

Health, Social Care and Sport Committee  
Tuesday 17 February 2026  
8th Meeting, 2026 (Session 6)

## **Note by the Clerk on the Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 [Proposed Draft Order]**

### **Overview**

1. At this meeting, the Committee will consider a proposed Draft Order: The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 (SG/2026/33).
2. This is a proposed draft order which must be laid before the Parliament for a 60-day period, together with a statement of reasons for proposing to proceed by remedial order rather than by other means. More information about the instrument is summarised below:

**Title of instrument:** [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 Remedial Order 2026 \[Proposed Draft Order\]](#)

**Laid under:** [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#)

**Laid on:** 16 January 2026

**Procedure:** Laid only

### **Procedure**

3. This Proposed Draft Order is subject to a form of super-affirmative procedure under section 12 of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001](#). The power allows the Scottish Ministers to make remedial orders to remedy an incompatibility with Convention rights.
4. Where Ministers propose to make a remedial order under section 12, they must lay a proposed draft of the Order before the Parliament for a 60-day period, together with a statement of their reasons for proposing to proceed by remedial order rather than by other means. Ministers must also consult on the proposed draft and have regard to any comments made during the 60-day period.
5. Once that stage is complete, Ministers must lay a finalised draft remedial order before the Parliament, subject to the affirmative procedure. That draft must be accompanied by a statement summarising the representations received and explaining any changes made to the draft as originally laid.
6. At this stage, therefore, the Parliament is considering the proposed draft order during the initial 60-day consultation and pre-scrutiny phase, ahead of the laying of a finalised draft instrument at a later date.

7. As such, there is no formal procedure associated with the instrument at this stage.

## Purpose of the instrument

8. The purpose of the instrument is to insert 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").
9. The [Policy Note](#) accompanying the instrument explains:

"On 19 October 2022, Lord Harrower, sitting in the Outer House of the Court 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."
10. The Policy Note is included in the annexe. It includes a [summary of consultation to be undertaken on the proposed draft order](#) and the anticipated financial effects as well as a Statement of Reasons for proposing to proceed by remedial order rather than by other means. The following impact assessments have been carried out and will be updated and revised following the conclusion of the consultation:
  - [Interim Equality Impact Assessment \(EQIA\)](#).
  - [Child Rights and Wellbeing Impact Assessment \(CRWIA\)](#).
  - [Partial Business and Regulatory Impact Assessment \(BRIA\)](#).

## Statement of Reasons

11. Setting out the Scottish Ministers' reasons for proposing to proceed by remedial order rather than by other means, the Statement of Reasons annexed to the Policy Note accompanying the Proposed Draft Order concludes:

"Scottish Ministers consider that a Remedial Order under the general procedure is the most appropriate and proportionate means of remedying the legislative defect, ensuring equality of treatment for civil and forensic patients while maintaining safeguards and flexibility within the mental health system. A Remedial Order enables a focused and timely fix without waiting until wider mental health law reform is introduced. It also provides for consultation on the draft instrument and parliamentary scrutiny under the general procedure, and it avoids the risk of calls for broader amendments that could delay progress."

## **Delegated Powers and Law Reform Committee consideration**

12. The DPLR Committee considered the instrument on 10 February and reported on it in its [17<sup>th</sup> Report, 2026](#).
13. In relation to the proposed draft instrument, the DPLR Committee agreed to note the following:
  - the proposed order appears capable of remedying the incompatibility with Convention rights identified in X v Mental Health Tribunal for Scotland;
  - the proposed order goes beyond addressing the specific incompatibility identified by the Court, which concerned recorded matters in the context of Compulsion Orders, by extending the recorded matters framework to other types of forensic orders, but that this is permitted by the scope of the power in section 12 of the Convention Rights (Compliance) (Scotland) 2001 Act;
  - full technical scrutiny of the instrument will be carried out by the Committee when the finalised draft order is laid under the affirmative procedure; and
  - the incompatibility was identified in October 2022, and that the proposed order is not expected to come into force until November 2026. The incompatibility is capable of affecting not only the individual petitioner in the case of X, but others in an analogous position, namely persons subject to forensic (as opposed to civil) mental health orders, who are currently unable to have recorded matters specified. It is unclear how many persons may have been (and may continue to be) detrimentally affected during this period. It draws this point to the attention of the lead committee on this draft order.

## **Committee consideration**

14. Members are invited to consider the instrument and decide whether there are any points they wish to raise. If there are, options include:
  - seeking further information from the Scottish Government (and/or other stakeholders) through correspondence, and/or
  - inviting the Minister (and/or other stakeholders) to attend the next meeting to give evidence on the instrument.

