

MENTAL HEALTH (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE STRUCTURE & A SUMMARY OF THE ACT

Part One – the 2003 Act

Section 1: Measures until application determined

Amendment of sections 64 and 65

6. Compulsory treatments orders (CTO) are orders made by the Mental Health Tribunal for Scotland (the Tribunal). A CTO can authorise detention and/or medical treatment in hospital or it can impose compulsory measures in the community. The arrangements for the application for and making of CTOs are contained in Part 7 of the 2003 Act (sections 57 to 129). Section 64 of the 2003 Act sets out powers of the Tribunal when considering an application for a CTO under section 63 of the 2003 Act. If the Tribunal is satisfied that the conditions for a CTO are met, then it may authorise for a period of up to 6 months, measures listed in section 66 of the 2003 Act. Section 65 of the 2003 Act empowers the Tribunal to grant an interim compulsory treatment order where an application has been made for a CTO. A patient can be made subject to measures under an interim CTO for a total period of no more than 56 days.
7. Short term detention certificates (STDC) can be granted in certain circumstances to authorise the detention of a patient in hospital, for 28 days under section 44 of the 2003 Act and for a further 3 days if an extension certificate is granted under section 47.
8. For patients who are already subject to an STDC (or an extension certificate), section 68 provides that once an application for a CTO has been made under section 63, the patient's detention in hospital under authority of the certificate is automatically extended for a further five working days. This is to enable the Tribunal to have sufficient time to come to a decision on the application.
9. Section 1 of the Act provides that if the Tribunal is making a CTO under section 64 or an interim CTO under section 65 and the patient subject to the orders has been detained in hospital under a STDC or an extension certificate under section 44 or 47 of the 2003 Act, the 6 month period, in the case of section 64, or 56 days under section 65 must be reduced by the length of time the patient has been detained under section 47(4)(a) or 68(2)(a).

Section 2: Information where order extended

10. Section 87 of the 2003 Act sets out the steps that a responsible medical officer (RMO) must take when he or she has determined that a CTO 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. Also required to be recorded are, in the case of a disagreement the reasons for the disagreement, the type of mental disorder suffered by the patient and whether that has changed from the disorder in the original CTO.

11. 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 Mental Welfare Commission for Scotland (the Commission). The Tribunal must be told if the RMO is sending a copy or not to the patient and, if not, the reasons for that decision.

New section 87A

12. Section 2 of the Act inserts new section 87A which sets out new duties for the MHO when the Tribunal is required by section 101(2)(a) of the 2003 Act to review the determination. That is, when the determination states that there is a difference between the type of mental disorder that the patient has and that recorded in the original CTO, or the MHO disagrees with the determination, or has failed to express a view.
13. When section 101(2)(a) applies, section 87A requires the MHO to 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 85 of the 2003 Act (and if the MHO has not interviewed the patient, the reasons for that), and so far as relevant to the extension of the CTO, the details of the personal circumstances of the patient, any advance statement of the patient (if known by the MHO, and not withdrawn), the views of the MHO on the extension of the CTO and any other information the MHO considers relevant in relation to the extension of the CTO. A copy of this record must also be sent to the patient, the patient's named person, RMO and the Commission. The MHO need not send a copy of the record to the patient if the MHO considers so doing would carry a significant risk of harm to the patient or others. The Tribunal must be told if the patient is not receiving the report, and the reasons for this decision.

Section 3: Transfer to another hospital

Amendment of section 124

14. Section 124 of the 2003 Act makes provision for patients who are detained in hospital on the authority of a CTO to be transferred by the managers of that hospital to a different hospital, including to a state hospital. Various conditions and requirements, set out in subsections (3) to (13), apply in respect of any transfer.
15. Section 3 of the Act amends section 124 to include reference to interim compulsory treatment orders (ICTOs) in order to allow the transfer between hospitals of patients who are subject to ICTOs, as well as patients who are subject to CTOs.

Section 4: Emergency detention in hospital

Amendment of sections 36, 38, 40 and 42

16. **Part 5** (sections 36 to 43) of the 2003 Act makes provision for removal to and emergency detention in hospital by means of an emergency detention certificate (EDC). Section 36 sets out the procedure for the granting of an EDC authorising the detention of a patient in hospital for a period of 72 hours. An EDC cannot be granted in respect of a patient if the patient is subject to detention by virtue of the provisions listed in section 36(2).
17. Section 4(2) of the Act adds short term detention under section 113(5) of the 2003 Act (non-compliance with a CTO or interim CTO) to that list.
18. Section 38 of the 2003 Act at present provides that in the case of an emergency detention, a hospital manager must inform the following persons that the certificate has been granted: the patient's nearest relative; if the patient's nearest relative doesn't reside with the patient any person who does reside with the patient; the patient's named person (if known); and the Commission. The hospital manager must also notify those persons of the matters notified to them under section 37, i.e. the reason for granting

the certificate, whether the MHO consented to it, if not then why an MHO was not consulted, the alternatives to emergency detention that were considered by the medical practitioner and the reason that any such alternative was decided to be inappropriate.

19. Section 4(3) of the Act amends section 38 to add any guardian or welfare attorney of the patient (if known) to the list of people to be notified. It also amends the Act so that hospital managers will still be required to inform those persons that an emergency detention certificate has been granted, but will have discretion as to whether they are notified of the matters in section 37. Those matters will still require to be notified to the Commission. Section 4(4) and 4(5) of the Act make consequential amendments in respect of the revocation of EDCs in sections 40 and 42 of the 2003 Act.

