

# **Consultation on The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026**

***March 2026***

## **Introduction**

Social Work Scotland is the professional body for social work leaders, working closely with our partners to shape policy and practice, and improve the quality and experience of social services. We welcome the opportunity to provide a response to the consultation on the Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026.

## **Summary**

Members of Social Work Scotland broadly welcomed the aims of the 2026 Proposed Draft Order and strongly supported the extension of recorded matters to forensic mental health orders. They viewed the reforms as an important step towards achieving equity between civil and forensic patients, addressing a long-recognised human-rights incompatibility, and strengthening the safeguards available to people subject to compulsory measures.

Across discussions, members agreed that the proposals are clear, proportionate and aligned with existing CTO processes, making them both familiar and conceptually sound for practitioners. At the same time, members emphasised that the successful implementation of these changes depends on the wider context in which they will operate. They repeatedly highlighted the significant pressures already faced by services, particularly around workforce capacity, Tribunal backlogs and limited

availability of appropriate community supports, and expressed concern that without parallel investment, the reforms may raise expectations that the current system cannot realistically meet.

Overall, while members were supportive of the principles and direction of change, they stressed the need for resourcing, guidance and system-wide preparedness to ensure that the intended benefits for patients, families and professionals can be fully realised.

## Questions and responses

Q1: Do you have any views on the proposed application rights for patients and their named person?

Members are broadly supportive of the proposed application rights for patients and their named person. Members agreed that extending these rights to individuals subject to forensic mental health orders represents a logical and necessary step that brings parity with the rights already available to people on civil Compulsory Treatment Orders (CTOs). They noted that the proposed framework closely mirrors existing civil processes, making the changes familiar and straightforward for practitioners to work with.

Members welcomed the introduction of equivalent rights for those subject to Compulsion Orders, COROs, Hospital Directions and Transfer for Treatment Directions. This was seen as an important mechanism for addressing the identified human-rights incompatibility between civil and forensic provisions, ensuring equity and consistency across the system. Members felt strongly that extending these rights can only be a positive, as it provides comparable safeguards and removes an unjustified disparity.

The ability for patients and named persons to apply directly to the Tribunal to modify, add or remove recorded matters was viewed positively. Members considered this an important strengthening of accountability, offering a clear route back to the Tribunal where recorded matters are not delivered, and ensuring that treatment and support needs can be properly escalated when unmet.

Overall, members expressed no concerns with the principle of granting these application rights. They considered the proposals proportionate, fair, and consistent with the ethos of the Mental Health (Care and Treatment) (Scotland) Act 2003 and felt that the rights would appropriately enhance safeguards for patients across both civil and forensic settings.

Q2: Do you have any comments on the proposed duties and powers across all parties involved in reviews, including RMOs, MHOs, Scottish Ministers, the Tribunal and the MWC?

Members generally felt that the proposed duties and powers set out for RMOs, MHOs, Scottish Ministers, the Tribunal and the Mental Welfare Commission are appropriate and consistent with the direction of travel established by the existing civil framework. Members noted that, in many respects, the proposals simply extend familiar CTO processes into the forensic context, meaning that the changes are likely to feel more like an adaptation than a fundamental shift in practice. This alignment was viewed positively, as it provides a coherent and consistent framework across civil and forensic orders, which in turn helps ensure procedural fairness and clarity for everyone involved.

That said, members also reflected on the practical reality that these expanded duties will inevitably place additional pressure on practitioners and systems. For example, RMOs will be required to undertake more frequent reviews, consultations and reporting actions, and MHOs will experience corresponding increases in communication, information-gathering and participation in Tribunal processes. Members observed that demand for Tribunal time is already high, particularly in forensic appeals, where waits of several months are not uncommon. Introducing new routes back to the Tribunal whenever recorded matters are not delivered will, in their view, increase activity significantly and could exacerbate existing delays unless additional capacity is created.

Members also recognised that, while MHOs are already accustomed to working with recorded matters under CTOs, some forensic RMOs may have limited or no experience of this aspect of the civil system, particularly those who have spent many years practising exclusively in secure forensic settings. For this group, the new duties may represent a meaningful expansion of their responsibilities, and members felt that targeted training and guidance will therefore be important to ensure a consistent and confident approach across services. This was seen as particularly relevant given the complexity of some forensic pathways and the weight of professional judgement required in making or recommending changes to recorded matters.

