



SCOTTISH EXECUTIVE

Health Department
Service Policy and Planning Directorate

Dear Colleague

THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003 (TRANSITIONAL AND SAVINGS PROVISIONS) ORDER 2005 SSI 2005/452.

1. This letter informs NHS Boards and local authorities of the transitional arrangements for patients subject to the provisions of the Mental Health (Scotland) Act 1984 and the Criminal Procedure (Scotland) Act 1995, on the coming into effect of the Mental Health (Care and Treatment) (Scotland) Act 2003. It will be of interest to all health and allied professionals, those who deal with mentally disordered persons who come into contact with the criminal justice system, Mental Health Officers, care workers and support workers, providing services to users of mental health services and their carers.

2. The transitional arrangements are set out in a Transitional and Savings Provisions Order which has been laid before Parliament. This order makes transitional provisions in relation to the conversion of 1984 Act orders to 2003 Act orders, the conversion of 1995 Act orders to orders under the 1995 Act as amended by the 2003 Act and for treatment to be given over a specified period of time, leave of absence, transfers (including cross-border transfers), absconding, reviews, appeals and discharge.

3. Annex A explains how these provisions will operate in relation to civil patients and Annex B explains the provisions relating to patients who are subject to criminal justice provisions. For further information and a copy of the Order please refer to the following websites:

www.scotland.gov.uk/health/mentalhealthdivision and
www.opsi.gov.uk/legislation/Scotland/Scottish/s-stat.htm

Yours sincerely

IAN GORDON

Director of Service Policy and Planning

28th September 2005

Addresses

For action

Chief Executives, Health Boards
Chief Executives, Local Authorities
Directors of Social Work/Chief Social Work Officers
General Manager, State Hospitals Board for Scotland
Scottish Secretary, British Medical Association
Royal College of General Practitioners, Scottish Division
Royal College of Psychiatrists, Scottish Division
Royal College of Nursing, Scottish Division
British Psychological Society, Scottish Division
Scottish Board, College of Occupational Therapists
Scottish Social Services Council
Scottish Commission for the Regulation of Care
Law Society of Scotland
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GUIDANCE ON TRANSITIONAL PROVISIONS FOR CIVIL PATIENTS ON THE COMMENCEMENT OF THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

INTRODUCTION

1. This guidance should be read in conjunction with the **Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 SSI 2005/452 (“the Order”)**, which specifies the provisions necessary for transitory, transitional and saving purposes in connection with the coming into force of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). References below are to articles of this Order.

2. In general terms, patients detained in hospital under section 18 of the Mental Health (Scotland) Act 1984 Act (“the 1984 Act”) are immediately on commencement deemed to be subject to a compulsory treatment order (CTO) authorising detention and treatment under section 64 of the 2003 Act. Therefore an application does not have to be made to the Tribunal in respect of each patient to transfer him or her onto the new system.

3. There are some exceptions to this general rule. These are:

- Any court proceedings under the 1984 Act which have been started before midnight on 4 October will be allowed to conclude under the terms of the 1984 Act. (This will include court proceedings with respect to any applications which have been submitted to the court before 5 October even though full court proceedings have not yet begun.)
- Any emergency or very short-term orders which are still live at midnight on 4 October will be allowed to run until their expiry date under the terms of the 1984 Act. (This will include the emergency orders under section 24 & 25(1) of the 1984 Act and any warrants etc which have a very short duration.) A person detained under the nurse's holding power (section 25(2) of the 1984 Act) at midnight on 4 October, will be held until the remainder of the 2 hour period expires under section 299(2) of the 2003 Act.

LONG TERM DETENTION: CIVIL PATIENTS

Overview

4. This section examines the transitional provisions which will apply to patients who are detained in hospital under section 18 of the 1984 Act. On 5 October the patient is immediately deemed to be subject to a CTO authorising detention under section 64(4)(a) of the 2003 Act. There is no need for an application to be made to the Tribunal.

Measures authorised by the CTO for existing 1984 Act patients

5. The provisions of the deemed CTO are set out in Parts 2, and 9-11 of the Order. The deemed CTO will authorise the measures specified in section 66(1)(a) and (b) of the 2003 Act - detention and treatment, for the remaining period of time for which there was authority for the detention of the patient under Part 5 of the 1984 Act. Where the type or types of mental disorder common to the two medical recommendations specified under section 18(2)

of the 1984 Act is recorded in the section 18 order as mental handicap or mental illness including personality disorder, these will be deemed to be learning disability and personality disorder, respectively, on commencement of the 2003 Act.

6. The CTO will be deemed to specify the hospital in which the patient will be detained as the hospital in which the patient was detained immediately before 5 October. If the patient has not yet been admitted to a hospital, the hospital will be deemed to be the one named in the application for the section 18 order.

7. The patient is now detained on the basis that he/she meets the criteria set out at section 64(5) of the 2003 Act. If the RMO considers that the patient does not meet these criteria he/she should discharge the patient.

Treatment

8. The deemed CTO gives the RMO the authority to continue and/or vary the medical treatment or begin a new treatment. Article 36(2) of the Order, allows the treatment being given to an existing patient under the provisions of Part X of the 1984 Act to continue until 12 October 2005 to cover those patients whose treatment has already been given for two months on 5 October. This gives the RMO 7 days to seek the patient's consent under the 2003 Act or take other appropriate action under Part 16 of the 2003 Act. Article 36(3) deals with consent given under the 1984 regime where the treatment has not been given or not completed. The treatment will continue unless the patient withdraws consent.

Commission's power to review such treatment

9. Article 36(4) applies the 2003 Act review by the Mental Welfare Commission in section 248 to treatment given under section 97 or 98 of the 1984 Act.

Applications for admission under the 1984 Act:

10. If the patient's nearest relative, guardian or welfare attorney has requested the MHO to make an application for a section 18 order and if before 5 October, no application has been made, the MHO must notify the nearest relative, guardian, etc, of his/her reasons for not making the application under article 8(1)

11. Applications made to the sheriff for a section 18 Order prior to 5 October (whether subsequent to a request from the nearest relative or not), will continue in the sheriff court to completion under the 1984 Act. If approved, the order will then immediately be deemed to be a 2003 Act order. Article 8(2) provides that the related provisions - 18(3) (form of mental disorder); 21 (approval of applications by sheriff); 23 (rectification of applications) and 113 (duty of sheriff to give patient the opportunity to be heard) - will remain in force in respect of that application.

