These notes refer to the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) which received Royal Assent on 25 April 2003

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader. They do not form part of the 2003 Act and have not been endorsed by the Scottish Parliament.

2. These Notes should be read in conjunction with the 2003 Act. They are not, and are not meant to be, a comprehensive description of the 2003 Act. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

3. Since Royal Assent there have been two orders made which modify the 2003 Act. These are:

- The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Modification) Order 2003[a] made on 13 October 2003 and coming into force on 14 October 2003; and

- The Mental Health (Care and Treatment) (Scotland) Act 2003 Modification Order 2004[b] made on 1 December 2004 and coming into force on 2 December 2004.

These Notes will indicate at the relevant paragraphs where changes have been effected by the orders.

4 The following terms are referred to in these Notes and have the following meanings:

- "the 1984 Act" means the Mental Health (Scotland) Act 1984;
- "the 1995 Act" means the Criminal Procedure (Scotland) Act 1995;
- "the 2000 Act" means the Adults with Incapacity (Scotland) Act 2000;
- "the 2003 Act" means the Mental Health (Care and Treatment) (Scotland) Act 2003;
- "the 2003 Order" means the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Modifications) Order 2003;

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[a] S.S.I 2003/498
[b] S.S.I. 2004/533

- "the 2004 Order" means the Mental Health (Care and Treatment) (Scotland) Act 2003 Modification Order 2004;
- "the Commission" means the Mental Welfare Commission continued in existence by section 4 of the 2003 Act;
- "the Tribunal" means the Mental Health Tribunal for Scotland established by section 21 of the 2003 Act.

5. Certain other important terms are defined in section 329(1) of the 2003 Act as follows:

- "approved medical practitioner" has the meaning given by section 22(4) of the 2003 Act:
- "carer", in relation to a person, means "an individual who, otherwise than—

  (a) by virtue of a contract of employment or other contract with any person; or

  (b) as a volunteer for a voluntary organisation,

  provides, on a regular basis, a substantial amount of care for, and support to, the person; and includes, in the case where the person is in hospital, an individual who, before the person was admitted to hospital, provided, on a regular basis, a substantial amount of care for, and support to, the person".
- "a medical practitioner who has such qualifications and experience, and has undertaken such training, as may be specified in directions given by the Scottish Ministers; and who has been approved by a Health Board or by the State Hospitals Board for Scotland as having special experience in the diagnosis and treatment of mental disorder".
- "hospital" means—

  " (a) any health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29));

  (b) any independent health care service; or

  (c) any state hospital."
- "medical practitioner" means "any registered medical practitioner".
- "medical treatment" means "treatment for mental disorder; and for this purpose "treatment" includes—

  (a) nursing;

  (b) care;

  (c) psychological intervention;

  (d) habilitation (including education, and training in work, social and independent living skills); and

  (e) rehabilitation (read in accordance with paragraph (d) above)".
- "mental health officer" means "a person appointed (or deemed to be appointed) under section 32(1) of this Act", and "the mental health officer" in relation to a patient, means "a mental health officer having responsibility for the patient's case".
- "patient" means "a person who has, or appears to have, a mental disorder".

6. Certain other important terms are not defined in section 329 but are defined elsewhere in the 2003 Act. Such terms include:

- "mental disorder": this is defined in section 328(1) of the Act as meaning "any mental illness, personality disorder or learning disability". Subsection (2) of that section states, however, that "a person is not mentally disordered by reason only of sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act".
- "responsible medical officer" means the approved medical practitioner appointed under section 230(1) of the Act.

THE 2003 ACT – AN OVERVIEW

7. The 2003 Act replaces the 1984 Act. It establishes new arrangements for the detention, care and treatment of persons who have a mental disorder. It also refines the role and functions of the Commission and establishes the Tribunal as the principal forum for approving and reviewing compulsory measures for the detention, care and treatment of mentally disordered persons.

8. The 2003 Act is divided into 23 parts:

- Part 1 sets out a range of the factors and principles to be considered when certain parties are discharging functions under the 2003 Act.
- Part 2 specifies the duties and powers of the Commission.
- Part 3 establishes the Tribunal.
- Part 4 places certain duties, mainly concerning the provision of services for persons with mental disorder, on Health Boards and local authorities.
- Part 5 deals with the emergency detention in hospital of persons with mental disorder.
- Part 6 deals with the short-term detention in hospital of persons with mental disorder.
- Part 7 makes provision about compulsory treatment orders in respect of mentally disordered persons.
- Part 8 makes provision about the disposals that may be made in respect of mentally disordered persons in criminal proceedings and where such persons are serving sentences of imprisonment.
- Part 9 provides for the consequences of a compulsion order (one of the main orders established in Part 8).
- Part 10 deals with the situation where a compulsion order is combined with a restriction order.

- Part 11 provides for the consequences of a hospital direction and a transfer for treatment direction.

- Part 12 provides for the transfer between hospitals of mentally disordered persons subject to compulsion orders combined with restriction orders, hospital directions or transfer for treatment directions.

- Part 13 provides for the temporary release from detention of persons subject to assessment orders, treatment orders, interim compulsion orders, compulsion orders combined with restriction orders, hospital directions and transfer for treatment directions.

- Part 14 provides for an assessment of a person's needs to be carried by a local authority or Health Board under certain circumstances.

- Part 15 provides for the designation of mental health officers and the appointment of responsible medical officers as well as the preparation of certain reports following the making of orders under the 2003 Act.

- Part 16 specifies the safeguards for patients where certain medical treatments are being considered or given.

- Part 17 makes provision about patient representation and patients detained in conditions of excessive security.

- Part 18 makes miscellaneous provisions including the drawing up of a code of practice, the making of statements indicating a patient's wishes about treatment, the withholding of correspondence and communications from certain detained patients and the cross-border transfer of patients.

- Part 19 sets out entry, removal and detention powers.

- Part 20 deals with patients who abscond while subject to compulsory measures.

- Part 21 creates offences in respect of the sexual abuse, ill-treatment and neglect of persons with mental disorder, as well as offences relating to the obstruction of the proper administration of the 2003 Act.

- Part 22 sets out provision for appeals against decisions of the Tribunal.

- Part 23 contains general provisions on matters such as interpretation and commencement.

COMMENTARY ON SECTIONS

PART 1 - INTRODUCTORY

Section 1: principles for discharging certain functions

9. Section 1 sets out a series of factors which must be considered by persons when they are discharging functions under the 2003 Act in relation to a patient who is over 18.

10. "Discharging a function" means carrying out a duty imposed by the 2003 Act or exercising a power conferred by it. (For this purpose, a power may be exercised by taking no action (see subsection (11)). As an example, a doctor, member of medical staff or mental health officer may take a decision concerning emergency or short term detention of a patient, or applying for, renewing, or seeking to vary a compulsory treatment order.

11. Subsection (3) sets out matters which a person discharging a function under the 2003 Act must take account into when doing so. The matters mentioned in subsections (3)(a), (b) and (d) should be read along with subsections (8), (9) and (10) respectively.

12. In addition, subsections (5) and (6) set out further matters that the person is to take account of in certain cases. The matters mentioned in subsection (5) are only to be considered if the function is not the making of a decision about medical treatment. The matters in subsection (6) are only to be considered where the person in relation to whom the function is being discharged is a person who is, or has been, subject to one of the certificates and orders mentioned in the subsection.

13. After having considered the matters mentioned in subsections (3), (5) and (6) and any other relevant matters, the person is required to discharge the function in a manner that appears to the person to be the one that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances(subsection(4)).

14. Subsection (7) exempts certain persons from the ambit of the section.

Section 2: welfare of the child

15. Section 2 requires that where a person is discharging a function under the 2003 Act which may be discharged in more than one manner in respect of a patient aged under 18, the person shall act in the manner which best secures the welfare of the child. The section sets out how the general principles in section 1 apply in respect of children. The section does not impose duties on the patient or any of the persons mentioned in section 1(7).

16. In deciding how to best secure the welfare of the child, the person discharging the function is to have regard to subsections (3), (5) and (6) of section 1. That person must also have regard to the importance of acting in the manner which involves the minimum necessary restriction on the freedom of the child.

Section 3: equal opportunities

17. Section 3 requires the Scottish Ministers, the Commission, Health Boards, hospital managers and local authorities, doctors, nurses and mental health officers to discharge functions under the 2003 Act in a manner which encourages equal opportunities and in particular the equal opportunities requirements. These requirements include the subject matter of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995. "Equal opportunities" has the same meaning as in the Scotland Act 1998, being "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions".

PART 2 – THE MENTAL WELFARE COMMISSION FOR SCOTLAND

Sections 4 to 20: the Mental Welfare Commission for Scotland

Continued existence of the Mental Welfare Commission for Scotland

18. Section 4 introduces schedule 4 and along with the schedule makes provision for the continued existence of the Commission. It was originally established by the Mental Health (Scotland) Act 1960. Schedule 1 of the 2003 Act contains provisions as to the membership, organisation and general powers of the Commission and is discussed in detail in paragraphs 655 to 666 of the Notes.

General duties

19. Section 5 requires the Commission to monitor the operation of the 2003 Act and to promote best practice in relation to its operation.

20. Section 6 places the Commission under a duty to inform the Scottish Ministers of any matter relating to the operation of the 2003 Act that it considers should be brought to their attention.

Particular functions

21. Sections 7 and 8 together place duties on the Commission to bring matters relating to the welfare of patients to the attention of any of the persons listed.

22. Section 7 is directed at matters of general interest or concern, while section 8 deals with the situation where the Commission believes that the persons listed have the ability to prevent or remedy certain circumstances. These circumstances are outlined in section 11(2) and include unlawful or improper detention, ill-treatment, neglect or a deficiency in the care or treatment of a person with mental disorder, loss or damage to a patient's property and when a patient is living alone and is unable to manage his or her affairs.

Duty to give advice

23. Section 9 establishes a duty on the Commission to provide advice where the Scottish Ministers, a local authority, a Health Board, the Scottish Commission for the Regulation of Care or the Scottish Public Services Ombudsman has referred a matter regarding the 2003 Act to it with the Commission's agreement.

Publishing information, guidance etc.

24. Section 10(1) allows the Commission to publish general information and guidance with regard to its functions as well as more specific information and guidance following an investigation under section 11(1), an inquiry under section 12(1) or visits to persons who have mental disorder carried out under section 13(1). The Commission may not publish advice given under section 9(1) without the permission of a person mentioned in subsection (2) of that section.

25. Section 11(1) enables the Commission to inquire into and make recommendations relating to any patient's case, where the circumstances outlined in subsection (2) apply. Those circumstances include that the patient may be, or may have been, subject or exposed to ill-treatment, neglect or some other deficiency in care or treatment.

26. (Local authorities also have certain powers of investigation in some of these circumstances under sections 33 to 35 of the Act (see paragraphs 60 to 63 of these Notes)).

Investigations: further provisions

27. Section 12 allows the Commission to hold a formal inquiry when it carries out an investigation under section 11(1). The Commission can require the attendance of persons, and has the ability to examine witnesses under oath.

Visits in relation to patients

28. Section 13(1) requires the Commission to ensure that persons authorised by it visit certain categories of patients specified in subsection (2). The frequency of visits is a matter for the discretion of the Commission. The duty applies whether the patients concerned are in hospital or the community. In addition to the duty to visit patients subject to compulsory measures, the Commission may visit hospitals, community mental health facilities and prisons both to inspect the facilities and to allow patients to discuss with the Commission any concerns they may have. Subsection (6) allows the Commission to make unannounced visits.

Interviews

29. Section 14 allows a person authorised by the Commission (the "authorised person"), in the discharge of its functions (for example as part of a visit or an investigation) to interview patients or other appropriate persons in private. The section also requires the authorised person, when carrying out visits under section 13, to give patients the opportunity of a private interview.

Medical examination and inspection of records

30. Section 15(1) provides that an authorised person may carry out a private medical examination of a patient. Subsection (2) provides that the authorised person must be a medical commissioner or a member of staff of the Commission with such qualifications, training and experience as may be prescribed by regulations. Medical commissioners are appointed in terms of paragraph 3(1)(b) of schedule 1 (see paragraphs 655 to 666 of these Notes).

31. Section 16(1) provides that an authorised person may, in connection with the discharge of any of the Commission's functions under the 2003 Act or the 2000 Act, require the production of medical or other records a person may hold and inspect those records. Subsection (2) provides that the authorised person for this purpose must be a member of the Commission or a member of staff of the Commission.

Duties of Scottish Ministers, local authorities and others with respect to the Commission

32. Section 17(1) requires the persons mentioned in subsection (2) to provide facilities for the Commission to carry out its functions.

Annual report; statistical information

33. The Commission must publish an annual report (section 18) and must provide and publish statistical information (section 19). The Scottish Ministers may direct what statistical or other information is to be provided to them and published.

Protection from actions of defamation

34. This provision in section 20 provides explicit protection to the Commission and its employees from actions of defamation unless they can be shown to be acting maliciously. Privilege would apply, for example, to any report published by the Commission as a result of an investigation into deficiencies in a patient's care.

PART 3 – THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Section 21: the Mental Health Tribunal for Scotland

35. This section introduces schedule 2 which along with this section makes provision concerning the Tribunal.

36. Subsections (1) and (2) establish the Tribunal. The Tribunal will act as an independent judicial body which will authorise compulsory treatment orders and deal with appeals against and reviews of compulsory treatment orders, short-term detention, compulsion orders and other mental health disposals affecting mentally disordered offenders. The Tribunal substantially replaces the role of the sheriff under previous mental health legislation.

37. The Scottish Ministers may make regulations in connection with the Tribunal (subsection (3)).

38. The composition of the Tribunal and its organisation and procedures are detailed in schedule 2 (see paragraphs 667 to 687 of these Notes). Appeals from the Tribunal to the sheriff principal and the Court of Session are dealt with in Part 22 (see paragraphs 633 to 645 of these Notes).

PART 4 – LOCAL AUTHORITY AND HEALTH BOARD FUNCTIONS

Chapter 1: Health Board duties

Sections 22 to 24

Approved medical practitioners

39. Section 22 places a duty on Health Boards and on the State Hospitals Board for Scotland, (the special Health Board with responsibility for the State Hospital) to each maintain a list of approved medical practitioners having special experience in the diagnosis and treatment of mental disorder. An approved medical practitioner has a number of functions under the 2003 Act. For example, at least one of the mental health reports making a recommendation for a

compulsory treatment order must be provided by an approved medical practitioner while a short-term detention certificate may only be granted by an approved medical practitioner.

Provision of services and accommodation: children and young people

40. Where a patient under 18 is either detained in hospital under Parts 5 or 6 of this Act (that is, on the authority of an emergency detention certificate or a short-term detention certificate respectively) or has been admitted to hospital, whether voluntarily or not, to receive treatment, section 23 places a duty on Health Boards to provide services and accommodation sufficient to meet the young patient's particular needs.

Provision of services and accommodation: mothers with post-natal depression

41. Section 24 places a duty on Health Boards to provide services and accommodation for mothers with post-natal depression. The duty applies where the mother or adoptive mother of a child under the age of one admitted to hospital for treatment for post-natal depression, cares for the child, and is not likely to endanger the child's health or welfare. The duty consists in providing such services and accommodation as are necessary to ensure that the mother is able, if she wishes, to care for the child in hospital.

Chapter 2: local authority functions

Sections 25 to 35

Provision of services

42. Section 25(1) places a duty on a local authority to provide, or secure the provision of, services that provide care and support for patients in its area who are not in hospital. The section also gives local authorities the power to do the same for such patients who are in hospital.

43. Subsection (2) requires the services provided to be designed so as to minimise the effect of the mental disorder and to give the patient the opportunity to lead as normal a life as possible.

44. Subsection (3) describes care and support services which might be provided, including practical and emotional support in a crisis, assistance with daily tasks, and accommodation with appropriate levels of support.

45. Subsection (4) incorporates sections 25 and 26 into section 59(1) of the Social Work (Scotland) Act 1968 (c.49), with regard to the duty of local authorities to provide and maintain residential or other establishments.

46. Section 26(1) places a duty on a local authority to provide, or secure the provision of, services that are designed to promote the well-being and social development of those patients in its area who are not in hospital. Like section 25, the section also gives local authorities the power to do the same for patients in hospital.

47. Subsection (2) sets out some of the services that may be provided.

48. Subsection (3) states that the duty conferred by subsection (1) is without prejudice to the existing duty on local authorities to provide social, cultural and recreational activities and

vocational and industrial training under section 1 of the Education (Scotland) Act 1980 (c.44), and the duty on Scottish Ministers to provide further education under section 1 of the Further and Higher Education (Scotland) Act 1992 (c.37).

49. Section 27 places a duty on local authorities to provide, or secure the provision of, transport for patients who are not in hospital to attend or participate in those services provided under sections 25 and 26. Again, local authorities are given a power to do the same for patients in hospital.

Charging for services

50. Section 28 amends section 87 of the Social Work (Scotland) Act 1968 and sections 2 and 22(1) of the Community Care and Health (Scotland) Act 2002, so that:

- a local authority providing a service under sections 25 to 27 may recover such charge (if any) for it as it considers reasonable;
- if a patient utilises a service provided under these sections and satisfies the authority that they cannot afford to pay the charge for the service provided, the authority must only charge what that patient can practically afford; and
- the Scottish Ministers may by regulations exclude certain services from any charging regime under these provisions.

Relationship with general duties

51. Section 29 makes it clear that the duties established under this Part are in addition to the duties set out in sections 12(1), 13A, 13B and 14 of the Social Work (Scotland) Act 1968 (the general duty to promote social welfare, and the duties to provide residential accommodation with nursing, to provide care and after-care, and to provide domiciliary and laundry services) and section 22(1) of the Children (Scotland) Act 1995 (a duty to provide an appropriate range and level of services to safeguard and promote the welfare of children in need).

Co-operation and assistance

52. Section 30 imposes a duty on a local authority providing services, under sections 25 to 27 to co-operate with Health Boards, Special Health Boards, and voluntary organisations who have an interest in the provision of those services or a power or duty in relation to the provision of services for the patient.

53. Section 31(1) allows local authorities to request that Health Boards and Special Health Boards assist them in the performance of their duties under sections 25 and 26. These bodies are required to co-operate if to do so is compatible with their own responsibilities and would not prejudice the discharge of those responsibilities (subsection (2)). Subsection (3) makes it clear that the section does not interfere with, and is in addition to, the provisions of section 21 of the Children (Scotland) Act 1995.

Appointment of mental health officers

54. A local authority is required by section 32(1) to appoint for its area sufficient mental health officers for the purpose of discharging the functions of such officers under the Act, the

1995 Act and the 2000 Act. Mental health officers carry out a range of functions, including consenting to the granting of a short-term detention certificate under Part 6, and making an application for a compulsory treatment order under Part 7.

55. Subsection (2) sets out the requirements for being appointed as a mental health officer, which will include requirements on registration, qualifications and experience as directed by the Scottish Ministers.

56. Subsection (3) operates so that persons already appointed as mental health officers on the day section 32 comes into force are deemed to be appointed under that section. Effectively, such persons simply continue as mental health officers.

57. A local authority must provide or secure the provision of training of mental health officers in accordance with directions given by the Scottish Ministers, both to enable new mental health officers to be appointed and for those continuing as mental health officers (subsection (4)).

58. Subsection (5) provides for the circumstances in which a local authority is required to terminate the appointment of a mental health officer. The validity of anything done by that mental health officer before termination occurs is unaffected (subsection (6)).

59. Subsection (7) provides that the directions by the Scottish Ministers referred to in paragraphs 54 and 56 above, must be given to local authorities together rather than individually.

Duty to inquire into individual cases

60. Section 33(1) places a duty on local authorities to inquire into situations where an adult patient in its area may be at risk (see subsection (2) for the circumstances). Under section 34, local authorities may, where it is necessary for, or would assist, such inquiries, seek the co-operation of Health Boards, the Commission, the Public Guardian or the Scottish Commission for the Regulation of Care.

61. Section 35 confers powers on a sheriff or justice of the peace, which support the carrying out of inquiries under section 33. A relevant mental health officer may seek a warrant for any of a range of purposes which may be relevant to the inquiry: to enter premises and open lock-fast places; to detain a person for 3 hours for the purpose of a medical examination; or for a medical practitioner to have access to a person's medical records. Such an examination could be a preliminary to emergency detention or short-term detention under Parts 5 and 6 respectively.

62. Where a warrant is granted or refused, the mental health officer who applied for it must notify the Commission (subsection (10)). There is no appeal available against the decision of the sheriff or justice of the peace.

63. The meaning of "relevant mental health officer" for the purposes of this section depends on which warrant is being obtained (see subsection (12)).

PART 5 – EMERGENCY DETENTION

64. In an emergency, the need for a patient to be detained in hospital means that there might not be enough time to make arrangements for the usual procedures leading to short-term detention (see Part 6) or long-term detention (see Part 7) to be followed. Part 5 therefore provides an emergency procedure under which a patient may be removed to hospital and detained there for up to 72 hours on the basis of a certificate granted by a medical practitioner. The procedure for granting an emergency detention certificate is the same whether or not the patient was in hospital prior to being detained.

Section 36: emergency detention in hospital

Issuing the emergency detention certificate

65. Any medical practitioner may grant an "emergency detention certificate" if the conditions in subsection (1) are met. Before granting the certificate, the medical practitioner must examine the patient (subsection (1)(a)). Regulations may provide circumstances which preclude a medical practitioner from carrying out an examination where there may be a conflict of interest.

66. To reflect the urgency of the situation, a certificate can be granted only within the strict time limits which are set out in subsection (12). Those time limits are calculated by reference to the time when the medical examination is completed.

67. A patient cannot be detained under the emergency procedure if, immediately before the examination is carried out, the patient was detained in hospital under any of the authorisations listed in subsection (2).

Consent of mental health officer

68. The effect of subsections (3)(d) and (6) is that, where it is practicable to do so, the medical practitioner must consult and obtain the consent of a mental health officer before the proposed certificate is granted.

Criteria for emergency detention: tests applied by medical practitioner

69. The certifying practitioner must be *satisfied* that the conditions in subsection (5) are met. However, the practitioner need only consider it *likely* that the conditions in subsection (4) are met. Subsection (5)(c) also requires the practitioner to be satisfied that the process of trying to obtain a short-term detention certificate in respect of the patient would involve undesirable delay.

Measures authorised by certificate

70. Subsection (8) sets out the measures authorised by an emergency detention certificate: removal of the patient to hospital within the period of 72 hours from the time at which the certificate was granted; and detention in hospital for 72 hours. Subsection (7), however, provides that the patient's admission to hospital from the community and the subsequent 72-hour period of detention are only authorised where the emergency detention certificate has been given to the managers of the hospital in which the patient is to be detained. Subsection (8)(b)(ii), on

the other hand, provides that where a patient is in hospital immediately before the certificate is granted, the 72 hour period of detention begins with the granting of the certificate.

Contents of emergency detention certificate

71. Subsection (10) requires the medical practitioner who examined the patient and granted the certificate to state the reasons for believing that the conditions in subsections (4) and (5) are met and also to sign the certificate.

Sections 37 to 40: actions following emergency detention

Duties of medical practitioner who issued the detention certificate

72. Section 37 places a duty on the medical practitioner who granted the emergency detention certificate to give notice to the managers of the hospital in which the patient is to be detained of the following matters:

- why the certificate was granted;
- whether a mental health officer consented to the granting of the certificate;
- where no consent from a mental health officer was obtained, why it was impracticable to consult a mental health officer;
- the alternatives to the granting of the certificate which the medical practitioner considered and why such alternatives were believed to be inappropriate.

73. Subsection (1) states that the medical practitioner should provide notice of these matters when the emergency detention certificate is given to the hospital managers. Subsection (3) provides, however, that where it is impracticable for the medical practitioner to provide such notice when the certificate is given to the managers, it should be given as soon as practicable after the event.

Medical examination following admission

74. Section 38 imposes on the managers of the hospital in which the patient is detained a duty to arrange for an approved medical practitioner to carry out a medical examination of the patient. Section 39 provides that the approved medical practitioner who examines the patient must revoke the certificate if satisfied that the criteria for emergency detention listed at section 36(4) and (5)(b) are no longer met or if it is no longer necessary for the patient to be detained in hospital on the authority of the emergency detention certificate. If the emergency detention certificate is revoked, the practitioner must inform both the patient and the hospital managers of the revocation (section 40(1)). The hospital managers must then inform the parties listed at subsections (4) and (5) of section 38 that the certificate has been revoked (section 40(2)).

Other duties following admission

75. Section 38 places a further series of duties on the hospital managers. First, they must within 12 hours of receiving the detention certificate inform the parties listed at subsection (4) that the certificate has been granted. Second, they must notify the parties listed at subsection (4) of the matters which they were given notice of by way of section 37. Such notice must be given within 7 days of their receiving it from the practitioner who granted the certificate. Third, if an emergency detention certificate was granted without the consent of a mental health officer, the hospital managers must within 7 days of receiving the information required by section 37 give

notice of that information either to the local authority for the area in which the patient resides or (in instances where the hospital managers do not know where the patient resides) to the local authority for the area in which the hospital is situated.

76. The hospital managers are also required by section 230 to appoint an approved medical practitioner to act as the patient's responsible medical officer. The appointment must be made as soon as is reasonably practicable after the emergency detention certificate is granted. (See paragraphs 419 to 421 of these Notes).

Medical treatment during emergency detention

77. Emergency detention, unlike short-term detention, does not give general authority to provide compulsory medical treatment under Part 16. Urgent medical treatment may, however, be administered under section 243.

Sections 41 and 42: temporary suspension of emergency detention

78. Section 41(1) allows a patient's responsible medical officer to suspend temporarily the detention requirement when a patient is subject to an emergency detention certificate. The patient is not subject to that requirement for a particular period of time specified by that officer. Where, for example, the suspension is granted to enable the patient to attend an event, subsection (2) enables the period of time to be expressed as the duration of the event. In the circumstances set out in subsection (3), the suspension may be made subject to conditions. It is only the detention requirement which is suspended and the certificate continues to run. The authority to detain will revive when the period of suspension comes to an end.

