

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 8 – Mentally Disordered Persons: Criminal Proceedings**

184. Provision for the disposal by the criminal courts of persons with mental disorder involved in criminal proceedings is made principally by Part VI and sections 200 and 230 of the 1995 Act. Part 8 amends the 1995 Act to provide for two new pre-sentence disposals (assessment orders and treatment orders), to replace interim hospital orders and hospital orders with interim compulsion orders and compulsion orders, to provide courts with power to detain acquitted persons and to make minor changes to the provisions on remanding accused persons for inquiry into mental health and on probation with a requirement that the person receives treatment for mental disorder. In addition, Part 8 provides for the transfer of mentally disordered prisoners to hospital.
185. In addition to the amendments made to the 1995 Act by this Part, further amendments are made by paragraph 8 of schedule 4, and repeals are made by schedule 5, to the 2003 Act.

**Chapter 1:** pre-sentence orders

#### ***Assessment orders and treatment orders***

#### ***Section 130: mentally disordered persons subject to criminal proceedings: assessment and treatment***

186. **Section 130** inserts 19 new sections after section 52 of the 1995 Act.

#### **Remit of cases to sheriff court**

187. Section 52A provides that a case involving a person who has been charged with an imprisonable offence in the district court and who appears to have a mental disorder must be remitted to the sheriff court. The sheriff court can then deal with the case as if it had originally been brought in that court, including the making of a mental health disposal. This section replaces and expands on section 58(10) of the 1995 Act.

#### **Assessment order: sections 52B to 52J**

188. These provisions create a new type of disposal – the assessment order.
189. Section 52B provides that, where a person has been charged with an offence, disposal has not yet been made in the proceedings in respect of the offence and the person appears to the prosecutor to be suffering from a mental disorder, the prosecutor may apply to the court for an assessment order. Section 52C provides the Scottish Ministers with similar power where the person is in custody but has not yet been sentenced. Section 52E provides that a court may also make an assessment order on its own initiative if it

appears to the court that the person may have a mental disorder and the court is satisfied as to the matters set out in section 52D.

190. Section 52D sets out the matters as to which the court must be satisfied before it can make an assessment order. The court may make an assessment order only if it is satisfied on the evidence of a medical practitioner that:
- there are reasonable grounds for believing that the person has a mental disorder, that detention in hospital is necessary to assess whether the conditions in subsection (7) are met and that there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person if the order were not made;
  - the hospital proposed by the medical practitioner is suitable for assessing whether the conditions in subsection (7) are satisfied and could admit the person within 7 days of the making of the order; and
  - it would not be reasonably practicable to carry out the assessment unless the assessment order was made.
191. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person.
192. An assessment order may be made only in respect of a person who has not been sentenced (section 52D(5)).
193. If the court makes an assessment order, it may specify in it matters which it requires the responsible medical officer to include in the report to be submitted under section 52G(1) (see section 52D(2)).
194. Subsection (6) sets out the measures authorised by an assessment order, these being:
- the removal, if necessary, of the person to the hospital specified in the order within 7 days of the making of the order by one of the persons mentioned in subsection (6) (a);
  - the detention of the person for the period of 28 days in that hospital; and
  - the giving of medical treatment to the person in accordance with Part 16 of the 2003 Act.
195. The purpose of granting an assessment order is to assess whether the conditions at subsection (7) are met. Those conditions are:
- that the person has a mental disorder;
  - that medical treatment which is likely to prevent the disorder worsening or to alleviate the symptoms or effects of it is available; and
  - that, if the person were not provided with that treatment, there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person.
196. Subsection (8) provides circumstances where the court can make an assessment order in the absence of the person in respect of whom the order is being made.
197. Subsection (9) gives the court power to include directions in the assessment order for the removal of the person to, and detention in, a place of safety pending the person's admission to the hospital specified in the order. "Place of safety" is defined in section 307(1) of the 1995 Act.
198. Subsection (10) provides for the notification of the making of an assessment order.
199. Section 52F(1) provides that if it is not practicable by reason of emergency or other special circumstances to admit the person to the hospital specified in the order within 7 days, the court or the Scottish Ministers (where the person was in custody immediately

prior to the making of the order) may direct that the person be admitted to another hospital. Subsections (2) and (3) deal with notification where a direction has been made. Subsection (4) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the assessment order.

