This document relates to the Mental Health (Public Safety and Appeals) (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 31 August 1999

MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Mental Health (Public Safety and Appeals) (Scotland) Bill introduced in the Scottish Parliament on 31 August 1999:

   • Explanatory Notes;
   
   • a Financial Memorandum;
   
   • an Executive Statement on Legislative Competence; and
   
   • the Presiding Officer’s Statement on Legislative Competence.

A Policy Memorandum, also prepared by the Scottish Administration, is printed separately as SP Bill 1–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

4. The Mental Health (Scotland) Act 1984 (‘the 1984 Act’) sets out procedures under which a person with a mental disorder can be detained in hospital. This Act, together with the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’), provides that persons convicted of a criminal offence who suffer from a mental disorder (or persons found insane in bar of trial or acquitted by reason of insanity) may be detained in hospital under a ‘hospital order’ (1995 Act, sections 57 and 58). Where it is necessary for the protection of the public from serious harm (or where a person acquitted on the grounds of insanity or found insane in bar of trial was charged with murder), the patient is subject to further restrictions, under a ‘restriction order’ (1995 Act, sections 57(3) and 59). The restrictions are set out in section 62 of the 1984 Act.

5. There are other categories of ‘restricted patient’, including prisoners subject to a ‘transfer direction with a restriction direction’ (1984 Act, section 71), and prisoners given a prison sentence combined with hospital detention under a ‘hospital direction’ (1995 Act, section 59A).

6. Scottish Ministers can, at their discretion, discharge a restriction order, restriction direction or hospital direction at any time (1984 Act, section 68 and 74). It is also open to the patient to appeal to the Sheriff Court for discharge under sections 63, 65 and 66 of the Act. Section 64 of the 1984 Act sets out criteria which, if satisfied, require the sheriff to direct discharge. (In the case of a patient subject to a restriction direction or hospital direction, the patient would then return to prison.)

7. The patient must be discharged if the sheriff is satisfied either:
that the patient is not suffering from a mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment, or

that it is not necessary for the health and safety of the patient or the protection of other persons that he should receive such treatment.

8. If one of the grounds for discharge is established, but the sheriff is satisfied that it is appropriate that the patient remain liable to be recalled to hospital for further treatment, the discharge is conditional, and the patient can be recalled to hospital at a later date. Otherwise, the discharge is absolute.

9. In relation to patients whose mental disorder is a ‘persistent one, manifested only by abnormally aggressive or seriously irresponsible conduct’, the patient must be discharged by the sheriff unless it can be shown that treatment is likely to alleviate or prevent a deterioration of the condition. The requirement to discharge the patient applies regardless of any risk to public safety.

10. There is currently no appeal against the decision of the sheriff, other than by judicial review. Where the decision is to direct discharge, there is no power under the Act to continue detention pending the determination of any such review.

THE BILL

11. The Bill has two main purposes. The first is to specify that, in considering whether to direct the discharge of a restricted patient, the sheriff and Scottish Ministers must refuse discharge, if satisfied that the patient has a mental disorder, the effect of which is that continuing detention is necessary to protect the public from serious harm. The second purpose is to introduce a right of appeal against a decision of a sheriff concerning an appeal for discharge by a restricted patient.

12. The Bill also makes clear that the term ‘mental disorder’ in the 1984 Act includes a personality disorder.

COMMENTARY ON SECTIONS

Section 1

13. Section 1(1) adds new subsections (A1), (B1) and (C1) to section 64 of the 1984 Act. Subsection (A1) provides that, where a restricted patient appeals to the sheriff for discharge, the sheriff is required to refuse the appeal if satisfied that the patient is suffering from a mental disorder which makes it necessary for the patient to continue to be detained, whether for medical treatment or not, in order to protect the public from serious harm. Subsection (B1) states that it is for the Scottish Ministers, in opposing discharge, to satisfy the burden of proof.
14. Section 102 of the National Health Service (Scotland) Act 1978 requires that the Scottish Ministers must provide such hospitals as appear to be necessary for persons subject to detention under the 1984 Act, who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities. New subsection (C1) clarifies that persons, who are regarded as untreatable, can be detained in the State Hospital.