79. While a temporary suspension is in force, the responsible medical officer may revoke it if either of the conditions in section 42(2) applies. Where the responsible medical officer does revoke the suspension certificate, he must inform the parties listed at subsection (3). Included here are the relevant hospital managers who, under subsection (4), must then inform the persons mentioned in section 38(4) and (5) of the revocation.

Section 43: effect of an emergency detention certificate on a compulsory treatment order

80. Section 43 deals with the situation where a patient is already subject to a compulsory treatment order (see Part 7) when an emergency detention certificate is granted. Subsection (2) provides that the measures authorised by the order are suspended for the period that the patient is subject to the emergency detention certificate. The order itself continues to subsist, however, and (provided it still has time to run) revives once the emergency detention certificate expires; and operates as it did before suspension. Subsection (3) provides that any medical treatment which was authorised by the compulsory treatment order may continue to be given during the period for which the emergency detention certificate is in force.

PART 6 – SHORT-TERM DETENTION

81. Part 6 makes provision for a patient's detention in hospital for a period of 28 days for the purposes of assessment or treatment of his mental condition. Unlike the procedure under the

1984 Act, it is not necessary for the patient first to have been admitted to hospital on an emergency basis.

Sections 44 to 56: short-term detention in hospital

Procedure for initiating short-term detention

82. Section 44 sets out the procedure for granting a short-term detention certificate. The detention is initiated by an approved medical practitioner who has examined the patient, determined that the criteria for short-term detention are met and obtained the consent of a mental health officer. The approved medical practitioner should also, unless it is impracticable, have regard to any views expressed by the patient's named person (see Chapter 1 of Part 17) concerning the proposed detention. Any approved medical practitioner may issue a short-term detention certificate provided that there is no conflict of interest in relation to the medical examination.

83. Section 44(2) also provides that a patient may not be re-detained on a short-term detention certificate immediately upon the expiry of an earlier period of detention authorised by:

- a short-term detention certificate;
- an extension certificate;
- section 68;
- a certificate granted under section 114(2) or 115(2).

Criteria for short-term detention

84. Section 44(4) sets out the criteria for short-term detention. These criteria are similar to the criteria for compulsory treatment orders (see Part 7). However, because short-term detention may be required when the nature and effect of the patient's mental disorder is not clear, it is unnecessary to demonstrate that medical treatment is available which would benefit the patient. Instead, the approved medical practitioner must be satisfied that it is necessary to detain the patient for the purpose of either determining what treatment should be given or administering medical treatment.

Effect of granting of short-term detention certificate

85. By virtue of section 44(5), a certificate granted by an approved medical practitioner authorises three measures:

- removal to hospital within three days of the certificate being granted.

- detention in hospital for 28 days. The 28 day detention period starts at the beginning of the day on which the patient was admitted to hospital for a patient who is not already in hospital. For a patient who is already in hospital, the 28 day detention period starts at the beginning of the day on which the certificate was granted.

- the giving of medical treatment, in accordance with Part 16.

86. Subsection (1) of section 45 provides that, on being asked to consent to short-term detention, the mental health officer must, if practicable, interview the patient and ascertain the name and address of the patient's named person. The mental health officer must also inform the patient of the availability of advocacy services under section 259 of the Act. Subsections (2) and (3) provide that if it is impracticable for the mental health officer to interview the patient and ascertain the name and address of the named person, the mental health officer must give to the approved medical practitioner a copy of a record which states the steps they have taken in attempting to comply with these duties.

Hospital managers' duties

87. Section 46 requires the relevant hospital managers to give notice of the granting of a short-term detention certificate to the persons listed in subsection (2). Where a patient subject to a short-term detention certificate does not already have a responsible medical officer, the managers of the hospital in which the patient is detained must also appoint an approved medical practitioner to act as the patient's responsible medical officer. This duty is imposed by section 230 (see paragraphs 419 to 421 of these Notes).

Extension of short-term detention

88. Subsection (1) of section 47 enables short-term detention to be extended for a further three days if the conditions in that subsection are complied with and an extension certificate is granted by an approved medical practitioner. For example, this procedure can be followed towards the end of the 28 day detention period if the patient's mental health suddenly deteriorates. The three day extension would give the responsible medical officer and the mental health officer additional time within which to prepare an application for a compulsory treatment order. Before an extension certificate can be issued, the conditions set out in subsections (2) and (3) must apply.

89. Subsection (1) of section 48 requires the approved medical practitioner who grants an extension certificate to notify the persons listed in subsection (2) of the extension of the detention period and of the related matters set out in paragraphs (b) to (d) of subsection (1).

Revocation of detention

90. Section 49 imposes on the responsible medical officer a duty to keep under review the need for the patient to be detained either under a short-term detention certificate or an extension certificate; and requires the certificate to be revoked if the detention criteria are no longer met or if it is no longer necessary for the patient to be detained in hospital on the authority of the certificate. Where a certificate is revoked, notification under subsections (3) and (4) must be made.

Revocation on application of patient

91. Section 50 confers on the patient or the patient's named person a right to apply to the Tribunal for revocation of the certificate. A short-term detention certificate is also automatically revoked if a compulsory treatment order or an interim compulsory treatment order is made in respect of the patient (see section 70).

Commission's power to revoke detention certificates

92. Section 51 confers a power on the Commission to revoke a short-term detention certificate or an extension certificate where it is satisfied that one of the tests in paragraph (b) is met. Section 52 provides that where the Commission exercises this power, it must give notice of the revocation to the parties listed in that section.

Temporary suspension of detention

93. Section 53 allows a patient's responsible medical officer to suspend temporarily the detention requirement under a short-term detention certificate for a specified period of time. This is effected by the grant of a certificate by the patient's responsible medical officer. In the circumstances set out in subsection (3), the suspension may be made subject to conditions.

Revocation of temporary suspension

94. Subsection (2) of section 54 enables the responsible medical officer to revoke the temporary suspension certificate on either of the grounds set out in that subsection. The officer must give notice of revocation to the parties listed in subsection (3).

Relationship between certificate and other measures under Act authorising detention

95. Section 55 provides that the granting of a subsequent short-term detention certificate supersedes an emergency detention certificate.

96. Section 56 similarly provides that where a patient is subject to a compulsory treatment order and a short-term detention certificate is subsequently granted in respect of that patient, the compulsory treatment order will not authorise the measures specified in it during the period that the patient is subject to the short-term detention certificate.

PART 7 – COMPULSORY TREATMENT ORDERS

97. Part 7 sets out the procedures for making and the effect of a compulsory treatment order. This is an order which is made by the Tribunal and which authorises detention in hospital and various other community-based measures. A compulsory treatment order lasts for 6 months unless revoked before then. However, it may be extended on the application of the patient's responsible medical officer for a further 6 month period and then for periods of 12 months at a time.

98. Part 7 also provides for an interim compulsory treatment order which the Tribunal may grant while the application for the compulsory treatment order is being considered. An interim order lasts for up to 28 days and may not be extended, although the Tribunal may make more than one interim order provided that the total detention period authorised by those interim orders does not exceed 56 continuous days. The measures authorised by a compulsory treatment order and an interim compulsory treatment order are specified by the Tribunal but may be subsequently varied by the Tribunal. The responsible medical officer has power to suspend the effect of the order for temporary periods or to revoke it. The patient and the patient's named person also have the right to apply to the Tribunal for revocation or variation of the order.

Chapter 1: application for, and making of, orders

Pre-application procedures

Sections 57 and 58: medical examinations and mental health reports

99. Applications for compulsory treatment orders may be made only by a mental health officer. A mental health officer is under a duty to make such an application on receiving two mental health reports. One of these reports must be compiled by an approved medical practitioner while the other may be provided by an approved medical practitioner or the patient's general practitioner. The information which each practitioner must provide in the mental health report prepared by him or her is set out in subsection (4) of section 57.

Sections 59 to 62: duties and powers of mental health officer on receiving reports

100. On receipt of the mental health reports (defined in section 57(4)) produced by virtue of section 57, the mental health officer is required to interview the patient and comply with the other requirements in section 61(2); to take steps to identify the patient's named person (section 59); to co-ordinate the preparation of a proposed care plan in respect of the patient (section 62); and to prepare a report and application to the Tribunal (sections 61 and 63).

101. Section 57(7) requires the application for a compulsory treatment order to be submitted to the Tribunal within 14 days of the later of the two medical examinations.

102. Before making an application, the mental health officer must give notice to the persons listed in section 60(1) of the fact that an application is to be made. Notice need not be given to the patient if a mental health report provided by an approved medical practitioner has indicated that notice should not be given. However, the mental health officer may override the advice of the approved medical practitioner where he or she considers it appropriate and may give such notice all the same. This provision does not, however, relieve the mental health officer of the duty to inform the patient of the proposed application and of the availability of advocacy services at the point at which the mental health officer is preparing the report required under section 61.

103. Section 61(4) sets out the information which must be included in the mental health officer's report. The mental health officer is required by section 57 to submit an application whether or not that officer considers the powers sought are appropriate; but he or she may nonetheless express views on the mental health reports (section 61(4)(f)). Any difference in views between the mental health officer and the medical practitioners will be a matter for the Tribunal to consider. The report must also give details of any advance statement (see sections 275 and 276) which the patient has made and of which the mental health officer is aware.

104. Section 62 requires that the proposed care plan be prepared by the mental health officer in consultation so far as practicable with the medical practitioners who produced the mental health reports and with other persons or agencies who will be providing services, treatment or care to the patient. The plan must contain the information set out in subsection (5).

Application for order

Sections 63, 64 and 67 to 69: consideration by the Tribunal

105. Section 63 deals with the application for a compulsory treatment order. Subsection (2) sets out the matters that must be stated in the application and subsection (3) lists the documents that must accompany the application.

106. For patients who are already subject to a short-term detention certificate (or an extension certificate), section 68 provides that once an application under section 63 has been submitted to the Tribunal, the patient's detention in hospital under authority of the certificate is automatically extended for a further five working days. This is to enable the Tribunal to have sufficient time to come to a decision on the application. Section 69 requires the Tribunal either to make an interim compulsory treatment order or determine the application for the compulsory treatment order before the end of that extended period.

107. On receipt of an application for a compulsory treatment order, the Tribunal must make arrangements under section 64 to consider it. Subsections (2) and (3) require the Tribunal to afford various parties an opportunity to make representations. Tribunal rules made under schedule 2 to the Act will set out further procedural requirements.

108. Section 64(5) sets out the conditions which the Tribunal must be satisfied are met when deciding whether or not to make a compulsory treatment order. If so satisfied, the Tribunal must consider which of the measures from the list set out in section 66(1) are appropriate in the patient's case.

Outcome of application

Section 65: interim compulsory treatment order

109. Where an application for a compulsory treatment order has been made, the Tribunal has power to grant an interim compulsory treatment order. The Tribunal may do so at its own discretion or on the application of any party with an interest in the proceedings. An interim order may last for any period of up to 28 days. The Tribunal may grant more than one interim order in respect of a patient. In that case however, the total period authorised by the interim orders must not exceed 56 consecutive days.

110. Section 65(5) stipulates which persons must be afforded the opportunity to make representations to the Tribunal before an interim order can be granted.

Section 66: measures which may be authorised by a compulsory treatment order or an interim compulsory treatment order

111. A compulsory treatment order (or an interim compulsory treatment order) authorises the measures set out in it. The measures are drawn from the list in subsection (1) of section 66. The measures include detention of the patient in hospital and various measures which are delivered in the community. Whether or not the patient is in hospital, the compulsory treatment order may specify that the patient is to be given medical treatment in accordance with Part 16.

Sections 67, 70, 71, 75 and 76: actions following the making of a compulsory treatment order

112. Where a compulsory treatment order or an interim compulsory treatment order is made, the order will provide the authority for the patient to be removed to the hospital or other place specified in the order (section 67) within 7 days. Other duties which must be carried out once either of these orders has been made include:

- the appointment of a responsible medical officer by the hospital managers (if the patient does not already have a responsible medical officer) (section 230- see paragraphs 419 to 421 of these Notes)
- the preparation of a social circumstances report by the mental health officer (except where this would serve little or no practical purpose) (section 231- see paragraph 422 of these Notes)
- the preparation of a care plan by the patient's responsible medical officer. The responsible medical officer must ensure that this care plan is placed with the patient's medical records (section 76- see paragraph 119 of these Notes).

113. Section 70 provides that where an interim compulsory treatment order or a compulsory treatment order is made while a patient is detained on short-term detention, the certificate which authorised the short-term detention is automatically revoked upon the making of the subsequent order. Similarly, section 75 provides that where a patient is made subject to a compulsory treatment order while already subject to an interim compulsory treatment order, that interim order shall be revoked on the making of the 'full' compulsory treatment order.

114. Section 71 introduces schedule 3 and provides that Chapter 1 of Part 7 applies where a patient is subject to a hospital direction made under section 59A of the 1995 Act or a transfer for treatment direction made under section 136 of the 2003 Act subject to the modifications of that Chapter set out in schedule 3.

Chapter 2: interim compulsory treatment orders: review and revocation

Sections 72 to 75: revocation of interim compulsory treatment orders

115. Subsection (1) of section 72 imposes on the patient's responsible medical officer a duty to review the order from time to time to establish whether the matters mentioned in paragraphs (a) and (b) of that subsection apply. Following such a review, subsection (2) places that officer under a duty to revoke the order if not satisfied that either of the tests set out in that subsection is met.

116. Section 73 confers power on the Commission to revoke an interim compulsory treatment order if it is satisfied that one of the tests in that section is met in the case of a particular patient.

117. If an order is revoked under section 72 or 73, the notification requirements in section 74 must be complied with as soon as possible after the revocation. Subsection (1) relates to revocations under section 72 and subsection (2) relates to revocations under section 73. In each case, the list of persons to be notified (set out in subsection (3)) is the same.

118. Section 75 provides that where a compulsory treatment order is made in respect of a patient who is subject to an interim compulsory treatment order, that interim order is automatically revoked.

Chapter 3: compulsory treatment orders: care plan

119. Once appointed under section 230 subsequent to the making of the compulsory treatment order, the patient's responsible medical officer is required by section 76 to prepare a care plan for the patient setting out the information mentioned in subsection (2) of section 76. The care plan must be placed in the patient's medical records. It may be amended from time to time (subsection (3)) and the Scottish Ministers may make regulations requiring it to be amended in particular circumstances (subsection (4)). Regulations may also provide that certain information in the care plan may not be amended. Subsection (5) requires the patient's responsible medical officer to make sure that, if the care plan is amended, the amended care plan is placed in the patient's medical records.

Chapter 4: review of orders

Section 77: first mandatory review of compulsory treatment order

120. Subsections (1) and (2) of section 77 require the responsible medical officer of a patient who is subject to a compulsory treatment order to carry out an initial review. A compulsory treatment order lasts for six months and the first review must be carried out in the two months before the order is due to expire. The responsible medical officer must comply with the requirements of subsection (3).

Section 78: further mandatory reviews

121. Section 78 provides for further mandatory reviews of compulsory treatment orders following the first review. The section applies to compulsory treatment orders which have been extended by one of the three types of determination set out in subsection (1)(a) (broadly, a determination on first review extending the order for six months; a determination on the first further review (i.e. at the end of that six month extension) extending the order for twelve months; and a determination on a second or later further review (extending the order for a further period of twelve months)). It also applies to orders which have been extended by the Tribunal under section 103.

122. Subsection (2) imposes a duty on the patient's responsible medical officer to carry out a review. He or she must comply with the requirements in section 77(3). As with the first review, the further review must take place within two months of the date on which the extended order would otherwise expire.

123. There are three possible outcomes of a review of an order. Each is considered in turn.

First possible outcome: revocation

124. The review may result in the order being revoked by the responsible medical officer (section 79). If (having regard to the views of those consulted under section 77(3)(c)) the

responsible medical officer is not satisfied as to either of the matters mentioned in subsection (2) of section 79, that officer must make a determination revoking the order.

125. The responsible medical officer and the Commission can revoke an order if satisfied as to the matters specified in sections 80 and 81 respectively. In section 80 cases, the order must be revoked; in section 81 cases, it may be revoked.

126. If an order is revoked, notification must be made to those persons specified in section 82(4).

Second possible outcome: determination that order be extended for 6 months in same form

Section 83: further steps to be taken where order not revoked

127. If the order is not revoked, the responsible medical officer must take the further steps set out in section 83.

Sections 84 to 87: determination that order be extended in same form

128. Section 84(1) and (2) provide that if, after having complied with section 83, the responsible medical officer considers that the order should continue to apply in exactly the same form, that officer must give notice to the mental health officer that it is proposed to make a determination under section 86.

129. Subsection (1) of section 85 then requires the mental health officer, as soon as practicable after receiving that notice, to take the steps set out in subsection (2) of that section.

130. If the tests in subsection (1) of section 86 are met, the responsible medical officer must make a determination extending the order for a period of:

- in the case of a first review, six months,
- in the case of the first further review, a further 12 months,
- in the case of a subsequent further review, a further 12 months from the expiry of the last 12 month period for which the order was extended.

131. Section 87 applies where a determination is made under section 86. Subsection (1) requires the responsible medical offer to comply with subsection (2) of that section. By compliance with that provision, the patient's case is again brought to the attention of the Tribunal.

132. Under section 99 the determination made under section 86 may be challenged by the patient or the patient's named person.

Sections 101 and 102: review of determination by Tribunal

133. Subsection (2) of section 101 then requires the Tribunal to review the determination if any of the conditions in that subsection is satisfied. Section 102(1) sets out the range of powers available to the Tribunal on such a review.

Third possible outcome: application to tribunal for extension and variation of order

Sections 83, 88 to 92, 103(1) and 105 to 110: application to Tribunal for extension and variation of order

134. Having taken the further steps in section 83, the patient's responsible medical officer may decide both that it will be necessary for the order to be extended for a further period, as specified in section 88(4), and that it should be varied for that extended period (section 88(2)). In such a case, the responsible medical officer must give notice to the mental health officer under section 88(3).

135. This route to extension and variation, is separate from the responsibility placed on the responsible medical officer by way of sections 93 to 95 to seek a variation of the order *at any time*, should he or she consider that its terms require amendment (see paragraphs 144 and 145 of these Notes).

136. Once the mental health officer has received notice under section 88(3), he or she must take the steps set out in section 89.

137. Subsections (1) and (2) of section 90 provide that if, after having regard to the views of the mental health officer as expressed under section 89(2)(e) and to the views of the persons listed at section 77(3)(c), the responsible medical officer is still satisfied that extension and variation of the compulsory treatment order is necessary, he or she must make an application to the Tribunal under section 92. The information to be submitted as part of such an application is set out in section 92. As soon as practicable after the duty to make an application under section 92 arises, the responsible medical officer must give notice of the application to the persons listed in section 91.

138. Subsection (1) of section 103 sets out the powers that the Tribunal has on an application under section 92.

139. In addition to the powers in section 103(1), the Tribunal has power under sections 105 and 106 to make interim orders.

140. If the Tribunal is satisfied that the tests in paragraphs (a) and (b) of subsection (2) of section 105 are met, it may make an interim order extending (with or without variation) the compulsory treatment order for a period of up to 28 days. The Tribunal may make an interim order at its own discretion or on the application of any person with an interest in the proceedings.

141. Section 106 enables the Tribunal to make an interim order varying the compulsory treatment order for a period of up to 28 days. The test which must be satisfied is set out in subsection (2).

142. Section 107 imposes a limit on the powers in sections 105 and 106. An order under either of those sections cannot be made if, when taken together with any other interim order(s) made under those sections, it would lead to such interim orders being in force for a continuous period of more than 56 days.

143. Section 108 requires the Tribunal, when it makes an order under section 105 or 106 (or any of the other provisions referred to), to specify in the order the modifications made to the measures and any recorded matter.

Variation of order: application by responsible medical officer

Sections 93, 95, 96, 97, 104 and 106 to 108: recorded matters – reference to Tribunal by responsible medical officer

144. Section 93 also imposes a duty on the patient's responsible medical officer which is additional to the duties imposed by sections 77 and 78. The responsible medical officer must periodically consider whether a compulsory treatment order should be varied by modifying the measures or recorded matters specified. Subsection (4) details the steps which the officer must take and those who must be consulted. If the officer's views then remain that the order requires to be varied, he or she must apply to the Tribunal under section 95 for an appropriate order.

145. The section has been modified by the 2004 Order which adds to the required steps in the process which the mental health officer must take when notified that the responsible medical officer is proposing to apply to the Tribunal. These include interviewing the patient and giving the patient information about various matters, including the availability of advocacy services and how to access those, and the patient's rights in relation to an application to the Tribunal. There are corresponding amendments to section 95.

146. Section 96 sets out the procedure to be followed by the responsible medical officer where he or she is satisfied that any recorded matter specified in the compulsory treatment order is not being provided. Where this happens, the responsible medical officer must make a reference to the Tribunal (subsection (3)) after having regard to the views of the mental health officer and any other persons he or she considers appropriate.

147. Section 97 states which persons the responsible medical officer must notify once he is required to make a reference to the Tribunal under section 96(3).

148. Section 104 sets out the powers of the Tribunal on a reference under section 96. In addition it may make an interim order under section 106, in which case sections 107 and 108 apply (see paragraphs 142 to 143 of these Notes).

Reference to Tribunal by Commission

Sections 98, 104 and 106 to 108: reference to Tribunal by Commission

149. Section 98 confers on the Commission power to make a reference to the Tribunal with regard to a compulsory treatment order for any reason it considers appropriate. Where the Commission makes such a reference to the Tribunal, it must notify the persons listed in subsection (3) and include in that reference the details listed in subsection (4).

150. Sections 104 and 106 to 108 are then applicable (see paragraph 148 above).

Applications by patients etc.

Sections 99, 100, 103(2) to (4) and 106 to 108: applications by patients etc for revocation of determination extending order and for revocation or variation of order

151. Section 99 gives the patient or the patient's named person a right to apply to the Tribunal for an order under section 103 revoking the determination made by the responsible medical officer under section 86 to extend the compulsory treatment order.

152. Section 100 confers on the patient or the patient's named person a right to make an application to the Tribunal for an order revoking the compulsory treatment order outright or varying it by modifying any of the measures or recorded matters specified in the order. Any such application may not be made within three months of the compulsory treatment order being made or within three months of any further order being made in respect of that compulsory treatment order under section 102 or 103. Subsection (6) provides that if an application under section 100 for revocation is refused or an application is made for variation, the individual who made that application is entitled to make no more than one further application in respect of that compulsory treatment order within the period mentioned in subsection (8). This means, for example, that one further application for revocation can be made either within the six month period following the day on which the order was made, or within the six month period following the first extension of the order, or within the 12 month period following the second extension of the order.

153. The powers of the Tribunal are set out in section 103. Subsection (2) deals with applications under section 99 and subsections (3) and (4) with applications under section 100.

154. Sections 106 to 108 are then applicable (see paragraphs 141 to 143 above).

Ancillary powers of Tribunal

Sections 109 to 111

155. Section 109 confers power on the Tribunal to require the patient's responsible medical officer or mental health officer to submit certain reports for the purpose of determining an application under section 92, 95, 99 or 100; a review under section 101; and a reference under section 96 or 98. The circumstances in which the Tribunal may require such reports will be set out in regulations made by the Scottish Ministers.

Interpretative provisions

156. Sections 110 and 111 apply for the purposes of the Chapter. Section 110 sets out rules for the calculation of periods of time; and section 111 explains what "modify" means.

Chapter 5: breach of orders

Sections 112 to 123: non-compliance with compulsory treatment order or interim compulsory treatment order

Detention provisions

157. Sections 112 and 113 relate to a patient who is subject to a compulsory treatment order or an interim compulsory treatment order which does not authorise that patient's detention in hospital; and make provision for breach of the order.

158. Section 112 applies specifically to the patient's breach of a requirement in the order to attend a specified place with a view to receiving medical treatment (the "attendance requirement"). Where a patient has breached the attendance requirement, the responsible medical officer may, with the consent of a mental health officer, make arrangements for that patient to be admitted to hospital or to be taken to the place the patient is required to attend by the attendance requirement. The patient may be detained for no more than 6 hours from the point at which he or she arrives at the hospital or other place (section 112(4) and (5)).

159. Section 113 applies to patients who fail to comply with any of the measures specified in a community-based compulsory treatment order or community-based interim compulsory treatment order. The patient may be taken into custody and conveyed to a hospital either by the responsible medical officer or by a person authorised for that purpose by the responsible medical officer. The patient may then be detained for a period of up to 72 hours. Before the responsible medical officer can exercise this power, however, he or she must be satisfied that subsection (2) or (3) applies in the patient's case.

160. Section 113(6) provides that as soon as reasonably practicable after the patient has been conveyed to hospital under section 113(5), a medical examination of the patient must be carried out by either the patient's responsible medical officer or an approved medical practitioner.

161. Section 114 makes provision for the situation where a patient subject to a compulsory treatment order is detained in hospital under section 113(5) after a breach of the terms of the order. The patient's responsible medical officer may grant a certificate under subsection (2) authorising the patient's continued detention in hospital for a further period of up to 28 days. Before granting such a certificate, however, the responsible medical officer must comply with the conditions listed at subsections (1), (3) and (4). Subsection (5) requires the responsible medical officer to list the reasons for believing that if the patient does not continue to be detained in hospital that it is reasonably likely that there will be a significant deterioration in the patient's mental health. It is also a requirement that the certificate be signed by the responsible medical officer.

162. Section 115 makes provision for the situation where a patient subject to an interim compulsory treatment order is detained in hospital under section 113(5) after a breach of the terms of the order. Subsection (2) confers power on the responsible medical officer to grant a certificate authorising the patient's continued detention in hospital until the point at which the interim compulsory treatment order would have expired. A certificate may be granted only if the conditions in subsections (1), (3) and (4) are met.

Notification duties

163. Section 116 lists the persons who must be notified by the managers of the hospital in which the patient is detained where a certificate is granted under either section 114(2) or section 115(2).