Statutory duties after 5 October 2005

Duties of Hospital managers and local authorities

Provision of information to the patient

12. Section 260 of the 2003 Act places certain duties on hospital managers in relation to the provision of information to the patient, to be undertaken as soon as reasonably practicable after the commencement of a patient's detention in hospital. Article 40 provides that existing patients will be treated as though they were first detained on 5 October and must be provided with relevant information as soon as practicable.

13. In terms of workload planning, it would be helpful for hospital managers to advise RMOs of potential renewal dates of all long-term orders, so that RMOs can prioritise work appropriately.

Appointment of an RMO for an existing patient

14. Section 230(1) of the 2003 Act places a duty on the hospital managers to appoint an approved medical practitioner as the patient's RMO as soon as is reasonably practicable after a CTO is made (being an "appropriate act" under section 230(4)(a) of the 2003 Act.) Section 59 of the 1984 Act provides an interpretation of the expression "responsible medical officer" but there is no duty on the hospital managers to appoint one. Article 37 provides that whoever is classed as the patient's RMO immediately prior to the commencement date, will be the patient's RMO immediately after the commencement date as if he/she had been appointed under section 230(1) of the 2003 Act.

Designation of an MHO to existing patients

15. Hospital managers should inform the local authority as soon as reasonably practicable after 5 October of all 1984 Act patients becoming subject to CTOs so that this information can be passed to the designated Mental Health Officer (MHO).

16. The 2003 Act places a duty on the local authority to designate an MHO for the patient as soon as reasonably practicable after a relevant event occurs, the making of a CTO being one (section 229 of the 2003 Act). To ensure that existing patients under the 1984 Act are not disadvantaged in the early stages of the 2003 Act coming into force, article 39 places a duty on relevant local authorities to ensure that an MHO is designated to each 1984 Act patient as soon as is reasonably practicable after 5 October. The Order does not specify a time limit but "as soon as is reasonably practicable" is expected to mean by the time of the occurrence of the first of the following events for a patient:

- the next statutory review (sections 77 and 78 of the 2003 Act);
- an application by the RMO to the Tribunal for an extension and variation (section 92 of the 2003 Act) or a variation (section 95 of the 2003 Act)
- an application by the RMO to the Tribunal where a recorded matter is not being met;
- a referral by the Mental Welfare Commission to the Tribunal (section 98),
- the patient or named person appeals (section 99 or 100 of the 2003 Act);
- an application is made to the Tribunal re the named person (section 256 of the 2003 Act)

There would be an expectation in any case that an MHO should be appointed not more than 3 months after the commencement of the 2003 Act.

RMO's duties after 5 October

Preparation of a Care Plan under s76 of the 2003 Act

17. There is no provision under the 1984 Act for the RMO to prepare a care plan with respect to a patient subject to a Section 18 order. Under the 2003 Act the RMO has a duty to prepare a care plan and ensure that it is included in the patient's records as soon as practicable after he/she is appointed. Article 38 provides that a section 76 Care Plan must be prepared and inserted into the patient's records as soon as is reasonably practicable after the commencement date. Until this is done, any existing treatment plan will be considered to be the patient's care plan. In these circumstances "as soon as is reasonably practicable" means by the time of the occurrence of the first of the following events:

- within 3 months of the commencement date;
- the next statutory review (sections 77 and 78 of the 2003 Act);
- the RMO applies to the Tribunal for an extension and variation (section 92 of the 2003 Act) or a variation (section 95 of the 2003 Act)
- the RMO refers the CTO to the Tribunal where a recorded matter is not being met;
- if the Mental Welfare Commission refers the case to the Tribunal (section 98),
- the patient or named person appeals (section 99 or 100 of the 2003 Act);
- an application is made to the Tribunal re the named person (section 256 of the 2003 Act)

MHO's duties for existing patients after 5 October

18. Article 39(2) provides that the MHO should interview the patient and prepare a social circumstances report (SCR) as soon as reasonably practicable. The Order does not specify a time limit within which this must be completed. In these circumstances, this would be expected to mean by the time of the occurrence of the first of the events set out in paragraph 16 above. There would be an expectation in any case that this would be done within 6 months of the MHO being designated. Good practice also suggests that offering access to advocacy, establishing whether they have a named person, and considering social work services, are important.

19. There is a requirement for MHOs to prepare a brief mental health report to accompany the first section 86 determination for each patient under the new Act. In addition, the provision of a recent SCR would be best practice where time permits. In cases where, on the commencement date, the MHO is in the process of preparing an SCR under section 22(3) of the 1984 Act with the intention of submitting it to the RMO and the Mental Welfare Commission after the commencement date, he/she should continue and the SCR will be deemed to have been submitted under section 231 of the Act.

Review of the order

Timing of Reviews due in October/November

20. No application can be made under the 2003 Act, to the Tribunal before 5 October. It will therefore be difficult for the Tribunal to arrange any hearings for the first few days of its

operation, given notice requirements. RMOs/MHOs should review all patients with section 18 orders (and community care orders – see paragraph 44 below) which expire before 31 October and where appropriate, submit renewal notice to hospital managers and the Commission prior to 5 October. Orders due for renewal from 1 November should be renewed under the provisions of the 2003 Act.

The criteria for review

21. The criteria to which the RMO has to have regard in section 64(5), when reviewing the order are not the same as the criteria in section 17 of the 1984 Act. The 1984 Act does not contain the provision about the patient's ability to make decisions being significantly impaired. On renewal, the RMO needs to consider the new criteria under the 2003 Act. If the patient is unlikely to meet these then consideration should be given to not renewing the order. Alternatively, the order could be reviewed again immediately the 2003 Act is in force.

22. Article 4(1) provides that an existing patient making an appeal under section 100 of the 2003 Act will be treated as though the deemed CTO had been made on the date when the patient was first admitted to hospital under part 5 of the 1984 Act. Article 4(2) ensures that an existing patient on a CTO after commencement, is in the correct renewals regime. i.e. either first review patients who can be detained for a further 6 months or second review patients who can be detained for a further 12 months. Thus, the existing patient acquires the same rights as patient on a CTO.