15. Section 1(1)(b) of the Bill provides that where a Sheriff has not refused an appeal under new subsection (A1), he then goes on to consider the criteria for discharge set out in section 64 of the 1984 Act.

16. Section 1(2)(a) of the Bill provides that, where a patient on conditional discharge has been recalled and appealed to the Sheriff against recall under section 66(1) of the 1984 Act, the Sheriff must, in terms of new subsection (1A), refuse the appeal, if satisfied that the patient is suffering from a mental disorder which makes it necessary for the patient to continue to be detained in hospital, whether for medical treatment or not, in order to protect the public from serious harm. Again, the burden of proof lies with the Scottish Ministers in terms of new subsection (1B) and it is made clear that the patient can be detained in the State Hospital, even if untreatable, by new subsection (1C).

17. Sections 1(2)(b), (c) and (d) of the Bill provide that, where a sheriff does not refuse an appeal under new subsection (1A), he then goes on to consider the criteria for discharge under section 64 of the 1984 Act, and if, in consequence, discharge is ordered, the discharge shall have effect, only on the occurrence of an event set out in section 2(1)(c) of the Bill (see paragraph 22).

18. Section 1(3) introduces a new subsection (2A) in section 68 of the 1984 Act. Currently, Scottish Ministers have a general discretion to discharge restricted patients if they think fit. New subsection (2A) provides that Scottish Ministers shall not discharge a restricted patient, if satisfied that the patient is suffering from a mental disorder which necessitates continued detention in hospital, whether for medical treatment or not, to protect the public from serious harm. New subsection (2B) confirms that persons who are regarded as untreatable and whom Scottish Ministers refuse to discharge, can be detained in the State Hospital.

19. Section 1(4) of the Bill introduces a new subsection (1B) into section 74 of the 1984 Act confirming that, where a person suffering from a mental disorder is in hospital under a restriction or hospital direction, the Scottish Ministers must continue his detention in hospital, if satisfied that this is necessary to protect the public from serious harm. Such patients can be detained in the State Hospital, even if regarded as untreatable.

20. Section 1(5) states that the provisions of sections 1(1) of the Bill have effect, respectively, to appeals under section 64, 65 and 66 of the 1984 Act, in which the
hearing takes place on or after 1 September. Similar provision is made in relation to cases being considered by the Scottish Ministers under section 68(2) of the Act, as amended by section 1(2) of the Bill.

Section 2

21. Section 2 introduces a right of appeal to the Court of Session by either the patient or Scottish Ministers, against the decision, recommendation or notification of the sheriff in relation to an appeal by a restricted patient under sections 64, 65 and 66 of the 1984 Act.

22. Subsection (1) further amends section 64 of the 1984 Act by amending subsections (3) and (4) and introducing a new subsection (4A), the effect of which is that, only where a particular event has occurred, can a restricted patient who has been absolutely or conditionally discharged by the Sheriff leave hospital. The events, as set out in new subsection (4A), are:

- the expiry of the appeal period (14 days), if no appeal has been lodged;
- the receipt by both the Court of Session and the managers of the hospital in which the patient is detained of notice from the Scottish Ministers that they do not intend to move the Court of Session to make an order to continue the patient’s detention until the appeal has been concluded;
- the refusal by the Court of Session to make an order continuing the patient’s detention;
- the recall of any such order or the expiry of its effect.

23. New subsection (4B) of section 64, which is also introduced by section 2(1) of the Bill, clarifies that “appeal” and “appeal period” for purposes of new subsection (4A) mean, respectively, an appeal to the Court of Session under new section 66A, and the period (14 days) within which the appeal must be lodged.