Members expressed support for the additional responsibilities placed on Scottish Ministers and the MWC. They felt that it was entirely appropriate for the MWC's monitoring role to extend to forensic recorded matters, mirroring its oversight in civil

cases and reinforcing system-wide consistency. Similarly, the duties placed on Scottish Ministers were viewed as proportionate, though members again highlighted that these new referral and decision-making responsibilities will require adequate resourcing if they are to function as intended.

Q3: What, if any, operational challenges do you foresee for services, and how might these be mitigated (e.g. training, guidance, forms)?

Members felt that, while the proposed changes are sensible and consistent with the direction of mental health legislative reform, they are likely to create a range of operational challenges for services. A central concern raised by members was the inevitable increase in workload across multiple professional groups. They reflected that both RMOs and MHOs will face additional responsibilities, particularly around reviews, reporting, consultations and Tribunal attendance, and that this added volume of work cannot be absorbed without implications for staff capacity. Members noted that Tribunal hearings for forensic patients already involve long waits, sometimes several months, and anticipate that the expanded routes back to the Tribunal, especially where recorded matters are not being provided, will only intensify this demand.

Alongside the increased administrative and clinical workload, members also discussed the potential impact on system capacity. The Tribunal system, Scottish Ministers' forensic review functions and local authorities' responsibilities in delivering community services all operate under existing pressures. Members expressed concern that the introduction of recorded matters for forensic orders could amplify these pressures, particularly where existing services are already unable to meet need in a timely way. They highlighted examples from current practice, such as prolonged delays in securing appropriate accommodation for individuals with learning disabilities, where repeated appeals or hearings do not translate into meaningful change because the underlying provision simply does not exist. In this context, members felt that increased expectations brought about by the new rights may be difficult to meet, unless there is parallel investment in services and infrastructure.

Training needs were also identified, particularly for RMOs working exclusively in forensic settings. While MHOs already have extensive experience with recorded matters through civil Compulsory Treatment Orders, many forensic RMOs may not have undertaken this type of planning or preparation before. Members felt that these practitioners will require tailored training and operational guidance if the new duties are to be implemented consistently and competently across Scotland. This is especially important given the weight of responsibility placed on RMOs in reviewing, proposing and referring changes to recorded matters. Members also noted that the Mental Welfare Commission and the Tribunal may require additional tools or guidance to support consistent decision-making within the expanded framework.

Members suggested several mitigations that could support smoother implementation. Clear, accessible guidance, both for professionals and for people subject to forensic orders, would be important in ensuring shared understanding of the new processes. Members also saw value in developing easy-read materials and online resources to help people who access services understand what the changes mean in practice, as those who access services frequently ask, “What does this mean for me?” during periods of reform. They also emphasised the need for awareness-raising within teams so that practitioners are informed and prepared ahead of the commencement date.

More broadly, members stressed that successful implementation will depend on ensuring that services have the capacity to deliver what the legislation promises. Without investment in staffing, Tribunal capacity, community support packages and appropriate accommodation, members felt that the reforms may unintentionally generate higher expectations without the system being equipped to meet them. In their view, operational guidance and training will be essential but insufficient on their own; the wider resource pressures facing local authorities, NHS services and the Tribunal must be acknowledged and addressed if the reforms are to achieve their intended impact.

Q4: What impacts - positive or negative - do you anticipate for people with lived experience, families and carers?

Members felt that the proposed changes are likely to have a broadly positive impact on individuals subject to forensic mental health orders, as well as their families and carers. The extension of recorded matters into the forensic system was viewed as a step towards greater equity, ensuring that people on orders made by courts or prison governors have the same opportunities to have their treatment and support needs specified, monitored and enforced as those subject to civil Compulsory Treatment Orders. Members commented that creating this parity “can only be a good thing,” as it removes an unjustified distinction between two groups of individuals whose needs are often very similar.

Members also reflected that the changes could strengthen the voice of individuals and their families by offering clearer mechanisms for raising concerns about unmet needs. The ability to apply directly to the Tribunal give patients and named persons a more tangible route for seeking progress. This could be particularly significant for families who have long advocated for specific supports or community arrangements. Members agreed that, in principle, such rights enhance transparency and accountability within the system.

At the same time, members expressed reservations about how meaningful these improvements will feel to people subject to forensic orders, given the current limitations in service capacity. They pointed to ongoing systemic issues such as significant shortages of appropriate accommodation, the limited availability of community services for people with learning disabilities, and the persistently long waits many individuals experience while awaiting movement through secure settings. Members noted that some individuals already appeal regularly in the hope of progressing their care pathway, only to find that there is nowhere suitable for them to move to. In this context, adding new rights or recorded matters may raise expectations without the system being able to deliver corresponding change.