Papers submitted to the Tribunal when reviewing the case under section 86 of the 2003 Act

23. Article 4 (paragraphs (4)-(7)) provide that the RMO when reviewing a CTO for an existing patient, shall send to the Tribunal the patient's care plan together with a report prepared by the MHO with the following information:

- the views of the mental health officer on the determination and the reasons for those views;
- if known to the mental health officer, the views of the patient and the patient's named person on the determination and the reasons for those views;
- in so far as the mental health officer considers relevant for the purposes of the review, details of the personal circumstances of the patient
- if known to the mental health officer, details of any advance statement that the patient has made (and not withdrawn);
- any other information which the mental health officer considers may assist the Tribunal in considering the determination;
- the social circumstances report if available.

Transfer of existing patients

Hospital Transfers

24. Where a transfer has taken place under section 29 of the 1984 Act and the Mental Welfare Commission and the patient's nearest relative have not been notified by 5 October, article 5(1) provides that the notification should be carried out within 7 days

25. Where an existing patient is transferred to the State Hospital on or after 8 September, and by 5 October no appeal has been lodged, under section 29 of the 1984 Act, but the appeal period is still running, article 5(2) provides that the provisions of section 126 of the 2003 Act will apply. If an appeal has been lodged with the sheriff on or before 5 October, then the appeal proceedings will be allowed to run their course (article 5(3)).

Cross-border transfers of existing patients

26. Transfers within the UK after 5 October will be subject to the provisions of section 290 of the 2003 Act and the **Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital)(Scotland) Regulations 2005**, made under that section. Article 35(1) provides that authority given under sections 77 or 81 of the 1984 Act, for the transfer of a patient from Scotland to England, Wales or Northern Ireland and any directions given for the conveyance of the patient, will remain in force until that patient has reached his/her destination.

27. Similarly, where the transfer of a patient out of Scotland has been agreed but where relatives and the Commission have not been notified under section 87(2) of the 1984 Act, article 35(2) provides that this section will continue in force until the patient has reached his/her destination.

28. Where Scottish Ministers have agreed to a request for the transfer of a patient into Scotland under part 7 of the 1984 Act but the transfer has not taken place on 5 October, the consent will be deemed to have been given under section 290 of the 2003 Act and any further arrangements should be made under the provisions of the 2003 Act.

29. Where on or after 5 October, the RMO has not submitted a report to the hospital managers, on a patient transferred into Scotland as required by section 88 of the 1984 Act, that patient will be subject to the provisions of section 290 of the 2003 Act and the report submitted under that section as required.

30. Where a warrant has been issued under section 83 of the 1984 Act to transfer a patient who is neither a British citizen nor a Commonwealth citizen having the right to live in the UK under section 2(1) (b) of the Immigration Act 1971 and the transfer has not taken place on 5 October, the warrant and any directions made will remain in force until the patient has arrived at their destination.

Leave of absence

31. Article 6(1) provides that a patient granted leave under section 27 of the 1984 Act is to be treated as if on leave of absence under section 127 of the 2003 Act, except that the total period of leave of absence will be limited to a period which would take the total consecutive

periods of leave of absence to either 12 months from the time of first being granted or 9 months from the date of commencement of the new Act, whichever is the shorter.

32. Article 6(2) provides that any direction in force under section 27(3) of the 1984 Act shall be deemed to be a condition imposed under section 127(6) of the 2003 Act. Article 6(3) provides that where by 5 October, the RMO has not notified the Commission of a grant of leave of absence, (under section 27(4) of the 1984 Act) he/she should do so within 14 days.

Absconding

33. Article 7 provides that where a patient subject to a section 18 order under the 1984 Act has absconded prior to 5 October and has not returned by that date, he/she will be subject to the absconding provisions in Part 20 of the 2003 Act and will be dealt with in accordance with section 303 of that Act.

Appeals

34. Article 34 provides that any appeal proceedings commenced under the 1984 Act will be allowed to proceed to final determination by the court. No application for appeal may be made under section 99 of the 2003 Act until final disposal by the court. Any unsuccessful appeal made under section 30(6) of the 1984 Act will be treated as if an application under section 99 of the 2003 Act for revocation of a determination, had been refused. The person making the application could therefore not make another application within the 6 or 12 month period of the CTO continuing in effect. However, even though the patient's application had been refused under the 1984 Act, the patient's named person could apply in any period in question under the 2003 Act for revocation of the determination.

Discharge

35. Article 41 provides that where there has been a discharge by hospital managers but the 7 day period in which the RMO must give consent has still to elapse, the discharge order shall continue to have effect until 7 days from the day it was made

Discharge by nearest relative

36. If notice has been given by the nearest relative of the discharge to hospital managers under section 34(1) but the 7 days' notice period has not expired, the 7 day period is extended by article 41(3) to allow the discharge to take effect where there is no report to the contrary from the RMO. If there is a report from the RMO in that period, then the appeal to the sheriff within 28 days of the notification to the nearest relative will also proceed to final determination under the 1984 Act.

SHORT TERM DETENTION: CIVIL PATIENTS

Emergency and very short –term detention orders

Section 24 and 25(1) of the 1984 Act

37. Part 8 of the Order explains that any emergency or very short-term orders which are still live at midnight on 4 October should be allowed to run until their expiry date under the terms of the 1984 Act. (This includes the emergency orders under section 24 & 25(1) of the 1984 Act and any warrants under section 117 and 118, which have a very short duration.). Following the expiry of this period of detention there will be no further period of emergency detention allowed under section 36 of the 2003 Act.

The nurse's holding power under section 25(2) of the 1984 Act.

38. A person detained under the nurse's holding power (section 25(2) of the 1984 Act) at midnight on 4 October, will be held until the remainder of the 2 hour period runs out under section 299(2) of the 2003 Act. Following the expiry of this period of detention, there will be no further period of detention allowed under section 299(2) of the 2003 Act

Short term detention under section 26 and 26A of the 1984 Act

39. On 5 October, a patient detained under section 26 of the 1984 Act will be subject to a short-term detention certificate under section 44 of the 2003 Act, for the remaining period for which there was authority for the detention under the section 26 order. Similarly, where a patient is detained under section 26A of the 1984 Act immediately before 5 October, he/she will be subject to an extension certificate under section 47 of the 2003 Act. If the medical practitioner who has examined the patient has given notice of the patient's detention to the appropriate parties under the 1984 Act, he/she need not give further notice under the 2003 Act.

