POLICY NOTE

THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003 REMEDIAL ORDER 2026

SSI 2026/XXX

The above instrument is made in exercise of the powers conferred by section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 ("2001 Act"). The instrument is subject to the affirmative procedure.

Summary Box

The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 ("the draft Order") inserts provisions into the Mental Health (Care and Treatment) (Scotland) Act 2003 ("2003 Act") to allow "recorded matters" to be specified for patients subject to a Compulsion Order ("CO"), Compulsion Order with Restriction Order ("CORO"), Hospital Direction ("HD") and Transfer for Treatment Direction ("TTD").

Introduction

The draft Order amends Parts 9, 10 and 11 of the 2003 Act to extend the ability to specify "recorded matters" to patients subject to a CO, CORO, HD and TTD. This will ensure compliance with the European Convention on Human Rights ("ECHR"), as incorporated into domestic law by the Human Rights Act 1998.

Background

On 19 October 2022, Lord Harrower, sitting in the Outer House of the Court of Session, issued judgment in X v Mental Health Tribunal for Scotland [2022] CSOH 78. The Court held that the Tribunal's lack of power to specify recorded matters for patients subject to a CO amounted to unjustified discrimination under Article 14 of the ECHR, given that such powers exist for civil patients under Compulsory Treatment Orders ("CTOs"). The relevant provisions were declared unlawful and incompatible with Convention rights. Following the ruling, Scottish Ministers concluded that amendments to the 2003 Act were necessary to ensure compliance with Article 14.

Currently, recorded matters apply only to CTOs under Part 7 of the 2003 Act. Before applying for a CTO, the Mental Health Officer ("MHO") must prepare a proposed care plan under section 62(2). When the MHO applies to the Mental Health Tribunal for Scotland ("the Tribunal") for a CTO, the proposed care plan is submitted under section 63(3)(c). If the Tribunal grants the CTO, it may also specify recorded matters under section 64(4)(a)(ii). In addition, the Tribunal can later amend these matters, and the Responsible Medical Officer ("RMO") must refer the case back if such matters are not provided.

Civil patients are admitted solely on clinical grounds, without criminal justice involvement. Forensic patients, by contrast, have been convicted or acquitted on the grounds of a mental disorder and may be subject to a CO or a CORO. Other measures include HDs for offenders requiring hospital treatment and TTDs for prisoners needing care in secure mental health facilities.

Recorded matters aim to ensure that identified needs are met, reflecting the principle of reciprocity in the 2003 Act: where compulsory treatment is imposed, health and social care authorities have a corresponding duty to provide appropriate services.

Parliamentary Procedure

Following the Court's finding that the relevant provisions were incompatible with Article 14 ECHR, Scottish Ministers considered that amendments to the 2003 Act were required. Section 12(1) of the Act 2001 enables Scottish Ministers to make a remedial order where legislation is or may be incompatible with Convention rights. Under section 12(2), Ministers must be of the opinion that there are compelling reasons for making a remedial order rather than taking other action.

Scottish Ministers have used the general procedure under section 13 of the 2001 Act. The Proposed Draft Order was laid for consultation, public notice was given, and written observations were invited and considered. Following analysis of the responses, Scottish Ministers have made targeted changes to the draft Order and are now laying it before the Scottish Parliament for approval by resolution of the Parliament. The second laying is scheduled for 4 September 2026, with commencement set for 13 November 2026.

Policy Objectives

The policy objective is to ensure parity between civil and forensic patients by enabling the Tribunal to specify, review, and modify recorded matters for patients subject to relevant forensic orders, namely CO, CORO, HD and TTD. Scottish Ministers must act compatibly with the requirements of the ECHR and have determined that there is no reasonable justification for excluding patients subject to these related orders from the recorded matters process.

The proposed changes will enable patients, and their named person, the right to apply to the Tribunal for changes to recorded matters. The Tribunal's powers will be extended to vary orders and directions by modifying recorded matters, with 'modify' defined to include adding, removing, or amending recorded matters.

Summary of the Draft Order

The draft Order will amend the 2003 Act so that individuals subject to a CO, CORO, HD or TTD can have recorded matters specified in their mental health order. It clarifies that 'modifying' recorded matters includes adding, removing, or changing them. RMOs, MHOs, Scottish Ministers, and the Tribunal will have expanded powers and duties to review and implement changes, supported by procedural safeguards such as consultation with MHOs, notifying patients, and including changes in applications and reports. The intention is for the changes to mirror the existing CTO provisions and extend them to patients subject to the relevant forensic orders.

<u>COs</u>

Article 2 of the draft Order makes extensive amendments to Part 9 of the 2003 Act concerning COs, updating sections 145, 150, 154, 155, 156, 158, 159, 164, 166, 167, 168,

169, 171, 172 and 175, and inserting new sections 161A and 161B. The changes integrate "recorded matters" throughout the statutory framework in the same way as existing "measures", ensuring they can be considered, specified, modified, reviewed, and determined through the review, variation and Tribunal processes applicable to COs. The amendments place new duties on RMOs in relation to the review and delivery of recorded matters, enable patients, named persons and the Tribunal to seek or make changes to recorded matters, and provide for Tribunal references where a recorded matter is not being delivered. Consequential amendments clarify the Tribunal's powers and expand the definition of "modify" to encompass the addition, removal and amendment of recorded matters.