24. Section 2(2) introduces a new section 66A to the 1984 Act, setting out the provisions of the new appeal to the Court of Session, against the decision of a Sheriff under section 64 and 66 or a notification or recommendation by the Sheriff under section 65.

25. New subsection 66A(1) establishes the new appeal provision.

26. New subsection 66A(2) prescribes that the appeal will only be competent if made within 14 days of the decision, notification or recommendation appealed against.
27. New subsections 66A(3) and A(4) provide that, where an appeal is lodged against a decision of the Sheriff to direct the discharge of a patient under sections 64 or 66 or a notification or recommendation under section 65, the Court of Session may, on a motion by the Scottish Ministers, order that the patient will remain in hospital until an appeal to the House of Lords against the decision of the Court of Session has been concluded or the time limit for any such appeal has expired.

Section 3

28. Section 3 amends the definition of mental disorder in section 1 of the Mental Health (Scotland) Act 1984. It specifies that, for the purposes of the Act, the term ‘mental illness’ includes ‘personality disorder’, and that this amendment has effect from 1 September 1999.

Section 4

29. Section 4 states the short title of the Act and sets out the arrangements for commencement. Sections 1 and 3 commence on Royal Assent, and will have effect from 1 September. Section 2 will be commenced by statutory instrument, on such a day as the Scottish Ministers may appoint. Section 4 will commence on Royal Assent.

30. The relevant sections of the Mental Health (Scotland) Act 1984, as amended by this Bill, are set out below.

THE AMENDMENTS PROPOSED BY THE MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) BILL ARE SHOWN IN BOLD

63  Right of appeal of restricted patients etc.

(1) In this section and in sections 64 to 67 of this Act-

"restricted patient" means a patient who is subject to a restriction order to a hospital direction or to a restriction direction;

"relevant hospital order", “relevant hospital direction” and “relevant transfer direction”, in relation to a restricted patient, mean the hospital order, hospital direction or transfer direction by virtue of which he is liable to be detained in a hospital.

(2) A restricted patient detained in a hospital may appeal by way of summary application to a sheriff of the sheriffdom within which the hospital in which he is liable to be detained is situated—

(a) in the period between the expiration of 6 months and the expiration of 12 months beginning with the date of the
relevant hospital order, hospital direction or transfer direction;
and
(b) in any subsequent period of 12 months,
to order his discharge under section 64 or 65 of this Act.

(3) The provisions of section 35(3) and (4) of this Act shall have effect in relation to an appeal under sections 63 to 67 of this Act as they have in relation to an appeal under Part V of this Act.

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 direct the absolute discharge of the patient if he is satisfied-

(a) that the patient is not, 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 not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case)

(c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) of this section the sheriff is satisfied as to the matters referred to in paragraph (a) or (b) of that subsection but not as to the matters referred to in paragraph (c) of that subsection he shall direct the conditional discharge of the patient.
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.

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.

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.

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.

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.

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.

65 Right of Appeal of Patients subject to restriction directions

(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a hospital direction or 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 a 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 conveyed under a relevant hospital direction or removed under a relevant transfer direction to a hospital specified in the direction and that he shall be dealt with there as if he had not been so conveyed or 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.

(3) Where a direction has been given under subsection (2) of this section, on the person’s arrival in the prison or other institution or place to which he has been remitted by virtue of such a direction the relevant hospital direction or, as the case may be, the relevant transfer direction together with the restriction direction given in respect of the person shall cease to have effect.
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 satisfied as mentioned in section 64(1) or (2) of this Act, he shall uphold the appeal and—

(a) where he is satisfied as mentioned in the said section 64(1), he shall direct the absolute discharge of the patient;

(b) where he is 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.

66A Appeal to the Court of Session against sheriffs’ decisions under sections 64, 65 and 66

(1) It shall be competent to appeal to the Court of Session against the decision of the sheriff under section 64 or 66 or a notification or recommendation by the sheriff under section 65 of this Act.