Review of the short term detention

40. MHOs and RMOs are advised to review all short term detention orders which are due to expire a few days after 5 October, before the commencement of the 2003 Act. Where an application for long term detention is necessary, then this should be made before 5 October to the sheriff under the 1984 Act. Any such application in process on 5 October will continue in the sheriff court until completion as an order made under the 1984 Act. On completion, it will immediately be deemed to be an order under the 2003 Act.

PATIENTS DETAINED UNDER COMMUNITY CARE ORDERS PART 4 OF THE ORDER

Measures authorised by the community CTO

41. On 5 October, patients on a Community Care Order (CCO) under sections 35A to 35K of the 1984 Act will be deemed to be on a community CTO under section 64(4)(a) of the 2003 Act, except where Article 16 applies. The community CTO will:

- authorise the conditions imposed on the patient under section 35A(4)(a) of the 1984 Act, for the remaining period that the CCO has to run.
- the type(s) of medical disorder in the community CTO will be deemed to be learning disability and personality disorder where these are specified in the CCO as mental handicap or mental illness including personality disorder
- specify the hospital where the patient's special medical officer was a member of staff as the hospital responsible for appointing the patient's RMO

Review of the community CTO

42. For the reasons set out in paragraph 20 of this note, MHOs and RMOs are advised to review CCOs which are due to expire before 31 October under the provisions of section 35C of the 1984 Act, before 5 October. If the decision is made to renew the CCO, then the 1984 Act procedure should be followed. From 5 October, the patient will then be on a community CTO, which will continue until the end of the period of renewal.

43. Article 15 (paragraphs (5)- (7)) provide that the RMO when reviewing and extending, a community CTO without change for an existing patient, shall send to the Tribunal the patient's care plan together with a report prepared by the MHO with the following information:

- the views of the mental health officer on the determination and the reasons for those views;
- if known to the mental health officer, the views of the patient and the patient's named person on the determination and the reasons for those views;
- in so far as the mental health officer considers relevant for the purposes of the review, details of the personal circumstances of the patient
- if known to the mental health officer, details of any advance statement that the patient has made (and not withdrawn);
- any other information which the mental health officer considers may assist the Tribunal in considering the determination;
- the social circumstances report if available.

Health Department, Mental Health Division

September

2005

GUIDANCE ON THE TRANSITIONAL PROVISIONS WITH RESPECT TO MENTALLY DISORDERED OFFENDERS ON THE COMMENCEMENT OF THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

OVERVIEW

Introduction

1. This guidance relates to patients who immediately before 5th October 2005 are subject to Part 6 of the Criminal Procedure (Scotland) Act 1995 or Part 6 of the Mental Health (Scotland) Act 1984 and it should be read in conjunction with **The Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452)** (“the Order”). References below are to articles of this Order.

2. In general terms, where the patient is detained in hospital under a pre-sentence order he/she will remain subject to that order which is allowed to run its course. Where the patient is detained in hospital under a final disposal he/she will immediately on the commencement of the 2003 Act be deemed to be subject to the corresponding order in terms of the new legislation.

3. Any court proceedings under the Criminal Procedure (Scotland) Act 1995 Act (“the 1995 Act”) which have been commenced before midnight on 4th October 2005 will be allowed to conclude to the end of that particular stage of the criminal justice process. Therefore where the court is already in the process of considering a final disposal, the subsequent order made by the court may be in terms of the “old” provisions but on admission to hospital the patient will be deemed to be subject to the corresponding order in terms of the new legislation.

4. Any appeal proceedings under the 1984 Act or the 1995 Act which have been commenced before midnight on 4th October 2005 will continue to conclusion.

5. The first section of this guidance covers the transitional provisions made with respect to existing patients who are subject to one of the pre-sentence orders, these being an order under section 52, 53, 54(1)(c), or 200 of the 1995 Act or section 70 of the 1984 Act (see paragraphs 7 to 11).

6. The guidance goes on to examine the transitional provisions made with respect to existing patients who are subject to a final disposal, these being:

- hospital orders (paragraphs 12 to 32);
- community care orders (paragraphs 33 to 37);
- restriction orders (paragraphs 38 to 52);
- hospital directions and transfer directions (paragraphs 53 to 68).

PRE-SENTENCE ORDERS

7. Article 33 of the Order sets out the transitional provisions with respect to existing patients who on the commencement of the 2003 Act are subject to an order under section 52, 53, 54(1)(c) or 200 of the 1995 Act or section 70 of the 1984 Act. All of these orders will be allowed to run their course. Mental health orders made upon their termination must be made under the new legislation except during the period between 5th and 19th October 2005 where the court may in certain circumstances make an order in terms of the old legislation. This is intended to cover those situations where medical evidence in terms of the old legislation is already in the process of being prepared for the court or is already with the court.

8. Section 70 of the 1984 Act will continue to have effect after 5th October 2005 with respect to any applications that have still to be determined by the court. Where the order is subsequently made it will be allowed to run its course.

9. Responsible medical officers (“RMOs”) and designated mental health officers (“MHOs”) should note that on the termination of an interim hospital order between 5th and 19th October 2005 the court has the option to make a hospital order under section 58 of the 1995 Act but not to make a hospital direction in terms of the old legislation. Therefore with respect to a patient who on 5th October 2005 is subject to an interim hospital order, where a hospital direction is being recommended to the court on or after that date the medical evidence must be in terms of section 59A of the 1995 Act as amended by paragraph 8(6) of Schedule 4 to the 2003 Act and the court will have the option to ask for a report from the MHO in accordance with new section 59B of the 1995 Act.

10. Where during the period between 5th and 19th October 2005 the court, by virtue of the transitional provisions, makes a hospital order under section 58 of the 1995 Act or an order under section 57(2) of that Act which has the same effect as a hospital order, on admission to hospital the patient is deemed to be subject to a compulsion order under section 57A of the 1995 Act (see paragraphs 12 to 32 below).

11. For further information about the transitional provisions with respect to pre-sentence orders refer to subsections (9) and (12) to (19) of Article 33 in the Order.