Families and carers may therefore experience a mixture of reassurance and frustration. On one hand, the reforms offer stronger procedural safeguards and greater clarity about what support should be in place. On the other, families may continue to face the emotional strain of long delays where services or placements are simply unavailable. Members observed that these pressures are already felt keenly, and the reforms alone cannot resolve underlying structural gaps in provision.

Q5: In relation to the interim Equality Impact Assessment, please tell us about any potential impacts you think there may be on protected characteristics?

Members did not identify any specific negative impacts on people with protected characteristics arising directly from the proposed changes. They noted that the extension of recorded matters to forensic orders is fundamentally about creating equity between civil and forensic patients, and as such is intended to reduce, rather than generate, any form of discrimination. Members considered the reform to be a rights-based improvement that aligns with the principles of fairness and non-discrimination already embedded in the Mental Health Act.

However, members did reflect on broader accessibility issues that could intersect with protected characteristics. They highlighted that, in practice, barriers often arise not from the legislation itself but from the way information is communicated.

Members emphasised the importance of ensuring that information about the new rights and procedures is made accessible in a range of formats, particularly for people whose first language is not English, for those with learning disabilities, or for individuals who may struggle with literacy. They noted that existing Mental Health Act materials are not always available in multiple languages or in easy-read formats, and that people from minority ethnic communities may therefore be disadvantaged in understanding their rights or navigating Tribunal processes.

Members also discussed the well-established pattern that individuals whose first language is not English can experience longer stays within forensic services, not because of clinical need but because of communication barriers and a lack of accessible, culturally appropriate information. They felt it was important that implementation of these reforms does not inadvertently perpetuate these patterns. Ensuring that all new guidance, forms and explanatory materials are translated, easy to understand and available in multiple formats would help to mitigate this risk.

Beyond this, members did not identify concerns relating to specific protected characteristics such as sex, sexual orientation, religion, disability or age. They viewed the proposals as neutral or positive in their impact, provided that the accompanying communication and accessibility measures are robust. In their view, the key requirement is not that the legislative proposals be changed, but that the

supporting infrastructure ensures that every person affected, regardless of background or characteristic, can meaningfully understand and exercise their rights.

Q6: In relation to the Child Rights and Wellbeing Impact Assessment, please tell us about any potential impacts you think there may be on children's wellbeing?

Members did not identify any clear or direct impacts of the proposed changes on children or children's wellbeing. They noted that the reforms are aimed at adults subject to forensic mental health orders and felt that the proposals do not appear to introduce any mechanisms or consequences that would uniquely or disproportionately affect children. Members reflected that the extension of recorded matters is fundamentally about achieving equity between civil and forensic populations, and as such the anticipated effects are largely confined to adult services and adult pathways.

Q7: In relation to the partial Business Regulatory Impact Assessment, please tell us about any potential impacts you think there may be to particular businesses or organisations?

Members felt that the proposed changes will have a noticeable impact on a range of services involved in delivering and supporting forensic mental health pathways. Although the reforms are viewed as necessary and positive in principle, members were clear that they will create additional operational pressures which, in turn, will have financial implications for public services, particularly local authorities, NHS boards and the Mental Health Tribunal for Scotland.

Members observed that the new rights and duties associated with recorded matters will inevitably generate increased demand for Tribunal hearings, as patients, named persons, RMOs and Scottish Ministers will have multiple new routes to bring cases back for consideration. They noted that Tribunal panels already experience significant backlogs, with forensic appeals often taking several months to be heard. Any rise in referrals will require additional Tribunal time and administration, with resourcing implications for both the Tribunal service and the wider system.

For local authorities, members highlighted that the proposals would increase demands on MHOs. Additional hearings, more frequent consultations, report writing and responsibilities to communicate changes to patients all contribute to greater pressures on staffing, travel time and workload management. Members pointed out that MHOs are already stretched in many areas, and that without extra capacity the cumulative effect may be difficult to sustain. The requirement for MHOs to attend more Tribunal hearings will also have cost implications linked to staff time and service cover.