It would then be for the Committee, at the next meeting, to consider the additional information gathered and decide whether to make recommendations in relation to the proposed draft instrument.

15. If members have no points to raise, the Committee should note the proposed draft instrument (that is, agree that it has no recommendations to make).

Clerks to the Committee  
February 2026

## **Annexe: Scottish Government Policy Note**

### **POLICY NOTE**

#### **THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003 REMEDIAL ORDER 2026 – POLICY NOTE**

#### **SSI 20XX/XXX**

#### **Summary Box**

The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 (“the Proposed 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 Proposed 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 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 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 s62(2)). When the MHO applies to the Mental Health Tribunal for Scotland (“the Tribunal”) for a CTO, the proposed care plan is submitted under s63(3)(c)). If the Tribunal grants the CTO, it may also specify recorded matters under s64(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 grounds of 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**

The Court's declaration of incompatibility engages section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 ("2001 Act"). Under section 12(1) and (3), Scottish Ministers may make a Remedial Order where they believe there are compelling reasons for addressing Convention incompatibility via subordinate legislation. The reasons are set out in the "Statement of Reasons" which can be found under Annex A.

Scottish Ministers propose using the general procedure under section 13 of the 2001 Act. Section 13(3)(a) requires that, the Proposed Draft Order is laid before the Scottish Parliament. Section 13(3)(b) requires the Scottish Ministers to give public notice of the Proposed Draft Order and invite comments to be made in writing within 60 calendar days (which excludes days when the Scottish Parliament is dissolved or is in recess for more than four days). The consultation is targeted at key stakeholders such as patients, and named persons, advocacy groups, health boards, professional bodies, justice organisations, Intergration Authorities and Local Authorities. Once the 60 day consultation period has expired, the Scottish Ministers will publish a report summarising observations received and what, if any, modifications they consider appropriate to make to the proposed draft order. Following analysis of the responses, Scottish Ministers will lay the Proposed Draft Order before the Scottish Parliament, for it to be approved by resolution of the Parliament. The second laying is scheduled for 4 September 2026, with commencement set for 12 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, being 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 Proposed Draft Order**

The Proposed 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 all forensic patients.

## COs

Article 3 of the Proposed Draft Order makes extensive amendments to Part 9 of the 2003 Act concerning compulsion orders, updating sections 145, 150, 154–156, 158–159, 164, 166–169, 171–172, and 175, and inserting new sections 161A and 161B. Across these changes, “recorded matters” are brought onto the same footing as “measures,” which are already available to patients with a forensic order, ensuring they can be considered, modified, and enforced throughout the review, variation, and Tribunal processes for compulsion orders.

Section 145 is amended so that, during any mandatory further review where the compulsion order is not revoked, the RMO must consider whether recorded matters should be modified.

Section 154 introduces a duty on the RMO, when conducting a further review, to propose changes to the order by modifying recorded matters, and requires notification to the MHO of any proposed Tribunal application and proposed changes.

Sections 155 and 156 are updated to reflect the MHO’s duties after notification and the RMO’s duty to apply to the Tribunal for extension or variation, explicitly recognising that variation may include modifying recorded matters as well as measures.

Consequential amendments to section 158 ensure applications to the Tribunal for extension and variation can include modification of recorded matters, and section 159 clarifies that the RMO’s ongoing consideration of whether measures should be varied also encompasses recorded matters.

New section 161A obliges the RMO to make a reference to the Tribunal if any recorded matter is not being delivered to the patient, after seeking views from the MHO and any other appropriate individuals. The RMO must make this reference unless they are applying to revoke the compulsion order or have already applied to extend or vary it.

New section 161B sets out the associated notification requirements: the patient, their named person, any guardian or welfare attorney, the MHO, and the MWC must be informed when a reference under section 161A is made.

Sections 164 and 166 are amended so that patients and named persons can apply to vary compulsion orders by modifying recorded matters (not just measures), and the Tribunal’s powers on review include modifying recorded matters.

Section 167 similarly empowers the Tribunal, when extending or varying an order, to specify and modify recorded matters.

Sections 168 and 169 are updated to allow interim orders and interim variations (up to 28 days) to include modification of recorded matters as well as measures, and section 169 is further amended to apply to references under section 161A concerning non-provision of a recorded matter.

Section 171 is amended to allow the Tribunal, on a section 161A or 162 reference, to vary or revoke a compulsion order by modifying recorded matters in addition to measures.

Section 172 ensures that, when the Tribunal determines a variation of a compulsion order, it can specify modifications to recorded matters and include recorded matters not originally sought in the application, providing flexibility to secure appropriate care and treatment.