Section 5: Short term detention in hospital

Amendment of sections 44 and 46

20. Periods of short term detention in hospital are provided for in section 44 of the 2003 Act. In a similar way to section 36(2) of the 2003 Act, section 44(2) lists certain orders, which if in place in respect of a patient, mean that a short term detention certificate (STDC) cannot be granted in respect of the patient. Section 5(2) of the Act adds a detention under section 113(5) of the 2003 Act to the list of orders in section 44(2) of the 2003 Act.
21. Section 46 of the 2003 Act provides that hospital managers must send a copy of a STDC to the Tribunal and the Commission. Section 5(3) of the Act amends section 46 to provide that a copy of the certificate must now be sent to all those who are required to be notified of its granting (i.e. the patient, the patient's named person and any guardian or welfare attorney of the patient). It also provides that the Tribunal and Commission are no longer to receive a copy of the STDC but are still to be given notice of it being granted.

Section 6: Meaning of temporary compulsion

Amendment of section 329

22. Section 6(3) of the Act inserts a definition of "temporary compulsion order" into section 329 (interpretation) of the 2003 Act. In consequence of this, the reference to section 54(1)(c) in the definition of 'appropriate act' in paragraph (c) of section 230(4) of the 2003 Act is repealed.

Section 7: Suspension of orders on emergency detention

Amendment of section 43

23. Section 43 of the 2003 Act deals with the effect of subsequent emergency detention certificates (EDCs) on compulsory treatment orders (CTO). At present where a patient is subject to a CTO and an EDC is granted (for example because a patient's condition has perhaps deteriorated suddenly to the extent that detention in hospital is required), any measures authorised by the CTO cease to have effect whilst the patient is subject to the EDC (with the exception of any measures authorised under section 66(1)(b) of the 2003 Act, i.e., the giving of medical treatment, in accordance with Part 16 of the 2003 Act).
24. Section 7 of the Act amends section 43 of the 2003 Act to make equivalent provision as regards patients subject to a compulsion order or an interim CTO, and who then become subject to an EDC. The result of the amendments in such cases is that any measures authorised by a CO, interim CTO or CTO will cease to have effect for the duration of the EDC, with the exception of the giving of medical treatment in accordance with Part 16 of the 2003 Act (as authorised under section 66(1)(b) of the 2003 Act as regards CTOs and interim CTOs, or section 57A(8)(b) of the 1995 Act as regards compulsion orders).

25. Subsection (3) makes consequential changes to the title and heading of section 43.

Section 8: Suspension of orders on short term detention

Amendment of section 56

26. Section 56 of the 2003 Act makes provision for the effect of subsequent short term detention certificates (STDC) on compulsory treatment orders (CTO). At present where a patient is subject to a CTO and a STDC is granted (because a patient's condition has perhaps deteriorated suddenly to the extent that hospital treatment is required), any measures authorised by the CTO cease to have effect whilst the patient is subject to the STDC.
27. Section 8 of the Act amends section 56 to provide that if a patient is subject to a CTO, CO, or an interim CTO, and that patient becomes subject to a STDC, any measures authorised by the CO, interim CTO or CTO cease to have effect for the duration of the STDC. Subsection (3) makes consequential changes to the title and heading of section 56.

Section 9: Suspension of detention for certain purposes

28. Section 221 of the 2003 Act makes provision for the suspension of detention for patients subject to an assessment order (AO) made under the 1995 Act. At present, the consent of the Scottish Ministers is required for suspending the AO for any period of time. Section 9(3) of the Act provides that consent of the Scottish Ministers will no longer be required if the suspension of detention is required to enable the patient to attend either a hearing in criminal proceedings against the patient or a medical or dental appointment.
29. Section 224 of the 2003 Act makes provision for the suspension of detention for patients subject to a treatment order, interim compulsion order, compulsion order and a restriction order, hospital direction or transfer for treatment direction. The consent of the Scottish Ministers is required for any period of suspension. Section 9(4) of the Act amends section 224 to provide that the consent of the Scottish Ministers will no longer be required when suspension of detention is necessary for such patients to attend either a hearing in criminal proceedings against the patient, or a medical or dental appointment.
30. Section 127 of the 2003 Act makes provision for the suspension of detention for patients who are subject to a CTO or interim CTO. That section also applies in relation to patients who are subject to relevant compulsion orders, by virtue of section 179 of the Act. Sections 127, 221 and 224 of the 2003 Act are also amended by section 9 of the Act to provide that a certificate suspending detention must record the purpose for which the certificate has been granted. Sections 127, 221 and 224 are also amended to make clear that a certificate granted under these sections can specify either a single period of suspension of detention, or a series of more than one individual period.
31. Section 127(1) of the 2003 Act provides that in relation to a CTO a certificate granted under this section must not exceed 6 months. Section 9(2) of the Act amends that provision so that the certificate can specify a single period of suspension of detention not exceeding 200 days, or a series of more than one individual period within an overall 6 month period.
32. Section 224 of the 2003 Act provides that a certificate granted under this section must not exceed 3 months. Section 9 of the Act amends section 224 so that the certificate can specify a single period of suspension of detention not exceeding 90 days, or a series of more than one individual period within an overall 3 month period.

Section 10: Maximum suspension of detention measures

33. A patient who is subject to a CTO or an interim CTO can have measures authorising the detention under those orders suspended in terms of section 127 of the 2003 Act.