Revocation of detention certificates issued under sections 114(2) and 115(2)

164. Sections 117 and 118 place a duty on the responsible medical officer who granted a certificate under section 114(2) or section 115(2) to revoke that certificate under certain circumstances.

165. Section 117(1) provides that where a certificate under section 114(2) was granted on the basis mentioned in section 114(1)(c)(i) and the responsible medical officer determines that the order should not be varied, that officer must revoke the certificate. Subsection (2) provides that where a certificate under section 114(2) was granted on the basis mentioned in section 114(1)(c)(ii) and the test in section 117(2)(b) is satisfied, the responsible medical officer must revoke the certificate.

166. Section 118 provides that a certificate under section 115(2) must be revoked where the test in paragraph (b) is met.

167. Section 119 sets out the persons the responsible medical officer must notify of any such revocation.

168. Section 120 confers on the patient or the patient's named person the right to apply to the Tribunal for the revocation of a certificate issued under sections 114(2) or 115(2). Subsection (2) sets out the grounds on which the Tribunal will revoke the certificate.

Interaction of Chapter and orders

169. Section 121(1) provides that where a patient has breached the terms of a compulsory treatment order or an interim compulsory treatment order and is then detained in hospital under section 113(5), the measures originally authorised by the order are not authorised while the patient is detained under that section. The one exception to this rule relates to the giving of any medical treatment authorised by section 66(1)(b). Where such authorisation for medical treatment has been granted, that authorisation continues to apply during the period of hospital detention authorised by section 113(5).

170. Sections 122 and 123 similarly provide that where a certificate has been granted under section 114(2) or 115(2), the measures authorised in the compulsory treatment order or interim compulsory treatment order do not apply while the certificate is in force. As with section 121, the one exception to this provision relates to the giving of any medical treatment authorised by section 66(1)(b) which may continue to be given while these certificates are in force.

Chapter 6: transfers

Sections 124 to 126: transfers between hospitals

171. This chapter sets out the procedures which must be followed when a patient, who is detained in hospital on the authority of a compulsory treatment order, is to be transferred to a hospital, including to a state hospital.

172. Subsection (2) of section 124 vests the power to transfer a patient in the managers of the hospital in which the patient is detained, but under subsection (3) the transfer to a different hospital may proceed only where the managers of the receiving hospital have consented to the transfer. Subsection (4) requires the managers of the hospital who propose to transfer the patient to give seven days' notice of the transfer to the persons listed in subsection (8) except where it is necessary to transfer the patient urgently (subsection (5)) and where the patient consents to the transfer (subsection (7)), no notice to that patient is required.

173. Subsection (9) of section 124 provides that where notice has been given of a proposed transfer under subsection (4) or (6)(a) but that transfer does not take place within three months of the notice being given, the transfer may only take place if the managers of the hospital comply with the conditions set out in subsection (10).

174. Subsection (12) of section 124 provides that where a patient is transferred the managers of the hospital from which the patient is transferred must notify the Commission of the matters specified in subsection (13) within 7 days of the transfer taking place.

175. Section 125 makes provision for a patient or a patient's named person to appeal to the Tribunal against a transfer, or a proposed transfer, to a hospital other than a state hospital. Subsection (3) sets out the time limits within which appeals must be made. Where the patient has been given notice of the transfer before it takes place, he or she may appeal at any time between being given notice and 28 days after the transfer has occurred. Where the patient is given notice of the transfer only on or after the date of the transfer, the time limit for the appeal is 28 days from the point when notice was given. If the patient has not been given notice, the time limit is 28 days beginning with the day on which the patient is transferred. Similar time limits apply in the case of an appeal by the patient's named person.

176. Subsection (4) provides that if an appeal is made against a transfer, and if the transfer has not yet taken place, the transfer may not go ahead unless the Tribunal gives its approval in advance of the appeal being determined. Subsection (4)(b) provides that the Tribunal may make an order that the patient be transferred as proposed pending the determination of the appeal

177. Subsection (5) makes provision for the Tribunal to make an order on an appeal made under subsection (2) that the transfer should not take place if it has not already taken place. Where the transfer has already taken place, the Tribunal may make an order that the patient should be returned to the hospital from which the patient was transferred.

178. Where a patient is transferred to a state hospital, or receives notice of a proposed transfer to a state hospital, the patient or the patient's named person may appeal to the Tribunal under section 126. Where the patient has been given notice of the transfer before it takes place, he or she may make an appeal at any time between being given notice and 12 weeks after the transfer has occurred. Where the patient is given notice of the transfer only on or after the date of the transfer, the time limit placed on the patient's right of appeal is 12 weeks from the point when

notice was given. If the patient has not been given notice, the time limit is 12 weeks beginning with the day on which the patient is transferred. Again, similar time periods for appeal are allowed to the patient's named person.

179. Where the appeal is made before the transfer has taken place, the transfer should not then proceed unless the Tribunal makes an order that it should do so. If the transfer has already taken place, the Tribunal may make an order that the patient be returned to the transferring hospital unless satisfied that the patient requires to be kept under conditions of special security that only the state hospital can provide

Chapter 7: suspension

Sections 127 to 129: suspension of order

180. This Chapter makes provision for the temporary suspension of measures authorised under a compulsory treatment order.

181. Section 127 authorises the temporary lifting of a requirement for a patient to be detained in hospital. The responsible medical officer may suspend the detention requirement for a period of up to 6 months and may, under section 127(5), make the suspension subject to conditions where he or she considers it to be in the interests of the patient or to be necessary for the protection of others to do so. In the circumstances mentioned in subsection (7), the responsible medical officer must notify the persons listed in subsection (8). The responsible medical officer may grant a subsequent certificate but the total period specified in that certificate and any other certificate must not exceed 9 months in the period of 12 months ending with the expiry of the subsequent certificate (subsection (2)).

182. Section 128 enables the responsible medical officer to issue a certificate which would suspend any provision of the order other than a detention requirement. A certificate granted under section 128 may suspend measures specified in the compulsory treatment order for a period of up to 3 months. Notice must be given by the responsible medical officer in accordance with subsections (3) and (5).

183. Section 129 confers on the responsible medical officer power to revoke a certificate granted under section 127(1), 127(3) or 128(1) where he or she considers that revocation to be in the interests of the patient or to be necessary for the protection of any other person. The responsible medical officer must comply with the notification requirements in subsections (3) to (5).

PART 8 – MENTALLY DISORDERED PERSONS: CRIMINAL PROCEEDINGS

184. Provision for the disposal by the criminal courts of persons with mental disorder involved in criminal proceedings is made principally by Part VI and sections 200 and 230 of the 1995 Act. Part 8 amends the 1995 Act to provide for two new pre-sentence disposals (assessment orders and treatment orders), to replace interim hospital orders and hospital orders with interim compulsion orders and compulsion orders, to provide courts with power to detain acquitted persons and to make minor changes to the provisions on remanding accused persons for inquiry into mental health and on probation with a requirement that the person receives treatment for

mental disorder. In addition, Part 8 provides for the transfer of mentally disordered prisoners to hospital.

185. In addition to the amendments made to the 1995 Act by this Part, further amendments are made by paragraph 8 of schedule 4, and repeals are made by schedule 5, to the 2003 Act.

Chapter 1: pre-sentence orders

Assessment orders and treatment orders

Section 130: mentally disordered persons subject to criminal proceedings: assessment and treatment

186. Section 130 inserts 19 new sections after section 52 of the 1995 Act.

Remit of cases to sheriff court

187. Section 52A provides that a case involving a person who has been charged with an imprisonable offence in the district court and who appears to have a mental disorder must be remitted to the sheriff court. The sheriff court can then deal with the case as if it had originally been brought in that court, including the making of a mental health disposal. This section replaces and expands on section 58(10) of the 1995 Act.

Assessment order: sections 52B to 52J

188. These provisions create a new type of disposal – the assessment order.

189. Section 52B provides that, where a person has been charged with an offence, disposal has not yet been made in the proceedings in respect of the offence and the person appears to the prosecutor to be suffering from a mental disorder, the prosecutor may apply to the court for an assessment order. Section 52C provides the Scottish Ministers with similar power where the person is in custody but has not yet been sentenced. Section 52E provides that a court may also make an assessment order on its own initiative if it appears to the court that the person may have a mental disorder and the court is satisfied as to the matters set out in section 52D.

190. Section 52D sets out the matters as to which the court must be satisfied before it can make an assessment order. The court may make an assessment order only if it is satisfied on the evidence of a medical practitioner that:

- there are reasonable grounds for believing that the person has a mental disorder, that detention in hospital is necessary to assess whether the conditions in subsection (7) are met and that there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person if the order were not made;
- the hospital proposed by the medical practitioner is suitable for assessing whether the conditions in subsection (7) are satisfied and could admit the person within 7 days of the making of the order; and
- it would not be reasonably practicable to carry out the assessment unless the assessment order was made.

191. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person.

192. An assessment order may be made only in respect of a person who has not been sentenced (section 52D(5)).

193. If the court makes an assessment order, it may specify in it matters which it requires the responsible medical officer to include in the report to be submitted under section 52G(1) (see section 52D(2)).

194. Subsection (6) sets out the measures authorised by an assessment order, these being:

- the removal, if necessary, of the person to the hospital specified in the order within 7 days of the making of the order by one of the persons mentioned in subsection (6)(a);
- the detention of the person for the period of 28 days in that hospital; and
- the giving of medical treatment to the person in accordance with Part 16 of the 2003 Act.

195. The purpose of granting an assessment order is to assess whether the conditions at subsection (7) are met. Those conditions are:

- that the person has a mental disorder;
- that medical treatment which is likely to prevent the disorder worsening or to alleviate the symptoms or effects of it is available; and
- that, if the person were not provided with that treatment, there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person.

196. Subsection (8) provides circumstances where the court can make an assessment order in the absence of the person in respect of whom the order is being made.

197. Subsection (9) gives the court power to include directions in the assessment order for the removal of the person to, and detention in, a place of safety pending the person's admission to the hospital specified in the order. "Place of safety" is defined in section 307(1) of the 1995 Act.

198. Subsection (10) provides for the notification of the making of an assessment order.

199. Section 52F(1) provides that if it is not practicable by reason of emergency or other special circumstances to admit the person to the hospital specified in the order within 7 days, the court or the Scottish Ministers (where the person was in custody immediately prior to the making of the order) may direct that the person be admitted to another hospital. Subsections (2) and (3) deal with notification where a direction has been made. Subsection (4) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the assessment order.

200. Subsections (1) and (3) of section 52G provide that the responsible medical officer must provide a written report to the court within 28 days of the assessment order being made on the results of the assessment undertaken. Specifically, the responsible medical officer must report on whether the conditions mentioned in section 52D(7) are met and on any other matters

specified by the court under section 52D(2). Subsection (2) provides for the sending of copies of the report to the persons with an interest listed in that subsection.

201. Subsection (4) allows the court - once only - to extend the assessment order by up to 7 days if it is satisfied that more time is required to complete the assessment. Subsection (5) provides for the circumstances in which the court can extend an assessment order in the absence of the person who is subject to it. Where the court has extended an assessment order it must notify the persons listed at subsection (6) as soon as reasonably practicable after doing so.

202. Subsection (7) provides that the court can make a treatment order after reviewing an assessment order only if it would do so under section 52M, and the relevant provisions of section 52M apply to the making of a treatment order under section 52G as they apply to the making of an order under that section. A treatment order made under section 52G(3)(a) is to be treated in the same way as an order made under section 52M (see section 52G(8)).

203. Subsection (9) places a duty on the responsible medical officer to submit a written report to the court where there has been a change of circumstances which requires a variation of the order since the order was made. The court may then (under subsection (10)) confirm, vary or revoke the order. A variation may allow the transfer of the person to another hospital. If the court revokes the order, it may take any action mentioned in subsection (3)(b) including committing the person to prison or some other institution. It shall revoke the assessment order if satisfied that the person need not be subject to it.

204. Section 52H sets out the circumstances when an assessment order ceases to have effect due to reasons other than those set out in section 52G. The circumstances are-

- where a treatment order is made;
- where the person has been charged but no disposal as to the offence had been made when the order was made, the making of a relevant disposal as defined in section 52B(4);
- where the person has been convicted but not yet sentenced:
  - ❖ the deferral of sentence;
  - ❖ the making of an order listed in section 52H(3); or
  - ❖ the imposition of any sentence.

205. Section 52J sets out the powers of the court where an assessment order expires because its limited duration has ended. The court can commit a person who was subject to an assessment order to prison or other institution to which they would have been committed had the order not been made or deal with them otherwise, as it considers appropriate.

Treatment order: sections 52K – 52S

206. Section 52K provides that, where it appears to the prosecutor that a person, who has been charged but in relation to whom no disposal has been made, may have a mental disorder, an application may be made to the court for a treatment order in respect of that person. Section 52L provides the Scottish Ministers with similar power where the person charged is in custody but has not been sentenced. Section 52N provides that a court may also make a treatment order on

its own initiative without an application being made if it appears to the court that the person may have a mental disorder and the court is satisfied as to the matters set out in section 52M.

207. Section 52M sets out the matters as to which the court must be satisfied before it can make a treatment order and the measures that such an order authorises. Subsections (2), (3) and (4) provide that the court may make a treatment order only if it is satisfied on the evidence of two medical practitioners that the conditions set out in section 52D(7) are met and that there is a suitable hospital available for the admission of the person within 7 days of the order being made. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person. By virtue of section 61(1) of the 1995 Act (as amended by paragraph 8(10) of schedule 4 to the 2003 Act), one of the medical practitioners, on whose evidence the court makes the order, must be an approved medical practitioner.

208. A treatment order may be made only in respect of a person who has not been sentenced (see section 52M(5)).

209. Subsection (6) sets out the measures authorised by a treatment order, these being-

- the removal, if necessary, of the person to the hospital specified in the order within 7 days of the making of the order by one of the persons mentioned in subsection (6)(a);
- the detention of the person in that hospital; and
- the giving of medical treatment to the person in accordance with Part 16 of the 2003 Act.

210. Subsection (7) specifies when the court can make a treatment order in the absence of the person in respect of whom the order is being made.

211. Subsection (8) gives the court power to include directions in the treatment order for the removal of the person to, and detention in, a place of safety pending the person's admission to the hospital specified in the order.

212. Subsection (9) provides for the notification of the making of the treatment order.

213. Section 52P(1) provides that if it is not practicable by reason of emergency or special circumstances to admit the person to the hospital specified in the order within 7 days, the court or the Scottish Ministers (for persons in custody and those persons who were subject to an assessment order immediately before the treatment order was made and who were in custody prior to that assessment order being made) may direct that the person be admitted to another hospital. Notice should be given as soon as reasonably practicable after the direction has been made to those persons listed in subsection (4).

214. Subsection (5) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the treatment order.

215. Section 52Q(1) places the responsible medical officer under a duty to submit a report in writing to the court if the officer is satisfied that any of the criteria set out in section 52D(7) are

no longer met or there has been a change of circumstances since the order was made which makes detention of the person in hospital no longer appropriate.

216. Subsection (2) provides that if the court, on receiving the report of the responsible medical officer, is not satisfied that the person needs to be subject to the order, it must revoke the treatment order and commit the person to prison or other institution or otherwise deal with them as it considers appropriate. If the court is not satisfied that the person need not be subject to the treatment order it must confirm or vary the order or it can still decide to revoke the order.

217. Section 52R provides that, unless revoked earlier by the court, a treatment order remains in effect until-

- where the person has been charged but no disposal as to the offence had been made when the order was made, the making of a relevant disposal as defined in subsection 52B(4) ;
- where the person has been convicted but not yet sentenced-
  - ❖ the deferral of sentence;
  - ❖ the making of an order listed in section 52R(3); or
  - ❖ the imposition of any sentence.

218. The orders listed in subsection (3) are the same orders as are listed in section 52H(3).

219. Section 52S sets out the powers of the court where a treatment order ceases to have effect otherwise than under section 52Q(2) or 52R(2). The court can commit the person who was subject to the order to prison or another institution or deal with the person as it considers appropriate.

Prevention of delay in trials

220. Section 52T provides that, where a person is subject to an assessment order or a treatment order, the time limits as set out in sections 65 and 147 of the 1995 Act, are to apply to the person in the same way as those time limits apply to a person detained by virtue of committal for an offence until liberation in due course of law. Subsection (3) provides that any period during which detention of the person is not authorised by virtue of certificates under sections 221 or 224 of the 2003 Act shall still be taken into account for the purposes of calculating these periods.

Effect on pre-existing mental health orders

221. Section 52U provides that, should a person be made subject to an assessment order or a treatment order whilst subject to an interim compulsory treatment order or a compulsory treatment order, then the latter order is suspended while the person remains subject to the assessment order or treatment order.

Interim compulsion orders

Section 131: mentally disordered offenders: interim compulsion orders

222. Section 131 replaces section 53 of the 1995 Act (which made provision for interim hospital orders) with new sections 53 to 53D (which make provision for interim compulsion orders).

223. An interim compulsion order authorises a period of hospital detention for assessment of an offender's mental disorder, the offender's needs and the risk posed, in order to inform the sentencing decision of the court. The order may be made if a court thinks that either a compulsion order combined with a restriction order or a hospital direction may be in prospect. The person made subject to the interim compulsion order has a right of appeal against it being made under section 60 of the 1995 Act (as amended by the 2003 Act).

224. Section 53(1) sets out which offenders may be made subject to interim compulsion order, namely:

- persons convicted in the High Court or the sheriff court of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); and
- persons remitted to the High Court from the sheriff court for sentence for an offence punishable by imprisonment.

225. Subsections (2) to (7) set out the matters as to which the court must be satisfied before it can make an interim compulsion order. Subsection (2) provides that the court must be satisfied on the evidence of two medical practitioners, one of whom must be an approved medical practitioner (see section 61(1) of the 1995 Act as amended by the 2003 Act), that the offender has a mental disorder, as to the matters in subsection (3) and that it is appropriate having regard to the matters mentioned in subsection (4).

226. The matters in subsection (3) are:

- there are reasonable grounds for believing that the conditions outlined in subsection (5) are met, namely-
  - ❖ that medical treatment is available, which would be of benefit to the offender and without which the offender would be a significant risk; and
  - ❖ that it is necessary to make an interim compulsion order;
- there are reasonable grounds for believing that it would be appropriate to make either a compulsion order combined with a restriction order or a hospital direction in respect of the offender;
- a hospital which is suitable for assessing the offender could admit them within 7 days of the order being made; and
- it would not be reasonably practicable for the assessment to be made without an interim compulsion order being made.

227. The matters to which the court must have regard in making an interim compulsion order, set out in subsection (4), are-

- all the circumstances of the case (including the nature of the offence of which the person was convicted); and
- any alternative means of dealing with the person.

228. Subsection (7) provides that the person can be admitted to a state hospital only if the court is satisfied that the person needs to be detained under conditions of special security and that those conditions can be provided only in a state hospital.

229. If the court makes an interim compulsion order, it may specify in the order matters which it requires the responsible medical officer to include in the report to be submitted under section 53B(1) (see section 53(2)).

230. Subsection (8) sets out the measures that are authorised when an interim compulsion order is made. These are-

- the removal, if necessary, of the offender to the hospital specified in the order within 7 days of it being made by one of the persons mentioned in subsection 8(a);
- detention of the offender in that hospital for up to 12 weeks; and
- the giving of medical treatment to the offender in accordance with Part 16 of the 2003 Act.

231. Subsection (9) gives the court power to include directions in the interim compulsion order for the removal of the offender to, and detention in, a place of safety pending their admission to the hospital specified in the order.

232. Subsection (10) allows the court to make an interim compulsion order in the absence of the offender in respect of whom the order is being made, in specified circumstances.

233. Subsection (11) provides for notification of the making of an interim compulsion order.

234. Subsection (12) prevents the court in making an interim compulsion order from making any of a number of other orders and disposals (listed in subsection (12)(a)) at the same time. The court's power to make orders otherwise in respect of the offender is preserved by subsection (12)(b).

235. Section 53A(1) provides that if it is not practicable by reason of emergency or other special circumstances to admit the offender to the hospital specified in the order within 7 days, the court or the Scottish Ministers may direct that the offender be admitted to another hospital. Subsection (2) provides for the notification of the making of a direction. Subsection (3) provides that, where a direction has been made, the hospital specified in it shall replace the hospital originally specified in the interim compulsion order.

236. Subsections (1) to (7) of section 53B set out the provisions for the review and extension of interim compulsion orders. Before the expiry of the period specified by the court (of up to 12 weeks) the responsible medical officer must submit a written report with the results of the assessment undertaken and any recommendation as to further renewal for continued assessment or on the appropriate disposal of the person. The responsible medical officer must also send a copy of the report to the offender and to any solicitor acting on the offender's behalf.

237. The interim compulsion order can, under subsection (4), be extended by the court for further periods of up to 12 weeks, subject to an overall cumulative maximum of 12 months (see subsection (5)). Subsection (6) provides when the court can extend an interim compulsion order in the offender's absence.

238. Subsection (8) provides the court with powers, on receiving the report from the responsible medical officer under subsection (1), to revoke the order and either make one of the disposals mentioned in section 53(6) or deal with the offender in any way in which it could originally have done. It cannot, however, make a fresh interim compulsion order. The disposals mentioned in section 53(6) are either a compulsion order combined with a restriction order or a hospital direction.

239. Section 53C provides that an interim compulsion order ceases to have effect if either a compulsion order or a hospital direction is made in relation to the offender, or if the court deals with them in some other way.

240. Section 53D provides that, if an interim compulsion order ceases to have effect other than in the circumstances provided for in section 53B(8) or 53C, the court can deal with the offender in any way in which it could originally have done. It cannot, however, make another interim compulsion order.

Remand for inquiry into mental condition

Section 132: remand for inquiry into mental condition: time limit for appeals

241. This section amends section 200(9) of the 1995 Act (which provides for the remand of accused persons in custody to allow inquiry into the person's physical or mental condition). The 24-hour time limit previously applicable to an appeal by an offender against an order for committal to hospital, or renewal of such an order, is removed, thereby allowing an offender to appeal at any time during which the committal to hospital continues. Further amendments of section 200 are contained in paragraph 8(13) of schedule 4 to the 2003 Act.

Part 8 Chapter 2: disposals on conviction and acquittal

Compulsion orders

Section 133: mentally disordered offenders: compulsion orders

242. Section 57A creates a new type of order, the compulsion order. These orders replace hospital orders under section 58(1) (which is repealed by schedule 5 to the 2003 Act). The effect of a compulsion order is similar to that of a compulsory treatment order made under Part 7 of this Act. The court can authorise a range of measures in a compulsion order including detention in hospital or compulsory treatment in the community. Those measures are authorised for a period of 6 months. A person made subject to a compulsion order has a right of appeal against the order being made under section 60 of the 1995 Act (as amended by the 2003 Act).

243. Subsection (1) sets out which offenders may be made subject to a compulsion order. These are:

- those convicted in the High Court or the sheriff court of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); and
- those remitted to the High Court from the sheriff court for sentence for an offence punishable by imprisonment.

244. Subsections (2) to (6) set out the matters on which the court must be satisfied before it can make a compulsion order.

245. Subsection (2) provides that the court must be satisfied on the evidence of two medical practitioners, one of whom must be an approved medical practitioner (see section 61(1) of the 1995 Act as amended by the 2003 Act), that the conditions in subsection (3) are met and that the order is appropriate after consideration of the matters in subsection (4). Once a compulsion order (without an accompanying restriction order) is made, the measures specified in the order (which the court must select from those listed in subsection (8)) are authorised for a period of 6 months.

246. The conditions in subsection (3) are:

- that the offender has a mental disorder (provided both medical practitioners agree on the type of disorder the offender has: see subsection (13));
- that medical treatment is available which is likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the mental disorder;
- that, if the offender were not provided with medical treatment there would be significant risk to the health, safety or welfare of the offender or to the safety of any other person; and
- that the making of a compulsion order is necessary.

247. The matters to be considered in subsection (4) are-

- the mental health officer's report prepared under section 57C;
- all the circumstances (including the nature of the offence of which the offender was convicted and the offender's past history); and
- any alternative means of dealing with the offender.

248. Subsection (6) provides that the offender may be admitted to and detained in a state hospital only if both of the medical practitioners who gave evidence under subsection (2) satisfy the court that the offender needs to be detained under conditions of special security that can be provided only in a state hospital.

249. Subsection (7) provides that, where the court makes the offender subject to a restriction order at the same time as a compulsion order, the measures specified in the compulsion order shall be authorised indefinitely and not limited to the period of six months provided for by subsection (2)). The criteria for the making of a restriction order are set out in section 59 of the 1995 Act (as amended by the 2003 Act). The court can make a restriction order if, having regard to the nature of the offence of which the offender was convicted, the antecedents of the person and the risk that as a result of mental disorder the offender would commit offences if released, it is satisfied that the order is necessary for the protection of the public from serious harm.

250. The effects of the restriction order are outlined in Part 10 of the 2003 Act. A restriction order may be made only where the compulsion order authorises detention in hospital.

251. Subsection (8) sets out the measures that may be authorised when a compulsion order is made. A compulsion order can authorise detention in hospital or community based treatment in the same way as a compulsory treatment order, as provided for in Part 7 of the 2003 Act. However, unlike a compulsory treatment order, there is no provision for a court to specify in the order details of treatment or services which are considered to be appropriate.

252. Subsection (9) places a restriction on the power of the court to specify in a compulsion order that the offender must reside in a care home service (as defined in section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8)). That can only be specified if the court is satisfied that the person providing the service is willing to receive the offender.

253. Subsections (10) to (12) give the Scottish Ministers power to prescribe by regulations measures which are to be treated as included in subsection (8).

254. Subsection (14) sets out the matters that must be specified in a compulsion order and also gives the court power to include directions in the order for the removal of the offender to, and detention in, a place of safety pending admission to the specified hospital or place.

255. Subsection (15) prevents the court in making a compulsion order from imposing on the offender at the same time any of a number of other orders and disposals (listed in subsection (15)(a)). The court's power to make other orders in respect of the offender is otherwise preserved by subsection (15)(b).