Section 175's definition of "modify" is expanded to include adding, removing, or amending recorded matters in a compulsion order, and clarifies that "modify" also covers specifying a recorded matter in an order that previously did not include one.

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 parallel amendments to Part 10 of the 2003 Act for cases where a compulsion order (CO) is accompanied by a restriction order (RO).

Sections 182 and 184 are amended so that, when specified conditions are met, the RMO must comply with new section 184A.

New section 184A requires the RMO, where the statutory criteria for continuing the order are met, to consider whether any recorded matter should be modified, assess the patient's treatment needs, consult the MHO and others as appropriate, and, if warranted, recommend variation of recorded matters in reports prepared for annual or other reviews.

New section 184B requires the RMO, if satisfied that a recorded matter is not being provided, to submit a report to the Scottish Ministers; new section 185A then requires the Scottish Ministers to refer the case to the Tribunal on receipt of such a report and to notify specified persons.

Section 188 is amended to require the Scottish Ministers, in certain circumstances, to comply with new section 188A. Under section 188A, where the statutory criteria for continuing the order are met, the Scottish Ministers must consider modification of recorded matters, undertake assessment and consultation, notify the RMO and MHO if they propose to apply to the Tribunal to vary recorded matters and, if satisfied, apply to the Tribunal.

New sections 188B–188D set duties on the Scottish Ministers to consult and notify specified persons, to make a reference to the Tribunal where a recorded matter is not being provided, and allow the Tribunal to require an MHO report when considering such references.

Section 190 is amended to provide notification duties for applications made by the Scottish Ministers under section 188A.

Sections 191 and 192 are amended so that patients and named persons may apply to vary recorded matters in a CORO, subject to existing frequency limits on variation applications.

Section 193 is amended to include references arising from these new duties, with a new subsection (7A) requiring the Tribunal, where it is satisfied that the order should continue and a recorded matter should be modified, to make an order varying the CO accordingly.

Section 194 is consequentially amended to ensure the Tribunal's powers apply to an order varied under section 193(7A) concerning modification of a recorded matter.

Section 199 expands the meaning of “modify” to include recorded matters, and clarifies that “modify” includes specifying a recorded matter in an order that previously did not specify one.

#### Directions – HDs and TTDs

Article 5 also makes equivalent amendments in Part 11 of the 2003 Act for HDs and TTDs.

Sections 206 and 208 are amended so that, when specified conditions are met, the RMO must comply with new section 208A.

Under section 208A, where the statutory criteria for continuation are met, the RMO must consider whether any recorded matter should be modified, assess the patient's treatment needs, consult (including the MHO) and others as appropriate, notify the MHO of proposed recommendations, and include those recommendations in reports to the Scottish Ministers.

New section 208B requires the RMO, if satisfied that a recorded matter is not being provided, to submit a report to the Scottish Ministers. In turn, new section 210A requires the Scottish Ministers to refer the case to the Tribunal upon receipt of such a report and to notify specified persons.

Section 212 is amended so that, where conditions are met, the Scottish Ministers must comply with new section 212A.

Under section 212A, where continuation criteria are met, the Scottish Ministers must consider modification of recorded matters, consult and notify relevant parties and, if satisfied, apply to the Tribunal under new section 213B for an order under section 215 to vary the direction by modifying any recorded matter specified in it.



New sections 212B to 212D create consultation and notification duties, require the Scottish Ministers to make a reference to the Tribunal where non-provision of a recorded matter is identified, and allow the Tribunal to require an MHO report in considering such references.

New section 213A sets notification requirements for applications made by the Scottish Ministers under section 212A, and section 213B sets out the content of those applications.

Section 214 is amended to allow patients and named persons to apply to vary a direction by modifying any recorded matter, subject to initial and annual frequency limits.

Section 215 is amended to add the new routes of reference and application and to require the Tribunal—where satisfied that a direction should continue and a recorded matter should be modified—to make an order varying the direction accordingly.

Finally, new section 217A clarifies that “modify” includes adding, amending, removing, or newly specifying recorded matters.

## **Public Notice**

Scottish Ministers have given public notice of the Proposed Draft Order, as required under section 13(3)(b) of the 2001 Act, by publishing the consultation on the Scottish Government website on 23 January 2026. In addition, Scottish Ministers will proactively draw attention to the consultation by directly contacting relevant stakeholders including: advocacy organisations, Health Boards, Integration Authorities, Local Authorities, the Tribunal, Mental Welfare Commission (MWC), professional bodies, forensic mental health services, legal aid and justice partners. This will be done via email and will include information on the Remedial Order.