Members also emphasised the impact on NHS forensic services, particularly RMOs, who will need to devote more time to preparing reports, liaising with MHOs and participating in Tribunal processes. For some forensic services, these duties will be an expansion into areas of practice they have not previously engaged with, reinforcing the need for additional training and preparation. Members noted that this increased workload cannot realistically be absorbed into existing clinical duties without consequences for capacity and cost.

A further concern raised by members relates to the already limited availability of community services, specialised accommodation and support packages. They noted that many recorded matters are likely to specify such supports, but where these services do not currently exist in sufficient quantity, local authorities may face pressure to develop or commission new provision. This has major cost implications, particularly in the context of longstanding budget pressures. Members highlighted that some service users have waited years for suitable accommodation, and that without substantial investment the introduction of recorded matters will not resolve these structural gaps.

Q8: What do you think about how the changes will be introduced and when they will start?

Members broadly accepted the proposed implementation timetable, which would see the revised draft order laid in September 2026 and the changes commencing in November 2026. They recognised that the changes are required to address a clear human-rights incompatibility identified by the courts and therefore understood why Scottish Government intends to move forward at pace. From this perspective,

members did not feel that delaying the implementation date would, in itself, resolve any of the practical challenges facing services.

However, members expressed several reflections about the readiness of services to deliver the new framework effectively within the proposed timeframe. They noted that, while the legislative changes appear straightforward, the operational implications (particularly for forensic RMOs, MHOs and the Tribunal) are likely to be significant. Members highlighted that some RMOs working solely in forensic services may have had little or no experience with recorded matters to date, and may therefore require training, guidance and time to adapt to the new requirements. In this respect, members questioned whether all professionals would be sufficiently prepared by Autumn 2026, especially given the specialist nature of forensic practice and the potential need for national training input.

Members also commented that wider system pressures such as workforce shortages, limited availability of community resources and growing Tribunal workloads, will not be alleviated by the implementation date. These issues are structural rather than procedural, and members felt they may continue to shape the lived experience of the reforms regardless of when they commence. As such, they did not believe that extending the timeline would result in increased service capacity or reduce the challenges associated with unmet recorded matters. That said, they considered it important that any implementation plan acknowledges these pressures and is accompanied by clear communication, practical guidance and targeted support for staff.

While members did not object to the proposed go-live date, they emphasised the value of a well-planned lead-in period. This would allow time for awareness-raising within multi-disciplinary teams, for the development of accessible information for patients and families, and for discussions about how local processes, such as internal review cycles, referral pathways and MHO involvement, will operate under the new framework. Members saw particular benefit in clarity around training expectations, recognising that some staff may not receive mandatory professional reaccreditation for several years and may therefore require interim training or updates.

Q9: In your view, are there any unintended consequences that could arise as a result of changes to the 2003 Act?

Members felt that although the proposed reforms are well-intentioned and grounded in principles of equity and human-rights compliance, they may give rise to several unintended consequences if introduced without sufficient attention to the realities of service capacity. A central concern shared by members was that extending recorded matters to forensic mental health orders may significantly increase expectations among patients and carers, expectations that the system, in its current form, is simply not equipped to meet. Members described situations in which individuals have waited for many years for suitable accommodation or community support and emphasised that recorded matters are unlikely to change outcomes where the underlying resources do not exist. As a result, members feared that the reforms could unintentionally create greater frustration for patients, who may repeatedly seek Tribunal intervention without any meaningful change in their circumstances.

Members also highlighted the likelihood of increased pressure on the Tribunal system. At present, forensic appeals can already take several months to be heard due to limited panel availability. The introduction of new grounds for referral, particularly those triggered by unmet recorded matters, may substantially increase the number of cases returning to Tribunal. Members were concerned that this could result in longer waits for all parties, creating a backlog that affects civil and forensic cases alike. Such delays may, paradoxically, reduce the effectiveness of recorded matters, as patients could remain in restrictive settings simply because hearings cannot be scheduled in a timely manner.

Another unintended consequence identified by members relates to increased workload and administrative burden on RMOs, MHOs and Scottish Ministers. While the duties themselves are appropriate in principle, members pointed out that the cumulative impact of repeated reviews, reporting duties, consultations and Tribunal attendance could add significantly to professional workload. Members noted that MHOs already work under intense resource constraints, and that expanding their responsibilities without additional support risks undermining the quality and timeliness of decision-making. They also observed that this additional workload may

divert attention away from other statutory duties, potentially weakening the broader system of mental health and social care.