200. Subsections (1) and (3) of section 52G provide that the responsible medical officer must provide a written report to the court within 28 days of the assessment order being made on the results of the assessment undertaken. Specifically, the responsible medical officer must report on whether the conditions mentioned in section 52D(7) are met and on any other matters specified by the court under section 52D(2). Subsection (2) provides for the sending of copies of the report to the persons with an interest listed in that subsection.
201. Subsection (4) allows the court - once only - to extend the assessment order by up to 7 days if it is satisfied that more time is required to complete the assessment. Subsection (5) provides for the circumstances in which the court can extend an assessment order in the absence of the person who is subject to it. Where the court has extended an assessment order it must notify the persons listed at subsection (6) as soon as reasonably practicable after doing so.
202. Subsection (7) provides that the court can make a treatment order after reviewing an assessment order only if it would do so under section 52M, and the relevant provisions of section 52M apply to the making of a treatment order under section 52G as they apply to the making of an order under that section. A treatment order made under section 52G(3)(a) is to be treated in the same way as an order made under section 52M (see section 52G(8)).
203. Subsection (9) places a duty on the responsible medical officer to submit a written report to the court where there has been a change of circumstances which requires a variation of the order since the order was made. The court may then (under subsection (10)) confirm, vary or revoke the order. A variation may allow the transfer of the person to another hospital. If the court revokes the order, it may take any action mentioned in subsection (3)(b) including committing the person to prison or some other institution. It shall revoke the assessment order if satisfied that the person need not be subject to it.
204. Section 52H sets out the circumstances when an assessment order ceases to have effect due to reasons other than those set out in section 52G. The circumstances are-
  - where a treatment order is made;
  - where the person has been charged but no disposal as to the offence had been made when the order was made, the making of a relevant disposal as defined in section 52B(4);
  - where the person has been convicted but not yet sentenced:
    - the deferral of sentence;
    - the making of an order listed in section 52H(3); or
    - the imposition of any sentence.
205. Section 52J sets out the powers of the court where an assessment order expires because its limited duration has ended. The court can commit a person who was subject to an assessment order to prison or other institution to which they would have been committed had the order not been made or deal with them otherwise, as it considers appropriate.

### **Treatment order: sections 52K – 52S**

206. Section 52K provides that, where it appears to the prosecutor that a person, who has been charged but in relation to whom no disposal has been made, may have a mental disorder, an application may be made to the court for a treatment order in respect of

that person. Section 52L provides the Scottish Ministers with similar power where the person charged is in custody but has not been sentenced. Section 52N provides that a court may also make a treatment order on its own initiative without an application being made if it appears to the court that the person may have a mental disorder and the court is satisfied as to the matters set out in section 52M.

207. Section 52M sets out the matters as to which the court must be satisfied before it can make a treatment order and the measures that such an order authorises. Subsections (2), (3) and (4) provide that the court may make a treatment order only if it is satisfied on the evidence of two medical practitioners that the conditions set out in section 52D(7) are met and that there is a suitable hospital available for the admission of the person within 7 days of the order being made. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person. By virtue of section 61(1) of the 1995 Act (as amended by paragraph 8(10) of schedule 4 to the 2003 Act), one of the medical practitioners, on whose evidence the court makes the order, must be an approved medical practitioner.
208. A treatment order may be made only in respect of a person who has not been sentenced (see section 52M(5)).
209. Subsection (6) sets out the measures authorised by a treatment order, these being-
- the removal, if necessary, of the person to the hospital specified in the order within 7 days of the making of the order by one of the persons mentioned in subsection (6) (a);
  - the detention of the person in that hospital; and
  - the giving of medical treatment to the person in accordance with Part 16 of the 2003 Act.
210. Subsection (7) specifies when the court can make a treatment order in the absence of the person in respect of whom the order is being made.
211. Subsection (8) gives the court power to include directions in the treatment order for the removal of the person to, and detention in, a place of safety pending the person's admission to the hospital specified in the order.
212. Subsection (9) provides for the notification of the making of the treatment order.
213. Section 52P(1) provides that if it is not practicable by reason of emergency or special circumstances to admit the person to the hospital specified in the order within 7 days, the court or the Scottish Ministers (for persons in custody and those persons who were subject to an assessment order immediately before the treatment order was made and who were in custody prior to that assessment order being made) may direct that the person be admitted to another hospital. Notice should be given as soon as reasonably practicable after the direction has been made to those persons listed in subsection (4).
214. Subsection (5) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the treatment order.
215. Section 52Q(1) places the responsible medical officer under a duty to submit a report in writing to the court if the officer is satisfied that any of the criteria set out in section 52D(7) are no longer met or there has been a change of circumstances since the order was made which makes detention of the person in hospital no longer appropriate.
216. Subsection (2) provides that if the court, on receiving the report of the responsible medical officer, is not satisfied that the person needs to be subject to the order, it must revoke the treatment order and commit the person to prison or other institution or otherwise deal with them as it considers appropriate. If the court is not satisfied that the person need not be subject to the treatment order it must confirm or vary the order or it can still decide to revoke the order.