FINAL DISPOSALS

Hospital Orders

12. Article 9 of the Order provides that existing patients who are detained or liable to be detained under a hospital order under section 58 of the 1995 Act will, on 5th October 2005, be deemed to be subject to a compulsion order under section 57A of the 1995 Act with the deemed compulsion order (“CO”) having been made on the same day as the hospital order.

13. Subsection (2) of article 9 of the Order sets out the information that the CO is deemed to specify and the measures that it authorises in terms of section 57A(8) of the 1995 Act. The measures are detention of the patient in the specified hospital (section 57A(8)(a) of the 1995 Act) and the giving of medical treatment to him/her in accordance with Part 16 of the 2003 Act (section 57A(8)(b) of the 1995 Act).

14. The medical treatment may be given to the patient for the remaining period of time for which there was authority for the detention of the patient under the hospital order. Article 36 of the Order covers medical treatment given to existing patients over a period of time. For further information refer to paragraphs 8 to 9 in Annex A of this circular.

15. The CO is deemed to specify the form of mental disorder that was specified in the hospital order but to take account of the meaning of “mental disorder” given by section 328 of the 2003 Act, where the hospital order specified mental handicap the CO is deemed to specify learning disability, and where the hospital order specified mental illness consisting of personality disorder the CO is deemed to specify personality disorder.

Appointment of RMO

16. Article 37 of the Order provides that whoever is classed as the patient’s RMO in terms of section 59 of the 1984 Act immediately prior to 5th October 2005 shall be deemed to have been appointed as the patient’s RMO in terms of section 230(1) of the 2003 Act.

Duty on the RMO to prepare a Part 9 Care Plan

17. With respect to a patient who is subject to a CO without a restriction order, section 137 of the 2003 Act places a duty on his/her RMO to prepare a Part 9 care plan setting out the forms of care and medical treatment for mental disorder which it is proposed to give to the patient for the duration of the CO, the forms of care and medical treatment for mental disorder which are currently being given to the patient and other additional information as set out in The Mental Health (Content and amendment of Part 9 care plans) (Scotland) Regulations 2005 (SSI 2005/312).

18. In terms of the transitional provisions with respect to an existing patient who on the commencement of the 2003 Act becomes subject to a CO, article 38(1)(b) in the Order places a duty on the patient’s RMO to prepare a Part 9 care plan as soon as reasonably practicable after the commencement of the 2003 Act and ensure that it is included in the patient’s records. In these circumstances it would be expected that “as soon as reasonably practicable” would mean by the time of the occurrence of one of the following events, whichever occurs first:

- within 3 months of the commencement of the 2003 Act;

- the next statutory review of the CO (section 139 or 140 of the 2003 Act);
- the RMO makes an application to the Tribunal for an extension and variation to the CO (section 158 of the 2003 Act) or for a variation to the CO (section 161 of the 2003 Act);
- the Mental Welfare Commission refers the patient's case to the Tribunal (section 162 of the 2003 Act);
- the patient or the named person makes an application to the Tribunal (section 163 or 164 of the 2003 Act);
- an application is made to the Tribunal with respect to the patient's named person (section 256 of the 2003 Act).

19. RMOs should note that in terms of the transitional provisions (see paragraph 26 below) the patient's Part 9 care plan will require to be submitted to the Tribunal when the RMO is extending the CO for the first time following 5th October 2005.

Duty on the relevant local authority to designate an MHO

20. Article 39(1) in the Order makes provision for the designation of an MHO to the patient by the relevant local authority as soon as reasonably practicable after the commencement of the 2003 Act. (The meaning of "relevant local authority" is set out at section 229(3) of the 2003 Act). In these circumstances it would be expected that "as soon as reasonably practicable" would be interpreted in the same way as detailed in paragraph 18 above.

21. If they have not already done so hospital managers should inform the relevant local authorities of all existing patients who are currently subject to a hospital order (with or without a restriction order). This information may then be passed to the designated MHOs by the relevant local authorities.

Duties on the MHO

22. Article 39(2) of the Order places a duty on the designated MHO to interview the patient and prepare a social circumstances report if this has not already been done in terms of section 22(3) of the 1984 Act. This must be done as soon as reasonably practicable after the commencement of the 2003 Act. In these circumstances it would be expected that "as soon as reasonably practicable" would have the same interpretation as mentioned in paragraph 18 above. With respect to the first bullet point in paragraph 18 it would be expected that the MHO would in any event carry out these duties no later than 6 months after having been designated (unless one of the other "triggers" listed in paragraph 18 occurs first).

23. Best practice would suggest that when interviewing the patient in accordance with article 39(2) of the Order the MHO should also establish whether the patient has a named person and if so, ascertain their name and address, inform the patient of the availability of independent advocacy services under section 259 of the 2003 Act and take appropriate steps to ensure that the patient has the opportunity of making use of those services.

Duty on the hospital managers to provide information to the patient

24. Section 260 of the 2003 Act places certain duties on hospital managers in relation to the provision of information to a patient who is subject to a compulsion order (with or

without a restriction order). In the case of a patient who is subject to a compulsion order which authorises detention in hospital these duties must be carried out as soon as reasonably practicable after the patient has been admitted to hospital. With respect to an existing patient who on the commencement of the 2003 Act becomes subject to a CO, article 40 of the Order provides that the patient will be treated as though first detained on 5 October 2005 and so he/she must be provided with the relevant information as soon as practicable. In these circumstances it would be expected that “as soon as practicable” would be interpreted in the same way as detailed in paragraph 18 above.

Review, revocation and variation of the CO

25. The patient is now detained on the basis that he/she meets the criteria set out at section 139(4) of the 2003 Act and that it continues to be necessary for him/her to be subject to the CO. Section 142 of the 2003 Act places the patient’s RMO under an ongoing duty to keep the CO under review. Therefore, if following the change over to a CO the RMO is not satisfied that the patient meets the criteria at section 139(4) of the 2003 Act or that it continues to be necessary for him/her to be subject to the CO, the RMO must revoke the order in accordance with section 142(3) of the 2003 Act and discharge the patient. Similarly, if following the change over the RMO considers that the measures in the CO require to be varied he/she must make an application to the Tribunal in accordance with section 159 of the 2003 Act.

