

# MENTAL HEALTH (SCOTLAND) ACT 2015

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## EXPLANATORY NOTES

### THE STRUCTURE & A SUMMARY OF THE ACT

#### Part Two – Criminal Cases

##### *Section 38: Making certain orders in remand cases*

##### **Amendments to sections 52B, 52C, 52D, 52F, 52K, 52L, 52M and 52P**

113. The 1995 Act was amended by Parts 8, 9 and 10 of the 2003 Act with regard to the treatment of mentally disordered offenders. Part 2 of the Act makes a number of minor amendments to the 1995 Act, mainly concerned with timescales, and procedure.

##### **Amendments to sections 52B, 52C, 52D, 52F, 52K, 52L, 52M and 52P**

114. Section 38 of the Act amends the following sections of the 1995 Act: sections 52B, 52C, 52D, 52F, 52K, 52L, 52M and 52P, in the same way. In each of these sections, reference is made to a person being in custody. The Act adds the words ‘remanded in’ in front of ‘in custody’, on each occasion it occurs, to clarify that the references to a person being in custody are to persons being held in prison, and do not include persons held in police custody.

##### *Section 39: Detention under compulsion orders*

##### **Amendment of section 57**

115. Section 39 of the Act amends section 57 of the 1995 Act. Section 57(2) of the 1995 Act sets out the disposals available to the court in cases where the accused has been acquitted on grounds of lack of criminal responsibility (section 51A) or where the accused has been found to be unfit for trial (section 53F) and has been found to have committed the acts or omissions constituting the offence following an examination of facts (section 55). Section 57(2) sets out a number of different orders which the court can make in such cases. This includes at section 57(2)(a) making a compulsion order authorising the detention of the person in hospital and at section 57(2)(b) a restriction order in addition to a compulsion order made under section 57(2)(a).
116. **Section 39** substitutes the words “authorising the detention of the person in a hospital” in section 57(2)(a) of the 1995 Act with the words “(whether or not authorising the detention of the person in a hospital)”. This has the effect of clarifying that either a community-based compulsion order (where the offender is not detained in hospital) or a compulsion order authorising detention in hospital can be made in respect of a person who is unfit for trial or acquitted on grounds of lack of criminal responsibility.
117. **Section 39** also makes a consequential amendment to section 57(2)(b) of the 1995 Act, by substituting paragraph (b) for the words “subject to subsection (4A) below, make a restriction order in respect of the person (that is, in addition to a compulsion order authorising the detention of the person in a hospital)”. This will have the effect

of providing that a restriction order may only be made where a compulsion order authorising detention of the person in hospital is also made.

#### ***Section 40: Periods for assessment orders***

118. Section 52D of the 1995 Act makes provision for assessment orders. If a person has been charged with an offence, the case has not been concluded, and it appears to the prosecutor that the person has a mental disorder, the prosecutor may apply to the court for an assessment order to allow the appropriate examination and assessment by an approved medical practitioner of a person prior to trial or after conviction but before sentencing. The time periods for assessment orders are amended by section 40 of the Act.

#### **Amendment to sections 52D, 52F, 52G and 52H**

119. **Section 40(2)(a)** changes the way in which timescales for removal of a person to hospital under an assessment order (AO) are calculated. At present the AO authorises the removal to and detention of a person in a specific hospital for up to 28 days, beginning with the day that the order is issued and ending 28 days after that event. This approach is different from the general rule applicable to the computation of time periods in the criminal court where time periods are calculated from the day the relevant order begins to the end of the day following the expiry of the relevant period. Section 40(2)(a) amends section 52D of the 1995 Act to align the computation of time periods under the parts of the 1995 Act amended by the 2003 Act, to the computation of time periods generally found in criminal procedure. This approach is replicated in the remainder of section 40 for the purposes of computation of time periods with regard to supplementary provision for AOs, review of AOs, and early termination of AOs in sections 52F, 52G and 52H of the 1995 Act respectively.
120. In addition, section 40(4) amends the period of extension for consideration of a case. If the court is satisfied on receipt of an assessment report under 52G(1), that further time is necessary to consider the case, it may on one occasion only make an order extending the AO for 14 days, beginning with the day on which the order would otherwise cease to authorise the detention of the person in hospital and expiring at the end of the 14 days following that day. This is an increase of 7 days from the previous power to extend an AO.

#### ***Section 41: Periods for treatment orders***

#### **Amendment of sections 52M, 52P, 52R**

121. Treatment orders can be made by a court and authorise certain measures, including, if required, the removal to hospital and detention of a person there, and the giving of specified treatment. Provision for treatment orders is made in sections 52K to 52U of the 1995 Act. Section 41 amends the timescales for treatment orders in sections 52M, 52P and 52R in the same way, and for the same purpose as the timescales for assessment orders (AOs) are amended by section 40 of the Act.

#### ***Section 42: Periods for short term compulsion***

122. Section 53 of the 1995 Act makes provision for interim compulsion orders (ICOs). These orders can be made by the court after conviction if a court is satisfied, on the written or oral evidence of two medical practitioners that the offender has a mental disorder.