256. Section 57B(1) provides that, where a compulsion order authorises detention in hospital or requires residence at a specified place, the order authorises the removal of the offender to the hospital or place specified by one of the persons mentioned in subsection (2), within 7 days of the making of the order.

257. Where the court is considering making an offender subject to a compulsion order, section 57C gives the court power to direct the mental health officer to interview the offender and prepare a report containing the information listed in subsection (4). The mental health officer need not interview the offender if it is impracticable to do so.

258. Section 57D(1) provides that, where a compulsion order authorises detention in hospital, if it is not practicable by reason of emergency or other special circumstances to admit the offender to the hospital specified in the order within 7 days, the court or the Scottish Ministers may direct that the offender be admitted to another hospital. Subsection (2) provides for notification of the making of a direction. Subsection (3) provides that, where a direction is made, the hospital specified shall replace the hospital specified in the compulsion order.

Urgent detention of acquitted persons

Section 134: power of court to detain acquitted persons

259. Section 134 inserts new sections 60C and 60D into the 1995 Act. Section 60C gives the court power to detain, for the purpose of a medical examination, a person charged with an offence and who has been acquitted (other than by reason of insanity).

260. Before it can so, the court must be satisfied on the evidence of two medical practitioners (one of whom must be an approved medical practitioner by virtue of section 61(1) of the 1995 Act (as amended by the 2003 Act)) that the person meets the criteria set out in subsection (3) and that it is not practicable for a medical practitioner to examine the person immediately.

261. The order authorises the measures mentioned in subsection (4), namely the removal of the person to, and the detention of the person in, a place of safety for a period of 6 hours to allow an examination by a medical practitioner.

262. Subsection (5) gives a police constable or person specified by the court in the order, the power to take an acquitted person into custody if that person absconds either on the way to, or from, the place of safety.

263. Subsection (6) provides that an order under this section ceases to have effect on the granting, before the expiry of the 6 hour period, of an emergency detention certificate or a short-term detention certificate in respect of the person.

264. Section 60D provides that where a court makes an order under section 60C(1), it must notify the Commission within 14 days and provide the information set out in subsection (3). Subsection (3)(e) gives power to the Scottish Ministers to add to the information which must be provided to the Commission. They may do so by making regulations, the procedure for which is set out in subsections (4) and (5).

Probation with a requirement for treatment

Section 135: amendment of 1995 Act: probation for treatment of mental disorder

265. Section 135(a) amends section 230 of the 1995 Act by removing the 12-month maximum time limit on a requirement for treatment for mental condition. This has the effect that such a treatment requirement can now last for up to the 3-year maximum duration of a probation order.

266. Section 135(b) replaces subsection (3) of section 230 of the 1995 Act with a new subsection (3) which has the effect that, before imposing a requirement of treatment, the court must be satisfied on the evidence from those who provide the service that the service is appropriate and, if the treatment is to be provided in a hospital, that the hospital has made arrangements to receive the offender.

Chapter 3: mentally disordered prisoners

Section 136: transfer of prisoners for treatment for mental disorder

267. Section 136 provides for the transfer of prisoners to hospital for treatment for mental disorder. Further provisions regarding the effect of such transfers are at Part 11.

268. Subsections (2) to (4) provide that the Scottish Ministers may make a transfer for treatment direction if they are satisfied on the written reports of two medical practitioners, one of whom is an approved medical practitioner, that the following conditions are met:

- the prisoner has a mental disorder (provided that both medical practitioners agree on the type of disorder the prisoner has: see subsection (7));
- medical treatment is available which is likely to prevent the mental disorder worsening or alleviate any of the symptoms of or effects of the disorder;
- if the prisoner were not provided with the medical treatment proposed there would be significant risk to the health, safety or welfare of the prisoner or to the safety of any other person;
- the making of the direction is necessary; and
- a hospital which is suitable is for the medical treatment of the prisoner could admit the prisoner within 7 days of the direction being made.

269. Subsection (5) provides that a transfer for treatment direction may authorise the prisoner's detention in a state hospital only if the Scottish Ministers are satisfied that the prisoner needs to be detained under conditions of special security and that those conditions can be provided only in a state hospital.

270. Subsection (6) sets out the measures which a transfer for treatment direction authorises in relation to the prisoner. This includes the giving of medical treatment to the prisoner in accordance with Part 16.

271. Subsection (8) provides for the specification in the direction of the type of mental disorder that both medical practitioners agree the prisoner has. It also provides that the Scottish Ministers can specify directions for the removal of the prisoner to, and detention in, a place of safety pending admission to hospital. "Place of safety" here is defined by section 300 of the 2003 Act.

272. Subsection (9) provides that certain categories of prisoners may not be made subject to a transfer for treatment direction. These categories are prisoners subject to:

- assessment orders;
- treatment orders;
- interim compulsion orders;
- orders made under section 54 of the 1995 Act (where an accused has been found insane so that the trial cannot proceed or continue);
- orders made under section 57 of the 1995 Act (where an accused is acquitted on ground of insanity at the time of the offence);
- compulsion orders; and
- orders made under section 118(5) or 190 of the 1995 Act (where an offender is found on appeal to have been insane at the time of the offence).

PART 9 - COMPULSION ORDERS

273. Part 9 provides a regime for compulsion orders made under section 57A(2) of the 1995 Act. The regime for compulsion orders which are combined with restriction orders is provided for by Part 10. This Part is similar in many ways to Chapters 3 to 7 of Part 7 (some of the provisions of which it adopts with appropriate modifications) and includes provision for the review of compulsion orders, variation, extension and revocation of them, transfer of patients subject to them and suspension of measures authorised by them.

Chapter 1: duties following making of order

Section 137: Part 9 care plan

274. Section 137 makes provision for a care plan to be prepared once a compulsion order is made. Unlike the Tribunal, a criminal court does not require a care plan to be submitted before an order is made. However, it should be prepared subsequently as it will be relevant for future reviews by the Tribunal. As soon as practicable after being appointed under section 230, the patient's responsible medical officer must prepare a care plan and make sure that it is included in the patient's medical records. The section also provides for the amendment of a care plan by the responsible medical officer.

Section 138: mental health officer's duty to identify named person

275. Section 138 provides that as soon as practicable after a compulsion order is made, the patient's mental health officer must take reasonable steps to find out the name and address of the patient's named person.

Chapter 2: review of compulsion orders

Mandatory reviews by responsible medical officer

Section 139: first review of compulsion order

276. Section 139 sets out the procedure for the first review of a compulsion order. The order requires to be reviewed at regular intervals in a similar manner to a compulsory treatment order. If it is not extended, a compulsion order will expire after 6 months (see section 57A(2) of the 1995 Act, inserted by section 133 of the 2003 Act).

277. The section provides that within the last 2 months before the compulsion order is due to expire, the responsible medical officer must:

- carry out or make arrangements for a medical examination of the patient;
- consult the mental health officer;
- consult the persons mentioned in subsection (5) that the responsible medical officer considers appropriate;
- consult any other persons that the responsible medical officer considers appropriate; and

- consider whether the conditions mentioned in subsection (4) continue to apply and whether it is necessary that the order be renewed.

278. Subsection (4) sets out the conditions which the responsible medical officer is to decide either do or do not continue to apply in respect of the patient. Those conditions mirror the conditions set out in section 57A(3) of the 1995 Act which must be satisfied before the court can make a compulsion order.

279. The duty in this section exists alongside the ongoing duty on the responsible medical officer in section 142 to keep the need for the compulsion order under regular review.

Section 140: further reviews of compulsion order

280. Section 140 provides for further reviews of a compulsion order. If extended beyond 6 months from the date on which it was first made, the compulsion order will lapse unless it is extended again at the first anniversary and annually thereafter. Within the last 2 months before the expiry date of the order, the responsible medical officer must take the same steps to review the continuing need for the order as section 139 sets out for the first review.

Revocation of order by responsible medical officer or Commission

Section 141: responsible medical officer's duty to revoke compulsion order: mandatory reviews

281. Section 141 provides that if, as a result of a first review under section 139 or a further review under section 140, the responsible medical officer is not satisfied that the conditions set out in section 139(4) continue to apply or that there continues to be a need for the order, then that officer has a duty to revoke the compulsion order. The responsible medical officer must then follow the notification procedure under section 144. Revocation by the responsible medical officer does not require the approval of the Tribunal or any other person and is not subject to appeal.

Section 142: revocation of compulsion order: responsible medical officer's duty to keep under review

282. In addition to the duties to carry out a first review of a compulsion order prior to its expiry and to carry out further reviews if the order is extended, section 142 places the responsible medical officer under a duty to consider on an ongoing basis whether the patient still meets the criteria for a compulsion order. If, having considered the views of those persons listed in section 139(3)(c), the responsible medical officer decides that the conditions for the making of a compulsion order no longer apply or that there is no longer a need for the order, then that officer has a duty to revoke the order. The responsible medical officer must then follow the notification procedure under section 144. Revocation by the responsible medical officer does not require the approval of the Tribunal or any other person and is not subject to appeal.

Section 143: Commission's power to revoke compulsion order

283. Section 143 gives power to the Commission to revoke a compulsion order if the Commission considers that not all the conditions specified in section 139(4) are met or, even if those conditions are met, that it is no longer necessary for the patient to be subject to the compulsion order. The Commission must then follow the notification procedure under section

144. As with the revocation of the compulsion order by the responsible medical officer, the Commission does not require the approval of the Tribunal or any other person to revoke the order and the revocation is not subject to appeal.

Section 144: revocation of compulsion order: notification

284. Section 144 provides for the notification of the revocation of a compulsion order by the responsible medical officer or the Commission.

Further steps to be taken where order not revoked

Section 145: mandatory reviews: further steps to be taken where compulsion order not revoked

285. Section 145 sets out the steps that the responsible medical officer must take and the matters that the officer needs to consider if, when carrying out a first review or a further review of a compulsion order, the officer is satisfied that the conditions in section 139(4) continue to be met and the compulsion order continues to be necessary. In particular, subsection (2) requires the responsible medical officer to comply with the requirements of subsection (3), which include a requirement to consider whether the measures authorised by the compulsion order should be varied.

Extension of order following first review

Section 146: first review: responsible medical officer's duty where extension proposed

286. Section 146 provides that if, following the first review of the compulsion order and after having taken into consideration the views expressed by the persons mentioned in section 139(3), the responsible medical officer considers that the compulsion order should continue to apply without varying the measures authorised by it, the responsible medical officer has a duty to notify the patient's mental health officer that the responsible medical officer is proposing to make an application to the Tribunal for the order to be extended for a further 6 months.

Section 147: proposed extension on first review: mental health officer's duties

287. Section 147 sets out the duties of the mental health officer on being notified by the responsible medical officer after the first review has been carried out that the responsible medical officer intends to apply to the Tribunal to have the compulsion order extended. The mental health officer must interview the patient, unless it is impracticable to do so, and provide the patient with information about the patient's rights in relation to the application and about the availability of advocacy services. The mental health officer must also take appropriate steps to make sure the patient has the opportunity to make use of those advocacy services. The mental health officer must also inform the responsible medical officer of those matters listed in subsection (2)(d), primarily whether the mental health officer agrees that the compulsion order should be extended.

Section 148: first review: responsible medical officer's duty to apply for extension of compulsion order

288. Section 148 provides that, if the responsible medical officer is still satisfied, having had regard to the views of persons consulted and of the patient's mental health officer, that the compulsion order should be extended, then the responsible medical officer is under a duty to apply to the Tribunal for an extension of the order. It is only at the first review that the extension

of the order is done by way of an application to the Tribunal. Subsequent extensions, where no variation of the measures authorised by the order is required, are made by the responsible medical officer making a determination under section 152. Such extensions may, however, be reviewed by the Tribunal under section 165.

Section 149: application to Tribunal for extension of order following first review

289. Section 149 sets out the information that must be included in an application by the responsible medical officer to the Tribunal for an order extending a compulsion order after the first review. The section also gives the Scottish Ministers power to make provision by regulations for other documentation to be sent with the application (section 149(b)).

Extension of order following further review

Section 150: further review: responsible medical officer's duty where extension proposed

290. Section 150 places a duty on the responsible medical officer, where, after carrying out a review of the compulsion order (other than the first review), that officer is satisfied that the compulsion order continues to be necessary but need not be varied, to inform the mental health officer that the responsible medical officer proposes to make a determination under section 152 extending the order.

Section 151: proposed extension of order on further review: mental health officer's duties

291. Section 151 sets out the duties of the mental health officer on being notified by the responsible medical officer of the intention to extend the compulsion order after a further review. The duties are similar to those under section 147 after a first review.

Section 152: further review: responsible medical officer's duty to extend compulsion order

292. Section 152 places a duty on the responsible medical officer to extend a compulsion order for 12 months, where the officer is satisfied that it will continue to be necessary for the patient to be subject to the order but the order need not be varied. The responsible medical officer need not apply to the Tribunal although the extension may be reviewed by the Tribunal in the circumstances set out in section 165.

Section 153: determination extending compulsion order: notification

293. Section 153 provides that the responsible medical officer must make a record of the determination extending a compulsion order following a further review. The content of the record and the notification procedure is detailed in subsection (2). The responsible medical officer need not send a copy of the record to the patient if doing so would put the patient or anyone else at risk of significant harm. The responsible medical officer is also under a duty to make a statement of the matters mentioned in subsection (5) (which relate to whether a copy of the record is being sent to the patient) and send the statement to the Tribunal, the patient's named person, the mental health officer and the Commission.

Extension and variation of order

Section 154: responsible medical officer's duty where extension and variation proposed

294. Section 154 provides for what the responsible medical officer must do if the officer decides, on carrying out a first review or a further review of a compulsion order, that it is

appropriate to extend the order and that it should be varied by modifying the measures authorised by it. The responsible medical officer must notify the patient's mental health officer that the responsible medical officer is proposing to apply to the Tribunal for an order extending the compulsion order in an amended form. Subsection (3) provides that the responsible medical officer must give notice to the mental health officer of the changes to the measures authorised by the order which the responsible medical officer is proposing.

Section 155: mental health officer's duties: extension and variation of compulsion order

295. Section 155 sets out the duties of the mental health officer on being notified by the responsible medical officer that an application is going to be made to the Tribunal for the extension and variation of the compulsion order. The duties are similar to those set out in section 147, with the addition in subsection (4) of the duty to inform the patient of the details of the variation of the order proposed.

Section 156: responsible medical officer's duty to apply for extension and variation of compulsion order

296. Section 156 imposes a duty on the responsible medical officer to apply to the Tribunal for the extension and variation of a compulsion order, where that officer is satisfied that it will be necessary for the patient to be subject to the order and that the measures authorised by it should be varied.

Section 157: application for extension and variation of compulsion order: notification

297. Section 157 places a duty on the responsible medical officer, where the officer intends to apply to the Tribunal for the extension and variation of a compulsion order, to notify the persons listed in that section before making the application.

Section 158: application to Tribunal for extension and variation of compulsion order

298. Section 158 sets out the information that must be included in an application by the responsible medical officer to the Tribunal for an order extending and varying a compulsion order. It also gives power to the Scottish Ministers to make provision by regulations for other documentation to be sent with the application.

299. The 2004 Order modifies section 158 to provide that the Tribunal is to be advised if the mental health officer disagrees that the application should be made, of the reasons for that view.

Variation of order

Section 159: responsible medical officer's duties: variation of compulsion order

300. Section 159 imposes a duty on the responsible medical officer to consider on an ongoing basis whether the measures specified in a compulsion order require to be varied. Subsection (3) provides that, if it appears to the responsible medical officer that the measures authorised by the order should be varied, the officer must carry out the steps listed in subsection (4), which include assessing the patient's needs and consulting the patient's mental health officer. Where, after doing so, the responsible medical officer is still satisfied that the order should be varied, subsection (5) imposes a duty on the officer to apply to the Tribunal for variation of the order.

301. The 2004 Order amends this section to provide for steps which the mental health officer is to take on being notified by the responsible medical officer that an application to the Tribunal is proposed. These steps include interviewing the patient and providing information to the patient about various matters, including available advocacy services and how to access those, as well as on the patient's rights in relation to such an application to the Tribunal.

302. Corresponding changes are made to section 161 (see paragraph 304 below).

Section 160: application for variation of compulsion order: notification

303. Section 160 places a duty on the responsible medical officer to notify the persons listed in section 157 before making an application to the Tribunal for the variation of a compulsion order.

Section 161: application to Tribunal by responsible medical officer

304. Section 161 sets out the information that must be included in an application to the Tribunal by the responsible medical officer for an order varying a compulsion order. It also gives power to the Scottish Ministers to make provision by regulations for other documentation to be sent with the application.

305. The 2004 Order amends into the section a requirement that the Tribunal be advised when the mental health officer disagrees that the application is required, of the reasons for that view.

Reference to Tribunal by Commission

Section 162: Commission's power to make reference to Tribunal

306. Section 162 gives power to the Commission to refer the case of a patient subject to a compulsion order to the Tribunal for review, where it considers it appropriate to do so. Section 171 provides what the Tribunal can do on such a reference.

Applications to Tribunal by patient etc.

Section 163: application to Tribunal by patient etc for revocation of determination extending compulsion order

307. Section 163(1) gives the patient and the patient's named person the right to apply to the Tribunal for the revocation of a determination, made by the responsible medical officer under section 152, extending a compulsion order.

308. Subsection (2), however, provides that, where the Tribunal is required by section 165 to review the determination, neither the patient nor the patient's named person can apply for a revocation.

Section 164: application to Tribunal by patient etc for revocation or variation of compulsion order

309. Section 164 gives the patient and the patient's named person the further right to apply to the Tribunal for an order to either revoke the compulsion order or to modify the measures authorised by it. Such an application cannot be made during the initial 6 months following the court's making of the compulsion order (subsection (4)(a)). In addition, no application can be

made within 3 months of an order being made by the Tribunal in respect of the compulsion order under section 166 or 167 (subsection (4)(b)).

310. Subsection (5) provides that, where an application under this section to revoke the order is refused, the person who made the application is entitled to make only one more application within the time-scale set out in subsection (7). Subsection (5) also makes the same provision where an application under this section to vary a compulsion order has been made (whether that application was successful or not).

311. Subsection (6) makes similar provision where an application (under section 163) for revocation of a determination under section 152 is refused.

Review by Tribunal of determination extending order

Section 165: Tribunal's duty to review determination under section 152

312. Section 165 provides that the Tribunal must, in certain circumstances, review the section 152 determination by the responsible medical officer to extend the compulsion order. Those circumstances are-

- the responsible medical officer's record (prepared under section 153) states that-
  - ❖ there is a change in diagnosis of the type (or types) of mental disorder that the patient has from the type which was recorded in the compulsion order; or
  - ❖ the mental health officer either disagrees with the determination or has not carried out that officer's duties under section 151(2)(d)(i); or
- no review has been made by the Tribunal of the compulsion order, which would have been in force for 2 years ending with the day on which the order, had it not been extended, would have ceased to authorise the measures specified, either under this section or under section 167.

Powers of Tribunal

Section 166: powers of Tribunal on review under section 165

313. Section 166 sets out the powers of the Tribunal on a review under section 165 of a responsible medical officer's determination to extend a compulsion order. Before it makes a decision, the Tribunal must allow the patient, the patient's named person, the responsible medical officer and the other persons listed in subsection (3) the opportunity to make representations or to lead or produce evidence. The Tribunal may revoke or confirm the determination. Where it revokes the determination, it may also revoke the compulsion order. Where it confirms the determination, it may also vary the compulsion order.

Section 167: powers of Tribunal on application under section 149, 158, 161, 163 or 164

314. Section 167 provides for the powers of the Tribunal on the following applications, namely:

- applications under section 149 by the responsible medical officer for the first extension of a compulsion order (see subsection (1));
- applications under section 158 by the responsible medical officer for the extension and variation of a compulsion order (see subsection (2));

- applications under section 163 by a patient or patient's named person for revocation of a determination by the responsible medical officer under section 152 (see subsection (3));
- applications under section 164(2)(a) by a patient or patient's named person for revocation or variation of a compulsion order (see subsection (4)); and
- applications under section 161 or 164(2)(b) by the responsible medical officer or the patient or patient's named person respectively for the variation of a compulsion order (see subsection (5)).

315. Before making any decision on an application, the Tribunal must give the persons listed in section 166(3) and any person appearing to the Tribunal to have an interest, the opportunity of making written or oral representations and of leading or producing evidence (subsection (6)).

Section 168: interim extension etc of order: application under section 149

316. Section 168 gives power to the Tribunal to make an interim order to extend or extend and vary a compulsion order for a period of up to 28 days where it has received an application from the responsible medical officer under section 149 to extend the order. It is open to anyone with an interest in the proceedings to ask the Tribunal to make an interim order. In addition, the Tribunal has power to make the order on its own initiative. The Tribunal may make an interim order only where it considers that it will not be able to come to a decision on the application before the compulsion order would cease to have effect and that it is appropriate to make the order. The Tribunal's power is subject to the restriction set out in section 170.

Section 169: interim variation of order following application, reference or review under Chapter

317. Section 169 provides the Tribunal with power to make an interim order to vary a compulsion order for a period of up to 28 days where it has received an application or reference mentioned in subsection (1)(a) or (b) or where it is reviewing a determination made under section 165. Any person with an interest in the proceedings can ask the Tribunal to make an interim order or the Tribunal can do so on its own initiative. The Tribunal can make an interim order only where it considers it appropriate to do so pending its decision on the application, reference or review. The Tribunal's power is subject to the restriction in section 170.

Section 170: limit on power of Tribunal to make interim order

318. Section 170 provides that the maximum continuous period of time that interim orders can be in force under sections 168 and 169 cannot exceed 56 days.

Section 171: powers of Tribunal on reference under section 162

319. Section 171 provides powers to the Tribunal on receiving a reference from the Commission under section 162, to vary or revoke the compulsion order. Before it makes any order, the Tribunal must give the persons listed in section 166(3) and any other person appearing to the Tribunal to have an interest the opportunity of making representations or leading or producing evidence.

Section 172: Tribunal's order varying compulsion order

320. Section 172 sets out what the Tribunal must specify when it makes an order under section 166, 167 or 171 varying a compulsion order. It must specify the modifications that it has made

to the measures specified in the compulsion order. In addition, the Tribunal may specify measures which were not sought in the application to which its order relates.

Section 173: applications to Tribunal: ancillary powers

321. Section 173 gives power to the Scottish Ministers to make regulations to prescribe circumstances in which the Tribunal can require the responsible medical officer and the mental health officer to submit reports to the Tribunal; and to prescribe the matters which those reports must cover.

Section 174: effect of interim orders: calculation of time periods in Chapter

322. The section provides that, if the Tribunal has extended, or extended and varied, an order under section 168, the period of time for which that order was extended will not be taken into account in the calculation of the day on which the order ceases, will cease or would have ceased.

Meaning of "modify"

Section 175: meaning of "modify"

323. The section provides the definition of "modify" in respect of a compulsion order as meaning amending, removing or adding to any of the measures specified in it.

Chapter 3: applications of Chapters 5 to 7 of Part 7

Breach of order

Section 176: medical treatment: failure to attend

324. Section 176 makes provision for breach of a compulsion order where the patient fails to attend for medical treatment. It applies the provisions in section 112 with regard to compulsory treatment orders to compulsion orders but with certain minor modifications (see paragraph 157 of these Notes).

Section 177: non-compliance generally with compulsion order

325. Section 177 relates to non-compliance generally with a compulsion order. It lists the various sections relating to compulsory treatment orders in Chapter 5 of Part 7 that apply to compulsion orders but with the modifications set out in subsections (2) and (3).

Transfers

Section 178: transfers

326. Section 178 applies the provisions in sections 124 to 126 (regarding transfers of patients who are subject to compulsory treatment orders) to patients who are subject to compulsion orders which authorise detention in hospital (see paragraphs 170 to 178 of these Notes).

Suspension of measures

Section 179: suspension of measures

327. Section 179 applies the provisions of section 127 regarding the suspension of detention requirements, the suspension of any other compulsory measure in section 128, and the revocation of any such suspension in section 129, to a patient who is subject to a compulsion order but with certain minor modifications.

PART 10 - COMPULSION ORDERS AND RESTRICTION ORDERS

328. Part 10 provides the regime for a compulsion order made under section 57A(2) of the 1995 Act which is combined with a restriction order made under section 59(1) of that Act.

Chapter 1: preliminary

Section 181: mental health officer's duty to identify named person

329. Section 181 provides that as soon as practicable after a compulsion order combined with a restriction order is made, the patient's mental health officer must take reasonable steps to find out the name and address of the patient's named person.

Chapter 2: review of orders

Annual review of orders

Section 182: review of compulsion order and restriction order

330. Where a compulsion order is combined with a restriction order, it continues to have effect indefinitely unless some positive action is taken to bring it to an end. Section 182 provides for the responsible medical officer to carry out an annual review of the compulsion order and restriction order. The first review must be carried out during the 2 month period ending with the first anniversary of the making of the compulsion order. Further reviews must be carried out annually thereafter, again during the last 2 months of each 12 month period. The review carried out under this section is similar to the review carried out under section 139 in Part 9, with the addition (in subsection (3)(b)(ii) and (iv)) of two new criteria. They are-

- whether the patient's mental disorder is such that detention in hospital is necessary to protect any other person from serious harm, whether the patient would receive medical treatment there or not; and
- whether it continues to be necessary for the patient to be subject to the restriction order.

Consequences of annual review

Section 183: responsible medical officer's report and recommendation following review of compulsion order and restriction order

331. Section 183 makes provision for the procedure following reviews under section 182. The responsible medical officer must submit a report to the Scottish Ministers recording that officer's views on:

- whether the conditions set out in section 182(4) (that the patient has a mental disorder etc) continue to apply;
- whether it is necessary to detain the patient in hospital to protect any other person from serious harm;
- whether it continues to be necessary for the patient to be subject to the compulsion order; and
- whether it continues to be necessary for the patient to be subject to the restriction order.