At present, a patient's responsible medical officer (RMO) can grant a certificate suspending detention, as an important part of the patient's rehabilitation process, allowing patients extended time out of hospital, but still subject to conditions imposed by the RMO. The power is exercised at the RMO's discretion. Under the current provisions, an RMO can suspend measures authorised by a CTO for up to 6 months in a single certificate. More than one certificate can be granted but the total period of suspension cannot exceed 9 months in any 12 month period. For the purposes of this provision, section 127(4) provides that a period may be expressed as the duration of an event or a series of events and any associated travel. Section 128 of the 2003 Act allows for suspension of measures other than detention for those subject to a CTO. More than one certificate can be granted but the total period cannot exceed 3 months.

Amendment of section 127

34. Section 10 of the Act amends section 127 of the 2003 Act by providing that the maximum period of suspension of detention for a CTO may not exceed 200 days in any 12 month period; however, any period of suspension authorised by the RMO of 8 hours or less is not to be counted towards that total. For the purpose of calculation, any period of more than 8 hours and less than 24 hours is counted as one day towards the total period, whether it falls within one day or spans two days. The amendments made to section 127 will also apply to patients subject to a compulsion order (CO) by virtue of section 179 of the 2003 Act.

Amendment of section 128

35. **Section 10** amends section 128 so that the maximum total period of suspension of measures other than detention is 90 days. A day counts as a whole day towards the 90 day limit if any period of suspension falls on that calendar day.

Amendment of section 224

36. **Section 10** further amends section 224, by making similar amendments to those made to section 127 referenced above. As is the case with section 127, a patient's RMO can, with the consent of the Scottish Ministers, grant suspension of detention for a maximum of 9 months in a 12 month period. Section 10 amends this to provide that suspension of detention can now be granted for a maximum of 200 days in any 12 month period. Any period of suspension authorised which is 8 hours or less is not to be counted towards the maximum of 200 days, and periods of more than 8 hours but less than 24 hours are to be counted as one day, whether it falls within one day or spans two days.

Section 11: Specification for detention measures

Amendment of section 36 and 44 and new section 71A

37. Section 36 of the 2003 Act allows a medical practitioner to grant an emergency detention certificate which authorises the removal of a patient to a hospital or different hospital, and the detention of the patient in hospital for a period of 72 hours.
38. Section 44 of the 2003 Act allows an approved medical practitioner to grant a short-term detention certificate which authorises the removal of a patient to a hospital or different hospital, the detention of the patient in hospital for a period of 28 days, and the giving to the patient of medical treatment in accordance with Part 16 of the Act.
39. Sections 62 to 68 of the 2003 Act relate to compulsory treatment orders and interim compulsory treatment orders.
40. Section 11 of the Act amends sections 36 (emergency detention in hospital) and 44 (short-term detention in hospital) of the 2003 Act and adds a new section 71A which relates to sections 62 to 68 (compulsory treatment orders). The amendments and new section provide that references in sections 36, 44, 46 to 49 and 62 to 68

to a ‘hospital’ may be read as references to a ‘hospital unit’. This allows emergency detention orders, short-term detention orders, interim compulsory treatment orders and compulsory treatment orders to authorise detention in a specified hospital unit. It also makes clear that a mental health officer’s proposed care plan under section 62 of the 2003 Act may propose that a patient is detained in a specified hospital unit. In addition, the amendments will enable the removal of patients who are subject to emergency or short-term detention certificates to a particular hospital unit or to a different unit within the same hospital (where the patient is in hospital at the time that the order is granted).

Section 12: Transfer of prisoner to hospital unit

Amendment of section 136

41. Section 136 of the 2003 Act provides for the Scottish Ministers to authorise the transfer of prisoners to hospital for treatment for mental disorder.
42. **Section 12** provides that references in section 136 of the 2003 Act to a “hospital” may be read as references to a “hospital unit”, and defines “hospital unit” as meaning any part of a hospital which is treated as a separate unit. This makes clear that a transfer for treatment direction may authorise the transfer of prisoners to, and their detention in, specific hospital units.

Section 13: Transfer from specified unit

New section 124A

43. Section 124A of the 2003 Act (as introduced by section 13 of the Act) applies to patients subject to compulsory treatment orders (CTOs) and interim compulsory treatment orders (ICTOs) and enables the managers of the hospital in which the patient is detained to transfer the patient to another unit within the same hospital. This power will be available only where the order specifies that the patient is to be detained in a particular hospital unit, as provided for by section 13, described above.
44. The effect is that patients subject to CTOs and ICTOs which require their detention in a particular hospital unit may be transferred to another unit within the same hospital. The provisions of section 124(4) to (14), which apply to transfers of those patients between hospitals, will apply with such modifications as are set out at subsection (3), being those necessary to reflect the fact that the transfer is within a hospital.
45. These provisions will also apply to patients subject to compulsion orders (made without a concurrent restriction order) by virtue of section 178 of the 2003 Act.

