



SCOTTISH EXECUTIVE

Health Department
Director of Service Policy and Planning

NHS
HDL (2003) 57

Dear Colleague

MENTAL HEALTH (SCOTLAND) ACT 1984 APPEALS AGAINST DETENTION

Purpose

1. This letter informs Consultant Psychiatrists of amendments to sections 33, 64 and 66 of the Mental Health (Scotland) Act 1984 which have an effect on appeals against detention for civil and restricted patients under the 1984 Act. The effect of these amendments is that the sheriff shall order discharge or direct absolute or conditional discharge if he or she is not satisfied that the patient meets the detention criteria. These amendments came into force on 25 April 2003. A subsequent drafting amendment to section 64(2) also came into force on 14 October 2003.

Background

2. Under the 1984 Act, before these provisions were amended, the sheriff had to be satisfied that the patient did not meet the detention criteria before discharging him. It appeared that the onus was on the patient appealing against a detention order to satisfy the court that he or she did not meet the detention criteria.

3. The opportunity was taken during the passage of the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#) (schedule 6) to make amendments to sections 33, 64 and 66 of the 1984 Act to clarify the position. The sheriff must order the discharge unless he or she is satisfied that the patient does meet the detention criteria. These amendments (along with the rest of the 1984 Act) will be repealed and replaced when the 2003 Act is fully implemented.

10th November 2003

Addresses

For action

Consultant Psychiatrists (via
Hospital Medical & Clinical
Directors)

For information

Chief Executives, NHS Boards
Chief Executives, NHS Trusts
Directors of Social Work
Mental Welfare Commission for
Scotland
Royal College of Psychiatrists
Chief Executive, Scottish Health
Advisory Service
Scottish Courts Service
Clerk of Justiciary
Sheriff Clerks
Clerks of District Courts
Crown Office
Home Office
Northern Ireland Office
Central Legal Office for the
Scottish Health Service

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Schedule 6 of the 2003 Act

4. Whilst making changes to section 64(2) of the 1984 Act, schedule 6 of the 2003 Act introduced a drafting error to that section. That error has now been corrected by the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(Consequential Modification\) Order 2003](#) which came into force on 14 October 2003. In Section 64(2) of the 1984 Act (appeal by patient subject to a restriction order), “that subsection” has been substituted for “subsection (1) of this section”.

5. A copy of sections 33, 64 and 66 of the 1984 Act as amended by schedule 6 of the 2003 Act is attached. Copies of the Modification Order are available from The Stationery Office Bookshops price £1.50.

Action

6. This letter should be drawn to the attention of those whose duties require knowledge of appeals under the Mental Health (Scotland) Act 1984. In particular, it should be drawn to the attention of all consultant psychiatrists.

Yours sincerely

IAN GORDON

Appeals Against Detention

Extracts from Mental Health (Scotland) Act 1984, as amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Sections 33, 64 and 66)

Section 33 - Discharge of patients: hospital.

- (1) Subject to the provisions of this and the next following section, a patient who is liable to be detained in a hospital under this Part of this Act shall cease to be so liable if an order in writing discharging him from detention (in this Act referred to as "an order for discharge") is made in accordance with the following provisions of this section.
- (2) An order for discharge may be made in respect of a patient by the responsible medical officer, the Mental Welfare Commission or, where an appeal has been taken under sections 26, 26A, 30 or 34 of this Act, by the sheriff:

Provided that such an order shall not be made by the responsible medical officer in respect of a patient detained in a State hospital without the consent of the managers of the hospital.
- (3) The responsible medical officer or the Mental Welfare Commission shall make an order for discharge in respect of a patient where he is or they are satisfied that
 - (a) he 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
 - (b) it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment.
- (4) Where an appeal is made to the sheriff by a patient under sections 26, 30 or 34 of this Act, the sheriff shall order the discharge of the patient if he is not satisfied that
 - (a) the patient is at the time of the hearing of the appeal 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
 - (b) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment.
- (5) Subject to the provisions of this section and section 34 of this Act, an order for discharge in respect of a patient may also be made by the managers of the hospital, by the nearest relative or by any guardian or welfare attorney who has powers to do so of the patient.
- (6) An order for discharge made in respect of a patient by the managers of a hospital shall, with the consent of the responsible medical officer, take effect on the expiration of a period of 7 days from the date on which the order was made, and where the responsible medical officer does not so consent he shall furnish to the managers a report certifying that in his opinion the grounds set out in section 17(1) of this Act apply in relation to the patient.
- (7) Where an order for discharge is made in respect of a patient in relation to whom an application for admission has been submitted but has not been finally determined, the

managers of the hospital shall notify the sheriff to whom the application has been submitted of the making of the order for discharge.