332. Depending on those views and taking account of the mental health officer's views, the responsible medical officer will recommend to the Scottish Ministers:

- that the compulsion order should be revoked;
- where not satisfied that the patient has a mental disorder or otherwise that the restriction order is necessary, that the restriction order should be revoked and the compulsion order varied so that the patient is no longer detained in hospital; or
- that both orders should continue but that the patient should be discharged subject to conditions ("conditional discharge").

Responsible medical officer's duty to keep orders under review

Section 184: responsible medical officer's duty to keep compulsion order and restriction order under review

333. Section 184 provides that the responsible medical officer is under a continuing duty to keep the compulsion order and restriction order to which the patient is subject under review. Whenever the responsible medical officer reviews the order, he or she must submit a report to the Scottish Ministers complying with the requirements of section 183 and containing his or her recommendations.

Reference to Tribunal by Scottish Ministers

Section 185: duty of Scottish Ministers on receiving report and recommendation from responsible medical officer

334. Where the responsible medical officer submits a report to the Scottish Ministers under section 183(2) or 184 which contains a recommendation (section 184 reports are submitted only where there is a recommendation by the responsible medical officer to change the orders applicable), the Scottish Ministers must refer the patient's case to the Tribunal. Notice of the proposed reference must be given to the persons listed in subsection (2) before it is made. The reference must state the information set out in subsection (3).

Section 186: Commission's power to require Scottish Ministers to make reference to Tribunal

335. Section 186 gives power to the Commission to require the Scottish Ministers to refer the compulsion order and restriction order to which a patient is subject to the Tribunal, if the Commission considers that such a reference is appropriate. The Commission must notify the Scottish Ministers of this requirement in writing and include its reasons for making the request.

Section 187: duty of Scottish Ministers to refer to Tribunal if required to do so by Commission

336. Section 187 provides that, where the Commission has notified the Scottish Ministers under section 186, the Scottish Ministers have a duty to refer the case to the Tribunal. Notice of the reference must be given to the persons listed in paragraphs (a) to (g) of section 185(2) and it

must state the information set out in section 187(4). The Scottish Ministers should, if possible, notify those persons before making the reference.

Scottish Ministers' duty to keep orders under review

Section 188: duty of Scottish Ministers to keep compulsion order and restriction order under review

337. Section 188 provides that the Scottish Ministers are under a duty to keep the compulsion order and restriction order to which the patient is subject under review by considering the matters set out in subsection (2). Subsections (3) to (7) set out the series of tests that the Scottish Ministers must apply when reviewing a compulsion order and restriction order.

338. Depending on their views, the Scottish Ministers may be required to apply to the Tribunal to have the compulsion order revoked, to have the restriction order revoked, to have the compulsion order varied or to have the patient conditionally discharged.

Section 189: reference to Tribunal by Scottish Ministers

339. Section 189 imposes a duty on the Scottish Ministers to refer a patient's case to the Tribunal two years after the making of the compulsion order and restriction order if no reference or application has been made to the Tribunal during that period.

340. In addition, at the end of each year thereafter, the Scottish Ministers have a duty to review the previous 2 years and refer the patient's case to the Tribunal if no reference or application has been made to it during that 2 year period.

341. In order to ensure that the Tribunal reviews the compulsion order and restriction order at least once every 2 years, subsection (3) provides that, in assessing whether there has been an application or reference to the Tribunal in a 2 year period, any reference under this section during the first year of that period is ignored.

342. Notice of the reference to the Tribunal must be given by the Scottish Ministers to the persons listed in paragraphs (a) to (g) of section 185(2) and the reference must state the information set out in section 189(5).

Section 190: application by Scottish Ministers: notification

343. Section 190 provides that where the Scottish Ministers make an application to the Tribunal as a result of section 188, they must notify the persons listed in paragraphs (a) to (g) in section 185(2). They should, if possible, notify those persons before making the application.

Section 191: application to Tribunal

344. Section 191 sets out the information which must be provided by the Scottish Ministers when applying to the Tribunal for an order under section 193. Section 191(b) gives the Scottish Ministers power to prescribe by regulations the documents which must accompany the application.

Application by patient etc

Section 192: application to Tribunal by patient and named person

345. Section 192 gives a patient subject to a compulsion order combined with a restriction order and the patient's named person the right to apply to the Tribunal for any of the following orders-

- conditional discharge;
- revocation of the restriction order;
- revocation of the restriction order and variation of the compulsion; and
- revocation of the compulsion order (the restriction order will automatically fall when the compulsion order falls (see section 197)).

346. The patient and the patient's named person can each apply once in the period beginning with the day 6 months after the compulsion order was made and ending on the anniversary of the order; and once in any subsequent 12 month period. However, neither of them can apply within a three month period after the Tribunal has conducted any review of the compulsion order and restriction order to which the patient is subject, and this includes where the Tribunal has carried out such a review and decided to make no order. The patient's named person must give notice to the patient if the named person makes an application under this section.

Proceedings before Tribunal

Section 193: powers of Tribunal on reference under section 185(1), 187(2) or 189(2) or application under section 191 or 192(2)

347. Section 193 sets out the powers of the Tribunal on an application by the Scottish Ministers under section 191, an application by a patient or a patient's named person under section 192(2) or a reference by the Scottish Ministers under section 185(1), 187(2) or 189(2). Before making a decision, the Tribunal must hold a hearing and allow the persons listed in subsection (9) the opportunity to make representations and give evidence.

348. Under subsection (2), where the Tribunal is satisfied that the patient has a mental disorder and that the effect of the mental disorder makes it necessary, in order to protect others from serious harm, that the patient continues to be detained in hospital, whether for treatment or not, the Tribunal shall make no order. The compulsion order and restriction order continue to have effect.

349. Under subsection (3), where the Tribunal is not satisfied that the patient has a mental disorder it must revoke the compulsion order. Under subsection (4), where the Tribunal is satisfied that there is a mental disorder but it is not satisfied that the effect of that disorder makes it necessary, in order to protect others from serious harm, for the patient to continue to be detained in hospital and is not satisfied that the criteria in section 182(4)(b) and (c) are met, it shall revoke the compulsion order.

350. Under subsection (5), where the Tribunal is satisfied that the conditions in section 182(4) continue to be met and that it is necessary for the patient to be subject to the compulsion order but it is not satisfied that the patient needs to be detained in hospital in order to protect others

from serious harm and that the restriction order is no longer necessary, the Tribunal shall revoke the restriction order.

351. Subsection (6) provides the circumstances when the Tribunal can vary the measures authorised by a compulsion order.

352. Under subsection (7), where the Tribunal is satisfied that the compulsion order and restriction order continue to be necessary, but is not satisfied that as a result of the patient's mental disorder, it is necessary to continue to detain the patient in hospital in order to protect any other person from serious harm, it can conditionally discharge the patient, imposing whatever conditions it sees fit.

353. Subsection (10) repeats the effect of sections 64(C1) and 66(1C) of the 1984 Act. Section 102 of the National Health Service (Scotland) Act 1978 (as amended) states that state hospitals must be provided for persons detained under the 2003 Act or the 1995 Act who *require medical treatment* under conditions of special security. The Tribunal may decide under this section to make no order (and so continue the compulsion order and restriction order) because the patient must be kept in hospital, even if the practical effect is that the patient will be detained in a state hospital.

Section 194: Tribunal's powers etc when varying compulsion order

354. Section 194 provides that if, under section 193(6), the Tribunal revokes the restriction order and varies the compulsion order, it must specify the modifications made by its order to those measures in the compulsion order.

Section 195: deferral of conditional discharge

355. Where the Tribunal orders the conditional discharge of the patient under section 193(7), section 195 gives the Tribunal power to defer the discharge to allow necessary arrangements to be made. Such arrangements could relate, for instance, to the provision of suitable medical treatment in the community.

Effect of modification or revocation of orders

Section 196: general effect of orders under section 193

356. Section 196 provides that where the Tribunal makes any of the orders listed in subsection (1), those orders shall not take effect until the occurrence of the earliest of the events listed in subsection (2), which relate to appeals against those orders.

Section 197: effect of revocation of compulsion order

357. Section 197 provides that, where the Tribunal revokes a compulsion order, the restriction order automatically falls with it.

Section 198: effect of revocation of restriction order

358. Section 198 provides that, where the Tribunal revokes a restriction order but not the compulsion order, then the patient is treated as if the compulsion order had been made without a

restriction order. Part 9 will apply to the patient as if the compulsion order had been made on the date on which the restriction order was revoked.

Meaning of "modify"

Section 199: meaning of "modify"

359. Section 199 provides the definition of "modify" in respect of a compulsion order as amending, removing or adding to any of the measures specified in it.

Chapter 3: conditional discharge

Section 200: variation of conditions imposed on conditional discharge

360. Section 200 gives the Scottish Ministers power to vary the conditions imposed by the Tribunal on a patient who has been conditionally discharged. If they do so, they must notify the persons listed in subsection (3) of the variation.

Section 201: appeal to Tribunal against variation of conditions imposed on conditional discharge

361. Section 201 allows the patient and the patient's named person to appeal to the Tribunal against any variation imposed by the Scottish Ministers under section 200(2). The appeal must be lodged with the Tribunal within 28 days of the notice being given under section 200(3).

362. Subsection (3) provides that the Tribunal will treat an appeal under this section as an application for conditional discharge. Section 193 therefore applies and the Tribunal has the options that are available under that section.

Section 202: recall of patients from conditional discharge

363. Section 202 provides that the Scottish Ministers can, by warrant, recall a conditionally discharged patient to hospital if they are satisfied that it is necessary for the patient to be detained in hospital.

Section 203: effect of recall from conditional discharge

364. Section 203 provides that if, under section 202, the Scottish Ministers recall a patient to a hospital that is different to the one specified in the compulsion order, the hospital to which the patient is recalled shall effectively be substituted for the one specified in the order.

Section 204: appeal to Tribunal against recall from conditional discharge

365. Section 204 provides that the patient and the patient's named person can appeal to the Tribunal against recall to hospital within 28 days of the recall from conditional discharge taking effect.

366. Subsection (3) provides that the Tribunal will treat an appeal under this section as an application for conditional discharge. Section 193 therefore applies and the Tribunal has the options that are available under that section.

PART 11 – HOSPITAL DIRECTIONS AND TRANSFER FOR TREATMENT DIRECTIONS

367. Part 11 provides for the regime which governs the effect of hospital directions made under section 59A of the 1995 Act and transfer for treatment directions made under section 136 of the 2003 Act. This regime is similar to the regime for compulsion orders combined with restriction orders set out in Part 10 of the 2003 Act.

Preliminary

Section 205: mental health officer's duty to identify named person

368. Section 205 provides that, as soon as practicable after a hospital direction or a transfer for treatment direction is made, the mental health officer must take reasonable steps to find out the name and address of the patient's named person.

Review of directions

Section 206: review of hospital direction and transfer for treatment direction

369. Section 206 provides for the responsible medical officer to carry out an annual review of a hospital direction or a transfer for treatment direction. The first review must be carried out during the two month period ending with the first anniversary of the making of the direction. Further reviews must be carried out annually thereafter, again during the last two months of each 12 month period. The review must conform to the requirements set out in subsection (3) and the responsible medical officer must consider the matters in subsection (4). As part of the review process, the responsible medical officer must consult, in addition to the mental health officer, such other persons as he considers appropriate.

Consequences of review

Section 207: responsible medical officer's report following review of direction

370. Section 207 makes provision for the procedure following reviews under section 206. The responsible medical officer must submit a report to the Scottish Ministers recording that officer's views on the matters set out in subsection (3). If the responsible medical officer is not satisfied that the patient has a mental disorder, the officer must include in the report a recommendation that the direction be revoked. If the responsible medical officer, while satisfied that the patient has a mental disorder, is not satisfied that it is necessary to detain the patient in hospital to protect any other person from serious harm and is not satisfied that the conditions in section 206(4)(b) and (c) are met, the officer must again recommend revocation of the direction.

Responsible medical officer's duty to keep directions under review

Section 208: responsible medical officer's duty to keep directions under review

371. Section 208 provides that the responsible medical officer is under a continuing duty to keep a hospital direction or a transfer for treatment direction to which the patient is subject under review. Where the responsible medical officer considers that the direction should be revoked, the officer must submit a report to the Scottish Ministers containing a recommendation to that effect. This section closely mirrors section 207.

Reference to Tribunal by Scottish Ministers

Section 209: Commission's power to require Scottish Ministers to make reference to Tribunal

372. Section 209 gives power to the Commission to require the Scottish Ministers to refer the hospital direction or transfer for treatment direction to which a patient is subject to the Tribunal, if the Commission considers that such a reference is appropriate. The Commission must notify the Scottish Ministers of this requirement in writing and include its reasons for making the request.

Section 210: duty of Scottish Ministers on receiving report from responsible medical officer

373. Section 210 provides that, where the Scottish Ministers receive a report from the responsible medical officer recommending that a hospital direction or a transfer for treatment direction be revoked, the Scottish Ministers must consider the matters in section 212(2)(a) to (c). The Scottish Ministers are under a duty to revoke where, having considered those matters, they are not satisfied that the patient has a mental disorder or they are satisfied that the patient is suffering from a mental disorder but are not satisfied that as a result of that disorder it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment, and they are not satisfied that the conditions listed in section 206(4)(b) and (c) continue to apply.

374. Subsection (3) provides that, where the Scottish Ministers decide not to revoke the direction, they must refer the case to the Tribunal. Notice of the reference must be given by the Scottish Ministers to the persons listed in subsection (4) and the reference must state the information set out in subsection (5). The notice must be given before the reference is made.

375. Subsection (6) makes equivalent provision for this section to that made by section 193(10) for that section.

Section 211: notice under section 209(2): reference to Tribunal

376. Section 211 provides that, where the Commission has notified the Scottish Ministers under section 209(2) that they require the Scottish Ministers to refer a patient's case to the Tribunal, the Scottish Ministers have a duty to refer the patient's case to the Tribunal as soon as practicable. Notice that the reference is to be made must be given by the Scottish Ministers as soon as practicable to the persons listed in paragraphs (a) to (g) of subsection 210(4) and the reference must state the information set out in subsection (4).

Scottish Ministers' duty to keep directions under review

Section 212: duty of Scottish Ministers to keep directions under review

377. Section 212 provides that the Scottish Ministers are under a duty to keep the hospital direction or transfer for treatment direction to which a patient is subject under review by considering the matters set out in subsection (2). The Scottish Ministers are under a duty to revoke if not satisfied that the patient has a mental disorder or where they are satisfied that that is the case but are not satisfied that, as a result of the disorder, it is necessary in order to protect any other person from serious harm, for the patient to be detained in hospital, whether for medical treatment or not, and they are not satisfied that the conditions in section 206(4)(b) and (c) continue to apply.

378. Subsection (5) makes equivalent provision for this section to that made by section 193(10) for that section.

Section 213: reference to Tribunal by Scottish Ministers

379. Section 213 imposes a duty on the Scottish Ministers to refer a patient's case to the Tribunal 2 years after the making of the hospital direction or transfer for treatment direction if no reference or application has been made to the Tribunal during that period. In addition, at the end of every year thereafter, the Scottish Ministers have a duty to review the previous 2 years and refer the patient's case to the Tribunal if no reference or application has been made to it during that 2 year period. In order to ensure that the Tribunal reviews the direction to which the patient is subject at least once every 2 years, subsection (3) provides that, in assessing whether there has been an application or reference to the Tribunal in a 2 year period, any reference made under this section during the first year of that period is ignored.

380. Notice of the reference to the Tribunal must be given by the Scottish Ministers to the persons listed in paragraphs (a) to (g) of subsection 210(4) and the reference must state the information set out in section 213(5). This section operates in the same way as section 189.

Application by patient etc

Section 214: application to Tribunal by patient and named person

381. Section 214 gives a patient subject to a hospital direction or a transfer for treatment direction and the patient's named person the right to apply to the Tribunal for revocation of the direction.

382. Where a patient is subject to a hospital direction, neither the patient nor the named person may apply to the Tribunal during the first 6 months following the day on which the direction was made. However, they may each apply to the Tribunal once during the subsequent 6 month period and then once every 12 months thereafter.

383. Where a patient is subject to a transfer for treatment direction, the patient and patient's named person may each apply to the Tribunal once within the 12 week period beginning with the day on which the direction is made. If an application is not made within that timescale then the patient or the named person may not apply until 6 months have elapsed after the making of the direction. The patient and the named person can then each apply to the Tribunal once during the subsequent 6 month period and then once every 12 months thereafter.

384. The patient's named person must give notice to the patient if the named person makes an application under this section.

Proceedings before Tribunal

Section 215: powers of Tribunal on reference under section 210(3), 211(2) or 213(2) or on application under section 214(2)

385. Section 215 sets out the powers of the Tribunal on an application by the patient or the patient's named person or on a reference by the Scottish Ministers

386. Under subsection (2), where the Tribunal is satisfied that the patient has a mental disorder and that the effect of it makes it necessary, in order to protect others from serious harm, for the patient to be detained in hospital, whether for treatment or not, the Tribunal shall make no direction to the Scottish Ministers, with the effect that the direction to which the patient is subject continues to apply.

387. Under subsection (3), where the Tribunal is not satisfied that the patient has a mental disorder, it must direct the Scottish Ministers to revoke the direction to which the patient is subject.

388. Under subsection (4), the Tribunal must again direct the Scottish Ministers to revoke the direction to which the patient is subject if the Tribunal is satisfied that the patient has a mental disorder, is not satisfied that it makes it necessary to detain the patient in hospital to protect others from serious harm and is not satisfied that the criteria in section 206(4)(b) and (c) are met.

389. Under subsection (5), where directed to do so by the Tribunal under subsection (3) or (4), the Scottish Ministers must revoke the direction to which the patient is subject.

390. Before making a decision, the Tribunal must hold a hearing and allow the persons listed in subsection (7) the opportunity to make representations and give evidence (subsection (6)).

Effect of revocation of direction

Section 216: effect of revocation of direction

391. Section 216 provides that, where a hospital direction or transfer for treatment direction is revoked by the Scottish Ministers, the patient must be returned to a prison, institution or other place where the patient may have been detained had the patient not been detained in hospital. The direction ceases to have effect on admission.

Termination of direction on release of patient

Section 217: termination of hospital direction on release of patient

392. Section 217 provides that a hospital direction or a transfer for treatment direction ceases to have effect when the underlying sentence of imprisonment to which the patient is subject comes to an end under the terms of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. This applies also where the prisoner is released on licence by the Parole Board under that Act.

PART 12 - PARTS 10 AND 11: TRANSFERS

Section 218: transfer of patients between hospitals

393. Section 218 provides for the transfer by hospital managers of patients subject to compulsion orders combined with restriction orders, hospital directions or transfer for treatment directions. The hospital managers may transfer patients between hospitals provided that the managers of the hospital receiving the patient and the Scottish Ministers consent to the transfer. The managers of the hospital that is proposing to transfer a patient have a duty to notify the

patient and the patient's named person at least 7 days before the proposed transfer unless it is necessary that the patient is transferred urgently or the patient consents to the transfer. Where the 7-day period of notice has not been given because the transfer was a matter of urgency then notice should be given to the patient and the patient's named person as soon as practicable.

394. Where the patient and the named person have been notified of the patient's proposed transfer to another hospital but the transfer has not taken place within 3 months of the notice being given, the transfer can take place only if the managers of the receiving hospital still agree to the transfer and the patient and the patient's named person have once again been given 7 days' notice, unless the matters in subsections (5) and (7) apply.

395. Where the patient has been transferred, the managers of the hospital from which the patient was transferred must notify the Commission within 7 days of the transfer having taken place. The notification should include the information listed in subsection (13).

396. Subsection (14) provides that, following a transfer, the order or direction to which the patient is subject has effect as if the hospital the patient was transferred to the hospital specified in the order or direction.

Section 219: appeal to Tribunal against transfer under section 218 to hospital other than state hospital

397. Section 219 provides for an appeal to the Tribunal by the patient or the patient's named person against a transfer to a hospital other than the state hospital. The appeal must be made within a time limit set out in subsection (3). Which time limit applies depends on whether the appeal is by the patient or the named person and on whether (and, if so, when) notice is given.

398. Where an appeal has been lodged with the Tribunal in advance of the transfer taking place, the transfer may not take place except where the Tribunal orders that it should do so, pending the outcome of the appeal.

399. When dealing with an appeal the Tribunal has power to order that the patient be transferred back to the original hospital.

Section 220: appeal to Tribunal against transfer under section 218 to state hospital

400. Section 220 provides for an appeal to the Tribunal by the patient or the patient's named person against a transfer to a state hospital. The appeal must be made within a time limit set out in subsection (3). Which time limit applies depends on whether the appeal is by the patient or the named person and on whether (and, if so, when) notice is given.

401. As with section 219, where an appeal has been lodged with the Tribunal in advance of the transfer taking place, the transfer may not take place except where the Tribunal orders that it should do so pending the outcome of the appeal. The Tribunal has the same powers on an appeal under this section as it has under section 219, subject to subsection (6). That subsection provides that Tribunal can stop or reverse a transfer to a state hospital only if it is not satisfied that the patient must be detained under conditions of special security which can be provided only in a state hospital.

PART 13 - PARTS 8, 10 AND 11: SUSPENSION

402. Part 13 provides for the temporary release from detention of patients subject to assessment orders, treatment orders, interim compulsion orders, compulsion orders combined with restriction orders, hospital directions and transfer for treatment directions. Provision for patients subject to compulsion orders is made by section 179.

Assessment orders

Section 221: assessment order: suspension of measure authorising detention

403. Section 221 provides for the temporary suspension of the measure in an assessment order which authorises detention of the patient in hospital. The responsible medical officer may do so by granting a certificate for a period, provided that the consent of the Scottish Ministers is obtained.

404. The responsible medical officer may include conditions in the certificate. Those conditions can include a requirement that the patient be kept in the charge of a person duly authorised during the period of the certificate.

Section 222: certificate under section 221: revocation by responsible medical officer

405. Section 222 sets out the power of the responsible medical officer to revoke a certificate granted under section 221 where it is necessary in the interests of the patient or to protect any other person. As soon as practicable after revoking the certificate, the responsible medical officer must notify the patient, the Scottish Ministers and, where applicable, the person authorised for the purposes of section 221(6)(a) (in whose charge the patient is to be kept).

Section 223: certificate under section 221: revocation by Scottish Ministers

406. Section 223 sets out the power of the Scottish Ministers to revoke a certificate granted under section 221 and have the patient returned to hospital. This power mirrors that of the responsible medical officer under section 222. The section also provides for notification of the revocation to be made.

Certain other orders and directions

Section 224: patients subject to certain other orders and directions: suspension of measure authorising detention

407. Section 224 provides for the temporary suspension of the measure in certain orders and directions which authorises the detention of the patient in hospital. It applies to the following orders and directions-

- treatment orders;
- interim compulsion orders;
- compulsion orders combined with restriction orders;
- hospital directions; and
- transfer for treatment directions.

408. The patient's responsible medical officer may suspend the authorisation to detain, by granting a certificate specifying a period of up to 3 months. To do so requires the consent of the Scottish Ministers and the period granted must not take the total period granted by virtue of this and any other certificates over 9 months in any 12 month period. The certificate may also be issued for a period relating to a particular event or series of events.

409. The responsible medical officer may include conditions in the certificate. Those conditions can include a requirement that the patient be kept in the charge of a duly authorised person during the period of the certificate.

410. Where the responsible medical officer proposes to grant a certificate for a period of more than 28 days; or less than 28 days but for a period which, when added to any previous period granted during the last 12 months, takes the total over 28 days, the officer must notify the persons listed in subsection (9) before granting the certificate. Where a certificate is granted for a period of more than 28 days, the responsible medical officer must notify the Commission within 14 days.

Section 225: certificate under section 224: revocation by responsible medical officer

411. Section 225 sets out the power of the responsible medical officer to revoke a certificate granted under section 224 and have the patient returned to hospital. The responsible medical officer can do this if it is necessary in the interests of the patient or to protect any other person. As soon as practicable after revoking the certificate, the responsible medical must notify the persons listed in subsection (3). Where the certificate was granted for a period of more than 28 days, the responsible medical officer must also notify the Commission within 14 days of the certificate being revoked.

Section 226: certificate under section 224: revocation by Scottish Ministers

412. Section 226 sets out the power of the Scottish Ministers to revoke a certificate granted under section 224. This power mirrors that of the responsible medical officer under section 225.

PART 14 – ASSESSMENT OF NEEDS

413. Part 14 deals with three situations relating to the assessment of needs of persons with mental disorder.

Section 227: assessment of needs for community care services etc

414. Section 227(1) deals with the situation where a local authority is informed by a mental health officer that a patient for whom the authority have a duty or power to provide (or secure the provision of) community care services may be in need of such services. The notification by the mental health officer triggers the authority's duty under section 12A of the Social Work (Scotland) Act 1968 to undertake an assessment of needs in relation to that patient.

415. Section 23(3) of the Children (Scotland) Act 1995 places a duty on a local authority to carry out an assessment of the needs of a child when a request for such an assessment is made by a parent or guardian. Section 227(2) amends that section to allow the child's mental health officer to make such a request.

Section 228: request for assessment of needs: duty on local authorities and Health Boards

416. Section 228 requires a local authority or health board on receipt of a written request for an assessment of the needs of a patient in the circumstances set out in subsection (2), to respond to the request within 14 days, saying whether or not they intend to carry out the assessment, and, if not, why not.

PART 15 – PRELIMINARY DUTIES ON THE MAKING OF ORDERS

Section 229: designation of mental health officer responsible for patient's case

417. Subsection (1) of section 229 places two duties on the relevant local authority (as defined in subsection (3)). First it must ensure that, as soon as reasonably practicable after the occurrence of any relevant event listed in section 232, a mental health officer is designated as the mental health officer having responsibility for the patient's case. Second, it must ensure that for as long as the patient is subject to any of the certificates, orders or directions listed in that section, a mental health officer is designated as having responsibility for that patient's case.

418. Subsection (2) provides that the relevant local authority may at any time designate a mental health officer to act in place of the mental health officer designated under subsection (1) for all purposes or for a particular purpose.