The first Tribunal application / determination made by the RMO following 5th October 2005

26. RMOs and MHOs should take particular note of subsections (5) to (8) of article 10 of the Order which detail the documents that the RMO must send to the Tribunal where he/she is extending the CO for the first time following the commencement of the 2003 Act, whether by way of an application under section 149 of that Act (where the hospital order to which the patient was previously subject had not been renewed under the 1984 Act prior to 5th October 2005) or a determination under section 152 of that Act (where the hospital order to which the patient was previously subject had been renewed under the 1984 Act prior to 5th October 2005). These documents are a copy of the patient’s Part 9 care plan and a report from the designated MHO. Subsection (8) of article 10 of the Order details the information that must be contained in the MHO’s report.

27. Best practice would suggest that the RMO should also submit with the application/determination copies of the two medical reports that were submitted to the court in terms of section 58(1)(a) of the 1995 Act with respect to the hospital order if these are available.

2 year review by the Tribunal

28. Section 165(2)(b) of the 2003 Act sets out the circumstances in which the Tribunal must review an RMO’s determination to extend a CO (made under section 152 of the 2003 Act) which includes the Tribunal’s “2 year review”. Article 10(4) of the Order amends section 165(2)(b) with the effect that for patients who are subject to a CO by virtue of the transitional provisions the 2 year period begins with the first day of the period for which the hospital order had last been renewed under the 1984 Act. The first “2 year reviews” by the Tribunal for these patients may therefore begin taking place from October 2006 onwards.

Transfer, leave of absence and absconding

29. Articles 11 to 13 of the Order set out the transitional provisions for patients who immediately prior to the 2003 Act coming into force were subject to the provisions in the 1984 Act with respect to transfer, leave of absence and being liable to be taken into custody where the patient has absconded.

30. With respect to article 12(1) in particular which puts a limit on the period of leave of absence that must be applied to a patient who is already on a period of leave when the 2003 Act comes into force, it should be noted that for the purpose of calculating the period that the patient has previously been granted leave, any “specified occasions” that have been granted in terms of section 27(2) of the 1984 Act are not taken into consideration. For the purpose of the transitional provisions the limit only applies to consecutive periods of leave. (It should be noted that this differs from the suspension of detention provisions in the 2003 Act where the limit imposed by that Act also applies to the duration of an event or a series of events).

Appeals

31. Article 34(1) of the Order provides that any appeal proceedings under the 1984 Act or the 1995 Act which are ongoing on 5th October 2003 will be allowed to continue until conclusion. Until such proceedings have been concluded neither the patient nor the named person may make an application to the Tribunal under section 163 of the 2003 Act (application for the revocation of a determination extending the CO) or section 164 of that Act (application for the revocation or variation of the CO).

32. Where the patient has appealed to the sheriff within the period of detention authorised by the hospital order immediately prior to the commencement of the 2003 Act and he/she is not discharged, article 10(3) of the Order provides that on the commencement of the 2003 Act the patient is treated as if he/she had made an application under section 163 of the 2003 Act for the revocation of a determination extending the CO and the application had been refused. Therefore in accordance with section 164(6) of the 2003 Act the patient may not then make an application to the Tribunal within the period of the CO continuing to have effect. However the patient’s named person may do so in accordance with the timescales set out at section 164 of the 2003 Act.

Community Care Orders where the patient was previously subject to criminal justice provisions

33. Article 16 of the Order provides that existing patients who are subject to a community care order and who prior to being made subject to it were detained under Part 6 of the 1984 Act, shall upon the 2003 Act coming into force, be treated as if they were subject to a compulsion order under section 57A(2) of the 1995 Act (referred to in the Order as a “deemed community compulsion order”) made on the same day as the community care order.

34. Article 18 (2)(b) of the Order provides that the relevant provisions in the 1984 Act and the Mental Health (Patients in the Community) (Transfer from England and Wales to Scotland) Regulations 1996 will continue to have effect after 5th October 2005 so that any applications for a community care order which have still to be determined will be able to be progressed and a community care order made where appropriate. Where prior to the application being made the person subject to the application was liable to be detained under Part 6 of the 1984 Act or subject to after-care supervision after having been detained under section 37, 45A, 47 or 48 of the Mental Health Act 1983, he/she shall be subject to a deemed community compulsion order immediately upon the making of the community care order.

35. The deemed community compulsion order authorises the same conditions as were imposed on the patient in terms of section 35A(4)(a) of the 1984 Act with respect to the community care order.

36. The deemed community compulsion order specifies the form of mental disorder that was specified in the community care order but to take account of the meaning of “mental disorder” given by section 328 of the 2003 Act, where the community care order specified mental handicap the order is deemed to specify learning disability, and where the community care order specified mental illness consisting of personality disorder the order is deemed to specify personality disorder.

37. In general terms the remainder of the transitional provisions which relate to a deemed community compulsion order mirror those for a patient who on 5th October 2005 becomes subject to a deemed compulsion order so refer to paragraphs 16 to 28 above for further information.

Restriction orders

38. Article 20 of the Order provides that existing patients who are subject to a hospital order and a restriction order will on 5th October 2005 be treated as if they are subject to a compulsion order and a restriction order (“CORO”) with the compulsion order having been made under section 57A of the 1995 Act on the same day as the hospital order.

Appointment of RMO

39. Article 37 of the Order provides that whoever is classed as the patient’s RMO in terms of section 59 of the 1984 Act immediately prior to 5th October 2005 shall be deemed to have been appointed as the patient’s RMO in terms of section 230(1) of the 2003 Act.

Care Plan

40. Although not a statutory duty in terms of the transitional provisions best practice would suggest that as soon as practicable after the commencement of the 2003 Act the RMO should prepare a care plan in which he/she should record similar information to that which is required in a Part 9 care plan for patients who become subject to a CO without a restriction order (see paragraphs 17 to 19 above) and ensure that it is included in the patient’s records. In these circumstances it would be expected that “as soon as reasonably practicable” would mean by the time of the occurrence of one of the following events, whichever occurs first:

- within 3 months of the commencement of the 2003 Act;
- the next statutory review of the CORO (section 182 of the 2003 Act);
- the RMO submits a report to the Scottish Ministers under section 183(2) of the 2003 Act that contains a recommendation;
- the RMO submits a report to the Scottish Ministers under section 184 of the 2003 Act;
- the Scottish Ministers make an application to the Tribunal under section 191 of the 2003 Act;
- the Mental Welfare Commission notifies the Scottish Ministers under section 186(2) that it requires the patient’s case to be referred to the Tribunal;
- the patient or the named person makes an application to the Tribunal under section 192 of the 2003 Act);
- an application is made to the Tribunal with respect to the patient’s named person (section 256 of the 2003 Act).