Section 64 - Right of appeal of patients subject to restriction orders

- (A1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall refuse the appeal if satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not.
- (B1) The burden of proof of the matters as to which the sheriff is to be satisfied for the purposes of subsection (A1) of this section is on the Scottish Ministers.
- (C1) Nothing in section 102 (State hospitals) of the National Health Service (Scotland) Act 1978 (c.29) prevents or restricts the detention of a patient in a State hospital in pursuance of the refusal, under subsection (A1) of this section, of an appeal.
- (1) Where the sheriff has decided, under subsection (A1) of this section, not to refuse an appeal, the sheriff shall, subject to subsection (2) of this section, direct the absolute discharge of the patient if he is not satisfied-
 - (a) that the patient is at the time of the hearing of the appeal, 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
 - (b) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment;
- (2) Where in the case of any such patient as is mentioned in subsection (A1) of this section the sheriff is not satisfied as to the matters referred to in paragraph (a) or (b) of subsection (1) of this section but is satisfied that it is appropriate for the patient to remain liable to be recalled to hospital for further treatment he shall direct the conditional discharge of the patient.
- (3) Where a patient is absolutely discharged under subsection (1) of this section he shall, on the occurrence of any of the events mentioned in subsection (4A) of this section, cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
- (4) Where a patient is conditionally discharged under subsection (2) of this section the conditional discharge shall have effect on the occurrence of any of the events mentioned in subsection (4A) of this section and, when it does, the following provisions shall apply in relation to the patient—
 - (a) he may be recalled by the Secretary of State under section 68(3) of this Act as if he had been conditionally discharged under subsection (2) of that section;
 - and
 - (b) he shall comply with such conditions (if any) as may be imposed at the time of discharge by the sheriff or at any subsequent time by the Secretary of State.
- (4A) The events are-

- (a) the expiry of the appeal period, no appeal having been lodged within it;
- (b) the receipt by both the Court of Session and the managers of the hospital in which the patient is detained of notice from the Scottish Ministers that they do not intend to move the Court to make an order under section 66A(3) of this Act;
- (c) the refusal by the Court to make such an order;
- (d) the recall of any such order or the expiry of its effect.

(4B) In subsection (4A) of this section_

"appeal" means an appeal under section 66A of this Act;

"appeal period" means, in relation to an appeal, the period within which, under section 66A(2) of this Act, the appeal has to be lodged in order to be competent.

- (5) The Secretary of State may from time to time vary any condition imposed (whether by the sheriff or by him) under subsection (4) of this section.
- (6) Where a restriction order in respect of a patient ceases to have effect after he has been conditionally discharged under subsection (2) of this section the patient shall, unless previously recalled, be deemed to be absolutely discharged on the date when the order ceases to have effect and shall cease to be liable to be detained by virtue of the relevant hospital order.
- (7) The sheriff may defer a direction for the conditional discharge of a patient until such arrangements as appear to the sheriff to be necessary for that purpose have been made to his satisfaction; and where by virtue of any such deferment no direction has been given on an appeal before the time when the patient's case comes before the sheriff on a subsequent appeal, the previous appeal shall be treated as one on which no direction under this section can be given.
- (8) This section is without prejudice to section 68 of this Act.

Section 66 - Further consideration of case of conditionally discharged patient.

- (1) Where a restricted patient has been conditionally discharged under sections 64 or 68(2) of this Act and is subsequently recalled under section 68(3) of this Act to hospital he may, within one month of the day on which he returns or is returned to hospital, appeal against such recall to a sheriff of the sheriffdom in which the hospital in which he is liable to be detained by virtue of the warrant under the said section 68(3) is situated.
- (1A) The sheriff shall refuse an appeal under subsection (1) above if satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not.
- (1B) The burden of proof of the matters as to which the sheriff is to be satisfied for the purposes of subsection (1A) of this section is on the Scottish Ministers.
- (1C) Nothing in section 102 (State hospitals) of the National Health Service (Scotland) Act 1978 (c.29) prevents or restricts the detention of a patient in a State hospital in pursuance of the refusal, under subsection (1A) of this section, of an appeal.
- (2) Where a restricted patient has been conditionally discharged as aforesaid but is not recalled to hospital he may appeal
 - (a) in the period between the expiration of 12 months and the expiration of 2 years beginning with the date on which he was conditionally discharged; and
 - (b) in any subsequent period of 2 years,to a sheriff of the sheriffdom in which he resides.
- (3) Where the sheriff has decided, under subsection (1A) of this section not to refuse an appeal under subsection (1) and in any appeal under subsection (2) of this section, if the sheriff is not satisfied as mentioned in section 64(1) or (2) of this Act, he shall uphold the appeal and
 - (a) where he is not satisfied as mentioned in the said section 64(1), he shall direct the absolute discharge of the patient;
 - (b) where he is not satisfied as mentioned in the said section 64(2), he shall direct, or (as the case may be) continue, the conditional discharge of the patient; and, in either case, he may vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith.
- (3A) A conditional discharge under subsection (3)(b) of this section shall have effect on the occurrence of any of the events mentioned in subsection (4A) of section 64 of this Act.
- (4) Where a patient is absolutely discharged in an appeal under subsection (1) or (2) of this section he shall on the occurrence of any of the events mentioned in subsection (4A) of section 64 of this Act cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.