#### **Amendment of sections 53, 53A, 53B and 54**

123. In the same way that section 40 of the Act amends the timescales for assessment orders, and section 41 amends the time periods for treatment orders, section 42 amends section 53 and section 53A of the 1995 Act in respect of the timescales for ICOs. This

section also amends section 53B and section 54 in respect of the timescales for the review and extension of ICOs in the same way.

### ***Section 43: Periods for compulsion orders***

#### **Amendment of sections 57A, 57B and 57D**

124. Sections 57A to 57D of the 1995 Act make provision for compulsion orders (CO), which may be made by the courts after conviction if the court is satisfied on the written or oral evidence of two medical practitioners that the offender has a mental disorder.
125. Section 43 of the Act amends the timescales for COs to bring the computation of these timescales in line with practice in criminal procedure more generally. Section 43 amends sections 57A, 57B and 57D of the 1995 Act in the same way and for the same purposes as was the case with sections 39, 40, 41 and 42 of the Act.

### ***Section 44: Periods for hospital directions***

#### **Amendment of sections 59A and 59C**

126. Hospital directions (HDs) are directions which allow a person to receive appropriate medical treatment for mental disorder in hospital, and then, if they become well, to be transferred to prison to complete the prison sentence imposed at the time of making the HD. In accordance with earlier changes made in the Act, section 44 amends sections 59A(4)(b), 59A(7)(a) and 59C to bring the computation of the relevant timescales in these sections in line with the way timescales are calculated for AOs, treatment orders and compulsion orders under the 1995 Act.

### ***Section 45: Variation of interim compulsion orders***

127. When an interim compulsion order (ICO) is made under section 53 of the 1995 Act, the court will specify a hospital to which the offender is to be admitted. Section 53B concerns the review and extension of ICOs. At present whilst the terms of an order can be extended, it is not possible for the court to direct that an offender be moved to a different hospital, notwithstanding the fact that it may have become apparent during the course of the initial period of the ICO that the present hospital was not suitable for the offender in question.

#### **Amendment of section 53B**

128. Section 45 of the Act provides a power for the court to direct that, if it is appropriate to do so, the offender be admitted to a different hospital, specified by direction. If that is done, section 32(2)(c) provides that this is to have the same effect as if the hospital specified in the direction were the hospital specified in the ICO.

### ***Section 46: Transfer of patient to suitable hospital***

129. In certain situations, it becomes apparent that a person who is subject to an assessment order (AO), treatment order (TO), interim compulsion order (ICO) or temporary compulsion order (TCO) and has been admitted to hospital by virtue of that order, would be more appropriately treated in another hospital.

#### **New section 61A**

130. Section 46 of the Act inserts section 61A into the 1995 Act, which gives a person's responsible medical officer (RMO) the authority to transfer a person subject to an AO, a treatment order, an interim CO, or a temporary compulsion order to a hospital other than that originally specified by the court. Such a transfer can only occur once, and in making the transfer the RMO must be satisfied both that the current hospital is not suitable and that the new hospital is suitable for the purpose for which the order is made.

Before carrying out the transfer, the RMO must, as far as practicable, inform the person of the reason for the transfer, notify the managers of the specified hospital and obtain the consent of the managers of the other hospital and the Scottish Ministers. After the transfer, the RMO must notify any solicitor acting for the person, and the court which made the order.

### ***Section 47: Specification of Unit***

#### **New section 61B**

131. Section 47 of the Act inserts section 61B into the 1995 Act. It provides that any reference to a hospital in Part VI of the 1995 Act may be read as a reference to a hospital unit, where a “hospital unit” means any part of a hospital which is treated as a separate unit. The effect is that any order or direction which may already be made under Part VI of the 1995 Act authorising the detention of a person or patient in a specified hospital, may be made authorising detention in a specified hospital unit. This relates to assessment orders, treatment orders, interim compulsion orders, temporary compulsion orders, compulsion orders, compulsion orders and restriction orders, hospital directions and transfer for treatment directions.
132. **Section 47** also makes provision as to how section 61A of the 1995 Act (inserted by section 46 of the Act) is to apply in relation to a transfer from one hospital unit to another within the same hospital. The effect is that persons subject to assessment orders, treatment orders and interim compulsion orders will be able to be transferred to another hospital unit, where the order in question specifies the hospital unit in which the person is to be detained. The conditions for transfer set out in section 61A reflect that the transfer is within a single hospital.

### ***Section 48: Transfer from specified unit***

#### **New section 218A**

133. **Section 48** inserts section 218A into the 2003 Act. Patients subject to compulsion and restriction orders (COROs), hospital directions or transfer for treatment directions, can be subject to an order or direction specifying a hospital unit rather than a hospital. New section 218A allows hospital managers to transfer a patient who is subject to an order specifying a hospital unit, to another unit within the same hospital, but only if the Scottish Ministers consent to that transfer. Again, hospital unit is defined as meaning any part of the hospital treated as a separate unit.

### ***Section 49: Consequential repeals***

134. Section 9 of the Crime and Punishment (Scotland) Act 1997, and paragraph 66 of schedule 7 to the Criminal Justice and Licensing (Scotland) Act 2010, relating to power to specify hospital units, are repealed by section 49 of the Act.