Separately, Article 3 amends the Mental Health (Compulsion Orders—Documents and Reports to be Submitted to the Tribunal) (Scotland) Regulations 2005 by inserting regulation 4A. This enables the Tribunal to request a report and relevant information from the MHO on the non-provision of a recorded matter, assisting the Tribunal in its consideration of such references.

COROs

Article 4 makes corresponding amendments to Part 10 of the 2003 Act in relation to COROs. Article 4 amends sections 182, 184, 188, 190, 191, 192, 193, 194 and 199 and inserts new sections 184A, 184B, 185A, 188A, 188B, 188C and 188D.

The changes integrate "recorded matters" into the existing statutory framework in the same way as "measures", ensuring they can be considered, reviewed and varied through the processes applicable to COROs. The amendments place new duties on RMOs and the Scottish Ministers to review the appropriateness and delivery of recorded matters, provide mechanisms for referral to the Tribunal where recorded matters are not being delivered, enable patients and named persons to seek variations, and expand the Tribunal's powers to modify recorded matters.

Consequential amendments also extend the definition of "modify" to include the addition, removal and amendment of recorded matters.

Directions – HDs and TTDs

Article 5 makes corresponding amendments to Part 11 of the 2003 Act in relation to HDs and TTDs. Article 5 amends sections 206, 208, 212, 214 and 215, and inserts new sections 208A, 208B, 210A, 212A, 212B, 212C, 212D, 213A, 213B and 217A.

The changes incorporate "recorded matters" into the existing statutory framework, ensuring they can be considered, reviewed and varied in the same way as other elements of these directions.

The amendments place new duties on RMOs and the Scottish Ministers to review the appropriateness and delivery of recorded matters, establish processes for referral to the Tribunal where recorded matters are not being provided, enable patients and named persons to seek variations, and extend the Tribunal's powers to modify recorded matters.

Consequential amendments also clarify that "modify" includes the addition, removal, amendment and initial specification of recorded matters.

Article 6 amends section 64 of the 2003 Act to make clear that, when making a CTO, the Tribunal may specify a recorded matter. It also substitutes the definition of "recorded matter" in section 329 so that it includes such medical treatment, community care services, relevant services, other treatment, care or service as the Tribunal considers appropriate.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the Act), the Scottish Ministers certify that, in their view, the draft Order is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

Scottish Ministers consulted on the Proposed Draft Order between 23 January 2026 and 23 March 2026. The consultation was undertaken in accordance with section 13(3)(b) of the 2001 Act, which requires Scottish Ministers to give public notice of the Proposed Draft Order and invite written observations within 60 calendar days, excluding any days when the Scottish Parliament is dissolved or is in recess for more than four days.

The consultation was published on the Scottish Government website and made available through Citizen Space. The consultation material included the Consultation Paper (and easy read version), Proposed Draft Order, the Statement of Reasons, and supporting impact assessments, including the Interim Equality Impact Assessment, the Child Rights and Wellbeing Impact Assessment and the Partial Business and Regulatory Impact Assessment. Responses could be submitted through Citizen Space or by email.

Scottish Ministers also proactively drew the consultation to the attention of relevant stakeholders. This included advocacy organisations, Health Boards, Integration Authorities, Local Authorities, the Mental Health Tribunal for Scotland, the Mental Welfare Commission for Scotland, professional bodies, forensic mental health services, legal aid representatives and justice partners. This targeted engagement was intended to ensure that those affected by the proposals, and those involved in implementing them, had an opportunity to comment.

The Scottish Government received 23 responses to the consultation, comprising 17 responses from organisations and 6 from individuals. Respondents were broadly supportive of the policy intention to extend the recorded matters framework to patients subject to relevant forensic mental health orders, and recognised that the Proposed Draft Order would address an inequality between civil and forensic patients, strengthen parity of treatment and support compliance with Convention rights.

Respondents also commented on the practical operation of the proposals. Key themes included the importance of clear guidance, accessible information for patients and named

persons, updated forms and processes, training, access to independent advocacy and, where required, legal support. A number of respondents highlighted potential implementation challenges, including existing workforce pressures, Tribunal capacity, and the availability of services needed to deliver the treatment, care, support, accommodation or rehabilitation identified in recorded matters.

Following the close of the consultation, officials analysed the responses and Scottish Ministers had regard to the observations received. The Scottish Government subsequently published the consultation analysis and Scottish Government response, alongside consultation responses where respondents gave permission for publication, and took steps to draw these publications to the attention of relevant stakeholders.