(2) An appeal under subsection (1) of this section shall be competent only if it is lodged within 14 days of the decision, notification or recommendation appealed against.

(3) Where an appeal has been lodged under subsection (1) of this section against a decision of the sheriff to direct the discharge of a patient under Section 64 or 66 or a notification or recommendation by the sheriff under section 65 of this Act the Court of Session may, on a motion by the Scottish Ministers, order—

   (a) that the patient who is the subject of the appeal shall continue, in accordance with subsection (4) of this section, to be detained; and
   (b) that the relevant order or direction shall continue to have effect accordingly.

(4) An order under subsection (3) of this section has the effect of continuing the patient’s detention—

   (a) where no appeal is made to the House of Lords against the decision of the Court of Session on an appeal under this section, until the expiry of the time allowed, without leave, to appeal to the House of Lords against the decision; and
   (b) where such an appeal has been made, until it is abandoned or finally determined.

67 Application of sections 63 to 66 to other persons treated as restricted patients

(1) Sections 63, 64 and 66 of this Act shall apply to a person who—

   (a) is subject to—

      (i) a direction which by virtue of section 69(3) of this Act;
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(ii) [repealed],

has the like effect as a hospital order and a restriction order; or

(b) is treated as subject to a hospital order and a restriction order by virtue of section 80(2) of the Mental Health Act 1983 or section 81(2) of this Act, as they apply to a restricted patient who is subject to a restriction order and references in the said sections 63, 64 and 66 to the relevant hospital order or restriction order shall be construed as references to the direction under section 69(1) of this Act.

(2) Sections 63 and 65 of this Act shall apply to a person who is treated as subject to a transfer direction and a restriction direction by virtue of section 80(2) of the Mental Health Act 1983 or section 81(2) of this Act as they apply to a restricted patient who is subject to a restriction direction and references in the said sections 63 and 65 to the relevant transfer direction or the restriction direction shall be construed as references to the transfer direction or restriction direction to which that person is treated as subject by virtue of the said section 80(2) or 81(2).

68 Powers of Secretary of State in respect of patients subject to restriction orders

(1) If the Secretary of State is satisfied that a restriction order in respect of a patient is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions set out in section 62(1) of this Act; and, where the Secretary of State so directs, the restriction order shall cease to have effect and subsection (3) of that section shall apply accordingly.

(2) At any time while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

(2A) The Scottish Ministers shall not, however, discharge a patient from hospital under subsection (2) of this section if they are satisfied that the patient is 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.

(2B) 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
decision of Scottish Ministers, under subsection (2A) of this section, not to discharge the patient.

(3) The Secretary of State may, at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection (2) of this section, and without prejudice to his further discharge as aforesaid, by warrant recall the patient to such hospital as may be specified in the warrant; and thereupon—

(a) if the hospital so specified is not the hospital from which the patient was conditionally discharged, the hospital order and the restriction order shall have effect as if the hospital specified in the warrant were substituted for the hospital specified in the hospital order;

(b) in any case, the patient shall be treated for the purposes of section 28 of this Act as if he had absented himself without leave from the hospital specified in the warrant, and if the restriction order was made for a specified period, that period shall not in any event expire until the patient returns to the hospital or is returned to the hospital under that section.

(4) If a restriction order ceases to have effect in respect of a patient after the patient has been conditionally discharged under this section, the patient shall, unless previously recalled under the last foregoing subsection, 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 accordingly.

(5) The Secretary of State may, if satisfied that the attendance at any place in Great Britain of a patient who is subject to a restriction order is desirable in the interests of justice or for the purposes of any public inquiry, direct him to be taken to that place; and where a patient is directed under this subsection to be taken to any place he shall, unless the Secretary of State otherwise directs, be kept in custody while being so taken, while at that place, and while being taken back to the hospital in which he is liable to be detained.

