

MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) ACT 1999

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (“the Act”). They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Mental Health (Scotland) Act 1984 ('the 1984 Act') sets out procedures by reference to which a person with a mental disorder, as defined in section 1(2) of the 1984 Act, can be compulsorily detained in hospital. Part VI of the 1984 Act, together with the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'), provides that persons convicted of a criminal offence who suffer from a mental disorder (or persons found by the court to be insane in bar of trial or who are acquitted by reason of insanity) may be detained in hospital under a 'hospital order' (or an order having the same effect) imposed by that court (sections 57 and 58 of the 1995 Act). Where the court considers it is necessary for the protection of the public from serious harm it may impose a restriction order (or an order having the same effect) – see sections 57 and 59 of the 1995 Act. The effect of a restriction order is set out in section 62(1) of the 1984 Act.
4. The 1984 Act defines 'restricted patient' to mean a patient subject to a restriction order as described in paragraph 3 above; prisoners subject to a 'transfer direction' with a 'restriction direction' (sections 71 and 72 of the 1984 Act); and prisoners given a prison sentence combined with hospital detention in terms of a 'hospital direction' (section 59A of the 1995 Act).
5. The Scottish Ministers may, in exercise of their discretion contained in section 68 of the 1984 Act, lift a restriction order where they are satisfied that it is no longer necessary for the protection of the public from serious harm. By contrast, a restriction direction and hospital direction will cease to have effect where the patient is returned to prison having recovered from his or her mental disorder to the extent that no further treatment in hospital is necessary; or alternatively where the underlying prison sentence itself expires (section 74 of the 1984 Act). It is also open to the patient to appeal to a Sheriff in the sheriffdom in which the detaining hospital is located to order absolute or conditional discharge under sections 63, 65 and 66 of the 1984 Act. Section 64 of the 1984 Act, which has now been amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), sets out the criteria which, if satisfied, require a sheriff to direct either absolute or conditional discharge. (In the case of a

patient subject to a restriction direction or a hospital direction, a successful appeal will result in the patient returning to prison.)

6. Subject to the provisions on conditional discharge mentioned in the next paragraph, the patient must be absolutely discharged if the sheriff is not satisfied either:-

- that the patient is suffering from a mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
- that it is necessary for the health and safety of the patient or for the protection of other persons that he should receive such treatment.

7. If the sheriff is not satisfied as to the preceding matters, but is nevertheless satisfied that it is appropriate that the patient remain liable to be recalled to hospital for further treatment, the sheriff is required to order a conditional discharge. In those circumstances the patient's discharge will be subject to any conditions which the sheriff considers appropriate. The patient can thereafter be recalled to hospital by the Scottish Ministers in terms of section 68(3) of the 1984 Act at any time while he or she is subject to conditional discharge. If the discharge is absolute the restriction order ceases to have effect completely, and there is no possibility of recalling the patient to hospital or of attaching conditions to his or her discharge.

THE ACT

GENERAL

8. The Act has two main purposes:

- The first is to add a new criterion to the statutory tests applied by a sheriff or the Scottish Ministers when considering whether to order the discharge of a restricted patient. The sheriff and the Scottish Ministers must now *refuse* to order a discharge (either conditional or absolute) if satisfied that the patient has a mental disorder, the effect of which is that continuing detention in hospital is necessary to protect the public from serious harm. That is so whether or not the patient is to receive medical treatment for the mental disorder.
- The second is to introduce a right of appeal against a decision, notification or recommendation of a sheriff in relation to an appeal brought by a restricted patient in terms of Part VI of the 1984 Act. The right of appeal against the sheriff's decision, notification or recommendation is conferred on both the patient and the Scottish Ministers. The appeal is to the Court of Session.

9. The Act also provides that the term 'mental disorder', where it appears in the 1984 and 1995 Acts, includes a personality disorder.