Section 14: Requirement for medical report

46. Chapter 3 of Part 17 of the 2003 Act is concerned with appeals against detention in conditions of excessive security.
47. Section 264 of the 2003 Act provides at present that a patient detained in a state hospital by virtue of a compulsory treatment order (CTO), a compulsion order (CO), a hospital direction (HD) or a transfer for treatment direction (TTD) can apply to the Tribunal for an order declaring that the patient is being detained in conditions of excessive security. Similar provision is made at section 268 for patients detained in hospitals other than a state hospital. Where the Tribunal is satisfied that the conditions of security are excessive, the Tribunal can make an order declaring that the patient is being detained in conditions of excessive security and specifying a period of three months or less for the relevant Health Board to identify another hospital where the patient could be detained in conditions which would not involve an excessive level of security. By virtue of sections 265 (state hospital) and 269 (non-state hospital), if a suitable alternative hospital has not been identified, a further period of between 28 days and 3 months can be given to the relevant Health Board to identify such a hospital. After that, by virtue of section 266

(state hospital) and 270 (non-state hospital), another 28 days can be given to the relevant Health Board to identify such a hospital.

48. Where the patient is a relevant patient (defined in section 273 as a patient who is subject to a compulsion order and restriction order, a hospital direction or transfer for treatment direction), the Health Board is required to obtain the agreement of the Scottish Ministers that the alternative hospital identified is one in which the patient could be detained in conditions which would not involve an excessive level of security.

Amendment to section 264 and 268

49. **Section 14** amends sections 264 and 268 of the 2003 Act to introduce a new requirement for a report by a medical practitioner to accompany an application to the Tribunal under those sections for an order declaring that a patient is being detained in conditions of excessive security and requiring the Health Board to identify a hospital in which the patient could be detained in appropriate conditions. The report must state that, in the practitioner's opinion, the test set out in regulations is met in relation to the patient, and set out the reasons for that opinion. The regulations referred to are those made under section 271A of the 2003 Act, inserted by section 16 of the Act.

Section 15: Process for enforcement of orders

Amendment of sections 266, 267, 270, 271 and 272

50. Section 15(2) of the Act repeals section 266 so that, where the Tribunal determines that a patient is being detained in a state hospital but does not require to be detained under conditions of special security that can only be provided in such a hospital, the Health Board now has a maximum of six months in which to identify a suitable alternative hospital. Subsections (3) and (4) make changes consequential to this amendment.
51. **Section 15(5)** repeals section 270. This repeal has the same effect as repealing section 266, but in respect of orders relating to detentions in conditions of excessive security for patients in non-state hospitals. Subsections (6) and (7) make changes consequential to this amendment.
52. **Section 15(8)** reflects the repeal of section 266 and 270 in section 272 of the 2003 Act (proceedings for specific performance of statutory duty).

Section 16: Orders relating to non-state hospitals

Amendment of section 268

53. Section 268 of the 2003 Act provides patients in non-state hospitals with a right of appeal against conditions of excessive security. At present, that right extends to "qualifying patients" in "qualifying hospitals", with the definition of what constitutes a qualifying patient or hospital to be provided in regulations. If the Tribunal is satisfied that a patient is being held in conditions of excessive security, then it may make a declaration to that effect and require the relevant Health Board to identify a hospital where the patient could be detained in conditions which would not involve the patient being subject to a level of security which is excessive in the patient's case.
54. Section 16 of the Act makes a number of amendments to the provisions relating to appeals against excessive security for patients detained in a hospital other than a state hospital. Section 16 removes references to "qualifying" in respect of patients who may appeal under this section. Instead, any patient in a "qualifying hospital" will be able to appeal, with the meaning of "qualifying hospital" to be set out in regulations under new section 271A (inserted by subsection (5) of this section).
55. This section also adjusts sections 268 and section 269 so that notification of the proposed hospital, or hospital unit (section 18 provides that references to 'hospital' can

include a ‘hospital unit’) to which the patient is to be moved, is given to the managers of the hospital or unit where the patient is currently resident. This is a slight change from the current requirement (to notify the managers of the ‘qualifying hospital’) to recognise the fact that notification that a patient is moving between units in a hospital may need to be given to the managers of the units as opposed to simply the overall manager of the hospital.

56. Subsections (11) to (14) of section 268, relating to the definition of qualifying patients are repealed and re-enacted (with adjustments) in section 271A. A revised definition of a relevant patient is inserted at section 273 of the 2003 Act by section 16(5) of the Act in consequence of the amendments which remove the term “qualifying” in respect of patients. The definition of “relevant patient” applies to the provisions requiring the Health Board to obtain the agreement of the Scottish Ministers to the hospital identified following an order of the Tribunal.
57. Subsections (2)(b), (3)(b) and (4)(b) of section 16 of the Act provide that the Tribunal may make an order under section 268 or 269 of the 2003 Act (as applicable) where the test specified in regulations under section 271A(2) is met, and must make an order under section 271 of the 2003 Act (recalling an order under section 268 or 269) where the Tribunal is satisfied that the test specified in regulations is not met.

New section 271A

58. Section 16(5) of the Act inserts new section 271A into the 2003 Act. Subsection (1) of inserted section 271A provides that a qualifying hospital is a hospital which is not a state hospital and which is specified or is of a description specified in regulations. Only patients who are detained in qualifying hospitals within the meaning set out in regulations made under subsection (1) will have the right to make an application to the Tribunal under section 268.
59. Subsection (2) of section 271A provides that regulations may also set out the test for the purposes of the Tribunal’s consideration of whether to make an order under sections 268, 269 and 271 of the Act. The test must, by virtue of subsection (3)(a), include a requirement that the Tribunal is satisfied that detention of the patient in the hospital in question involves the patient being subject to a level of security that is excessive in the patient’s case. In addition it may, by virtue of subsection (3)(b), include other requirements.
60. Subsection (4) of section 271A includes a power for Ministers to make provision in regulations about when, for the purposes of regulations made under subsection (2) and sections 268 to 271 of the Act, a patient’s detention in a hospital is taken to involve the patient being subject to a level of security that is excessive in the patient’s case.
61. Subsection (5) of new section 271A provides that regulations may make provision requiring that a person meet criteria besides being a medical practitioner in order to prepare a report in support of a patient’s excessive security appeal for the purposes of the new requirements introduced by section 14 of the Act. This applies both in relation to a patient making an application to the Tribunal in respect of detention in a state hospital (under section 264 of the 2003 Act) or another hospital (under section 268 of the 2003 Act).