69 Persons ordered to be kept in custody during Her Majesty’s pleasure

(1) The Secretary of State may by warrant direct that any person who, by virtue of any enactment to which this subsection applies, is required to be kept in custody during Her Majesty's pleasure or until the directions of Her Majesty are known shall be detained in a State hospital or such other hospital as he may specify and, where that person is not already detained in the hospital, give directions for his removal there.
(2) The enactments to which subsection (1) of this section applies are section 16 of the Courts-Martial (Appeals) Act 1968, section 116 of the Army Act 1955, section 116 of the Air Force Act 1955, and section 63 of the Naval Discipline Act 1957.

(3) A direction under this section in respect of any person shall have the like effect as a hospital order together with a restriction order.

Transfer to hospital or guardianship of prisoners etc.

70 Removal to hospital of persons in prison awaiting trial etc.

(1) If in the case of a person committed in custody while awaiting trial or sentence it appears to the Secretary of State that the grounds are satisfied upon which an application may be made for his admission to a hospital under Part V of this Act he may apply to the sheriff for an order that that person be removed to and detained in such hospital as may be specified in the order; and the sheriff, if satisfied by reports from 2 medical practitioners (complying with the provisions of this section) that the grounds are satisfied as aforesaid may make an order accordingly.

(2) An order under this section (in this Act referred to as “a transfer order”) shall cease to have effect at the expiration of the period of 14 days beginning with the date on which it is made, unless within that period the person with respect to whom it was made has been received into the hospital specified therein.

(3) A transfer order with respect to any person shall have the like effect as a hospital order made in his case together with a restriction order in respect of him made without limit of time.

(4) Of the medical practitioners whose reports are taken into account under subsection (1) of this section, at least one shall be a practitioner approved for the purposes of section 20 of this Act by a Health Board as having special experience in the diagnosis or treatment of mental disorder.

(5) A transfer order shall specify the form or forms of mental disorder, being mental illness or mental handicap or both, from which the patient is found by the sheriff to be suffering; and no such order shall be made unless the patient is described by each of the practitioners whose evidence is taken into account as aforesaid as suffering from the same form of mental disorder, whether or not he is also described by either of them as suffering from the other form.

71 Removal to hospital of persons serving sentences of imprisonment and other prisoners

(1) If in the case of a person to whom this section applies the Secretary of State is satisfied by the like reports as are required for the
purposes of section 70 of this Act that the grounds are satisfied upon which an application may be made for his admission to a hospital under Part V of this Act the Secretary of State may make a direction (in this Act referred to as “a transfer direction”) in respect of him.

(2) This section applies to the following persons, that is to say—

(a) persons serving sentences of imprisonment;

(b) [repealed]

(c) persons detained under the Immigration Act 1971.

(3) Subsections (2), (4) and (5) of section 70 of this Act shall apply for the purposes of this section and of any transfer direction given by virtue of this section as they apply for the purposes of that section and of any transfer order thereunder, with the substitution for any references to the sheriff of a reference to the Secretary of State.

(4) Subject to section 71A of this Act a transfer direction with respect to any person shall have the like effect as a hospital order made in his case.

(5) Where a transfer direction is given in respect of any person that person may, within one month of his transfer to a hospital thereunder, appeal to the sheriff to cancel the direction, and the sheriff shall cancel the direction unless he is satisfied that the grounds are satisfied upon which an application may be made for the admission of the person to a hospital under Part V of this Act; and, if a transfer direction is so cancelled, the Secretary of State shall direct that the person be remitted to any prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.

(6) Subsections (2), (3) and (4) of section 35 of this Act shall apply to an appeal under subsection (5) of this section in like manner as they apply to an appeal referred to in that section.

