

**National Health Service in Scotland
Management Executive**St. Andrew's House
Edinburgh EH1 3DG

Dear Colleague

**AMENDMENT TO MENTAL HEALTH (SCOTLAND) ACT
1984 BY THE PRISONERS AND CRIMINAL PROCEEDINGS
(SCOTLAND) ACT 1993****Summary**

1. The purpose of this circular is to inform you that, in accordance with the Prisoners and Criminal Proceedings (Scotland) Act 1993 Commencement, Transitional Provisions and Savings Order 1993 (SI 1993/2050), the provisions in Part 1 of and Schedule 5 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") which amend the Mental Health (Scotland) Act 1984 ("the 1984 Act") will take effect on 1 October 1993.

2. Part I of the 1993 Act introduces a new early release system to replace the current scheme of remission and parole. In particular, section 4(1) provides for the early release provisions to apply to a prisoner transferred to hospital and subject to restrictions under the 1984 Act and dealt with in accordance with the revised section 74 of the 1984 Act introduced by section 4(3) of the 1993 Act. This revised section 74 takes account of the new early release arrangements and will take effect in relation to those persons who are sentenced on or after 1 October 1993 or detained under the Immigration Act 1971 on or after that date. For persons sentenced before 1 October 1993 who are now or are in future made subject to transfer and restriction directions, see paragraph 7, Annex 1.

3. The explanation of the amendments to Part VI of the 1984 Act in Annex 1 (which is not to be taken as an authoritative interpretation) should be read as supplementing the Notes on the 1984 Act which were issued by the Department on 19 September 1984. The full text of the substantial amendments (new section 74 and amended section 65(1) and (2)) are set out in Annex 2.

5 October 1993

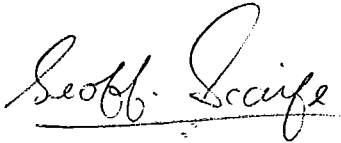
Addressees**For Action:**General Managers,
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Action

4. This letter should be copied to Unit General Managers, consultants and Registrars for action as required.

Yours sincerely

A handwritten signature in cursive script that reads "Geoff Scaife". The signature is written in dark ink and is positioned above the printed name.

GEOFF SCAIFE
NHS in Scotland

EXPLANATION OF AMENDMENTS TO 1984 ACT

Further Provisions Affecting Prisoners Subject to Transfer and Restriction Directions

1. The new section 74 provides that where a person has been transferred to hospital subject to restrictions (under sections 71 and 72 of the 1984 Act), and the Secretary of State is satisfied that person does not pass the usual criteria for being detained in hospital (that is - mental disorder requiring treatment in hospital and detention being necessary for health or safety of that person, or protection of others), and that it is not appropriate for that person to remain liable to recall to hospital (section 74(1) and (2)(a) and (b)), then the Secretary of State shall return that person to any prison or other place in which he might have been detained had he not been removed to hospital (**section 74(3)**).
2. Broadly speaking, where a transferred and restricted prisoner would still have been detained in pursuance of his sentence had he not been transferred, and where his mental disorder is brought under control or alleviated to the extent that detention in hospital is no longer justified, then the Secretary of State is required to direct that he be returned to prison.
3. If the Secretary of State is satisfied that such a person should remain liable to be recalled to hospital for further treatment (but is not satisfied as to the usual criteria in section 74(2)(a)(i) or (ii)) he may return him to prison (section 74(4)(a)) or may decide that he should remain in hospital (section 74(4)(b)). The option provided by paragraph (b) of section 74(4) avoids the automatic return to prison of a person who, if so returned, would be likely to suffer a relapse and consequently require to be transferred back to hospital again.
4. On the return of the person to prison under section 74(3) or 4(a), the transfer direction and restriction direction cease to have effect (section 74(5)).
5. A transfer or restriction direction on a person originally detained as a prisoner under the Immigration Act 1971 (but not for a criminal offence under that Act) ceases to have effect when such detention comes to an end (section 74(8)), unless it has already ceased to have effect under either section 74(4) or under section 65(2) on appeal to the Sheriff. Where such a person ceases to be liable to detention in hospital by virtue of section 74(8), but is to remain in Scotland (ie is not to be deported), and where further detention in hospital is considered necessary, authority for that detention will require to be obtained by way of the procedures in Part V of the 1984 Act.
6. Where a transferred and restricted person has been released under Part 1 of the 1993 Act, the transfer and restriction directions cease to have effect and he must be discharged from hospital (section 74(6) and (7)), unless fresh medical reports supporting the need for detention are obtained at least 28 days prior to the date of release (section 74(9)). The reports (the report from a medical practitioner other than the RMO, and the RMO's report assessing the need for detention) in the form prescribed by regulations (section 74(9) and (12)), must be sent to the Mental Welfare Commission.