COMMENTARY ON SECTIONS OF THE ACT

Section 1

10. Section 1(1) of the Act adds new subsections (A1), (B1) and (C1) to section 64 (*right of appeal of patients subject to restriction order*) of the 1984 Act. New subsection (A1) provides that, where a sheriff is considering an appeal by a restricted patient, the sheriff must refuse the appeal if satisfied that the patient, at the time of the hearing, is suffering from a mental disorder the effect of which is such that the patient must continue to be detained in hospital in order to protect the public from serious harm. This is so whether or not the patient is to receive medical treatment for that mental disorder. New subsection (B1) provides that the burden of proof in satisfying the sheriff as to the matters specified in new subsection (A1) is on the Scottish Ministers.

11. Section 102 of the National Health Service (Scotland) Act 1978 (“the 1978 Act”) requires the Scottish Ministers to provide such hospitals (referred to as “state hospitals”) as appear to them to be necessary for persons subject to detention under the 1984 Act who require *treatment* under conditions of special security on account of their dangerous, violent or criminal propensities. New subsection (A1) (see paragraph 10 above) contemplates a situation in which persons may continue to be detained under the 1984 Act despite the fact that they are not receiving *medical treatment* for their mental disorder. New subsection (C1) therefore makes clear that nothing in the wording of section 102 of the 1978 Act prevents or restricts the detention in state hospitals of such patients in consequence of new subsection (A1).

12. Section 1(1)(b) of the Act makes a necessary consequential amendment to section 64(1) of the 1984 Act.

13. Section 1(2)(a) of the Act adds new subsections (1A), (1B) and (1C) into section 66 (*further consideration of case of conditionally discharged patient*) of the 1984 Act. Section 66 enables a patient to appeal to the sheriff against recall from conditional discharge (as well as against the continuation of conditions on discharge). New subsection (1A) provides that the sheriff must refuse an appeal against recall if satisfied that the patient, at the time of the hearing, is suffering from a mental disorder the effect of which is such that the patient must continue to be detained in hospital in order to protect the public from serious harm. Again that is so whether or not the detention is for medical treatment. New subsection (1B) imposes on the Scottish Ministers the burden of proof of establishing the matters set out in new subsection (1A). For the purposes of section 66, new subsection (1C) makes the same provision in relation to section 102 of the 1978 Act as is made for section 64 by new section 64(C1) (see paragraph 11 above).

14. Section 1(2)(b) makes a necessary consequential amendment to section 66(3) of the 1984 Act.

15. Section 1(2)(c) and (d) makes the same provision for deferring the effect of conditional and absolute discharges following a sheriff’s decision under section 66 as is made in relation to decisions under section 64 of the 1984 Act by section 2 (see paragraph 21 below). In summary, unless the Scottish Ministers confirm that they do not seek to prolong the detention pending the outcome of an appeal, the effect of those discharges is delayed until it is clear that there is to be no appeal against them or any such appeal has been completed.

16. Section 1(3) of the Act adds new subsections (2A) and (2B) to section 68 (*Powers of the Scottish Ministers in respect of patients subject to restriction orders*) of the 1984 Act. Prior to this amendment, the Scottish Ministers had a power in terms of section 68(2) of the 1984 Act, as they thought fit and at any time while a restriction order was in force, to direct the absolute or conditional discharge of a patient. New subsection (2A) prevents the Scottish Ministers from discharging a patient under section 68(2) if they are satisfied that the patient is suffering from a mental disorder the effect of which is such that the patient must continue to be detained in hospital in order to protect the public from serious harm. That is the case whether the continued detention is for medical treatment or not.

17. For the purposes of section 68, new subsection (2B) makes the same provision in relation to section 102 of the 1978 Act as is made for section 64 by new section 64(C1) (see paragraph 11 above).

18. Section 1(4) of the Act adds new subsections (1B) and (1C) into section 74 (*transfer of patients back to prison*) of the 1984 Act. These make the same provision, in relation to transfers under section 74, as is made by section 1(3) in relation to discharge under section 68 (see paragraph 16 above). A patient who meets the new statutory criteria may not be transferred back to prison.