(7) References in this section to a person serving a sentence of imprisonment include references—

(a) to a person detained in pursuance of any sentence or order for detention made by a court (other than an order under section 54, 57, 118 or 190 of the Criminal Procedure (Scotland) Act 1975, or under any enactment to which section 69 of this Act applies);

(b) to a person committed by a court to a prison or other institution to which the Prisons (Scotland) Act 1952, applies in default of payment of any fine to be paid on his conviction.
71A Further provision as to persons removed to hospital under section 71

(1) Where the Secretary of State is satisfied, in relation to a person in respect of whom he has made a transfer direction under section 71(1) of this Act, that—

(a) 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) 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) it is not appropriate for the person to remain liable to be recalled to hospital for further treatment,

he 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.

(2) Where the Secretary of State is satisfied as to the matters mentioned in subsection (1)(a) above, but not as to the matters mentioned in subsection (1)(b) above, he may either—

(a) by warrant give such direction as is mentioned in subsection (1) above; or

(b) decide that the person shall continue to be detained in hospital.

(3) If a direction is given under subsection (1) or (2)(a) above, then on the person’s arrival in the prison or other institution or place to which he is remitted by virtue of that subsection the transfer shall cease to have effect.

72 Restriction on discharge of prisoners removed to hospital

(1) There a transfer direction is given in respect of any person, the Secretary of State, if he thinks fit, may by warrant direct that that person shall be subject to the special restrictions set out in section 62(1) of this Act.

(2) A direction under this section (in this Act referred to as “a restriction direction”) shall have the like effect as a restriction order in respect of the patient made under section 59 of the Criminal Procedure (Scotland) Act 1995.

73 Further provisions as to persons removed to hospital while awaiting trial etc.
Subject to the following provisions of this section any transfer order made in respect of a person under section 70(1) of this Act shall cease to have effect if the proceedings in respect of him are dropped or when his case is disposed of by the court to which he was committed, or by which he was remanded, but without prejudice to any power of that court to make a hospital order or other order under section 53, 57, 58 or 59 of the Criminal Procedure (Scotland) Act 1995 in his case.

Where a transfer order has been made in respect of any such person as aforesaid, then, if the Secretary of State is notified by the responsible medical officer at any time before that person is brought before the court to which he was committed, or by which he was remanded, that he no longer requires treatment for mental disorder, the Secretary of State may by warrant direct that he be remitted to any place where he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed, and on his arrival at the place to which he is so remitted the transfer order shall cease to have effect.

Further provision as to transfer directions and restriction directions

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.

This subsection applies if the Secretary of State is satisfied as regards a person who has been conveyed to a hospital under a hospital direction as to the matters mentioned in subsection (2) below at a time when the person, by virtue of a sentence of imprisonment imposed on him at the time that direction was made, would but for that direction be in prison or being detained other than in a hospital.

Neither of subsections (1) and (1A) above apply, however, where the Scottish Ministers are satisfied, at the respective times mentioned in three subsections, that the person is, at the relevant time, 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 person continue to be detained in a hospital, whether for treatment or not.
(1C) Nothing in section 102 (State hospitals) of the National Health Service (Scotland) Act 1978 (c.29) prevents or restricts the detention of a person in a State hospital in consequence of subsection (1B) above.

(2) The matters referred to in subsection (1) and (1A) 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) or (1A) 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 conveyed or removed to hospital and that he be dealt with there as if he had not been so conveyed or removed.

(4) Where subsection (1) or (1A) 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, the 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 or, as the case may be, the hospital 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.

(8A) This subsection applies where a hospital direction has been made in respect of a person and he has thereafter been released under the Crime and Punishment (Scotland) Act 1997.

(8B) Where subsection (8A) above applies-

(a) the hospital 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.

(9) Not earlier than 28 days before-

(a) a restriction direction given in respect of a person ceases to have effect other than by virtue of subsection (8) above; or

(b) a hospital direction ceases to have effect,

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 or as the case may be, hospital direction ceases to have effect, be treated as if he had, on the date on which the restriction direction or as the case may be hospital 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 or, as the case may be, hospital 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.