Duty on the relevant local authority to designate an MHO and the MHO’s duties

41. The duties that article 39 of the Order places on the relevant local authority to designate an MHO, and on the MHO him/herself with respect to the interview of the patient and the preparation of a social circumstances report, are the same as those for an existing patient who on 5th October 2005 becomes subject to a CO without a restriction order. For further information refer to paragraphs 20 to 23 above bearing in mind the different “triggers” for a CORO patient as detailed in paragraph 40 above.

Duty on the hospital managers to provide information to the patient

42. The duty that article 40 of the Order places on the hospital managers with respect to the provision of information to the patient are the same as those for an existing patient who

on 5th October 2005 becomes subject to a CO without a restriction order. For further information refer to paragraph 24 above. It would be expected that “as soon as practicable” would be interpreted in the same way as detailed in paragraph 40 above.

Review, revocation and variation of the CORO

43. The patient is now detained on the basis that he/she meets the review criteria set out section 182(3)(b) of the 2003 Act. Sections 184 and 188 of that Act place a duty on the patient’s RMO and the Scottish Ministers respectively to keep the CORO under review. If following the change over to a CORO the RMO is not satisfied that the patient meets these criteria he/she must submit a report to the Scottish Ministers in accordance with section 184 of the 2003 Act. Similarly, if following the change over the Scottish Ministers are not satisfied that the patient meets the criteria they must make an application to the Tribunal in accordance with section 188 of the 2003 Act.

2 year review by the Tribunal

44. Section 189 of the 2003 Act sets out the circumstances in which the Scottish Ministers must refer a CORO to the Tribunal for a “2 year review”. Article 20(3) of the Order amends this section with the effect that for patients who are subject to a CORO by way of these transitional provisions the 2 year period begins with the day which falls 2 years after the hospital order was made or the anniversary of that day, whichever falls during the 12 month period prior to 5th October 2005. The first “2 year reviews” by the Tribunal for these patients may therefore begin taking place from October 2006 onwards.

The first reference to the Tribunal following 5th October 2005

45. RMOs and MHOs should take particular note of subsection (6) of Article 20 of the Order which detail the documents that the Scottish Ministers must send to the Tribunal where they are referring the patient’s case or making an application to the Tribunal for the first time following the commencement of the 2003 Act. These documents are a copy of the patient’s current care plan and a report from the designated MHO, the content of which is the same as the MHO report under article 10(8) of the Order for a patient who is subject to a CO without a restriction order.

46. Best practice would suggest that the Scottish Ministers should also submit copies, if available, of the medical evidence that was submitted to the court when the hospital order and restriction order were under consideration by the court.

Transfer, leave of absence and absconding

47. Articles 21 to 23 of the Order set out the transitional provisions for patients who immediately prior to the 2003 Act coming into force were subject to the provisions in the 1984 Act with respect to transfer, leave of absence and being liable to be taken into custody where the patient has absconded.

48. It should be noted that the limit that the transitional provisions impose on a CO without a restriction order with respect to consecutive periods of leave of absence (see paragraph 30 above) does not also apply to these patients. This is because the limit applies to periods of leave and the modifications that Part 2 of Schedule 2 to the 1984 Act makes to

the leave of absence provisions at section 27 of that Act mean that patients subject to a hospital order and a restriction order may only be granted leave on “specified occasions”. (It should be noted that this differs from the suspension of detention provisions in the 2003 Act in that the limit imposed by that Act also applies to the duration of an event or a series of events).

Conditional discharge

49. Article 24 of the Order sets out the provisions which apply to patients who on 5th October 2005 are subject to conditional discharge. The patient is treated as if he/she had been conditionally discharged by the Tribunal under section 193(7) of the 2003 Act with the conditions that had previously been imposed by the Sheriff in terms of sections 64(2) or 68(2) of the 1984 Act having been imposed by the Tribunal.

Appeals

50. Article 34(1) of the Order provides that any appeal proceedings under the 1984 Act or the 1995 Act which are ongoing on 5th October 2005 will continue until conclusion. Until such proceedings have been concluded neither the patient nor the named person may make an application to the Tribunal in terms of section 192 of the 2003 Act (see article 34(2)).

51. Where the outcome of an appeal is that the patient is not discharged article 34(6) of the Order provides that on the commencement of the 2003 Act the patient is treated as if he/she had made an application to the Tribunal under section 192 of the 2003 Act and no direction had subsequently been made by the Tribunal. Therefore in terms of section 192(5)(a) of the 2003 Act, where the appeal was commenced within 12 months of the original hospital order having been made the patient cannot make an application to the Tribunal until that 12 month period has expired. Similarly if the appeal was commenced in any subsequent 12 month period the patient cannot make an application to the Tribunal until that 12 month period has expired (see section 192(5)(b) of the 2003 Act). However the patient’s named person may do so in accordance with the timescales set out at section 192 of the 2003 Act.

52. Where the outcome of an appeal is that the patient is conditionally discharged the patient is treated as if he/she had been conditionally discharged by the Tribunal under section 193(7) of the 2003 Act with the conditions that were imposed on the patient upon disposal of the appeal proceedings having been imposed by the Tribunal.

Hospital Directions and Transfer Directions

53. Upon the commencement of the 2003 Act an existing patient who is subject to a hospital direction under section 59A of the 1995 Act will remain subject to that direction but will also be subject to the provisions in Parts 11 to 13 of the 2003 Act which cover statutory reviews, applications to the Tribunal, suspension of detention and patient transfer.

54. Upon the commencement of the 2003 Act an existing patient who is subject to a transfer direction will be treated as if he/she is subject to a transfer for treatment direction made under section 136 of the 2003 Act on the same day as the transfer direction. He/she will also be subject to the provisions in Parts 11 to 13 of the 2003 Act which cover reviews, applications to the Tribunal, suspension of detention and transfer to another hospital.

55. In the following paragraphs the term “direction” refers to a hospital direction and a transfer for treatment direction.