217. Section 52R provides that, unless revoked earlier by the court, a treatment order remains in effect until-
- where the person has been charged but no disposal as to the offence had been made when the order was made, the making of a relevant disposal as defined in subsection 52B(4) ;
  - where the person has been convicted but not yet sentenced-
    - the deferral of sentence;
    - the making of an order listed in section 52R(3); or
      - the imposition of any sentence.
218. The orders listed in subsection (3) are the same orders as are listed in section 52H(3).
219. Section 52S sets out the powers of the court where a treatment order ceases to have effect otherwise than under section 52Q(2) or 52R(2). The court can commit the person who was subject to the order to prison or another institution or deal with the person as it considers appropriate.

### **Prevention of delay in trials**

220. Section 52T provides that, where a person is subject to an assessment order or a treatment order, the time limits as set out in sections 65 and 147 of the 1995 Act, are to apply to the person in the same way as those time limits apply to a person detained by virtue of committal for an offence until liberation in due course of law. Subsection (3) provides that any period during which detention of the person is not authorised by virtue of certificates under sections 221 or 224 of the 2003 Act shall still be taken into account for the purposes of calculating these periods.

### **Effect on pre-existing mental health orders**

221. Section 52U provides that, should a person be made subject to an assessment order or a treatment order whilst subject to an interim compulsory treatment order or a compulsory treatment order, then the latter order is suspended while the person remains subject to the assessment order or treatment order.

### **Interim compulsion orders**

#### ***Section 131: mentally disordered offenders: interim compulsion orders***

222. **Section 131** replaces section 53 of the 1995 Act (which made provision for interim hospital orders) with new sections 53 to 53D (which make provision for interim compulsion orders).
223. An interim compulsion order authorises a period of hospital detention for assessment of an offender's mental disorder, the offender's needs and the risk posed, in order to inform the sentencing decision of the court. The order may be made if a court thinks that either a compulsion order combined with a restriction order or a hospital direction may be in prospect. The person made subject to the interim compulsion order has a right of appeal against it being made under section 60 of the 1995 Act (as amended by the 2003 Act).
224. Section 53(1) sets out which offenders may be made subject to interim compulsion order, namely:
- persons convicted in the High Court or the sheriff court of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); and