Having considered stakeholder comments on the drafting, Scottish Ministers made targeted changes to the Proposed Draft Order before laying it for approval. These were mainly directed at improving clarity and consistency, and ensuring that application routes to the Tribunal operate equally across the relevant forensic orders. The changes clarify the operation of the CORO provisions, including the circumstances in which the Tribunal may vary a compulsion order by modifying recorded matters, where a restriction order remains in force. The application route for patients and named persons in CORO cases has also been revised so that it is limited to modification of recorded matters, ensuring it aligns with the Tribunal's powers.

Further changes have been made to improve the clarity, consistency and operation of the Order. A technical cross-reference in the HD and TTD provisions has been updated, and the CORO provisions on non-provision of recorded matters have been adjusted to refer to recommendations made during time-to-time reviews as well as mandatory reviews. Scottish Ministers also considered whether further express references to the definition of "modify" were needed. No such references have been added, as the existing definition is drafted in a manner that is consistent with the definition that applies to CTOs in the 2003 Act. The definition already includes adding a recorded matter, including where none is currently specified, and applying that definition consistently avoids creating unintended distinctions across the Order and within the 2003 Act. The reasons for the changes are set out in the Statement of Reasons included at Annex A.

A list of respondents who agreed to the publication of their details has been made available as part of the consultation material. This includes, VOX Scotland, Social Work Scotland, The Law Society of Scotland, The Mental Welfare Commission for Scotland, Mental Health Tribunal for Scotland and the Royal College of Psychiatrists in Scotland.

Impact Assessments

Updated impact assessments are being laid alongside the draft Order. These have been revised following the statutory consultation and reflect the consultation analysis, stakeholder feedback and implementation considerations identified during policy development:

- Equality Impact Assessment (EQIA): The updated Equality Impact Assessment identifies positive impacts in relation to age and disability, and neutral impacts for other protected characteristics, with implementation work focused on accessible

information, communication support, advocacy and monitoring to support equality of access in practice.

- Child Rights and Wellbeing Impact Assessment (CRWIA): The updated Child Rights and Wellbeing Impact Assessment concludes that direct impacts on children and young people are likely to be limited due to the small number potentially affected, but may be positive where recorded matters support age-appropriate treatment, participation in decision-making and safe, meaningful family contact arrangements where appropriate.

- Final Business and Regulatory Impact Assessment (BRIA): The Final BRIA indicates that the number of additional cases is expected to be small, estimated at around 19 to 64 cases per year, and that any operational impacts will mainly relate to Tribunal activity, advocacy, monitoring and delivery of services specified as recorded matters. These impacts are expected to be manageable through guidance, revised forms and implementation planning with relevant partners.

- Island Communities Impact Assessment (ICIA) screening and decision record: The screening found that a full ICIA is not required, as the Order applies uniformly across Scotland and is not expected to have a significantly different effect on island communities compared with other communities.

Financial Effects

A Final BRIA has been completed. It concludes that the impact on businesses, healthcare providers and third sector organisations is expected to be low.

Scottish Government
Mental Health and Social Care Directorate
Forensic Mental Health Policy Unit
September 2026

ANNEX A

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

Statement of Reasons (as published separately)

1. Introduction

This Statement of Reasons is provided by the Scottish Ministers in accordance with section 13(4) of the Convention Rights (Compliance) (Scotland) Act 2001.

2. Consultation and observations received

The Proposed Draft Order was laid before the Scottish Parliament on 23 January 2026 and was subject to a 60-day consultation period from 23 January to 23 March 2026. A total of 23 responses were received, including 17 from organisations and 6 from individuals.

Responses showed broad support for the policy intention of extending recorded matters to relevant forensic mental health orders. Respondents also raised practical issues relating to implementation, including guidance, accessibility, advocacy, workforce capacity, Tribunal demand, resourcing and monitoring.

3. Changes made to the draft Order

Following consideration of the observations received, and comments from the Mental Health Tribunal for Scotland and legal/technical review, the Scottish Ministers have made a small number of changes to the draft Order. These include:

- making clear that, in continuing CORO cases, the Tribunal must be satisfied that both the compulsion order and the restriction order remain necessary;
- correcting an erroneous cross-reference in the TTD provisions; and
- ensuring that the process for non-provision of recorded matters in CORO cases also takes account of relevant time-to-time review recommendations.

4. Reasons for the changes

The changes have been made to improve the clarity, accuracy and effective operation of the Order. They address technical drafting points and do not alter the underlying policy intention of extending the recorded-matters framework to relevant forensic mental health orders.

5. Points not taken forward

The Tribunal also raised a concern that some wording could be read as suggesting that a recorded matter must already exist before it can be modified. Scottish Ministers have considered this point but do not propose to make further changes. This is because the Order is drafted in a manner that is consistent with the definition that applies to CTOs in the 2003 Act.

The definition already makes clear elsewhere that “modify” includes adding a recorded matter for the first time, including where none is currently specified. Adding further wording to repeat this could make the provisions more complex and risk suggesting that “modify” has different meanings in different parts of the Order and the 2003 Act.

6. Conclusion

Having had regard to the observations received, the Scottish Ministers consider that the draft Order should proceed to final laying. The draft Order remains focused on remedying the identified Convention rights incompatibility and supporting parity between civil and forensic patients in relation to recorded matters.