19. Section 1(5) provides for the amendments made by section 1 to have effect from 1 September 1999 (the date of publication of the Bill).

Section 2

20. Section 2 of the Act confers on both the patient and the Scottish Ministers a new right of appeal to the Court of Session against the decision of a sheriff under section 64 or 66 or a notification or a notification or recommendation by a sheriff under section 65 of the 1984 Act.

21. Section 2(1)(a) and (b) of the Act amends subsections (3) and (4) of section 64 of the 1984 Act so that the absolute and conditional discharges, respectively, mentioned in those subsections are deferred to allow any appeal to take place. This is achieved by deferring their effect until the occurrence of any of the events set out by new subsection (4A), which is added by section 2(1)(c). Broadly, unless the Scottish Ministers confirm that they do not seek to prolong the detention pending the outcome of an appeal, discharge is delayed until it is clear that there is to be no appeal against them or any such appeal has been completed. The events set out in new subsection (4A) are:-

- the expiry of the appeal period (14 days), if no appeal has been lodged within that time (see paragraph 25 below);
- the receipt by both the Court of Session and the managers of the hospital in which the patient is detained of notice from the Scottish Ministers that they do *not* intend to move the Court of Session to make an order in terms of new section 66A(3) of the 1984 Act to continue the patient's detention in hospital until the appeal has been finally concluded (see paragraph 26 below);
- the refusal by the Court of Session to make an order under section 66A(3) continuing the patient's detention;
- the recall of any order under section 66A(3) or the expiry of its effect.

22. Section 2(1)(c) of the Act also adds a new subsection (4B) into section 64 of the 1984 Act. This provision defines “appeal” and “appeal period” for the purposes of new section 64(4A).

23. Section 2(2) of the Act adds a new section 66A to the 1984 Act. This provides for the new appeal right to the Court of Session. Prior to this amendment decisions of a sheriff under part VI of the 1984 Act were subject only to judicial review.

24. New subsection 66A(1) sets out the new right of appeal. This allows either the patient or the Scottish Ministers to appeal to the Court of Session against the decision of a sheriff under section 64 or 66 of the 1984 Act or a notification or recommendation by the sheriff under section 65 of the 1984 Act. The new section does not restrict any such appeal only to questions of law or to matters of fact, and either may therefore be raised.

25. New subsection 66A(2) requires any appeal to be lodged within 14 days of the decision, notification or recommendation of the sheriff appealed against.

26. New subsections (3) and (4) of section 66A enable the Scottish Ministers, where an appeal has been lodged, to ask the Court of Session to continue the patient’s detention, or the effect of an order or direction, until any further appeal to the House of Lords has been completed or the time for such an appeal has expired without any appeal being made.

Section 3

27. Section 3 of the Act amends the definition of “mental disorder” in the 1984 Act and the 1995 Act. It provides that the term ‘mental illness’ includes within it “personality disorder”. For the purposes of the new restriction now contained in sections 64(A1), 66(1A), 68(2A) and 74(1B) of the 1984 Act, this amendment had effect from 1 September, 1999.

Section 4

28. Section 4 of the Act states the short title of the Act. Since no provision for postponed commencement is made, the Act came into force on 13 September 1999, the date of Royal Assent (but subject to the retrospective effect of sections 1 and 3 – see paragraphs 19 and 27 above).

PARLIAMENTARY HISTORY OF THE MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) ACT 1999

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports **Reference**
Introduction

31 August 1999 SP Bill 1 (Session 1)

Stage 1

Meeting of the Parliament
2 September 1999 cols 71-125

Financial Resolution
8 September 1999 col 205

Stage 2

Committee of the Whole Parliament
8 September 1999 cols 207-268

Stage 3

Meeting of the Parliament
8 September 1999 cols 269-272

Royal Assent 13 September 1999

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