Section 230: appointment of patient's responsible medical officer

419. Subsection (1) of section 230 places a duty on the relevant managers (as defined in subsection (4)) to appoint as soon as is practicable after the occurrence of an "appropriate act" an approved medical practitioner to act as the patient's responsible medical officer. The list of appropriate acts is given in subsection (4).

420. Subsection (2) provides that where an approved medical practitioner was acting as the patient's responsible medical officer before an appropriate act took place, that approved medical practitioner may continue to act as that patient's responsible medical officer.

421. Subsection (3) provides that the relevant managers may appoint an approved medical practitioner to act as the patient's responsible medical officer in place of the existing responsible medical officer. They may also authorise an approved medical practitioner to act in the place of the patient's responsible medical practitioner whether for a particular purpose or in particular circumstances. A definition of the relevant managers is given in subsection (4).

Section 231: mental health officer's duty to prepare social circumstances report

422. Subsection (1) of section 231 provides that within 21 days of the occurrence of one of the events listed in section 232 the mental health officer must prepare a social circumstances report and send a copy to the patient's responsible medical officer and the Commission. However, a report need not be prepared where the mental health officer believes that the report would serve little, or no, practical purpose (subsection (2)). Regulations made by the Scottish Ministers will set out the information that is to be contained in such a report.

PART 16 – MEDICAL TREATMENT

423. Part 16 contains provisions relating to the giving of medical treatment to patients. The expression "medical treatment" is defined in section 329(1).

424. Patients who are subject to short-term detention certificates and offenders subject to various orders imposed by the criminal courts (including treatment orders and interim compulsion orders) are liable to be given medical treatment compulsorily. A patient subject to a compulsory treatment order or an interim compulsory treatment order is liable to be given medical treatment compulsorily only if that is specified as a measure in the order. In the case of an offender made subject to a compulsion order, the sentencing court must specify whether the order authorises the giving of medical treatment.

425. In addition to the specific requirements set out in this Part, any medical practitioner giving treatment must have regard to the principles set out in section 1, and to any advance statement made by the patient (see sections 275 and 276).

Designated medical practitioners

Section 233: designated medical practitioners

426. Subsection (1) of section 233 requires the Commission to maintain a list of medical practitioners (referred to in the 2003 Act as "designated medical practitioners") who will perform functions under this Part. As well as having such qualifications and experience as the Commission considers appropriate, designated medical practitioners must undergo training if required to do so by the Commission.

427. The Commission is required to include child specialists on the list. Part 16 requires that such a specialist should be involved in certain treatment decisions about a child or young person which attract special safeguards.

428. Subsection (4) confers certain powers on designated medical practitioners to allow them to perform the functions given to them under this Part, namely powers to:

- interview the patient in private;
- carry out a medical examination of the patient in private;
- require those holding the relevant medical records to produce them; and
- inspect the records produced.

429. There is provision in subsection (6) for the Commission to pay fees, expenses or allowances to designated medical practitioners.

Sections 234 to 236: safeguards for certain surgical operations etc

430. Sections 234 to 236 apply to any patient irrespective of whether the giving of medical treatment to a particular patient is authorised by virtue of the 2003 Act or the 1995 Act.

431. Subsection (1) of section 234 provides that the types of medical treatment mentioned in subsection (2) may be given to a patient only in accordance with the safeguards set out in sections 235 and 236. Subsection (2) specifies any surgical operation that destroys brain tissue or the functioning of brain tissue (generally known as neurosurgery for mental disorder) and enables the Scottish Ministers to consult appropriate persons before making regulations specifying other types of medical treatment that will attract the same special safeguards.

Patients capable of consenting

432. Subsections (2) and (3) of section 235 set out the conditions that must be met before the medical treatments specified in section 234 may be given to patients who are capable of consenting to treatment.

433. Under subsection (2), a designated medical practitioner must confirm both that the patient is capable of consenting and has done so in writing, and that the treatment is in the patient's best interests, having regard to the test set out in paragraph (c) of that subsection.

434. Two lay persons appointed by the Commission for the purpose, who may interview the patient in private, must certify that the patient is able to consent and has done so in writing (subsection (3)).

435. If the patient is aged under 16, subsection (6) modifies the operation of subsection (2) so that if the patient's responsible medical officer is not a child specialist (as defined in section 249) then the certificate under subsection (2), confirming that the patient is capable of consenting and that the treatment is in their best interests, must be given by a designated medical practitioner who is a child specialist.

Patients incapable of consenting

436. Section 236 sets out the conditions that must be met before neurosurgery for mental disorder or other treatments specified in regulations under section 234 can be given to patients who are incapable of consenting.

437. The effect of subsections (1) and (2) is as follows. A patient who opposes the treatment, either by stating an objection or by resisting treatment, may not be given such treatment. Where a patient does not resist or object to receiving the treatment, but is unable to consent, a designated medical practitioner must certify that this is the case and that the treatment is in the patient's best interests. Two lay persons appointed by the Commission must certify in writing that the patient is incapable of consenting and that the patient does not object to the treatment. In addition, the responsible medical officer must apply to the Court of Session for an order authorising the treatment specified. The Court of Session may authorise the treatment only if satisfied that, having regard to the likelihood of the treatment alleviating, or preventing a deterioration in, the patient's condition, it is in the best interests of the patient, and the patient does not object to the treatment.

438. If the patient is aged under 16, subsection (6) sets out special rules which must be complied with in relation to the certification under subsection (2).

Sections 237 to 241: safeguards for other medical treatment

Electro-convulsive therapy etc

439. Subsections (1) and (2) of section 237 provide that the types of medical treatment mentioned in subsection (3) may be given to patients to whom the giving of medical treatment is authorised by virtue of the 2003 Act or the 1995 Act, only in accordance with the safeguards set out in sections 238 and 239. Subsection (3) mentions electro-convulsive therapy (ECT) and other types of treatment to be specified in regulations made by the Scottish Ministers, after consultation with appropriate persons.

440. The section is subject to section 243 which allows urgent medical treatment for patients detained in hospital (see paragraphs 457 to 460 below).

Patients capable of consenting and not refusing consent

441. Subsection (1) of section 238 sets out the conditions that must be met before medical treatment under sections 237 and 240 may be given to patients who can and do consent. The patient must consent in writing and either the responsible medical officer or a designated medical practitioner must certify that this consent has been given and that the treatment is in the patient's best interests having regard to the likelihood of the treatment's alleviating or preventing a deterioration in the patient's condition.

442. Subsection (3) provides that if the patient is aged under 16, the certificate under subsection (1) must be given by a child specialist.

Patients incapable of consenting

443. Section 239 sets out the conditions that must be met before any treatment specified under section 237(3) can be given to patients who are incapable of consenting.

444. A designated medical practitioner must certify under subsection (1) the following three matters: first, that the patient is incapable of understanding the nature, purpose and likely effects of the treatment; second, that the giving of medical treatment to the patient is authorised by virtue of the 2003 Act or the 1995 Act; and third, that it is in the patient's best interests that the treatment be given, having regard to the likelihood of the treatment alleviating, or preventing a deterioration in, the patient's condition.

445. Subsection (2) provides that if the patient resists or objects to the treatment, the treatment can be given only if instead of certifying that third matter the designated medical practitioner certifies that the patient resists or objects to the treatment but that the treatment is necessary under one of the urgent medical treatment provisions of section 243(3)(a) to (c) (namely, to save the patient's life, to prevent serious deterioration in the patient's condition or to alleviate serious suffering on the part of the patient).

446. If the patient is aged under 16, subsection (3) sets out special rules which must be complied with in relation to the certification under subsection (1).

Sections 240 and 241: treatments given over period of time etc.

447. Subsections (1) and (2) of section 240 provide that the types of treatment mentioned in subsection (3) may be given to a patient to whom the giving of medical treatment is authorised by virtue of the 2003 Act or the 1995 Act only in accordance with section 238 or 241. Subsection (3) sets out three types of treatment and enables the Scottish Ministers to make regulations specifying other types.

448. Subsection (2) is subject to subsection (4) and the provisions on urgent treatment in section 243.

Patients refusing consent or incapable of consenting

449. Subsection (1) of section 241 sets out the conditions that must be met if medication for mental disorder is to be given for more than 2 months, nutrition by artificial means is to be administered or any other treatment specified in regulations made under section 240(3) is to be given to a patient who is unable to or refuses to consent. A designated medical practitioner must certify as to the matters set out in that subsection.

450. Subsection (2) requires a designated medical practitioner to take into account the views of a capable patient who refuses consent; and if, having considered those views, the designated medical practitioner is of the opinion that the treatment should still be given, requires him or her to state the reason in the certificate under subsection (1).

451. If the patient is aged under 16, the special rules in subsection (3) as to certification under subsection (1) must be complied with.

452. Subsection (4) provides that if the patient is not in hospital, subsection (1) does not authorise the giving of medical treatment by force to the patient.

Section 242: treatment not mentioned in section 234(2), 237(3) or 240(3)

453. Section 242 sets out conditions for the giving of medical treatment to patients to whom the giving of medical treatment is authorised by the 2003 Act or the 1995 Act where the treatment is not specified elsewhere in the Part as requiring particular safeguards.

454. The rules are set out in subsections (3) and (4). Those rules are, however, subject to the provisions mentioned in subsection (2).

455. Subsection (3) deals with patients who are capable of consenting and who consent in writing. Medical treatment for mental disorder may be given provided it is given by or under the direction of the responsible medical officer.

456. Subsection (4) deals with patients who are capable of consenting but do not consent or consent other than in writing and those incapable of consenting. Medical treatment can be given if the requirements in subsection (5) are met.

Urgent medical treatment where patient detained in hospital

Section 243: urgent medical treatment

457. Section 243 applies to any patient whose detention in hospital is authorised under the 2003 Act or the 1995 Act. It describes the circumstances in which urgent medical treatment may be administered even to a patient who does not consent, or is incapable of consenting, to the treatment.

458. The section applies to any form of medical treatment (as defined in section 329(1), and authorises the treatment being given for any of the purposes set out in subsection (3). Subsection (4) imposes further restrictions on some of those purposes.

459. Subsection (5) prohibits the giving of ECT where the patient is capable of consenting but does not consent.

460. The responsible medical officer must notify the Commission within 7 days of the treatment first being given to the patient of the type of treatment given to a patient under this section and the purpose for which it was given.

Additional safeguards for certain informal patients

Section 244: Scottish Ministers' power to make provision in relation to treatment for certain informal patients

461. Section 244 enables the Scottish Ministers to make regulations setting out the conditions to be satisfied before types of medical treatment set out in the regulations can be given to informal patients (i.e. patients to whom the giving of medical treatment is not authorised by the 2003 Act or the 1995 Act) under 16 years of age.

Section 245 to 247: certificates

Certificates under sections 235, 236, 239, and 241

462. Section 245 provides that before giving a certificate which allows treatment to proceed, the certifying medical practitioner must consult the patient, the patient's named person (where practicable) and those persons appearing to have the primary responsibility for the patient's medical treatment. The certificate must be copied to the Commission within 7 days.

Certificates under section 238

463. Section 246 provides that the Scottish Ministers may prescribe by regulations the particulars that a certificate under section 238 must include.

464. The amendment made by the 2004 Order ensures a certificate given under section 238 must be copied within 7 days to the Commission.

Scope of consent or certificate under sections 235, 236, 238, 239 and 241

465. Section 247 provides that any consent or certificate given under section 235, 236, 238, 239 or 241 may relate to a plan of treatment which may involve one or more of the treatments specified, and may include a timescale for the administration of the treatments. For example,

electro-convulsive therapy is usually given as a planned series of treatments. The consent or certificate in any case in which such therapy is to be given may relate to the whole of the proposed series of treatments, rather than to any individual instance of the treatment.

Section 248: sections 235, 236, 238, 239 and 241: review of treatment etc.

466. Section 248 provides that where a patient is given treatment under section 235, 236, 239 or 241, the responsible medical officer must report to the Commission on the treatment and on the patient's condition at the times specified in paragraphs (a) or (b) of subsection (1).

467. Subsection (2) provides that the Commission may, at any time, direct that a form of treatment should cease to be given by giving notice to the responsible medical officer that the certificate given under any of the sections mentioned in that subsection will not apply to the patient with effect from the time specified in the notice.

468. Section 249 provides the meanings of terms used in this Part.

PART 17 – PATIENT REPRESENTATION

Chapter 1: named persons

Sections 250 to 257: named persons

469. These sections deal with appointing or identifying a named person to represent the interests of and support a patient subject to proceedings under the 2003 Act. Broadly speaking, the named person has similar rights to the patient to appear and be represented at Tribunal hearings concerning compulsory treatment orders, and to appeal against short-term detention. The named person is also entitled to be given information concerning compulsory measures which have been taken or are being sought where this is provided for in the 2003 Act.

470. Unlike, for example, a welfare guardian (depending on their powers), a named person does not "step into the shoes" of the patient. The named person and the patient are each entitled to act independently of the other.

Nomination of named person

471. A patient aged 16 or over may choose an individual to be his or her named person. The nomination may be made whether or not the patient is, at the time, the subject of compulsory measures. Section 250 sets out the process of nomination of a named person.

472. To be valid, a nomination must be signed by the patient and witnessed by a prescribed person. The prescribed person must certify that the patient understands the effect of making a nomination and has not been subject to any undue influence, for example that the patient has not been pressed into nominating when he or she clearly does not wish to (subsection (2)).

473. A nomination may be revoked, provided the conditions in subsection (3) are met. (These are similar to the conditions for the making of a valid nomination).

474. Subsection (5) provides that a nomination remains valid even if the person who made it subsequently becomes incapable.

475. A person nominated may refuse act as the named person. This must be done by giving notice to the patient and the local authority for the area where that patient lives (see subsection (6)).

476. Subsection (7) explains the meaning of the terms "incapable" and "prescribed person".

Named person where no person nominated or nominated person declines to act

477. Where no named person is nominated under section 250, or the nominated person declines to act, section 251 determines who is to be the named person for a patient who is 16 or over.

478. Subsection (1) provides that the patient's primary carer, if aged 16 or over, is to be the named person. (The primary carer is defined in section 329).

479. Where the primary carer is under 16, but another carer is 16 or over, that carer is the named person (subsection (2)).

480. Where a patient has no primary carer, but has two or more carers of at least 16, those carers may agree which of them is to be the named person (subsection (3)(a)). Where the primary carer is under 16, but there are two or more carers aged 16 or over, those carers may agree which of them is to be the named person (subsection (3)(b)).

481. A named person may decline to act by giving notice in accordance with subsection (6).

482. Where a patient does not have a named person (or if the named person declines) the nearest relative, as defined in section 254, is to be the named person.

Named person in relation to child

483. Section 252 provides that a named person for a patient under 16 shall be determined in accordance with subsection (1). A person, unless under the age of 16, who has parental rights and parental responsibilities in relation to that child, will ordinarily be the named person. (Parental rights has the meaning given by section 2(4) of the Children (Scotland) Act 1995 and parental responsibilities has the meaning given by section 1(3) of that Act.)

484. Where there are 2 or more persons of the relevant age with parental rights and parental responsibilities in relation to a child, subsections (2) and (3) operate so as to determine who will be the named person.

485. Where the child is in the care of a local authority by virtue of section 31 of the Children Act 1989, the authority is to be the named person.

486. Where neither of the situations in the preceding paragraphs applies, subsection (1)(c) provides that, where the child's primary carer is 16 or over, that person is the named person.

Declaration in relation to named person

487. As well as the right to nominate a named person, a patient who is 16 or over also has the right under section 253 to specify someone whom he or she would not wish to be their named person.

488. This right is to be exercised by a declaration made in accordance with subsection (2). Such a declaration remains valid even if the patient making it subsequently becomes incapable (subsection (3)). It may be revoked in accordance with subsections (4) and (5).

Meaning of "nearest relative"

489. The nearest relative of a patient is identified in accordance with section 254.

490. Subsection (2) lists the persons who may be the nearest relative. This list should be read along with subsections (7) and (8) which explain the entries at paragraphs (b) and (j). The patient's spouse is disregarded for these purposes where the couple are separated or there is a continuing desertion (subsection (3)). Similarly disregarded, are those under 16 years old and, where a patient is ordinarily resident in the UK, Channel Islands or the Isle of Man, relatives living elsewhere. Subsection (6) provides that half-relations are generally treated in the same way as whole relations (so, for example, a half-sister is included in paragraph (e) of subsection (2)) and a step-child is treated as a child.

491. Where, in relation to a patient, only one person falls within the list, that person is the nearest relative (see subsection (1)).

492. Where, however, two or more persons fall within the list, the nearest relative is, ordinarily, the person who appears in the first paragraph in the list (e.g. where the person has a spouse and a child, the named person would be the spouse). Where two or more persons fall within the first paragraph of the list, subsection (4) determines which of them is the nearest relative.

Section 255: named person: mental health officer's duties

493. This section places a duty on a mental health officer, in discharging a function under the 2003 Act or the 1995 Act, where it is necessary for that purpose to establish whether the patient has a named person, to take steps to find out whether a person has a named person and if so, who it is (subsections (1) and (2)).

494. Subsections (3) to (5) address the situation where the officer is unsuccessful. The officer is required to record the steps taken to identify the named person and must then give a copy of the record to the Tribunal and the Commission.

495. Where the officer does identify the named person but considers that the person is inappropriate, the officer must apply to the Tribunal for an order under section 257 appointing another person to be the named person (subsection (6)).

496. Subsection (7) empowers a mental health officer, when discharging any function under the 2003 Act in relation to a patient who has no named person, or where the named person seems inappropriate, to apply to the Tribunal for an order under section 257.

Section 256: named person: application by patient

497. Certain persons, other than the mental health officer, have a power apply to the Tribunal for an order under section 257 by virtue of section 256. Those persons are listed in subsection (2) (as read with subsection (3)). Such persons may apply where: the patient has no named person (subsection (1)(a)); the nominated named person appears to the applicant to be inappropriate to act in that role (subsection (1)(b)); or in such other circumstances as may be prescribed in regulations made by the Scottish Ministers (subsection (1)(c)).

Section 257: named person: Tribunal's powers

498. Section 257 gives the Tribunal power to make certain orders about named persons. Subsection (1) deals with applications in respect of patients who have no named person. The Tribunal may make an order appointing a specified person to be the patient's named person. Subsection (2) deals with applications in respect of inappropriate named persons. The Tribunal may make an order declaring that the acting named person is not the named person or substituting the person specified in the application as the named person for the acting named person. In relation to applications made under section 256(1)(c), the Tribunal may make such order as it thinks fit, although it cannot appoint a person under 16 years of age to be a patient's named person (subsection (4)).

Chapter 2: Advocacy

Advocacy

Section 259: advocacy

499. Section 259(1) confers on every patient a right of access to independent advocacy.

500. It places a duty on each local authority and health board to ensure the provision of independent advocacy services to patients within their areas. The duty requires local authorities and health boards to collaborate with each other. Where local authority and health board boundaries are not the same, each health board must collaborate with each local authority in its area and vice versa (see subsections (2) and (3)).

501. Subsection (1) also requires each local authority and health board to take steps to ensure that patients in its area have the opportunity of making use of the independent advocacy services provided.

502. "Advocacy services" is defined in subsection (4) as "services of support and representation made available for the purpose of enabling the person to whom they are available to have as much control of, or capacity to influence, that person's care and welfare as is, in the circumstances, appropriate". Such services are considered to be independent for these purposes where they are provided other than by someone mentioned in the list set out in subsection (5).

503. In addition, subsection (7) requires the State Hospitals Board for Scotland to secure independent advocacy services for patients detained in a state hospital, and to take steps to enable those patients to use the services.

504. Subsection (8) deals with the situation of a patient who, having been detained in a state hospital by virtue of section 127 or 193(7), is no longer detained there. In this case, a duty lies with the State Hospitals Board for Scotland along with the local authority and Health Board in whose area such a patient resides, to secure the availability of independent advocacy services.

Section 260: provision of information to the patient

505. Section 260 contains requirements for appropriate persons, as defined in subsection (5),to take steps to ensure that, at various stages throughout the operation of compulsory measures, patients are aware of their situation and their rights.

506. The patients with which this section is concerned are listed in subsection (1). They fall into two broad categories: patients detained under the 2003 Act or the 1995 Act; and patients who, although not detained, are subject to compulsory measures.

507. Subsection (2) places duties on the appropriate persons who are the managers of the hospital in which the patient is detained, or would be detained but for suspension of the order, or in any other case the managers of the hospital specified in the order.

508. The appropriate person must take reasonable steps:

- to ensure that the patient understands the "relevant matters", as specified in subsection (5), which are matters concerning the patient's status and rights, at a series of relevant times (which are set out in subsection (3));

- to ensure that the patient is supplied with material appropriate to their needs to enable the patient to refresh their understanding of the relevant matters (subsection (2)(a)(ii)). The material must be given in a form that is appropriate to those needs and permanent. Reasonable steps must be taken to ensure that the patient's named person is given a copy of any such material, in a form that is appropriate to the needs of the named person (subsection (4)); and

- to take reasonable steps to inform the patient of the availability of independent advocacy services at each of those relevant times.

509. In addition, the appropriate person requires to take reasonable steps to ensure the patient has the opportunity to use these services.

Section 261: provision of assistance to patient with communication difficulties

510. Section 261 applies in respect of patients subject to the same sorts of measures as those covered by section 260. Subsection (1) lists those patients. If such a patient has difficulty in communicating generally (for example as a result of their mental disorder, any physical or sensory impairment, or literacy difficulties) or where their first language is not English, then the

section imposed further duties upon the appropriate person. ("Appropriate person" has the same meaning here as in section 260(5) (see paragraph 507 of these Notes)).

511. Subsection (2) requires the appropriate person to take all reasonable steps to secure that appropriate arrangements are made, or assistance provided, to enable the patient to communicate effectively at any Tribunal proceedings, any review of the patient's detention, or any medical examination carried out to assess the patient's mental disorder.

512. No particular form of assistance is specified. What will be appropriate will depend on the needs of the particular patient. For example, arrangements might include the provision of interpreters or translators, or of appropriate equipment.

513. The steps taken in implementing the duty in subsection (2) must be recorded by the appropriate person in a written record (see subsection (5)).

Sections 262 to 263: access to medical practitioner and inspection of medical records

514. Section 262 enables a medical practitioner to visit a patient detained under the 2003 Act or the 1995 Act at any reasonable hour and to carry out a medical examination.

515. The visit must be for one of the purposes mentioned in subsection (2). The first of these is to advise the patient (or the patient's named person) about the making of applications to the Tribunal. The second is to provide information to the patient (or the patient's named person) about the patient's condition for the purpose of any such application or any other proceedings before the Tribunal in which the patient (or the named person) is participating.

516. The medical practitioner must be authorised by the patient or the patient's named person (subsection (4)). An authorisation by the named person may be rescinded by the patient at any time when the patient is capable (subsections (5) and (6)).

517. Section 263 enables a medical practitioner to obtain certain records of a patient.

518. Where a person holds records relating to a patient whose detention in hospital is authorised under the Act or the 1995 Act, a duly authorised medical practitioner may require that person to produce records relating to the patient's detention or medical treatment (subsection (1)).

519. A person who holds records concerning medical treatment of a patient who is subject to a compulsory treatment order, or a compulsion order, which does not authorise detention in hospital, may be required to produce those records for inspection by a duly authorised medical practitioner (subsection (2)).

520. The records must be required for one of a list of purposes, which are set out in subsection (3) and are the same as those applying in relation to a medical examination under section 262 (see paragraphs 514 to 516 of these Notes).

Chapter 3: detention in conditions of excessive security

521. Chapter 3 makes provision about situations where a patient may be being detained in conditions of excessive security.

Sections 264 to 267: detention in conditions of excessive security: state hospitals

522. Under section 264(2), the Tribunal may make an order declaring that a patient, who is being detained in a state hospital under an order or direction specified in subsection (1), is being detained in conditions of excessive security; and specifying a period, not exceeding 3 months, within which certain duties are to be performed in respect of that patient.

523. The basis for deciding that security is excessive is that the statutory criterion for detention in a state hospital (that is, the patient requires to be detained under conditions of special security that can only be provided in a state hospital) is no longer met.

524. The persons who may apply for such an order are the patient, the patient's named person, guardian or welfare attorney, or the Commission (subsection (6)).

525. The duties that are to be performed when an order is made are set out in subsections (3) to (5). Where the patient is a "relevant patient" (defined in section 273 as a patient whose detention in hospital is authorised by a compulsion order and who is also subject to a restriction order or a patient whose detention is authorised by a hospital direction or a transfer for treatment direction), the "relevant Health Board" (which is to be determined in accordance with regulations made under section 273) is required to identify a hospital which is (a) not a state hospital; (b) which the Board and the Scottish Ministers (and the managers of the hospital if not the Board) agree to be one in which the patient could be detained in appropriate conditions; and (c) in which accommodation is available.

526. Where the patient is not a relevant patient, the duty on the relevant Health Board is the same, except that the agreement of the Scottish Ministers is not required. Once the relevant Health Board has identified a hospital, subsection (4) requires that it gives notice to the managers of the state hospital of the name of the hospital.

527. Subsection (7) places restrictions on when an application may be made. An application may be made only after the patient has been detained under the order or direction concerned for a period of 6 months. Subsection (8) places restrictions on multiple applications. No more than one application may be made in each consecutive 12 month period.

528. Subsection (9) obliges the Tribunal to allow persons referred to in subsection (10) to make representations or provide evidence to the Tribunal before it makes an order under this section.

529. Section 265 requires that if, at the end of the specified period, the patient has not been transferred from the state hospital, then the Tribunal must hold a hearing. At this hearing, the Tribunal can grant the Health Board a further period within which to identify a suitable hospital. The period specified may be 28 days or such longer period not exceeding 3 months as the Tribunal thinks fit. Again, before making such an order the Tribunal must allow representations or admit evidence from the persons referred to in section 264(10).

530. Section 266 provides for a final Tribunal hearing (where the Tribunal has granted to the Board a period longer than 28 days under section 265) if the patient has still not been transferred. At that stage the Tribunal may make a final order. The effect of the final order is that the Board has 28 days to find a suitable place for the patient. The same requirement to allow representations and evidence from persons specified in section 264(10) applies.