## **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 Proposed 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 Minister will consult on the Proposed Draft Order. We will seek the views of those patients and named persons, individuals and organisations with an interest in forensic mental health care, criminal justice groups, Intergration Authorites, Local Authorities, the Tribunal and the MWC. The consultation will begin on 23 January 2026 and conclude on 23 March 2026.

A full list of those consulted, and who agreed to the release of this information, will be attached to the final order and consultation report. This will be published on the Scottish Government website following the conclusion of the consultation.

### **Impact Assessments**

Impact assessments will be laid alongside the proposed draft order to help inform the consultation. These will be updated and revised following the conclusion of the consultation:

- Interim Equality Impact Assessment (EQIA).
- Child Rights and Wellbeing Impact Assessment (CRWIA).
- Partial Business and Regulatory Impact Assessment (BRIA).

### **Financial Effects**

A Partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on businesses', health care providers and third sector organisations is expected to be low.

### **Conclusion**

Failure to act would leave the law incompatible with ECHR. The issue of discrimination resulting from a lack of recorded matters will continue to affect patients subject to a CO, CORO, HD and TTD. The Proposed Draft Order remedies an identified incompatibility with ECHR, ensures equality of treatment for forensic patients, and strengthens safeguards within mental health law.

Scottish Government  
Mental Health Directorate  
Forensic Mental Health Policy Unit  
January 2026

## **Annexe A: Statement of Reasons**

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

### **CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001**

#### **Statement of Reasons**

This Statement of Reasons is provided by the Scottish Ministers in accordance with section 13(3)(a) of the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act").

The Scottish Ministers are proposing to make the draft Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 for the following reasons:

On 19 October 2022, Lord Harrower (sitting in the Outer House of the Court Session) issued a judgment in *X v Mental Health Tribunal for Scotland* [2022] CSOH 78, following a petition for judicial review. The Petitioner was a patient detained in hospital under a Compulsion Order (COs) in terms of sections 51A and 57A of the Criminal Procedure (Scotland) Act 1995. The Court held that provisions in the Mental Health (Care and Treatment) (Scotland) Act 2003 (2003 Act) were incompatible with Article 14 (protection from discrimination) of the European Convention on Human Rights (ECHR), because civil patients subject to Compulsory Treatment Orders (CTOs) can have 'recorded matters' specified by the Mental Health Tribunal for Scotland (the Tribunal), whereas forensic patients subject to COs cannot.

The incompatibility in the law arises from the absence of provisions for recorded matters in COs. In analysing the judgment, Scottish Ministers considered that the principles and rationale set out in the judgment would likely apply to all COs not just those who had been acquitted on section 51A grounds. Careful consideration was given to other related orders, including Compulsion Orders with Restriction Orders, Hospital Directions and Transfer for Treatment Directions. Following this review, Scottish Ministers determined that there was no reasonable justification for excluding patients subject to these related orders from the recorded matters process.

Scottish Ministers must act compatibly with the requirements of the ECHR and they therefore propose to remedy the interference using the general procedure under section 13 of the 2001 Act.

Scottish Ministers have powers under section 12 of the 2001 Act to make a Remedial Order where legislation is or may be incompatible with Convention Rights. Scottish Ministers consider that there are compelling reasons for making an order under section 12 of the 2001 Act as distinct from taking any other action. Legislative change is required to deal with the incompatibility of the 2003 Act following a court judgment identifying a defect.

The changes being proposed will extend recorded matters provisions to COs and related orders, in order to bring those orders into equivalence with comparable civil orders. Responsible Medical Officers and Mental Health Officers will be required to consider and modify recorded matters during reviews. When proposing variations, Responsible Medical Officers must refer cases to the Tribunal where recorded matters are not being provided. Scottish Ministers must consult and make references to the Tribunal in defined circumstances. Tribunal powers will be extended so that they may vary orders and recorded matters, including interim powers, and allow patients and named persons to apply to modify recorded matters.

Scottish Ministers consider that a Remedial Order under the general procedure is the most appropriate and proportionate means of remedying the legislative defect, ensuring equality of treatment for civil and forensic patients while maintaining safeguards and flexibility within the mental health system. A Remedial Order enables a focused and timely fix without waiting until wider mental health law reform is introduced. It also provides for consultation on the draft instrument and parliamentary

scrutiny under the general procedure, and it avoids the risk of calls for broader amendments that could delay progress.

Therefore, the Scottish Ministers consider that there are compelling reasons for making an Order under section 12 of the 2001 Act as distinct from taking any other action.