- persons remitted to the High Court from the sheriff court for sentence for an offence punishable by imprisonment.
225. Subsections (2) to (7) set out the matters as to which the court must be satisfied before it can make an interim compulsion order. Subsection (2) provides that the court must be satisfied on the evidence of two medical practitioners, one of whom must be an approved medical practitioner (see section 61(1) of the 1995 Act as amended by the 2003 Act), that the offender has a mental disorder, as to the matters in subsection (3) and that it is appropriate having regard to the matters mentioned in subsection (4).
226. The matters in subsection (3) are:
- there are reasonable grounds for believing that the conditions outlined in subsection (5) are met, namely-
    - that medical treatment is available, which would be of benefit to the offender and without which the offender would be a significant risk; and
    - that it is necessary to make an interim compulsion order;
  - there are reasonable grounds for believing that it would be appropriate to make either a compulsion order combined with a restriction order or a hospital direction in respect of the offender;
  - a hospital which is suitable for assessing the offender could admit them within 7 days of the order being made; and
  - it would not be reasonably practicable for the assessment to be made without an interim compulsion order being made.
227. The matters to which the court must have regard in making an interim compulsion order, set out in subsection (4), are-
- all the circumstances of the case (including the nature of the offence of which the person was convicted); and
  - any alternative means of dealing with the person.
228. Subsection (7) provides that the person can be admitted to a state hospital only if the court is satisfied that the person needs to be detained under conditions of special security and that those conditions can be provided only in a state hospital.
229. If the court makes an interim compulsion order, it may specify in the order matters which it requires the responsible medical officer to include in the report to be submitted under section 53B(1) (see section 53(2)).
230. Subsection (8) sets out the measures that are authorised when an interim compulsion order is made. These are-
- the removal, if necessary, of the offender to the hospital specified in the order within 7 days of it being made by one of the persons mentioned in subsection 8(a);
  - detention of the offender in that hospital for up to 12 weeks; and
  - the giving of medical treatment to the offender in accordance with Part 16 of the 2003 Act.
231. Subsection (9) gives the court power to include directions in the interim compulsion order for the removal of the offender to, and detention in, a place of safety pending their admission to the hospital specified in the order.
232. Subsection (10) allows the court to make an interim compulsion order in the absence of the offender in respect of whom the order is being made, in specified circumstances.

233. Subsection (11) provides for notification of the making of an interim compulsion order.
234. Subsection (12) prevents the court in making an interim compulsion order from making any of a number of other orders and disposals (listed in subsection (12)(a)) at the same time. The court's power to make orders otherwise in respect of the offender is preserved by subsection (12)(b).
235. Section 53A(1) provides that if it is not practicable by reason of emergency or other special circumstances to admit the offender to the hospital specified in the order within 7 days, the court or the Scottish Ministers may direct that the offender be admitted to another hospital. Subsection (2) provides for the notification of the making of a direction. Subsection (3) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the interim compulsion order.
236. Subsections (1) to (7) of section 53B set out the provisions for the review and extension of interim compulsion orders. Before the expiry of the period specified by the court (of up to 12 weeks) the responsible medical officer must submit a written report with the results of the assessment undertaken and any recommendation as to further renewal for continued assessment or on the appropriate disposal of the person. The responsible medical officer must also send a copy of the report to the offender and to any solicitor acting on the offender's behalf.
237. The interim compulsion order can, under subsection (4), be extended by the court for further periods of up to 12 weeks, subject to an overall cumulative maximum of 12 months (see subsection (5)). Subsection (6) provides when the court can extend an interim compulsion order in the offender's absence.
238. Subsection (8) provides the court with powers, on receiving the report from the responsible medical officer under subsection (1), to revoke the order and either make one of the disposals mentioned in section 53(6) or deal with the offender in any way in which it could originally have done. It cannot, however, make a fresh interim compulsion order. The disposals mentioned in section 53(6) are either a compulsion order combined with a restriction order or a hospital direction.
239. Section 53C provides that an interim compulsion order ceases to have effect if either a compulsion order or a hospital direction is made in relation to the offender, or if the court deals with them in some other way.
240. Section 53D provides that, if an interim compulsion order ceases to have effect other than in the circumstances provided for in section 53B(8) or 53C, the court can deal with the offender in any way in which it could originally have done. It cannot, however, make another interim compulsion order.

## **Remand for inquiry into mental condition**

### ***Section 132: remand for inquiry into mental condition: time limit for appeals***

241. This section amends section 200(9) of the 1995 Act (which provides for the remand of accused persons in custody to allow inquiry into the person's physical or mental condition). The 24-hour time limit previously applicable to an appeal by an offender against an order for committal to hospital, or renewal of such an order, is removed, thereby allowing an offender to appeal at any time during which the committal to hospital continues. Further amendments of section 200 are contained in paragraph 8(13) of schedule 4 to the 2003 Act.