531. It is possible that circumstances might change, so that the patient continues to require to be detained in conditions of special security. Section 267 allows the Board, the responsible medical officer (in certain cases) or Scottish Ministers (in other cases) to seek a recall of an order made under section 264, 265 or 266. This might be justified if, for example, the patient's condition deteriorated. Subsection (5) again provides that the Tribunal must allow those persons specified in section 264(10) to make representations or submit evidence before an order may be recalled.

Sections 268 to 271: detention in conditions of excessive security: hospitals other than state hospitals

532. Sections 268 to 271 establish a scheme, in very similar terms to that in sections 264 to 266, in respect of "qualifying patients" detained in hospitals other than the State Hospital ("qualifying patient" is to be defined in regulations(section 268(11)). The provisions only apply where the qualifying patient's detention is authorised under one of the orders listed in section 268(1) in a "qualifying hospital". Section 268(11) provides that a qualifying hospital is one which is not a state hospital and is specified, or of a description specified, in regulations.

Section 272: proceedings for specific performance of statutory duty

533. Failure to comply with an order from the Tribunal under any of the sections in Chapter 3 may, ordinarily, leave the Board open to proceedings for specific performance of statutory duty under the provisions of section 45(b) of the Court of Session Act 1988. However, while subsection (1) provides that such proceedings cannot be taken at the earlier stages, where the matter still falls to be reconsidered by the Tribunal subsection (2) enables the Commission to take those proceedings where necessary once the Tribunal procedure has been exhausted. (This is without prejudice to any rights that the patient has to do so).

PART 18 – MISCELLANEOUS

Section 274: Code of Practice

534. Section 274 requires the Scottish Ministers to publish a Code of Practice to give guidance to people discharging functions by virtue of the 2003 Act or, as a result of the amendment made by the 2004 Order, Part VI of the 1995 Act. Before publishing the Code, Ministers must consult and lay a draft before Parliament. The Code may be revised periodically.

535. Any person who has a function to discharge must have regard to the latest available version of the Code. This would include, in particular, medical practitioners and mental health officers. The Code does not bind the Tribunal, the courts or the Commission, nor as a result of an amendment made by the 2004 Order, a prosecutor. However, those persons would be entitled to have regard to whether other parties exercising those functions had properly applied the Code.

Section 275 to 276: advance statements

Advance statements: making and withdrawal

536. Section 275 sets out a procedure by which a patient can make an 'advance statement'. This is a statement setting out how the patient would wish or would not wish to be treated for any mental disorder if, at some future time, he or she has a mental disorder which causes his or her ability to make decisions about those matters to be significantly impaired.

537. Subsection (2) provides that an advance statement must be in writing and must be signed by the patient and a witness. The witness must also certify that, in his or her opinion, the patient was capable of making the statement at the time.

538. A patient may withdraw an advance statement in accordance with the provisions in subsection (3).

Advance statements: effect

539. Section 276 sets out the effect of an advance statement which has been made in accordance with section 275, and which has not been withdrawn.

540. If the Tribunal is making a decision, subsection (1) requires it to have regard to the terms of any extant advance statement made by the patient concerned, if the Tribunal is satisfied that:

- because of mental disorder, the patient's ability to make decisions about his or her treatment is significantly impaired;
- the statement was properly made (that is, it is in compliance with section 275(2));
- the statement covers any aspect of the measures or treatment which might be authorised or no longer authorised by the decision to be made by the Tribunal; and
- the Tribunal is satisfied there has been no material change in circumstances since the statement was made.

541. Subsection (3) provides that, where any person is giving treatment authorised under the 2003 Act or the 1995 Act (for example, the responsible medical officer), that person has to have regard to any extant advance statement made by the patient concerned, if satisfied that the patient's current decision-making ability is significantly impaired by virtue of mental disorder.

542. Any designated medical practitioner making decisions under the 2003 Act must also have regard to any extant advance statement.

543. The Tribunal must consider an advance statement (or a withdrawal of a statement) to be valid unless the contrary appears. If the Tribunal has considered an advance statement as valid, it should be presumed to be valid by any person giving treatment authorised by a decision of the Tribunal. Similarly, if treatment is being given otherwise than by virtue of a decision of the Tribunal, then the person giving treatment must consider a statement (or its withdrawal) to be valid unless the contrary appears to be the case.

544. Wherever a decision of the Tribunal or a designated medical practitioner, or treatment given under authority of the 2003 Act or the 1995 Act, conflicts with a valid extant advance

statement, then the Tribunal or person concerned must record the circumstances and their reasoning in writing, notify various parties including the patient who made the statement and the Commission, and place a copy of the record in the patient's medical records.

Section 277: education of persons who have mental disorder

545. Section 277 amends section 14 of the Education (Scotland) Act 1980 to require education authorities to make arrangements to provide school education for children unable to attend school because they are subject to measures authorised by the 2003 Act or, in consequence of their mental disorder, by the 1995 Act.

546. Subsection (3) provides a corresponding amendment to section 131 of the 1980 Act to remove the exclusion of children who are detained in hospital by virtue of measures authorised by the 2003 Act from the scope of the 1980 Act.

Section 278: duty to mitigate adverse effects of compulsory measures on parental relations

547. Section 278 requires any person having functions under the 2003 Act to take all reasonable steps to reduce any adverse effect on the relationship between a child and a person having parental responsibilities for that child, where either the child or that person is made subject to measures authorised by the 2003 Act or, in consequence of his or her mental disorder, by the 1995 Act.

Section 279: information for research

548. Section 279 allows the Scottish Ministers to require any person having functions under the 2003 Act to provide relevant information for research purposes, as defined in section 33 of the Data Protection Act 1998. The section provides a number of exceptions and safeguards to this:

- information which a person could not be compelled to give as evidence in proceedings in court need not be provided;
- information which would enable the person who is the subject of the information to be identified must if reasonably possible be provided in such a way as to prevent identification; and
- where provision would breach a duty of confidentiality, the information cannot be provided without the permission of the person to whom the information relates.

Section 280: restriction of Scottish Ministers' powers to delegate management of state hospitals

549. Originally, Part VIII of the 1984 Act contained provisions regarding state hospitals for patients who required special security. These provisions have now largely been repealed, and the responsibility of the Scottish Ministers to provide such hospitals is contained in section 102 of the National Health Service (Scotland) Act 1978.

550. Section 102 of the 1978 Act provides that a state hospital may be managed on behalf of the Scottish Ministers by:

- a committee constituted under section 91 of the 1984 Act; or

- a Health Board, Special Health Board, the Common Services Agency or an NHS Trust.

551. Section 91 of the 1984 Act is not re-enacted in the Act. This section removes the reference to it from the 1978 Act.

Sections 281 to 283: correspondence

Correspondence of certain persons detained in hospital

552. Section 281 provides powers for a specified person's incoming and outgoing mail to be inspected and withheld in certain circumstances. 'Specified person' means a person detained in hospital who meets other conditions as may be specified by the Scottish Ministers in regulations.

553. Subsections (1) and (3) provide that a postal packet addressed by a specified person to any person may be withheld from a "relevant carrier" (defined in subsection (9)) if the intended recipient has requested in writing that communications from the patient be withheld. The request should be made in writing to the managers of the hospital, the responsible medical officer or the Scottish Ministers. "Postal packet" has the same meaning as in the Postal Services Act 2000, namely "a letter, parcel, packet or other article transmissible by post".

554. Hospital managers may also withhold a postal packet if they consider that receipt is likely to cause distress to the person to whom it is addressed or any other person (not being a member of staff of the hospital), or to cause danger to any person.

555. Subsection (6) provides that hospital managers may withhold a postal packet addressed to a specified person if they consider it is necessary to do so in the interests of the safety of the patient concerned or for the protection of any other person. The powers described in this paragraph and the preceding one do not apply to any correspondence between a patient and those persons or organisations listed at subsection (5).

556. Subsection (7) provides that hospital managers may open and inspect a postal packet to determine whether they can or should withhold it, or any of its contents.

Correspondence: supplementary

557. Section 282 provides that if a postal packet, or anything contained within it, is withheld by the managers of a hospital under section 281(1) or (6), those managers must:

- record that fact in writing;
- within 7 days, notify the Commission of the name of the specified person, the nature of the packet or contents withheld, and the reasons for doing so; and
- also within 7 days, notify the specified person and, in the case of incoming correspondence, the person who sent the packet.

558. However, these notification requirements do not apply if the reason for the packet being withheld is that the addressee has made a request that communications to them from the specified person be withheld.

559. Subsection (7) enables the Scottish Ministers to make regulations in relation to two matters: the exercise of the powers conferred by section 281, and, extending the application of that section to other forms of written communications.

Review of decision to withhold postal packet

560. Section 283 requires the Commission to review any decision to withhold a postal packet (or anything contained within it) if an application is made to them within 6 months of the day on which notification was received.

561. The application can be made by the patient where an outgoing postal packet (or anything contained within it) was withheld and by the patient and the sender where an incoming postal packet (or anything contained within it) was withheld.

562. Having reviewed the decision of the managers of the hospital, the Commission may direct that the packet or item in question should be released to the addressee, and the hospital managers are required to comply with any such direction.

563. The Scottish Ministers may make regulations with respect to the making of applications and as to the production to the Commission of relevant items.

Sections 284 and 285: telephone calls

Certain patients detained in hospital: use of telephones

564. Subsection (1) of section 284 empowers the Scottish Ministers to make regulations in connection with regulating the use of telephones by such patients detained in hospital as may be specified. The regulations may in particular make provision in relation to the matters set out in subsection (2).

565. Subsection (4) provides that the interception of telephone calls by such patients to certain persons detailed in subsection (6), may not be authorised by regulations unless the person has requested the interception of calls made by the patient, or the telephone call is, or would be, unlawful.

Directions as to implementation of regulations under section 284(1)

566. Subsection (1) of section 285 empowers the Scottish Ministers to give directions to hospital managers in relation to their implementation of regulations under section 284(1); and requires the managers to comply with any such directions. Subsection (2) empowers Ministers to require hospital managers to provide them with specified information in relation to their implementation of those regulations.

Section 286: safety and security in hospitals

567. Section 286(1) empowers the Scottish Ministers to make regulations authorising and placing conditions on various activities relating to safety and security in hospitals, including:

- searches;
- the taking and examination of body samples;

- restrictions on property which may be kept in hospital;
- restrictions on visitors and the property they bring into hospital;
- surveillance; and
- the searching of visitors and their property.

568. Implementation of those regulations in any particular hospital will be a matter for the managers of that hospital. Subsection (2) empowers the Scottish Ministers to make regulations requiring the provision by hospital managers of specified information to Ministers and to the Commission, in relation to their implementation of those regulations. Subsection (3), provides that regulations may also empower the Commission to make directions on certain matters.

569. The Scottish Ministers can also issue directions to hospital managers with which those hospital managers must comply (subsection (5)).

Information

Section 287: information

570. Section 287 empowers the Scottish Ministers to require a patient's responsible medical officer to provide them with such information as they specify, for the purposes of carrying out functions exercisable by the Scottish Ministers under the provisions of the 2003 Act and the 1995 Act mentioned in paragraphs (a) and (b) of the section.

Payments for expenses

Section 288: payments to persons in hospital to meet personal expenses

571. Section 288 empowers the Scottish Ministers to pay a patient such amounts as they consider appropriate in relation to the patient's occasional personal expenses, where the patient, has been admitted to a hospital and is receiving treatment there primarily for mental disorder, and where it appears to the Scottish Ministers that the patient would otherwise not be able to meet the expenses in question.

Cross-border transfers

Sections 289 and 290: cross-border transfer of patients

572. Sections 289 and 290, which have both been subject to minor modifications by the 2004 Order enable the Scottish Ministers to make regulations in relation to the transfer of patients to and from Scotland. Section 289 relates to patients subject to a community-based compulsory treatment order or compulsion order while section 290 provides for patients who are detained compulsorily in hospital. Regulations may make provision for such patients to move between different parts of the UK, and for patients being treated for mental disorder (whether or not subject to measures authorised by the 2003 Act or the 1995 Act) to be removed from the United Kingdom.

573. Any removal from Scotland will require the consent of the Scottish Ministers and will be subject to a right of appeal by the patient.

574. Patients will only be received in Scotland with the consent of the Scottish Ministers.

Informal patients

Section 291: application to Tribunal in relation to unlawful detention

575. Section 291 provides that where a patient has been admitted to hospital informally to receive treatment primarily for a mental disorder, that patient or any other person specified in subsection (4) may apply to the Tribunal for an order requiring the managers of the hospital to cease to detain the patient. If the Tribunal determines that the patient is being unlawfully detained, it will make an order requiring that the detention cease.

576. These provisions do not interfere with any existing rights a patient may have to challenge in the courts or seek redress for any unlawful interference with his or her liberty.

PART 19 – ENTRY, REMOVAL AND DETENTION POWERS

577. Part 19 provides powers to allow authorised persons to enter premises in order to take a patient to a place of safety, to another specified place, or into custody, and for those authorised persons to remove a patient to a place of safety. It also confers on certain classes of nurse, the power to detain certain categories of patient for up to 2 hours for the purpose of having a medical practitioner undertake an examination of the patient.

Section 292: entry to premises

578. Section 292 deals with obtaining access to premises where an authorised person already has power under the 2003 Act to take a patient to any place or into custody.

579. Subsection (1) gives a sheriff or justice of the peace the power to grant a warrant which would authorise a person, who already has authority to take a patient to a place or into custody, to enter premises specified in the warrant. Such a warrant may only be granted, firstly, where it is necessary to enable the authorised person to fulfil the purpose for which he or she had previously been authorised; and secondly, where the sheriff or justice of the peace is satisfied the authorised person cannot obtain, or cannot reasonably expect to obtain, entry to those premises (see subsection (2)). A warrant issued under this section also authorises a mental health officer for the area in which the premises are situated and a police constable to enter the premises. It further authorises a local constable to open lock-fast places on the premises where this is necessary to gain entry (see subsection (3)).

580. Subsection (4) provides that, in executing a warrant under subsection (1), a person may be accompanied by a medical practitioner and any other person who is authorised to take the patient to a place or into custody.

Sections 293 to 296: removal order

Application for a removal order

581. Section 293(1) confers on a sheriff the power to grant a removal order, on the application of a mental health officer for the area in which the premises to which the order relates are situated. A removal order may be granted where the sheriff is satisfied that a person over the age of 16 has a mental disorder, is vulnerable in one of a number of ways laid out in subsection (2) and is likely to suffer significant harm if not removed to a place of safety.

582. A removal order authorises the removal, within 72 hours, of the person who is the subject of the order to a specified place of safety and his or her detention in that place for a specified period of up to 7 days. Such an order also grants authority to enter premises and to open lock-fast places.

583. Subsections (4) to (7) deal with procedural aspects of removal orders.

584. Where it is impracticable for an application for a removal order to be made to a sheriff and any delay in obtaining an order is likely to be prejudicial to the person concerned, section 294 allows the application to be made to a justice of the peace for the commission area in which the premises are situated. The grounds for, and terms of, the order, would be the same as for an order under section 293.

Recall or variation of a removal order

585. Section 295 provides that where a person is subject to a removal order, that person, or any person claiming an interest in his or her welfare, may apply for a further order recalling or varying the removal order. The removal order may be varied by specifying a different place of safety, thereby authorising the removal of the person to that place of safety and his or her detention there for the remainder of the period originally specified. Subsection (2) makes clear that where a person is to be moved to a different place of safety, this must happen within 72 hours of the variation order being granted. The 7-day detention period continues to run from when the removal order was made.

586. Subsections (3) to (5) deal with procedural aspects of applications for recall or variation.

587. Where the sheriff grants a variation order, the sheriff may, in accordance with subsection (6), make an order that the person concerned be returned to the premises from which the person was originally removed, or be taken to some other place chosen by that person.

Appeals against a removal order or an order recalling or varying a removal order

588. Section 296 provides that no appeal is possible against a decision of a sheriff or a justice of the peace to make or refuse to make a removal order, nor against a decision to make or refuse to make an order to recall or vary a removal order.

Sections 297 and 298: removal to a place of safety from a public place

589. Subsection (1) gives a police constable the power to remove from a public place a person who appears to be mentally disordered and who appears to be in immediate need of care or treatment, to a place of safety.

590. Detention for up to 24 hours is allowed for the purpose of enabling the person to be medically examined and the making of necessary arrangements for the person's care and treatment (subsection (2)).

591. Subsection (3) allows a constable to detain a person who tries to abscond during that period, to take the person into custody and remove him or her to a place of safety.

592. Subsection (4) explains what is meant by a "public place". It includes, for example, the common stair of a tenement building.

593. Where no place of safety is immediately available the person may be removed to a police station (subsection (5)).

594. Section 298 imposes certain duties where a constable has exercised the power in section 297.

595. The constable must ensure as soon as reasonably practicable that the local authority in whose area the place of safety is situated and the nearest relative of the patient are informed of the matters listed in subsection (3).

596. The constable must also ensure that the Commission is given notice of the same matters within 14 days of the day on which the person was removed to a place of safety.

597. Subsections (4) and (5) provide that where it is impracticable to inform the nearest relative or where the nearest relative, although informed, does not reside with the person who has been removed, the constable must ensure that a person who resides with the person, provides a care service to the person or provides care to the person on a certain basis, is informed of the matters listed in subsection (3).

Section 299: nurse's power to detain pending medical examination

598. This section empowers certain nurses to detain certain categories of patients who are already in hospital receiving treatment for mental disorder. The first category is a patient who is detained in hospital and being given medical treatment by virtue of an order made under section 228(1) of the 1995 Act. The second category is patients whose presence in hospital does not arise from any provision of the 2003 Act or the 1995 Act. The nurse may hold the patient for a period of up to two hours or until a medical practitioner arrives, whichever is the sooner, and, where the doctor arrives after the first hour, for a further period of one hour from his or her arrival.

599. A nurse may exercise such a power where it appears that:

- a medical examination is necessary to ascertain whether an emergency detention certificate or a short-term detention certificate may be appropriate;
- the patient has a mental disorder ;
- it is necessary for the protection of the health, safety or welfare of the patient or the safety of any other person to prevent the patient from leaving;
- it is not practicable to secure an immediate medical examination of the patient.

600. The power is only available to a nurse who falls within a class prescribed in regulations.

601. As soon as is practicable after the detention period begins, the nurse exercising the power must take all reasonable steps to inform a mental health officer of the detention. Subsections (6)

to (8) provide that the nurse must also make a written record of matters relating to the detention and deliver that record to the hospital managers who must forward a copy to the Commission.

602. Subsection (9) preserves any subordinate legislation made under section 25 of the 1984 Act in force immediately before the day on which section 299 comes into force.

603. Section 300 provides a definition of "place of safety".

PART 20 – ABSCONDING

604. Part 20 makes provision for taking into custody and returning patients who are absent without due authorisation from the place where they are detained or required to reside.

Section 301: absconding etc. by patients subject to compulsory treatment order

605. Section 301 provides that patients who are subject to a compulsory treatment order which authorises detention in hospital or which imposes a requirement that the patient resides at a specified address or has to notify a change of address, and who absconds or fails to comply with any condition or requirement in the order, is liable to be taken into custody and made subject to the provisions of section 303.

Section 302: absconding etc. by other patients

606. Section 302 applies the provisions of section 303 to patients who are subject to other orders or detention certificates, such as an emergency detention certificate, a short-term detention certificate or an interim compulsory treatment order, where they have absconded or otherwise failed to comply with a requirement or condition of the order or certificate.

Section 303: taking into custody and return of absconding patients

607. Section 303 sets out the powers of authorised persons to make arrangements for the return of certain patients who have absconded or failed to comply with a requirement or condition imposed on them. A patient who absconds while subject to a compulsory treatment order may be taken into custody and returned any time up to 3 months after the date on which he or she goes absent, or fails to comply. Even if the compulsory treatment order has expired in the patient's absence, this provision is still applicable. In relation to any order or certificate other than a compulsory treatment order, the period during which the patient may be taken into custody and returned ends with the expiry of the order or certificate under which the patient is detained.

608. Subsection (3) of section 303 stipulates the parties who are authorised to take into custody and/or return patients who have absconded. Subsection (6) makes clear that any of the parties listed at subsection (3) may use reasonable force when taking into custody or returning such a patient.

Sections 304 to 308: effect of period of unauthorised absence on expiry of compulsory treatment order

609. Section 304 makes clear that the unauthorised absence does not affect the expiry date of any order or calculation of any period specified under the 2003 Act. Subsection (3) provides that a compulsory treatment order expires where the patient's unauthorised absence has continued for a period of 3 months.

610. Section 305 sets out the procedures to be followed where a patient is returned from a period of unauthorised absence more than 14 days before the expiry of the compulsory treatment order. Subsection (1) states that if a patient is absent for longer than 28 consecutive days and is returned at any point before the final 14 days of the compulsory treatment order, the order will cease to have effect at the end of a 14 day period which begins on the day that the patient was returned. Subsection (2) places a duty on the patient's responsible medical officer to carry out a review of the compulsory treatment order in line with the provisions of section 77(3) during this 14 day period after the patient has been returned.

611. Subsections (3) to (6) make provision as to how this review sits with the reviews provided for in Chapter 4 of Part 7 of the 2003 Act.

612. Sections 306 and 307 deal respectively with patients who are subject to compulsory treatment orders and whose absence ceases when the order has less than 14 days to run and patients subject to compulsory treatment orders whose period of unauthorised absence is for less than 3 months but ends after the expiry of the order. In these cases, the compulsory treatment order shall be deemed to continue for a period of 14 days from the return of the patient in order to enable the responsible medical officer to carry out a review. Again, subsections (2) to (5) of each section explain how this review operates in relation to the reviews normally carried out under Chapter 4 of Part 7 of the 2003 Act.

613. Section 308 states that where a patient subject to a short-term detention certificate or to a certificate issued under section 114(2) or 115(2) is returned in the last 13 days before the expiry of that certificate, the measures specified in the certificate will apply for a further 14 days. (This is to allow time for further assessment of the patient and, where appropriate, an application for a compulsory treatment order).

Sections 309: patients from other jurisdictions

614. Subsection (1) enables the Scottish Ministers to make regulations, with any modifications deemed appropriate, applying sections 301 to 303 in relation to patients from the other jurisdictions mentioned in the subsection.

Section 310: regulations as to absconding by other patients

615. Subsection (1) enables the Scottish Ministers to make regulations as to the circumstances in which a patient who absconds while subject to one of the orders listed in subsection (3) can be taken into custody.

616. The 2004 Order makes a minor amendment to allow any regulations made to require notification to be made, amongst others, to specified prosecutors.

PART 21 – OFFENCES

Section 311: non-consensual sexual acts

617. Section 311 creates an offence of engaging in a sexual act, as defined in subsection (2), with a patient who does not consent or is incapable of consenting to that act by reason of his or her mental disorder. It applies to any patient of either gender, whatever his or her type of mental disorder (unlike section 106 of the 1984 Act, which was restricted to sexual intercourse and could only be committed by a man on a mentally impaired woman).

618. A patient will be regarded as not having consented to a sexual act where the purported consent has been given as a result of the patient being frightened, threatened, intimidated or tricked.

619. Subsection (5) provides a defence to an accused who can prove that they did not know and could not reasonably be expected to know both that the patient had a mental disorder and was incapable of consenting.

620. Subsection (7) also makes it an offence for another person to assist or encourage a person to carry out such a sexual offence.

621. The section provides the levels of penalties applicable to these offences.

Section 312: offences under section 311: extended sentences

622. Section 312 amends section 210A of the 1995 Act, which allows a court to give an offender convicted of a sexual offence an extended sentence where an offence has been committed under section 311 of the 2003 Act.

Section 313: persons providing care services: sexual offences

623. Section 313 creates an offence where a carer or a member of staff, or someone working in or managing a hospital (other than the Scottish Ministers) engages in a sexual act, as specified in subsection (1), with a patient for whom he or she cares. Again, there is a defence available to an accused who did not know or could not reasonably be expected to know that the patient was mentally disordered. The offence does not apply where the person concerned is married to the patient, or there was an ongoing sexual relationship between them. The offence attracts a maximum sentence of 2 years' imprisonment.

Section 314: notification requirements for offenders under sections 311 and 313

624. The Sex Offenders Act 1997 provides that persons convicted of one of a list of offences are liable to be placed on the Sex Offenders Register. The effect is that the person must register certain personal details with the police. Section 314 provides that the offences created by sections 311 and 313 are added to the list. The 1997 Act has now been repealed and the notification provisions re-enacted in the Sexual Offences Act 2003 (c 42).

Section 315: ill treatment and wilful neglect of a mentally disordered person

625. Section 315 makes it an offence for a carer or a member of staff, or someone working in or managing a hospital (other than the Scottish Ministers) to ill-treat or wilfully neglect a patient to whom they are providing care or treatment. The maximum penalty on indictment is 2 years' imprisonment.

Section 316: inducing and assisting absconding etc

626. Subsection (1) makes it an offence to knowingly induce or assist a patient to abscond or to fail to act, in such a way as to make the patient liable to be taken into custody and subject to the provisions of section 303, or to harbour a patient who has absconded or so failed.

627. Subsection (2) provides that it is a defence for an accused to prove that what he or she did, did not interfere with other persons carrying out functions under the 2003 Act and it was calculated to protect the interests of the patient.

Section 317: obstruction

628. Section 317 makes it an offence to behave in a way which obstructs a person authorised to carry out functions under the 2003 Act and in particular to do so in any of the ways listed in subsection (1). The maximum penalty is 3 months' imprisonment or a fine not exceeding level 3 on the standard scale.

629. A patient who is the subject of any intervention under the 2003 Act cannot be guilty of the offence in relation to that intervention.

Section 318: false statements

630. Section 318 makes it an offence for a person to knowingly make a false statement in a written document which is an application under the 2003 Act, one accompanying such an application or any other document which must be made, prepared or sent or given for a purpose of the Act.

631. Documents that are exempt from this provision are documents produced by the patient nominating a named person or declaring that someone is not to be a named person, and also an advance statement.