Appointment of RMO

56. Article 37 of the Order provides that whoever is classed as the patient’s RMO in terms of section 59 of the 1984 Act immediately prior to 5th October 2005 shall be deemed to have been appointed as the patient’s RMO in terms of section 230(1) of the 2003 Act.

Care Plan

57. Although not a statutory duty in terms of the transitional provisions best practice would suggest that as soon as practicable after the commencement of the 2003 Act the RMO should prepare a care plan in which he/she should record similar information to that which is required in a Part 9 care plan for patients who become subject to a deemed compulsion order (see paragraphs 17 to 19 above) and ensure that it is included in the patient’s records. In these circumstances it would be expected that “as soon as reasonably practicable” would mean by the time of the occurrence of one of the following events, whichever occurs first:

- within 3 months of the commencement of the 2003 Act;
- the next statutory review of the direction (section 206 of the 2003 Act);
- the RMO submits a report to the Scottish Ministers under section 207(2) of the 2003 Act that contains a recommendation;
- the RMO submits a report to the Scottish Ministers under section 208(3) or (4) of the 2003 Act;
- the Mental Welfare Commission notifies the Scottish Ministers under section 209(2) that it requires the patient’s case to be referred to the Tribunal;
- the patient or the named person makes an application to the Tribunal under section 214 of the 2003 Act);
- an application is made to the Tribunal with respect to the patient’s named person (section 256 of the 2003 Act).

Duty on the relevant local authority to designate an MHO and the MHO’s duties

58. The duties that article 39 of the Order places on the relevant local authority with respect to these patients to designate an MHO, and on the MHO him/herself with respect to the interview of the patient and the preparation of a social circumstances report, are the same as those for an existing patient who on 5th October 2005 becomes subject to a CO without a

restriction order. For further information refer to paragraphs 20 to 23 above bearing in mind the different “triggers” for a patient who is subject to a direction as detailed in paragraph 57 above.

Duty on the hospital managers to provide information to the patient

59. The duty that article 40 of the Order places on the hospital managers with respect to the provision of information to the patient are the same as those for an existing patient who on 5th October 2005 becomes subject to a CO without a restriction order. For further information refer to paragraph 24 above. It would be expected that “as soon as practicable” would be interpreted in the same way as detailed in paragraph 57 above.

Review, revocation and variation of the direction

60. The patient is now detained in hospital on the basis that he/she meets the review criteria set out section 206(3)(b) of the 2003 Act. Section 208 of that Act places a duty on the patient’s RMO to keep the direction under review. If upon the commencement of the 2003 Act the RMO is not satisfied that the patient meets these criteria he/she must submit a report to the Scottish Ministers in accordance with section 208(3) or (4) of the 2003 Act. If the Scottish Ministers do not revoke the direction after receiving the report from the RMO they must refer the patient’s case to the Tribunal in accordance with section 210(3) of the 2003 Act.

61. Section 212 of the 2003 Act places a duty on the Scottish Ministers to keep the direction under review. If upon the commencement of the 2003 Act the Scottish Ministers are not satisfied that the patient meets the criteria mentioned in paragraph 60 above they must revoke the direction in accordance with section 212(3) or (4) of the 2003 Act.

2 year review by the Tribunal

62. Section 213 of the 2003 Act sets out the circumstances in which the Scottish Ministers must refer a direction to the Tribunal for a “2 year review”. Articles 25(1) and 29(3) of the Order amend this section with the effect that for these patients the 2 year period begins with the day which falls 2 years after the direction was made or the anniversary of that day, whichever falls during the 12 month period prior to 5th October 2005. The first “2 year reviews” by the Tribunal for these patients may therefore begin taking place from October 2006 onwards.

The first reference to the Tribunal following 5th October 2005

63. Although not a statutory duty in terms of the transitional provisions best practice would suggest that where the Scottish Ministers are referring the patient’s case to the Tribunal for the first time following the commencement of the 2003 Act they should submit the same documents that the Order specifies with respect to restriction orders, these being a copy of the patient’s current care plan and a report from the designated MHO (as detailed in article 10(8) of the Order). The Scottish Ministers should also submit copies, if available, of the medical evidence that was submitted to the court when the direction was under consideration by the court.

Transfer, leave of absence and absconding

64. Articles 27 to 28 and 30 to 32 of the Order set out the transitional provisions for patients who immediately prior to the 2003 Act coming into force were subject to the provisions in the 1984 Act with respect to transfer, leave of absence and being liable to be taken into custody where the patient has absconded.

65. It should be noted that article 30(1) of the Order includes the limit that the transitional provisions impose on a CO without a restriction order with respect to consecutive periods of leave of absence (see paragraph 30 above). However this limit will only apply in the case of a patient who immediately prior to the commencement of the 2003 Act is subject to a transfer direction without a restriction direction given that the modifications made to section 27 of the 1984 Act by Part 2 of Schedule 2 to that Act do not apply to these patients (see paragraph 48 above).

Appeals

66. Article 34(1) of the Order provides that any appeal proceedings under the 1984 Act or the 1995 Act which are ongoing on 5th October 2005 will continue until conclusion. Until such proceedings have been concluded neither the patient nor the named person may make an application to the Tribunal in terms of section 214 of the 2003 Act (see article 34(2)).

67. Where the outcome of an appeal is that the patient is not discharged article 34(5) of the Order provides that on the commencement of the 2003 Act the patient is treated as if he/she had made an application to the Tribunal under section 214 of the 2003 Act and no direction had subsequently been made by the Tribunal. Therefore in terms of section 214(6)(a) of the 2003 Act, where the appeal was commenced within 12 months of the original direction having been made the patient cannot make an application to the Tribunal until that 12 month period has expired. Similarly if the appeal was commenced in any subsequent 12 month period the patient cannot make an application to the Tribunal until that 12 month period has expired (section 214(6)(b) of the 2003 Act). However the patient's named person may do so in accordance with the timescales set out at section 214 of the 2003 Act.

Section 74(10) of the 1984 Act

68. Existing patients who are subject to an order under section 18 of the 1984 Act by virtue of section 74(10) of that Act will on the commencement of the 2003 Act be deemed to be subject to a compulsory treatment order ("CTO"). For further information on the transitional provisions with respect to deemed CTOs refer to paragraphs 4 to 23 of Annex A of this circular.