Members additionally reflected that the reforms may unintentionally widen the gap between what legislation promises and what services can realistically provide. Without the parallel development of community provision, such as supported accommodation, specialised services for people with learning disabilities, and sustainable care packages, the ability to specify recorded matters may become largely symbolic. This misalignment between rights and resources could risk eroding trust in the system.

Members noted that increased Tribunal activity and more frequent referrals may result in longer waits for legal processes to conclude, slowing down patient progression and creating unintended delays in discharge planning. They were also mindful that an overburdened system may produce more paperwork, more administrative turnover, and fewer opportunities for meaningful clinical engagement, all of which could detract from therapeutic relationships and continuity of care.

It was also noted that careful governance and proportionate timescales could play an important role in alleviating the pressure that the reforms may place on the Tribunal system. Given existing delays of several months for forensic appeal hearings, members felt that introducing clear parameters around the frequency of applications and referrals, particularly where recorded matters relate to supports or accommodation that are currently unavailable, could help ensure that Tribunal time is used in a way that is both fair and sustainable. Members emphasised that this is not about restricting rights, but about establishing a governance framework that balances the legitimate expectations of patients with the practical limits of Tribunal capacity. They suggested that Scottish Government may wish to explore whether guidance, time-bound review cycles, or staged implementation could help smooth demand in the early phases of the reforms, giving services and the Tribunal space to adapt without overwhelming existing systems. These measures would not remove the right to seek timely review but could mitigate the risk of a surge in hearings at a point when services are still adjusting to new responsibilities - an issue members highlighted repeatedly in relation to workload, Tribunal delays and unmet recorded matters.

#### Q10: Do you have any other comments on the 2026 Proposed Draft Order?

Members of Social Work Scotland welcomed the intent behind the 2026 Proposed Draft Order and agreed that extending recorded matters to forensic mental health orders is a long-overdue and necessary reform. They saw the proposals as a positive step towards ensuring parity, fairness and consistency across civil and forensic pathways, addressing an identified human-rights incompatibility in a way that is principled and proportionate. Members felt that the changes themselves are clear and their underlying purpose well-justified.

However, members also stressed that while the legislation creates more equitable rights on paper, its practical impact will depend heavily on the wider environment in which it is implemented. The success of recorded matters in forensic contexts is contingent not only on clear processes and defined duties, but also on whether the system has the capacity (both operationally and financially) to deliver what is specified. Members expressed concern that current pressures within forensic services, local authority social care, and community provision may limit the extent to which the reforms can achieve their intended outcomes. They highlighted that without sufficient accommodation, community supports, and specialist services, recorded matters could become an aspiration rather than a guarantee.

Members also noted that the reforms arrive at a time when multiple parts of the mental health and social care system are under strain. There are long waiting times for Tribunal hearings, significant workforce pressures, and longstanding shortages of appropriate community provision for individuals with complex needs. Members emphasised that the proposed changes would place additional demands on staff across agencies and that these pressures must be acknowledged if the reforms are to function as intended. They echoed concerns shared earlier in the consultation response that increased expectations may outpace what services can provide, potentially leading to frustration for both patients and practitioners.

Despite these challenges, members reiterated their support for the principle of introducing recorded matters into the forensic system. They felt the reforms were necessary and aligned with the values of the Mental Health (Care and Treatment) (Scotland) Act 2003, particularly in strengthening rights and ensuring that the clinical

and social needs of patients are clearly identified and monitored. Members were, however, keen to ensure that Scottish Government recognises the wider system conditions required for these reforms to be meaningful. In their view, implementation must be accompanied by ongoing dialogue with services, sufficient guidance, and investment where necessary to address structural gaps that the legislation alone cannot resolve.

Overall, members expressed a balanced position: the changes are welcome and appropriate, but they will only deliver their intended benefit if introduced alongside realistic planning, adequate resourcing, and clear communication. Members welcomed the opportunity to contribute to the consultation and encouraged continued collaboration with the sector as the reforms progress.

## **Conclusion**

In conclusion, members of Social Work Scotland welcome the commitment to strengthening rights, improving equity and addressing the long-standing human-rights incompatibility within the current legislative framework. While supportive of the principles and intentions underpinning the 2026 Proposed Draft Order, members emphasise that its success will depend on meaningful attention to the operational realities faced by services.

Ensuring adequate resourcing, clear guidance and sustained collaboration with practitioners will be essential if the reforms are to deliver tangible improvements for individuals subject to forensic mental health orders. Members look forward to continued engagement as the legislation progresses and to working with partners to support its effective implementation.

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