Section 17: Section 16: exercise of powers before commencement

62. **Section 17** allows regulations to be made under section 271A of the 2003 Act (introduced by section 16 of the Act) before that section comes into force. The regulations may not come into force before section 16(5) of the Act comes into force.

Section 18: Meaning of hospital in sections 264 to 273 of the 2003 Act

Amendment to section 273

63. Section 18 provides that in Chapter 3 of Part 17 of the 2003 Act, a reference to a hospital may be read as a reference to a hospital unit and that “hospital unit” means any part of a hospital which is treated as a separate unit.

Section 19: Notifying decisions on removal orders

New section 295A

64. Under section 293 or 294 of the 2003 Act a mental health officer (MHO) can apply for a removal order if he or she considers that a person over 16 who has a mental disorder, is at risk of significant harm and that certain circumstances are met. These circumstances are that the person is being subject or exposed to ill treatment or neglect, or that the person’s property is suffering loss or damage, or at risk of such loss or damage and the person is living alone or without care and unable to look after him or herself. Application is made to the sheriff, or justice of the peace, in urgent cases, for the removal of the person at perceived risk, and detention of that person for a maximum of 7 days.
65. Section 19 of the Act inserts new section 295A into the 2003 Act which places a new duty on MHOs to notify the Commission of the decision of the sheriff or justice, and any subsequent recall or variation of the removal order.

Section 20: Detention pending medical treatment

Amendment of Section 299

66. Under section 299 of the 2003 Act a nurse has the power to detain certain patients for a period of up to two hours to enable a medical examination to be carried out, with an extension of one hour after the arrival of the medical practitioner, if the medical practitioner does not arrive within the first hour. Section 20 of the Act amends section 299 to clarify that a nurse will now be able to detain a patient for a maximum of 3 hours, for the purpose of enabling the carrying out of a medical examination of the patient by a medical practitioner.

Section 21: periodical referral of cases

Amendment of section 101, 189 and 213

67. Section 101 of the 2003 Act ensures that the Tribunal reviews a compulsory treatment order (CTO) at least once every 2 years. It does this by requiring a review to be carried out where, during the relevant 2-year period, the Tribunal has not been required to review the CTO by virtue of subsection (2)(a) and none of the following references or applications have been made to the Tribunal; namely, a reference under section 92 or 95 by a responsible medical officer or an application under section 99 or 100 by the patient or patient’s named person.
68. Section 189 of the 2003 Act requires the Scottish Ministers to refer the case of a patient who is subject to a compulsion and restriction order (CORO) to the Tribunal for review every 2 years. The requirement applies where during the relevant 2-year period none of the following references or applications have been made to the Tribunal; namely, a reference under section 185 or 187 or an application under section 191 or 192.
69. Section 21 of the Act amends sections 101 and 189 to provide that an order has to be reviewed under section 101 if a reference or application under sections 92, 95, 99 or 100 has not been determined by the Tribunal, rather than the requirement being based upon when a reference or application has been made. Similarly, it provides that an order has to be referred under section 189 if a reference or application under section 185, 187, 191 or

192 has not been determined by the Tribunal. This is different from the current position which is based upon whether a reference or application has been made, whether or not it has been determined. Requiring that a case has to be reviewed if a reference or application has not been determined by the Tribunal rather than the requirement being based upon when a reference or application has been made will avoid situations where a review is not triggered because an application has been made to the Tribunal and then withdrawn by the patient. Paragraph 13A of schedule 2 of the 2003 Act is repealed in consequence of these changes.

Section 22: Named person not to be automatic

70. Chapter 1 of Part 17 of the 2003 Act makes provision for the appointment and duties of named persons. Under section 250 of the 2003 Act, a person who is 16 years or over is entitled to nominate another person, over the age of 16 to act as a named person. A named person has a similar role to that of a safeguarder and represents the interests of the patient, but does not necessarily represent the patient. The named person should be involved in discussions about care options for the patient and may take part in any legal proceedings relating to compulsory measures.
71. At present, if an adult has not appointed a named person then in the absence of a declaration to the contrary, the person's primary carer becomes the named person, or the person's nearest relative where there is no primary carer by virtue of section 251 of the 2003 Act. An individual can decline to be a named person, and a person can make a declaration that a particular person or persons shall not be a named person. The Tribunal also has the authority to appoint a named person in certain cases under section 257.

Amendment to [section 251](#), [253](#) and [318](#)

72. [Section 22](#) repeals section 251 and 253 so that the carer or relative does not become a named person by virtue of those sections if the patient does not nominate a named person. Therefore a patient aged 16 or over will only have a named person if they choose one. A consequential amendment is made to section 318 and to the definition of named person in section 329 of the 2003 Act.