7. The RMO's report provides a renewal of authority to detain the person in hospital from the date on which the restriction direction ceases to have effect (section 74(10) as read with section 30(3) and (4)), as if admitted to hospital in pursuance of an application for admission (section 74(10)). That person then has rights of appeal to the Sheriff. (Section 74(10) as read with sections 30(5) and (6) and 35). It should be noted that the new section 74(10) is different from the existing section 74(6) under which such renewal of detention is as if in pursuance of a "hospital order" without restrictions.

8. Any period during which a transferred prisoner absconds from hospital will not count towards the calculation of the date on which he would be entitled to be released had he remained in custody. (Section 74(11) for the purposes of section 40(2) of the Prisons (Scotland) Act 1989).

Category of persons subject to transfer and restriction

9. Section 71(2)(b) (reference to "civil prisoners") is deleted, as are the words "in criminal proceedings" in section 71(7)(a). (Section 4(2) of and Part 1 of Schedule 7 to the 1993 Act.) The effect is that persons "sentenced" include civil prisoners (including, for example, those committed for contempt of court or breach of interdict) as well as those sentenced in criminal proceedings. Such persons may, subject to the existing exceptions in section 71(7)(a), be made subject to a direction transferring them to hospital.

Consequential on early release provisions

10. Consequent on the provisions for early release of prisoners, including those transferred to mental hospital, in Part I of the 1993 Act and the provisions in the new section 74 of the 1984 Act, section 65 of that Act is amended (paragraph 2 of Schedule 5 to the 1993 Act).

11. The substantial effect of amended section 65(1) and (2) remains the same as regards the powers of the Sheriff and the Secretary of State in respect of a prisoner sentenced before 1 October 1993 who is transferred to hospital as a restricted patient and who makes an appeal to the Sheriff.

12. There is no longer any reference in section 65 as amended to the powers of the Secretary of State to release such patients on licence or discharge them under supervision. The discretionary release of a person under Part I of the 1993 Act triggers absolute discharge from mental hospital, unless steps are taken to continue the patient's detention under subsections (9) and (10) of the new section 74.

Requirement for fresh detention

13. A transfer order under section 70 ceases to have effect if the person in respect of whom it is made is acquitted or if the proceedings against him are dropped. (Section 73(1)). From 1 October 1993 where further detention in hospital of such person is necessary, authority for that detention will require to be obtained by way of the procedures in Part V of the 1984 Act. This is effected by the repeal of **section 73(3)** (Section 26 of and Part 1 of Schedule 7 to the 1993 Act).

14. The reason for the repeal is that the existing section 73(3) falls short of the principle, that where the statutory authority for detention alters or is renewed, the person should have a right to be heard or a right of appeal.

Transitional

15. Transitional provisions and savings are contained in Schedule 6 to the 1993 Act. Persons sentenced before 1 October 1993 and transferred to hospital subject to restrictions either before or after that date will remain subject to sections 74 and 75 of the 1984 Act, as amended. There are, however, certain exceptions to this, as set out in Schedule 6, paragraph 2(2) providing for Section 3 of the 1993 Act to have effect (power to release on compassionate grounds) and paragraphs 3 to 9 (release provisions affecting certain prisoners sentenced to a term of less than 2 years and certain life prisoners etc). All the facts and circumstances of any person sentenced before 1 October 1993 and who is **either** already transferred to hospital subject to restrictions prior to that date, **or** who is being considered for transfer subject to restrictions after that date, should be carefully ascertained, taking account of the provisions of Schedule 6, in order to be satisfied which provisions of Part I of the 1993 Act and/or of the 1984 Act apply. In most instances it will depend on the powers which the Secretary of State exercises in relation to that person.

NEW SECTION 74

(3) For Sections 74 and 75 of the said Act of 1984 there shall be substituted the following section -

"Further provision as to transfer directions and restriction directions.