### ***Section 50: Information on extension of compulsion order***

#### **New section 153A**

135. Section 151 of the 2003 Act sets out the steps that a responsible medical officer (RMO) must take when he or she has determined that a compulsion order (CO) is to be extended without change. In such cases, an RMO must prepare a record setting out the reasons for the determination and whether the mental health officer (MHO) agrees, disagrees or has not expressed a view, and, in the case of a disagreement, the reasons for that, the type of mental disorder suffered by the patient and whether that has changed from the disorder in the original CO. This record must be submitted to the Tribunal and a copy sent to the patient (unless the RMO considers there would be significant risk to the patient in doing so), the patient’s named person, the MHO and the Commission. The

Tribunal must be informed if the RMO is sending a copy or not to the patient and, if not, the reasons for that decision. When the MHO disagrees with the determination, or the type of mental disorder differs from that originally recorded in the CO, the RMO's decision to extend the CO must be reviewed by the Tribunal.

136. Section 50 of the Act inserts new section 153A which sets out new duties for the MHO when the Tribunal is required by section 165(2)(a) of the 2003 Act to review the determination. That situation occurs when (i) the determination states that there is a difference between the type of mental disorder that the patient has and that recorded in the CO; and (ii) where the MHO disagrees with the determination, or has failed to comply with the duties imposed by section 151 of the 2003 Act to inform the patient of the determination, their rights in relation to this and the right to independent advocacy, and as far as practicable interview the patient.
137. When section 165(2)(a) applies, the MHO, must prepare and submit a record to the Tribunal with the patient's name and address and that of the patient's named person and primary carer, if known, details of what the MHO has done in compliance with section 151 of the 2003 Act, and so far as relevant to the extension of the CO, the details of the personal circumstances of the patient, any advance statement of the patient (if known by the MHO), the views of the MHO on the extension of the CO and any other information the MHO considers relevant in relation to the extension of the CO. A copy of this record must also be sent to the patient and the patient's named person, RMO and the Commission. The patient need not receive a copy of the record if the MHO considers so doing would carry a significant risk of harm. The Tribunal must be told if the patient is not receiving the report, and the reasons for this decision.

### ***Section 51: Notification of changes to compulsion orders***

#### **Amendment of section 157 and 160**

138. This section makes consequential minor changes to section 157 and 160 in respect of compulsion orders.

### ***Section 52: Effect of revocation of restriction order***

#### **Amendment of section 198**

139. Part 10 of the 2003 Act contains provisions in relation to compulsion orders and restriction orders. There are various provisions which allow for applications or references to be made by patients subject to such orders and their named persons to the Mental Health Tribunal in respect of these orders. In addition, the Scottish Ministers are also required to refer cases to the Tribunal in certain circumstances. Where, following such an application or reference, the Tribunal considers that it is necessary for a compulsion order and restriction order (CORO) patient to remain subject to a compulsion order but considers that the restriction order is no longer necessary, it may make an order under section 193 of the 2003 Act revoking the restriction order.
140. Section 196 of the 2003 Act provides that any order made under section 193 does not take effect until the occurrence of certain events, which can be summarised as: (1) the expiry of the period for appealing against the Tribunal's order, without any appeal having been lodged; or (2) where an appeal has been lodged, a decision by Scottish Ministers not to seek an order under section 323 suspending the effect of the Tribunal's order, or the court's decision not to grant such an order, or (3) where a section 323 order has been made, the recall or expiry of such an order.
141. Section 198 of the 2003 Act provides that from the day on which the Tribunal makes the revocation order under section 193, the patient is to be treated as being subject to a compulsion order to which Part 9 of the 2003 Act applies which had been made on the day on which the Tribunal revoked the restriction order. And accordingly, from the day

on which the revocation order is made, the patient is subject to the review requirements of Part 9 of the 2003 Act (relating to compulsion orders).

142. **Section 52** substitutes the words “order revoking the restriction order has effect in accordance with section 196 of this Act” for the words “Tribunal revoked the restriction order” in section 198(2) of the 2003 Act. This has the effect that a patient whose restriction order is revoked should not be treated as being subject to a compulsion order (and its attendant review requirements) until such time as the revocation takes effect.
143. This avoids the possibility that the Registered Medical Officer could be required to carry out a review of the compulsion order despite the patient continuing to be subject to a CORO.

### ***Section 53: Clarification of meaning of compulsion order***

#### **Amendment of section 329**

144. Section 329 of the 2003 Act defines ‘compulsion order’ as an order made under section 57A(2) of the 1995 Act. Section 307 of the 1995 Act defines ‘compulsion order’ as having the meaning given by section 57A of that Act.
145. **Section 52** amends section 307 of the 1995 Act and section 329 of the 2003 Act to introduce, for clarity, a consistent definition of compulsion order in both Acts. The amendments provide that a compulsion order means an order under section 57(2)(a) or 57A(2) of the 1995 Act. It makes a consequential amendment to section 1(6)(c) of the 2003 Act.