Section 23: Consent to being named person

Amendment to [sections 250](#) and [257](#)

73. At present, an individual may become a named person under section 251 of the 2003 Act without necessarily consenting to that role, albeit that he or she may decline to act. Section 23 of the Act makes provision for a person to be appointed as a named person by virtue of section 250 or 257, only if he or she has agreed to act as the person's named person and signed a docket to that effect. If no such signed and witnessed docket exists, the appointment of the named person is null and void.

Section 24: Appointment of named person

Amendment of [sections 255](#), [256](#), [257](#) and [320](#).

74. The Tribunal currently has power to appoint a named person, in the absence of an existing named person. Section 24(4) of the Act removes this power from the Tribunal, in relation to adults, and makes associated amendments to section 255 and 256 of the 2003 Act which currently allow the Mental Health Officer and certain persons listed in section 256(2) (including the patient) to apply to the Tribunal to have a named person appointed. A consequential amendment is made to section 320.

New section 257(3A)

75. Subsection (4) of section 24 adds subsection (3A) to section 257. Subsection (3A) makes provision for the Tribunal to remove an existing person if they are considered

inappropriate to act as a named person and, if the individual appearing before the Tribunal is under 16, substitute another person to act as named person.

Section 25: Ability to act if no named person

New section 257A

76. Section 25 of the Act introduces a new section 257A to the 2003 Act which makes provision about who will have the ability to act in relation to a patient, over the age of 16, who does not have a named person and who is incapable in relation to a decision about whether to make a decision to initiate an appeal or application. This ability to act does not apply to the extent that the patient has made a declaration under subsection (6) (b) that they would not wish their primary carer or nearest relative to act in relation to them if they became incapable. Such a declaration must be in writing and can be made in relation to specific persons or all persons.
77. The section allows listed persons to initiate applications or appeals, to the Mental Health Tribunal for Scotland, the Sheriff Principal and the Court of Session, under various sections of the 2003 Act. The listed persons are the patient's guardian, welfare attorney, primary carer or nearest relative. The sections of the 2003 Act under which these listed persons will now be able to initiate an application or appeal are 50(1), 99(1), 100(2), 120(2), 125(2), 126(2), 163(1), 164(2), 192(2), 201(1), 204(1), 214(2), 219(2), 220(2), 264(2), 268(2), 320(2), 321(1) and 322(2). Under section 257A(5), guardians and welfare attorneys are excluded from the application of certain of these provisions where there is an overlap with their existing functions.
78. The section also extends the effect of various sections of the 2003 Act so that certain of the listed persons (the patient's guardian or welfare attorney) will now be entitled to obtain certain information in respect of a decision about the patient's treatment. The information which they will be entitled to is any notice or information that is provided under sections 54(3), 60(1), 87(2)(c), 124(4) or (6), 127(7), 128(3), 129(3) or (4), 153(2) (c), 200(3), 218(4), (6) or (10)(b), 224(8), 225(3) or 226(3) of the 2003 Act. For these sections of the 2003 Act, which are included by virtue of subsection (4), notice is only given under the particular subsections listed. Exemptions are also included in new section 257A(6) so that the guardian or welfare attorney does not receive a copy of the record of a determination to extend a compulsory treatment order (CTO) under section 87(2)(c) or a compulsion order under section 153(2)(c) of the 2003 Act and only receives information about the reasons for a Responsible Medical Officer's (RMO) in relation to decisions about suspension of detention under sections 128(3) or 129(4) if the RMO is satisfied it is appropriate for them to do so.

Section 26: Advance statements to be registered

New sections 276A, 276B and 276C

79. An advance statement is a statement which may be made by a person at any time provided the person making the statement has capacity to make such a statement. The statement must be in writing and witnessed. The advance statement should set out how a person wishes to be treated for mental disorder and the ways in which a person wishes not to be so treated. Section 275 and 276 of the 2003 Act make provision for advance statements.
80. Section 26 of the Act inserts sections 276A, 276B and 276C to the 2003 Act. Section 276A requires health boards to place a copy of any statement or document withdrawing a statement, with the person's medical records and send certain information to the Commission. This information is that a copy of the statement, or a document withdrawing the statement, is held with the person's medical records; the premises at which the medical records are kept; and personal and administrative details essential for identifying the records as the person's.

81. Section 276B places a duty on the Commission, on receipt of this information relating to an advance statement or a document withdrawing the statement, to enter this information in a register to be maintained by the Commission, and make a note of the date on which the entry is made. It also details who may inspect the register (at a reasonable time): namely the person who made the advance statement and whose medical records are mentioned in the entry; with respect to treatment for a mental disorder, any individual acting on the person's behalf; and for the purposes of making decisions or taking steps with respect to the treatment of the person for mental disorder – a mental health officer dealing with the person's case, the person's responsible medical officer, or the relevant health board responsible for the person's treatment.
82. Section 276C introduces a duty on Health Boards to publicise any support offered by the Health Board for making or withdrawing an advance statement and for sending copies of advance statements or documents withdrawing advance statements to a Health Board, and to give information to the Mental Welfare Commission, on request, as to how it has complied with this duty.

Section 27: information about advocacy services

83. Section 259 of the 2003 Act gives every person with a mental disorder the right to access independent advocacy and places duties on local authorities and Health Boards (including the State Hospitals Board for Scotland) to secure, and take appropriate steps to ensure access to, independent advocacy services for persons with a mental disorder in their area.