74.-(1) This subsection applies where a transfer direction and a restriction direction have been given in respect of a person -

- (a) serving a sentence of imprisonment; or
- (b) who is detained (other than in respect of a criminal offence) under or by virtue of the Immigration Act 1971,

if the Secretary of State is satisfied, at a time when the person would but for those directions be, by virtue of the circumstance mentioned in paragraph (a) or (b) above, in prison or being detained other than in a hospital, as to the matters mentioned in subsection (2) below.

(2) The matters referred to in subsection (1) above are -

- (a) that either -
 - (i) the person is not suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
 - (ii) that it is not necessary for the health or safety of the person or for the protection of other persons that he should receive such treatment; and
- (b) that it is not appropriate for the person to remain liable to be recalled to hospital for further treatment.

(3) Where subsection (1) above applies, the Secretary of State shall by warrant direct that the person be remitted to any prison or other institution or place in which he might have been detained had he not been removed to hospital and that he be dealt with there as if he had not been so removed.

(4) Where subsection (1) above does not apply only because the Secretary of State is not satisfied as to the matter mentioned in subsection (2)(b) above, he may either -

- (a) by warrant give such direction as is mentioned in subsection (3) above; or
- (b) decide that the person shall continue to be detained in hospital.

(5) If a direction is given under subsection (3) or (4)(a) above, then on the person's arrival in the prison or other institution or place to which remitted by virtue of that subsection the transfer direction and the restriction direction shall cease to have effect.

(6) This subsection applies where a transfer direction and a restriction direction have been given in respect of such person as is mentioned in

subsection (1) above and he has thereafter been released under Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

(7) Where subsection (6) above applies -

(a) the transfer direction and the restriction direction shall forthwith cease to have effect; and

(b) the person shall thereupon be discharged from hospital unless a report is furnished in respect of him under subsection (9) below.

(8) A transfer direction or restriction direction given in respect of a person detained (other than in respect of a criminal offence) under or by virtue of the Immigration Act 1971 shall, if it does not first cease to have effect under subsection (5) above or under section 65(2) of this Act, cease to have effect when his liability to be so detained comes to an end.

(9) Not earlier than 28 days before a restriction direction given in respect of a person ceases to have effect other than by virtue of subsection (8) above, the responsible medical officer shall obtain from another medical practitioner a report on the condition of the person in the prescribed form and thereafter shall assess the need for the detention of the person to be continued; and, if it appears to the responsible medical officer that it is necessary in the interests of the health or safety of the person or for the protection of others that the person should continue to be liable to be detained in hospital, the officer shall furnish to the managers of the hospital where the person is liable to be detained and to the Mental Welfare Commission a report to that effect in the prescribed form along with the report of the other medical practitioner.

(10) Where a report has been furnished under subsection (9) above the person shall, after the restriction direction ceases to have effect, be treated as if he had, on the date on which the restriction direction ceased to have effect, been admitted to the hospital in pursuance of an application for admission; but the provisions of sections 30(5) and (6) and 35 of this Act shall apply to the person and that report as they apply to a patient the authority for whose detention in hospital has been renewed in pursuance of subsection (4) of, and to a report under subsection (3) of, the said section 30.

(11) For the purposes of section 40(2) of the Prisons (Scotland) Act 1989 (discounting from sentence periods while unlawfully at large) a person who, having been transferred to hospital in pursuance of a transfer direction from a prison or young offenders institution, is at large in circumstances in which he is liable to be taken into custody under any provision of this Act, shall be treated as unlawfully at large and absent from the prison or young offenders institution.

(12) In this section "prescribed" means prescribed by regulations made by the Secretary of State".

AMENDED SECTION 65(1) AND (2)

65(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction direction, the sheriff-

(a) shall notify the Secretary of State, if in his opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under section 64 of this Act; and

(b) if he notifies the Secretary of State that the patient would be entitled to be conditionally discharged, may recommend that the patient should continue to be detained in hospital.

(2) If the sheriff notifies the Secretary of State-

(a) that the patient would be entitled to be absolutely discharged, the Secretary of State shall by warrant direct that the patient be remitted to any prison or other institution or place in which he might have been detained had he not been removed to hospital and that he shall be dealt with there as if he had not been so removed;

(b) that the patient would be entitled to be conditionally discharged, the Secretary of State may-

(i) by warrant give such direction as is mentioned in paragraph (a) above; or

(ii) decide that the patient should continue to be detained in a hospital,

and (if a direction is given under this subsection) on the person's arrival in the prison or other institution or place to which remitted by virtue of this subsection, the restriction direction, together with the transfer direction given in respect of the person, shall cease to have effect.