FINANCIAL MEMORANDUM

INTRODUCTION

31. This Memorandum is prepared in accordance with Rule 9.3 of the Standing Orders of the Scottish Parliament, and sets out best estimates of the costs and savings to which the provisions of the Mental Health (Public Safety and Appeals) (Scotland) Bill may give rise.

32. The Bill applies to a small number of people, namely patients who are subject to hospital and restriction orders (and some similar orders) under the Mental Health (Scotland) Act 1984. There are 290 ‘restricted’ patients in Scotland, of whom 144 are in the State Hospital, 110 in local hospitals and 36 living in the community.

33. Any additional costs, which are likely to be small, will fall upon the Scottish Administration; but there could be some savings, for example, to local authorities, as described below.

COSTS ON THE SCOTTISH ADMINISTRATION

34. The potential additional costs for the Scottish Administration arise in two situations under the Bill, namely:

- where a patient, who would otherwise be released, continues to be detained in hospital, and
where an appeal is taken to the Court of Session or House of Lords against a decision of the lower court, in relation to an appeal by a restricted patient against discharge.

**Costs of continuing to detain patients**

35. The legislation has been introduced to ensure that restricted patients, who pose a continuing risk of serious harm, are not discharged from detention. It is impossible to state with any degree of certainty how many patients might continue to be detained who would otherwise, as the law stands, be released. To date, there has only been one such successful appeal.

36. The cost to the State Hospital of an additional patient is estimated at £69,000 per year. On the assumption that there might be a total of, say, 4 patients who could continue to be detained solely because of the new provisions, the theoretical cost to the National Health Service would be £276,000 a year. However, until the recent appeal decision, to which this Bill relates, the resource planning assumption has been that such patients would remain detained in hospital and, on that basis, there will be no additional expenditure implications for the National Health Service.

37. Moreover, if patients continue to be detained in hospital, there could be offsetting savings against police, local authority and health budgets. A patient who could not continue to be detained, but presented a risk of serious harm, might require a degree of police monitoring, and could well present to local health and social work services for support. But such savings will vary substantially from case to case, and it is not feasible to produce a realistic estimate.

**Costs of appeals**

38. The costs of the new appeal provisions will be met by the parties to appeals. These will be Scottish Ministers and the patient. In almost all cases, it is anticipated that the patient will receive legal aid. There will also be costs to the courts for administration and judicial time.

39. The number of appeals cannot be predicted with certainty, but is likely to be small. Currently, there are about 5 appeals a year to the Sheriff Court under the relevant provisions of the Mental Health (Scotland) Act 1984, and around one judicial review annually. It is estimated that there may be 2 appeals a year to the Court of Session, lasting, say, 2 days in court, with, say, one of these being appealed to the House of Lords. The total costs, including doctors’ reports, solicitors’ and counsel’s fees and court costs of an appeal to the Court of Session are estimated at £20,000. Costs of an appeal to the House of Lords will be considerably higher, at approximately £100,000. This gives a total of £140,000.
40. It is possible that there will be an offsetting saving, in that a number of patients who might have a stateable case under the current legislation will be less likely to succeed under the new provisions, and so may choose not to appeal. If 2 appeals a year were not initiated because of the legislation, this would produce a saving in costs to the courts, Scottish Executive and for legal aid amounting, in total, to around £40,000 a year.

COSTS ON LOCAL AUTHORITIES

41. The Bill will impose no additional costs on local authorities, but as noted above, there could be some savings through reduced demands on social work.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

42. There will be no costs to other bodies, individuals and businesses. In the event that a patient is unable to obtain legal aid, the cost of raising or defending any appeal would fall to the patient. However, legal aid is likely to be available in most cases, and would be considered on the normal basis.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

43. On 31 August 1999, the Minister for Justice (Jim Wallace MSP) made the following statement:

“In my view, the provisions of the Mental Health (Public Safety and Appeals) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

44. On 31 August 1999, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Mental Health (Public Safety and Appeals) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

This document relates to the Mental Health (Public Safety and Appeals) (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 31 August 1999

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