New section 259A

84. **Section 27** requires local authorities, Health Boards, and the State Hospitals Board for Scotland to provide information to the Mental Welfare Commission on how they have exercised their functions under section 259 of the 2003 Act and how they plan to do so. The Commission may seek information at intervals that it chooses, covering periods of at least 2 years.

Section 28: Communication at medical examination etc.

New section 261A

85. Sections 260 and 261 of the 2003 Act place certain duties on hospital managers, known as appropriate persons for the purposes of these provisions, with regard to the provision of information to patients, and assistance to patients with communication difficulties.
86. Section 28 of the Act inserts section 261A to the 2003 Act, which places additional duties on appropriate persons, in respect of help with communication at certain medical examinations and interviews specified in subsection (4)(a) and (b).
87. If the subject of a medical examination has difficulty in communicating or generally communicates in a language other than English, all reasonable steps must be taken to make arrangements to ensure the subject of the medical examination can communicate during the examination. A written record must be made of the steps taken to facilitate this. Section 28 concludes by defining appropriate person for the purposes of this section; namely the Scottish Ministers in respect of a medical examination under section 136(2) of the 2003 Act (which is a medical examination for medical disordered prisoners) and otherwise, for examinations or interviews held in a hospital, the managers of that hospital, for examinations held elsewhere, the medical practitioner carrying it out, or for interviews, the mental health officer.

Section 29: Conflicts of interest to be avoided

New section 291A

88. Section 29 of the Act inserts a new section 291A into the 2003 Act which provides that there must be no conflict of interest in relation to certain medical examinations carried out for the purpose of certain sections under the 2003 Act. In addition, the new section confers a power upon Scottish Ministers to make regulations which may specify circumstances in which there is to be taken, or not to be taken to be a conflict of interest, and to specify circumstances in which the requirement to have no conflict of interest does not apply. The sections of the 2003 Act to which these provisions apply are sections 36(1), 44(1), 47(1), 57(2), 77(2), 78(2), 139(2), 140(2) and 182(2).

Amendments to sections 36, 44, 47 and 58

89. **Section 29** also removes the existing equivalent provisions from sections 36, 44, 47 and 58, as they are now covered by new section 291A.

Section 30: Safeguarding the patient's interest

Amendment of section 245

90. Section 245 of the 2003 Act provides that before giving a certificate which allows treatment to proceed under sections 235 (certain surgical operations etc. where the patient is capable of consenting), 236 (certain surgical operations etc. where the patient is incapable of consenting), 239 (electro-convulsive therapy etc.) and 241 (treatments given over period of time etc.), 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.
91. Section 30 of the Act amends section 245 to add any guardian or welfare attorney to the people who must be consulted before a certificate is granted.

Section 31: Services and accommodation for mothers

Amendment of section 24

92. Section 24 of the 2003 Act places a duty on health boards to provide services and accommodation for certain mothers with post natal depression, to enable those mothers to care for their child in hospital. Section 31 of the Act amends this provision to extend the duty to provide services for mothers with a mental disorder other than post-natal depression, in addition to provision of services for mothers with post-natal depression. Section 31 of the Act also amends section 24 of the 2003 Act so that the duty that the Health Board must provide these services applies only where the Health Board is satisfied that doing so would be beneficial to the wellbeing of the child.

Section 32: Cross-border transfer of patients

Amendment of sections 289, 290 and 309A

93. Section 32 of the Act makes a number of small changes to provisions relating to cross-border transfer of patients.
94. Sections 289 and 290 of the 2003 Act give the Scottish Ministers power to make regulations allowing, respectively, for the cross-border transfer of patients subject to measures other than detention, and the cross-border transfer of patients subject to detention. Section 32(2) amends section 289 of the 2003 Act by extending the power to make regulations in respect of the cross-border transfer of patients subject to requirement other than detention, to include persons subject to equivalent requirements in a member state of the European Union. Section 32(3) amends section 290 in the same

way in respect of cross-border transfer for patients subject to detention requirements or otherwise in hospital. It also requires regulations under section 290 to provide a right of appeal against the transfer to the patient, the patient's named person or, if there is no named person, any guardian, welfare attorney, carer or nearest relative.

95. Section 309A of the 2003 Act allows the Scottish Ministers to make regulations for and in connection with the keeping in charge of a person who is subject to escorted leave of absence authorised under legislation in force in another part of the UK, or in the Isle of Man or the Channel Islands. Regulations made under that section may make such provision by applying provisions of the 2003 Act dealing with absconding patients (sections 301 to 303 of the 2003 Act), with or without modification, to such patients. This enables regulations to make clear the powers of persons escorting patients under authority conferred under legislation in force in other territories, so that there is clear authority under the 2003 Act for those persons to continue to escort the patient whilst in Scotland.
96. **Section 32(4)** amends section 309A so that regulations made under that section can make provision for and in connection with the keeping in charge of a person who is subject to escorted leave of absence authorised under legislation in force in another member State of the European Union.
97. The effect of all of these changes is that regulations that currently make provision for the cross-border transfer of patients within the UK, under various orders, can now provide for the cross-border transfer of patients within the European Union, provided those patients are subject to equivalent requirements in their home country.

