

## **Representation of the People Act 1983 Remedial (Scotland) Order 2025 – RCPsychiS views**

**January 2026**

### **Legislative Oversight Forum**

The Royal College of Psychiatrists in Scotland (RCPsychiS) Legislative Oversight Forum (LOF) was established in 2020 following a decree by Scotland Devolved Council.

The LOF is a gathering of highly experienced and knowledgeable psychiatrists who have daily experience of applying mental health incapacity and safe-guarding laws when providing care and treatment. It seeks to provide a point of reference within and outside of the College. The LOF meets on a monthly basis to discuss current and proposed legislative changes which could impact the practice of psychiatry in Scotland.

### **Our views**

We welcome the Scottish Government's efforts to ensure compliance with the European Convention on Human Rights through the Representation of the People Act 1983 Remedial (Scotland) Order 2025. Extending voting rights to individuals detained on mental health grounds is an important step toward upholding equality and human rights.

However, following discussion among our members, we wish to raise several points for consideration:

### **Practical implementation and resource implications**

The Order places responsibility on hospitals and mental health services/staff to support patients in registering and exercising their right to vote, primarily through postal or proxy voting. While we fully support enabling participation, this introduces additional administrative and advocacy responsibilities for already overstretched clinical teams. Clear guidance and resources are needed to ensure that staff can facilitate voting without compromising patient privacy or therapeutic priorities. Consideration should also be given to funding or support for these additional tasks, particularly in secure settings, where processes are more complex and time consuming.

## **Safeguarding rights and autonomy**

Our members feel that voting rights should not be contingent on additional, specific assessments of capacity in this context (I.E – more assessment of ‘*capacity to vote*’ additional to existing capacity assessments already carried out).

We recommend the position that there is no additional test for capacity to vote (once standard capacity assessment has been carried out) beyond understanding the purpose of voting and expressing a preference. This approach respects autonomy and avoids discriminatory practices. We ask that guidance explicitly confirms that staff are not expected to assess voting competence.

Any communication materials for patients must be accessible and sensitive to mental health needs.

## **Deemed liability**

The explanatory notes state that the purpose of the order is to give voting rights to persons convicted of less serious offences, defined as those carrying a maximum penalty of less than 12 months imprisonment.

Where a person is detained under sections 53, 57(2)(a) or 57A(2) of the Criminal Procedure (Scotland) Act 1995 and has not been convicted or sentenced, eligibility to vote is determined by “deemed liability”. This means that the maximum possible sentence for the offence charged is used as a proxy for seriousness, rather than the person’s actual disposal or culpability.

Where a person has been convicted of an offence but given a hospital disposal, the justification for offence-based restrictions appears reasonable because criminal responsibility has been established. However, it raises particular concerns in cases involving unfitness to stand trial or acquittal on the grounds of mental disorder.

In post-conviction cases, imprisonment was legally available and the hospital order represents an alternative to punishment. By contrast, for individuals found unfit to stand trial or not criminally responsible, they are not convicted of an offence and imprisonment is excluded as a disposal by the court. In these circumstances, basing voting restrictions on hypothetical punishment depends on an incorrect assumption that punishment could have been imposed and risks attaching penal consequences to detention that is intended to be protective and therapeutic rather than punitive.

Another concern is that deemed liability does not account for the indeterminate nature of hospital detention and may result in patients being disenfranchised for longer than individuals serving determinate prison sentences for comparable offences. While prisoners automatically regain liberty and voting rights at the end of their sentence, patients may remain detained for clinical reasons well beyond the period of imprisonment the court would otherwise have imposed. There is no mechanism within the order or tribunal process to review or restore voting rights

in these circumstances, creating a risk of disproportionate, unreviewed, and potentially arbitrary restriction of a fundamental civic right.

The aim of the legislation is to exclude persons charged or convicted of serious offences. The exclusion of voting rights for persons who are subject to a restriction order under section 59 Criminal Procedure (Scotland) Act 1995 is consistent with this aim and we make no recommendations about this.

In conclusion, deemed liability may be a proportionate approach for persons convicted of an offence but it appears harder to justify this blanket restriction for

- persons found unfit to stand trial or not criminally responsible and not subject to a restriction order.
- persons detained in hospital for longer than the custodial sentence a court would otherwise have imposed, due to clinical need, lack of community resources, or risk management decisions.

We recommend that this is reviewed.

### **Underlying principles and clarity**

Members expressed concern about the historical rationale for disenfranchisement, which appears rooted in punishment rather than capacity. The arbitrary nature of the 12-month sentence threshold was noted by our members and should be given consideration. This limit is not based on capacity, risk, or any rational measure of civic responsibility - it appears to be simply a punitive line drawn by legislation. Applying this arbitrary rule to those detained under mental health legislation reinforces stigma. It implies that their voting rights depend on an analogy to criminal sentencing rather than their status as citizens.

We encourage the Government to clarify the principles underpinning these changes and commit to a broader review during the next Parliament, as indicated in the sunset clause.

Future legislation must also be informed by consultation with mental health professionals, advocacy groups, and those with lived experience.

### **Engagement and consultation**

We note the constraints of the formal feedback process and the 60-day representation period. We strongly recommend ongoing engagement with stakeholders to ensure practical challenges are addressed and rights are upheld in practice.

### **Summary of views**

In summary, while we support the intent of the Remedial Order, we urge the Scottish Government to: provide clear operational guidance and resources for implementation; confirm that no additional voting capacity assessment is

required; commit to a transparent review of the principles behind voting restrictions; engage meaningfully with mental health services and advocacy groups in shaping future legislation.

We would be happy to contribute further to this discussion and assist in developing practical solutions.

**Yours sincerely,**  
**RCPsychiS Legislative Oversight Forum**