Section 319: time limit for summary proceedings for offences under sections 311 and 313

632. Section 310 applies the time limits for summary proceedings in subsections (2) to (4) of section 4 of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings brought under section 311 or 313. Summary proceedings may be commenced at any time within the period of 6 months from the date on which evidence that the Lord Advocate considers sufficient to justify the proceedings comes to his knowledge.

PART 22 – APPEALS

633. This part creates an appeal structure against decisions of the Tribunal. Most appeals are made to the sheriff principal but complex cases may be remitted to the Court of Session. There is a further right of appeal from the sheriff principal to the Court of Session. Appeals concerning restricted patients go directly to the Court of Session. The grounds for any appeal are set out in section 324(2).

Section 320: appeal to the sheriff principal against certain decisions of the Tribunal

634. Section 320 provides that a relevant party may appeal to the sheriff principal against a range of decisions of the Tribunal, which are listed in subsection (1). Subsection (3) makes provision about the sheriff principal to which the appeal is to be made.

635. Subsection (4) enables the sheriff principal, either on the motion of one of the parties or at his or her own behest, to remit an appeal to the Court of Session. The test for so doing is that the appeal raises an important or difficult question of law.

636. Subsections (5) to (9) make provision about the persons who may appeal decisions.

Section 321: appeal to the Court of Session against decisions of sheriff principal

637. Section 321 provides for a further appeal from the sheriff principal in relation to applications made under section 320. The same parties as set out in section 320 will have the right of appeal to the Court of Session.

Section 322: appeal to Court of Session against certain decisions of the Tribunal

638. The decisions listed in section 322(1) which apply in relation to orders or directions made in the context of criminal proceedings are to be appealed directly to the Court of Session.

639. For these purposes, the patient, his or her named person, his or her guardian or welfare attorney and the Scottish Ministers may appeal (subsection (2)). Where the decision has been made in relation to detention under conditions of excessive security, the managers of the hospital concerned and the Commission may also appeal (subsection (3)).

Section 323: suspension of decision of Tribunal pending determination of certain appeals

640. Where the Scottish Ministers appeal a Tribunal decision made under section 193 or against a decision of the Tribunal to make a direction under section 215(3) or (4) they may apply to the Court for an order authorising the patient's continued detention pending the outcome of the appeal.

641. Such an order will remain effective until the appeal is either abandoned or finally determined (subsection (2)).

Section 324: appeals: general provisions

642. Subsection (2) specifies the grounds on which any appeal from the Tribunal, either to the sheriff principal or the Court of Session, must be based.

643. Subsections (3) and (4) make provision about the participation of the Tribunal in any such appeal.

644. If an appeal succeeds, the appellate court must either substitute its own decision for that of the Tribunal (where it is possible on the established facts to do so) or remit the case back to the Tribunal for consideration afresh (subsection (5)). Where a case is remitted, the court may make directions that the Tribunal now to consider the case must be differently constituted from the original Tribunal and such other matters about the consideration of the case as it considers appropriate (subsection (6)).

645. There is no time limit specified in the 2003 Act for the making of any appeal. Regulations may provide for this (subsection (7)).

PART 23: GENERAL

646. Section 325 makes provision for regulations to prescribe forms for documents to be prepared under the 2003 Act and to set out the circumstances under which such forms should be used.

647. Section 326 makes general provision about the making of orders, regulations and rules under the Act.

648. Section 327 makes general provision about directions given under the Act.

649. Section 328 provides a definition of the term "mental disorder". Subsection (2) of that section provides for a list of characteristics or conditions by reason of which alone a person is not mentally disordered.

650. Section 329 gives definitions for expressions used in the Act

651. Section 330 confers power on the Scottish Ministers to make supplementary, incidental or consequential provisions to ensure the 2003 Act functions effectively.

652. Section 331 introduces schedules 4 and 5. It brings the minor and consequential amendments to other legislation made by the 2003 Act into effect. These amendments are to be found in schedule 4. It also gives effect to the repeals and revocations of provisions in other legislation contained in schedule 5.

653. Section 332 brings into effect transitory amendments to the 1984 Act (these are set out in schedule 6). It also confers power on the Scottish Ministers to make transitory, transitional and savings provision in connection with the coming into force of the 2003 Act.

654. Section 333 provides the short title of the 2003 Act and makes provision about commencement.

SCHEDULE 1 (Introduced by Section 4): THE MENTAL WELFARE COMMISSION FOR SCOTLAND

655. The schedule sets out the new arrangements under which the Commission will operate and contains provisions as to the membership, organisation and operational arrangements for the Commission. Provision for the functions, rights and duties of the Commission are set out throughout the 2003 Act.

Part 1: membership, proceedings etc

656. Paragraph 1 makes provision about the status of the Commission. It is not to be regarded as a servant or agent of the Crown or as having any Crown status, immunity or privilege. Its members or staff are not to be regarded as civil servants and its property is not Crown property.

657. Paragraph 2 gives the Commission certain general powers.

658. Paragraph 3 deals with Commission membership. Commissioners are appointed by Her Majesty on the recommendation of the Scottish Ministers. The Commission must include a convenor and at least three commissioners holding such qualifications, training and experience as may be prescribed ("medical commissioners"). Other members who meet any other requirements as may be prescribed may also be appointed.

659. Paragraph 3(2) makes the chief officer of the Commission a member *ex officio* and provides for the cessation of membership on termination of office.

660. Paragraph 3(2) gives the Scottish Ministers power, by order, to amend the arrangements for the number and categories of commissioners.

661. Paragraph 4 makes provision about terms of office and paragraph 5 deals with eligibility for reappointment.

662. Paragraph 6 deals with the remuneration, pensions and allowances of commissioners and members of sub-committees who are not commissioners.

663. Paragraph 7 deals with the appointment and remuneration of Commission staff as well as pensions arrangements.

664. Paragraph 8 permits regulations to be made enabling the delegation of Commission functions to committees and sub-committees, and on their procedures.

665. Paragraph 9 deals with Commission accounts.

Part 2: transitional provisions

666. Part 2 contains transitional arrangements for the Commission. It makes provision amending sections 2 and 6 of the 1984 Act which concern the appointment of a chief officer to the Commission to provide that his or her powers as a member of the Commission are *ex officio*.

SCHEDULE 2 (Introduced by Section 21): THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

667. This schedule is in 4 parts and sets out the arrangements under which the Tribunal will operate.

Part 1: members of the Tribunal

668. Paragraph 1 provides that the membership of the Tribunal shall be drawn from three panels. The Scottish Ministers will appoint these members to the Tribunal. The three panels of members will consist of legal, medical and general members respectively. Regulations may specify the qualifications, training and experience required for each panel.

669. Categories of persons who are disqualified from appointment as, and being, members of the Tribunal are set out in sub-paragraph (2).

670. In addition to the three panels mentioned above, paragraph 2 establishes a panel consisting of all those holding office as sheriffs principal, sheriffs or part-time sheriffs to serve as sheriff conveners of the Tribunal.

671. Paragraph 3 requires the Scottish Ministers to appoint a President of the Tribunal. The President is to preside over the discharge of the Tribunal's functions, and can also serve as a convener of the Tribunal. The President must have such qualifications, training and experience as may be prescribed in regulations.

672. The President is subject to the same provisions as Tribunal members as regards disqualification, terms of office, remuneration and pensions (paragraphs 1(2), 4, 5 and 6). A legal member of the Tribunal appointed for the purpose by the Scottish Ministers can discharge the functions of the President if the President is absent or unable to act. Further regulations may provide for the President's functions to be delegated to Tribunal members or Tribunal staff. These regulations may contain provision for different functions to be delegated to different people for different regional areas.

673. Paragraph 4 sets out the terms of office for Tribunal members. Tribunal members will generally serve for 5 years but will normally be entitled to be re-appointed for a further period, unless the circumstances set out in sub-paragraph (6) apply.

674. Each member holds office in accordance with the terms of the member's instrument of appointment (which may, for example, provide that the member is appointed on a part-time or a full-time basis).

675. Paragraph 5 sets out the procedure for removing a Tribunal member from office. This can only be done by a disciplinary committee constituted under sub-paragraph (3),chaired by a Court of Session judge or a sheriff principal. Regulations may make provision on suspension and otherwise on the committee's procedure.

676. Paragraph 6 allows the Scottish Ministers to make remuneration and pension arrangements for Tribunal members.

Part 2: organisation and administration of the functions of the Tribunal

677. Paragraph 7 provides for the functions of the Tribunal to be discharged by such number of tribunals as may be determined from time to time by the President. The President also determines the times and places of Tribunal hearings.

678. Sub-paragraphs (3) and (4) deal with the constitution of the Tribunal when discharging a function. A tribunal will be selected by the President. Ordinarily it will consist of a convener, who will be the President or legal member, a medical member and a general member. In cases where the Tribunal receives an application under section 191 and 192 (restricted patient cases), the convener must be the President or a sheriff convener.

679. (Rules made under paragraph 10 (see paragraph 683 of these Notes) may alter the composition of the Tribunal for particular purposes).

680. The President is responsible for ensuring that the Tribunal discharges its functions efficiently and effectively (sub-paragraph (5)). Sub-paragraph (6) gives the President power to give directions, and issue guidance, about the administration of the Tribunal.

681. Paragraph 8 provides that the Scottish Ministers may appoint staff and make arrangements for their remuneration, pensions etc and provide accommodation for the Tribunal. Sub-paragraphs (3) and (4) of paragraph 8 impose a duty on Health Boards, the State Hospitals Board for Scotland and local authorities to provide hearing venues on request from the President, as far as it is reasonably practicable to do so.

682. Paragraph 9 provides for Scottish Ministers to provide financial resources to meet the Tribunal's expenses.

Part 3: Tribunal procedure

683. Paragraph 10(1) enables the Scottish Ministers to make rules about the practice and procedure of the Tribunal. Sub-paragraph (2) lists certain matters that may be included within such rules.

684. Paragraph 11 confers on the President a power to supplement the rules by making directions about procedure and practice. This power could be exercised in relation to, for example, the allocation of hearing dates.

685. Paragraph 12 gives the Tribunal power to require by citation any person to attend to give evidence at any hearing or to produce documents held by them. The Tribunal may require a witness to give evidence on oath or to affirm. Non-compliance with a citation without reasonable excuse, is an offence, subject to specified penalties.

686. Paragraph 13 provides for Tribunal decisions, where made by more than one member, to be made by majority with the convener having a second casting vote in the event of a tie. The Tribunal is required to produce a written document, containing the decision, a full statement of established facts and reasons for the decision. The Tribunal must notify each party of its decision and, on the request of one of the parties, a copy of the written document must be sent to each party.

Part 4: reports, information etc.

687. Paragraph 14 requires the President to submit an annual report to the Scottish Ministers on the performance of the Tribunal's functions. This report requires to be laid before the Scottish Parliament.

688. Paragraph 15 requires the President to provide to the Scottish Ministers, or other persons specified by them, such information about the Tribunal's operation as the Scottish Ministers may direct.

689. Paragraph 16 permits the Tribunal to pay allowances or expenses to persons appearing at a Tribunal hearing. These may cover for example, travel and subsistence and loss of earnings. Provision is also made for payments to persons who have produced medical or other reports commissioned by the Tribunal under paragraph 10(2)(q). In both cases the President determines the amount payable.

SCHEDULE 3 (Introduced by Section 71) – APPLICATION OF CHAPTER 1 OF PART 7 TO CERTAIN PATIENTS

690. This schedule applies the provisions in chapter 1 of Part 7 dealing with the application for and making of compulsory treatment orders to patients subject to a hospital direction or a transfer for treatment direction, with specified modifications.

691. A mental health officer can apply to the Tribunal for a compulsory treatment order to come into effect immediately after the expiry of the hospital direction or transfer for treatment direction to which the patient is subject. A condition of the application being that both of the medical practitioners who carried out the medical examination of the patient consider that the compulsory treatment order is necessary.

692. Where it considers it necessary, the Tribunal can make a compulsory treatment order in relation to a patient who is subject to a hospital direction or a transfer for treatment direction provided that the direction has less than 28 days left to run. The 6 month period during which the measures are authorised by the compulsory treatment order does not begin until the day on which the direction expires.

693. An interim compulsory treatment order cannot be made in relation to a patient who is subject to a hospital direction or a transfer for treatment direction.

SCHEDULE 4 (Introduced by section 331(1)) – MINOR AND CONSEQUENTIAL AMENDMENTS

684. Schedule 4 contains minor amendments to existing legislation and amendments consequential on the provisions of the Act. The amendments to existing legislation include where references to the 1984 Act are to be replaced by references to the 2003 Act.

The Social Work (Scotland) Act 1968 (c.49)

694. In paragraph 1, the 1968 Act is amended to reflect new provisions for local authorities under sections 25, 26, and 27, and the new definition for "mental health officer" to be found at section 32 of the 2003 Act.

The Local Government (Scotland) Act 1973 (c.65)

695. In paragraph 2, the 1973 Act is updated to reflect the definition of "mental health officer", to be found at section 32 of the 2003 Act.

The National Health Service (Scotland) Act 1978 (c.29)

696. In paragraph 3, the 1978 Act is amended to substitute a reference to the 1984 Act with a reference to the 2003 Act. The Scottish Ministers' duty to provide state hospitals in the 1978 Act is amended to refer to the 2003 Act as well as the 1995 Act.

The Disabled Persons (Services, Consultation and Representation) Act 1986 (c.33)

697. Paragraph 4 amends the 1986 Act by substituting for references to the 1984 Act, references to the 2003 Act.

The Tribunals and Inquiries Act 1992 (c.53)

698. Paragraph 5 amends the 1992 Act to include a reference to the Tribunal, with the effect that the Tribunal will be subject to supervision by the Scottish Committee of the Council on Tribunals.

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

699. Paragraph 6 amends the 1993 Act to refer to the 2003 Act in substitution for the reference to the 1984 Act.

The Children (Scotland) Act 1995 (c.36)

700. In paragraph 7, the 1995 Act is amended to substitute the definition for children affected by disability, with the definition of mental disorder as defined in section 328(1) of the 2003 Act.

The Criminal Procedure (Scotland) Act 1995 (c.46)

701. Paragraph 8 provides for amendments made by the 2003 Act to the 1995 Act. All section numbers in paragraphs 691 to 719 of these Notes refer to the 1995 Act unless stated otherwise.

702. Sub-paragraph (2) amends section 54 to replace temporary hospital orders with temporary compulsion orders. It inserts subsection (2A) into section 54 which allows the court to make a temporary compulsion order under section 54(1)(c)(ii) if it is satisfied on the evidence of two medical practitioners-

- that the offender has a mental disorder;
- that medical treatment is available which is likely to prevent the mental disorder worsening, or alleviate the symptoms or effects of the mental disorder; and
- that if the offender were not provided with medical treatment there would be a significant risk to his or her health, safety, or welfare or to the safety of any other person.

703. A new subsection (2B) is inserted into section 54 which details the measures that may be authorised by a temporary compulsion order, namely-

- the removal if necessary of the offender to hospital within 7 days of the making of the order by a constable or by a person engaged to provide services in or to the specified

hospital and who is authorised by the hospital managers to remove offenders for that purpose or by any specified person;

- the detention of the offender in hospital; and
- the giving of medical treatment to him or her in accordance with Part 16 of the 2003 Act.

704. Sub-paragraph (3) amends section 57 to allow for the making of interim compulsion orders, compulsion orders and compulsion orders combined with restriction orders in place of interim hospital orders and hospital orders. New subsection (3A) makes provision for section 57 equivalent to that made by section 53D(1), namely, that an offender cannot be made subject to consecutive interim compulsion orders (subject to the extension of the order under section 53B(4)).

705. New subsection (4) applies, with modifications, the provisions of sections 57A to 57D to compulsion orders made under section 57(2)(a). New subsection (4A) provides that section 59 applies to restriction orders made under section 57(2)(b).

706. New subsection (4B) applies, with modifications, sections 53 to 53D to interim compulsion orders made under section 57(2)(bb). New subsection (4C) applies, with modifications, section 58 to guardianship orders made under section 57(2)(c).

707. Sub-paragraph (4) makes a minor consequential amendment to subsection (1A) of section 58 by taking out a reference to subsection (1) which has been repealed by the 2003 Act (see schedule 5). It also inserts the definition of mental disorder in terms of the 2003 Act and provides that the two medical practitioners whose evidence forms the basis for the making of a guardianship order must agree on at least one type of mental disorder that they each consider the person to be suffering from.

708. Sub-paragraph (5) amends section 59 to replace references to hospital orders with references to compulsion orders authorising detention. It also makes a number of changes in consequence of the repeal of the 1984 Act. Finally, it inserts new subsection (2A), which provides that the court can make a restriction order, if it has not previously made an interim compulsion order in respect of the offender, only where it is satisfied that the making of an interim compulsion order was not appropriate.

709. Sub-paragraph (6) replaces section 59A with new sections 59A to 59C. The overall effect of these new sections is to bring the making of hospital directions into line with the provisions for the making of compulsion orders.

710. Subsection (1) of section 59A provides that only offenders convicted on indictment in the High Court or the sheriff court of an offence punishable by imprisonment can be made subject to hospital directions.

711. Subsection (2) provides that the court may make a hospital direction only if it is satisfied, on the evidence of two medical practitioners, that the conditions in subsection (3) are met and as to the matters set out in subsection (4) and that the direction is appropriate after having regard to the matters in subsection (5). One of the medical practitioners must be an approved medical practitioner (see section 61 as amended by the 2003 Act).

712. The conditions in subsection (3) are-

- that the offender has a mental disorder (provided both medical practitioners agree on the type of disorder that the offender has: see subsection (8));
- that medical treatment is available which is likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the mental disorder ;
- that, if the offender were not provided with that treatment, there would be a significant risk to his or her health, safety or welfare or to the safety of any other person; and
- that the making of the hospital direction is necessary.

713. Subsection (4) provides for two further conditions that must be met before a hospital direction can be made-

- that the proposed hospital is suitable; and
- that the offender could be admitted to it within 7 days of a direction being made.

714. The matters set out in subsection (5) to which the court must have regard are-

- the mental health officer's report under section 59B;
- all the circumstances (including the nature of the offence of which the offender is convicted and the offender's past history); and
- any alternative means of dealing with the offender.

715. Subsection (6) provides that the offender may be admitted to and detained in a state hospital only if both of the medical practitioners who gave evidence under subsection (2) satisfy the court that the offender needs to be detained under conditions of special security that can be provided only in a state hospital.

716. Subsection (7) sets out the measures that are authorised when a hospital direction is made, namely, removal of the offender to hospital within 7 days of the making of the order, their detention in hospital and the giving of medical treatment to them in accordance with the provisions of Part 16 of the 2003 Act.

717. Subsection (9) gives the court power to include in the hospital direction, directions for the removal of the offender to, and detention in, a place of safety pending admission to the specified hospital.

718. Where the court is considering making an offender subject to a hospital direction, section 59B allows the court to direct the mental health officer to interview the offender and prepare a report containing the information listed in subsection (4). The mental health officer need not interview the offender if it is impracticable do so.

719. Section 59C(1) provides that if it is not practicable by reason of emergency or special circumstances to admit the offender to the specified hospital within 7 days, the court or the Scottish Ministers may direct that the offender be admitted to another hospital. Subsection (2) provides for notification of the making of such a direction. Subsection (3) provides that, where a

direction is made, the hospital specified by the Scottish Ministers shall replace the hospital specified by the court.

720. Sub-paragraph (7) amends section 60 to allow for appeals by offenders against the making of interim compulsion orders and compulsion orders**.**

721. Sub-paragraph (8) amends section 60A so that it now provides for appeals by the prosecutor against the making of compulsion orders, restriction orders, guardianship orders, decisions under section 57(2)(e) to make no order or hospital directions.

722. Sub-paragraph (9) amends section 60B to substitute compulsion orders for hospital orders so that the court may, instead of making a compulsion order or a guardianship order, make an intervention order.

723. Sub-paragraph (10) amends section 61 to reflect the use of the term "approved medical practitioner" in the 2003 Act (which replaces practitioners approved under section 20 of the 1984 Act) and to make references to new section numbers inserted into the 1995 Act.

724. Sub-paragraph (11) amends section 118 with the effect that subsections (3) to (6) of section 57 apply to an order made under section 118(5)(b)(i).

725. Sub-paragraph (12) amends section 190 with the effect that subsections (3) to (6) of section 57 apply to an order made under section 190(1)(b)(i).

726. Sub-paragraph (13) amends section 200 with the effect that one of the conditions that must be met before the court can make an order under section 200 a person for inquiry into mental condition is that the offender being made subject to the order can be admitted to a hospital that is suitable for their detention.

727. Sub-paragraph (14) replaces references in section 210 to orders made under sections 52, 53 and 200 with references to assessment orders, treatment orders and interim compulsion orders so that time spent in hospital by virtue of those orders shall be a factor in any sentence of imprisonment subsequently imposed on an offender.

728. Sub-paragraph (15) amends section 230 to reflect the use of the term approved medical practitioner in this Act, and replaces the reference to a hospital order with references to a compulsory treatment order or a compulsion order.

729. Sub-paragraph (16) adds definitions of terms used in the new sections inserted by the 2003 Act into section 307, the interpretation section of the 1995 Act.

The Adults with Incapacity (Scotland) Act 2000 (asp 4)

730. In paragraph 9, the 2000 Act is amended to substitute references to the detention provisions of the 1984 Act with references to detention by virtue of the 1995 Act or the 2003 Act. In relation to the medical treatment of an incapable adult, references to the provisions for special treatments in Part 16 of the 2003 Act are also added. In relation to an application for a

guardianship order, references to a medical practitioner are amended to refer to an approved medical practitioner. The 2000 Act is also amended to align definitions for mental disorder and mental health officer with the provisions of sections 328 and 329 of the 2003 Act, and amended to substitute for references to the 1984 Act references to the 2003 Act.

The Regulation of Care (Scotland) Act 2001 (asp 8)

731. In paragraph 10, the definition of an "independent hospital" in the 2001 Act is amended and a reference to the 1984 Act is replaced by a reference to the 2003 Act.

The Housing (Scotland) Act 2001 (asp 10)

732. Paragraph 11 amends the 2001 Act to substitute a reference to the 1984 Act with a reference to the 2003 Act.

The Community Care and Health (Scotland) Act 2002 (asp 5)

733. In paragraph 12, the 2002 Act is amended to substitute references to the 1984 Act with references to the 2003 Act.

The Scottish Public Services Ombudsman Act 2002 (asp 11)

734. Paragraph 13 amends the 2002 Act to include a reference to the Tribunal by adding the Tribunal to the list of tribunals the Ombudsman would be entitled to investigate.

SCHEDULE 5 (Introduced by section 331(2) and (3)) – REPEALS

735. Schedule 5 sets out enactments which are repealed, wholly or partly by the 2003 Act. These include, for example, the 1984 Act and the Mental Health (Public Safety and Appeals) (Scotland) Act 1999.

736. Schedule 5 also revokes parts of two statutory instruments which make reference to the 1984 Act.

SCHEDULE 6 (Introduced by section 332(1)) – TRANSITORY AMENDMENTS OF THE MENTAL HEALTH (SCOTLAND) ACT 1984

737. Schedule 6 sets out transitory amendments to the 1984 Act. These amendments require the discharge of the patient on appeal if the sheriff is not satisfied that it is appropriate to continue to detain the patient.

738. The 2003 Order modifies section 64(2) of the 1984 Act, to take account of the amendment made to that section by paragraph 3(b) of schedule 6.

PARLIAMENTARY HISTORY OF MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for the 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	
16th September 2002	SP Bill 64 (Session 1)
Stage 1	
(a) Health and Community Care Committee	
23rd meeting 2002	25 September 2002, cols 3057 - 3103
25th meeting 2002	4 October 2002, col 3141
26th meeting 2002	9 October 2002, col 3200
27th meeting 2002	30 October 2002, col 3244
28th meeting 2002	6 November 2002, col 3308 - 3360
18th Report 2002 (4 December 2002): Stage 1 Report on Mental Health (Scotland) Bill	SP Paper 708
(b) Subordinate Legislation Committee	
29th meeting 2002	29 October 2002, col 1058 - 1059
31st meeting 2002	12 November 2002, col 1075
(c) Justice 1 Committee	
36th meeting 2002	29 October 2002, col 4131 - 4157
37th meeting 2002	5 November 2002, col 4163 - 4179
(d) Justice 2 Committee	
41st meeting 2002	13 November 2002, col 2099 - 2101

42nd meeting 2002	19 November 2002, col 2142
(e) Local Government Committee	
26th meeting 2002	29 October 2002, col 3372
(f) Finance	
20th meeting 2002	29 October 2002, col 2253 - 2274
Stage 2	
(a) Health and Community Care Committee	
1st meeting 2003	8 January 2003, col 3575
2nd meeting 2003	15 January 2003, col 3615
3rd meeting 2003	21 January 2003, col 3649
4th meeting 2003	22 January 2003, col 3680
5th meeting 2003	29 January 2003, col 3692 - 3724
6th meeting 2003	4 February 2003, col 3747 - 3774
7th meeting 2003	5 February 2003, col 3777
8th meeting 2003	11 February 2003, col 3817
9th meeting 2003	18 February 2003, col 3834
(b) Subordinate Legislation Committee	
9th meeting 2003	4 March 2003, col 1257 - 1263
10th meeting 2003	11 March 2003, col 1269 - 1270
Stage 3	
(a) Health and Community Care Committee	
11th meeting 2003	4 March 2003, col 3913
(b) Subordinate Legislation Committee	
23rd Report 2003 (19 March 2003): on Mental Health (Care and Treatment) (Scotland) Bill as amended at Stage 2 Delegated Powers	SP Paper 823

Scrutiny	
(c) Consideration by the Parliament	
19th March 2003	Cols 19590 - 19650 Cols 19676 - 19708
20th March 2003	Cols 19728 - 19778 Cols 19807 - 19830
Royal Assent 25 April 2003	

Printed in the United Kingdom by The Stationery Office Limited

under the authority and superintendence of Carol Tullo, the Queen's Printer for Scotland