Section 33: Dealing with absconding patients

Amendment of section 303

98. **Section 33** makes changes to sections 303, 309 and 310 of the 2003 Act with regard to provisions for absconding patients. Section 303 of the 2003 Act authorises certain persons to exercise powers in relation to any patient subject to an order authorising detention, where that patient has absconded. In particular, section 303(3)(a)(iii) gives a member of staff of any hospital, and where the patient liable to be taken into custody is subject to a compulsory treatment order which specifies a particular hospital, a member of staff of that establishment, the power, amongst other matters to take an absconding patient into custody.
99. **Section 33(2)** amends section 303(3)(a)(iii) to include a reference to a patient subject to an interim compulsory treatment order as well as a compulsory treatment order.

Amendment of section 309 and 310

100. Section 309 of the 2003 Act enables the Scottish Ministers to make regulations applying sections 301 to 303 of the 2003 Act to patients from England, Wales, Northern Ireland, the Isle of Man or the Channel Islands. Regulations made under section 309 allow persons who have absconded from those jurisdictions and are in Scotland to be taken into custody and returned to their own jurisdiction.
101. Section 33(3) of the Act amends section 309 by extending the power to make regulations applying provisions in relation to absconds, to persons in Scotland subject to corresponding requirements or measures in a member State of the European Union. The section further provides that regulations made under section 309 applying section 301 to 303 to patients from other jurisdictions or member states may apply specific provisions of Part 16 of the 2003 Act to allow persons held in custody by virtue of these provisions to be provided with medical treatment. The regulations may not however apply any of that Part to persons who are subject to detention in accordance with an emergency detention certificate EDC, or authorise medical treatment of the types mentioned in section 234 and 237 of the 2003 Act. The treatment excluded as a result of being

mentioned in those sections is any surgical operation for destroying brain tissue or the functioning of brain tissue, electro-convulsive therapy, and any other types of medical treatment as are specified in regulations made under sections 234 or 237.

102. Section 310 of the 2003 Act currently provides for regulations to provide the circumstances in which certain patients, specified in section 310(3), may be taken into custody, and the steps that can be taken by specified persons upon taking such patients into custody. Section 33(4) of the Act provides that regulations made under that section may specify persons authorised by the patient's RMO as persons who can take such patients into custody.

Section 34: Agreement to transfer of prisoners

103. Where a person who is serving a sentence of imprisonment has a mental disorder requiring treatment, section 136 of the 2003 Act allows for that person to be transferred from prison to a specified hospital under a transfer for treatment direction (TTD). Section 34 of the Act amends section 136 to provide that such a TTD may only be made if a mental health officer has agreed to the making of the direction, unless it is impracticable to obtain such agreement.

Section 35: Compulsory treatment of prisoners

Amendment of schedule 2, part 2

104. Part 2 of schedule 2 to the 2003 Act concerns the organisation and administration of the Tribunal. In particular paragraph 7(4) of schedule 2 provides that the convenor of proceedings before the Tribunal in relation to a patient subject to a compulsion order and a restriction order, a hospital direction (HD) or a transfer for treatment direction (TTD), must be the President of the Tribunal or a member of the Tribunal who serves as a sheriff convenor, unless those proceedings relate solely to the appointment of a named person in respect of the patient, under section 255 and 257 of the 2003 Act.
105. **Section 35** amends paragraph 7 to provide, for proceedings relating to an application for a compulsory treatment order (CTO) in respect of a patient subject to a TTD or an HD, that the convenor does not have to be the President, or a member of the Tribunal who serves as a sheriff convenor. This is in addition to the existing exception for proceedings relating solely to the appointment of named persons.
106. The effect of this amendment is that the default provision in sub-paragraph (3) of paragraph 7 will apply to proceedings relating to an application for a CTO in respect of patients subject to a TTD or an HD, with the result that the convenor of the Tribunal will have to be either the President or a legal member selected from the panel mentioned in paragraph (1)(1)(a) of Schedule 2.

New paragraph 1A, schedule 3

107. Chapter 1 of Part 7 of the 2003 Act is concerned with the application for and making of compulsory treatment orders (CTOs). Schedule 3 to the 2003 Act makes a number of modifications to Chapter 1 of Part 7 insofar as it applies to patients who become subject to a CTO whilst already subject to a HD or TTD.
108. **Section 35(3)** adds a new paragraph to schedule 3, with the result that when a patient is subject to a HD or a TTD, and an application is made for a CTO, notice of the application requires to be given to the Scottish Ministers, in addition to the existing requirement to give notice to the patient, the patient's named person and the Commission.

Section 36: Provision of information by the Commission

109. Section 19 of the 2003 Act provides for the Mental Welfare Commission to provide Ministers with, and publish, statistical or other information relating to the discharge of its functions in accordance with directions given to it by Ministers.
110. **Section 36** amends section 19 to provide a regulation making power to allow for regulations to be made setting out the information to be provided or published by the Commission, rather than this being in accordance with directions by Ministers. Section 36 requires that consultation take place before regulations are made. The regulations will be subject to affirmative procedure.

Section 37 – Review of deaths of patients in hospital for treatment

111. **Section 37(1)** requires Ministers to undertake a review of the arrangements for investigating the death of a patient who, at the time of death, was detained in hospital by virtue of the 2003 Act, the Criminal Procedure (Scotland) Act 1995, or who was admitted voluntarily to hospital for the purpose receiving treatment for a mental disorder. Section 37(2) requires that the review must be carried out within 3 years of the section coming into force.
112. **Section 37(3)** requires that in carrying out the review, Ministers must consult where practicable the nearest relatives of patients who are described in subsection (1) and consult others as appropriate. Section 37(4) requires that Ministers publish a report of the review, lay a copy of it before Parliament and notify persons consulted of its publication.