regard to the likelihood of the treatment's alleviating or preventing a deterioration in the patient's condition.
442. Subsection (3) provides that if the patient is aged under 16, the certificate under subsection (1) must be given by a child specialist.

Patients incapable of consenting

443. [Section 239](#) sets out the conditions that must be met before any treatment specified under section 237(3) can be given to patients who are incapable of consenting.
444. A designated medical practitioner must certify under subsection (1) the following three matters: first, that the patient is incapable of understanding the nature, purpose and likely effects of the treatment; second, that the giving of medical treatment to the patient is authorised by virtue of the 2003 Act or the 1995 Act; and third, that it is in the patient's best interests that the treatment be given, having regard to the likelihood of the treatment alleviating, or preventing a deterioration in, the patient's condition.
445. Subsection (2) provides that if the patient resists or objects to the treatment, the treatment can be given only if instead of certifying that third matter the designated medical practitioner certifies that the patient resists or objects to the treatment but that the treatment is necessary under one of the urgent medical treatment provisions of section 243(3)(a) to (c) (namely, to save the patient's life, to prevent serious deterioration in the patient's condition or to alleviate serious suffering on the part of the patient).
446. If the patient is aged under 16, subsection (3) sets out special rules which must be complied with in relation to the certification under subsection (1).

Sections 240 and 241: treatments given over period of time etc.

447. Subsections (1) and (2) of [section 240](#) provide that the types of treatment mentioned in subsection (3) may be given to a patient to whom the giving of medical treatment is authorised by virtue of the 2003 Act or the 1995 Act only in accordance with section 238 or 241. Subsection (3) sets out three types of treatment and enables the Scottish Ministers to make regulations specifying other types.
448. Subsection (2) is subject to subsection (4) and the provisions on urgent treatment in section 243.

Patients refusing consent or incapable of consenting

449. Subsection (1) of [section 241](#) sets out the conditions that must be met if medication for mental disorder is to be given for more than 2 months, nutrition by artificial means is to be administered or any other treatment specified in regulations made under [section 240\(3\)](#) is to be given to a patient who is unable to or refuses to consent. A designated medical practitioner must certify as to the matters set out in that subsection.
450. Subsection (2) requires a designated medical practitioner to take into account the views of a capable patient who refuses consent; and if, having considered those views, the designated medical practitioner is of the opinion that the treatment should still be given, requires him or her to state the reason in the certificate under subsection (1).
451. If the patient is aged under 16, the special rules in subsection (3) as to certification under subsection (1) must be complied with.
452. Subsection (4) provides that if the patient is not in hospital, subsection (1) does not authorise the giving of medical treatment by force to the patient.

Section 242: treatment not mentioned in [section 234\(2\)](#), [237\(3\)](#) or [240\(3\)](#)

453. [Section 242](#) sets out conditions for the giving of medical treatment to patients to whom the giving of medical treatment is authorised by the 2003 Act or the 1995 Act where the treatment is not specified elsewhere in the Part as requiring particular safeguards.
454. The rules are set out in subsections (3) and (4). Those rules are, however, subject to the provisions mentioned in subsection (2).
455. Subsection (3) deals with patients who are capable of consenting and who consent in writing. Medical treatment for mental disorder may be given provided it is given by or under the direction of the responsible medical officer.
456. Subsection (4) deals with patients who are capable of consenting but do not consent or consent other than in writing and those incapable of consenting. Medical treatment can be given if the requirements in subsection (5) are met.

Urgent medical treatment where patient detained in hospital

Section 243: urgent medical treatment

457. [Section 243](#) applies to any patient whose detention in hospital is authorised under the 2003 Act or the 1995 Act. It describes the circumstances in which urgent medical treatment may be administered even to a patient who does not consent, or is incapable of consenting, to the treatment.
458. The section applies to any form of medical treatment (as defined in [section 329\(1\)](#)), and authorises the treatment being given for any of the purposes set out in subsection (3). Subsection (4) imposes further restrictions on some of those purposes.
459. Subsection (5) prohibits the giving of ECT where the patient is capable of consenting but does not consent.
460. The responsible medical officer must notify the Commission within 7 days of the treatment first being given to the patient of the type of treatment given to a patient under this section and the purpose for which it was given.

Additional safeguards for certain informal patients

Section 244: Scottish Ministers' power to make provision in relation to treatment for certain informal patients

461. **Section 244** enables the Scottish Ministers to make regulations setting out the conditions to be satisfied before types of medical treatment set out in the regulations can be given to informal patients (i.e. patients to whom the giving of medical treatment is not authorised by the 2003 Act or the 1995 Act) under 16 years of age.

Section 245 to 247: certificates

Certificates under sections 235, 236, 239, and 241

462. **Section 245** provides that before giving a certificate which allows treatment to proceed, the certifying medical practitioner must consult the patient, the patient's named person (where practicable) and those persons appearing to have the primary responsibility for the patient's medical treatment. The certificate must be copied to the Commission within 7 days.

Certificates under section 238

463. **Section 246** provides that the Scottish Ministers may prescribe by regulations the particulars that a certificate under section 238 must include.
464. The amendment made by the 2004 Order ensures a certificate given under section 238 must be copied within 7 days to the Commission.

Scope of consent or certificate under sections 235, 236, 238, 239 and 241

465. **Section 247** provides that any consent or certificate given under section 235, 236, 238, 239 or 241 may relate to a plan of treatment which may involve one or more of the treatments specified, and may include a timescale for the administration of the treatments. For example, electro-convulsive therapy is usually given as a planned series of treatments. The consent or certificate in any case in which such therapy is to be given may relate to the whole of the proposed series of treatments, rather than to any individual instance of the treatment.

Section 248: sections 235, 236, 238, 239 and 241: review of treatment etc.

466. **Section 248** provides that where a patient is given treatment under section 235, 236, 239 or 241, the responsible medical officer must report to the Commission on the treatment and on the patient's condition at the times specified in paragraphs (a) or (b) of subsection (1).
467. Subsection (2) provides that the Commission may, at any time, direct that a form of treatment should cease to be given by giving notice to the responsible medical officer that the certificate given under any of the sections mentioned in that subsection will not apply to the patient with effect from the time specified in the notice.
468. **Section 249** provides the meanings of terms used in this Part.