Ministry of JUSTICE

Mental Health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders

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1. Overview

1.1 The majority of the provisions of the Mental Health Act 2007 ('the Act') are due to come into force in October 2008. Courts should be aware of the changes to be introduced and should note that one change is already in force (see paragraphs 2.6 and 4.29 below).

1.2 The Act reflects the continuation of the Government's policy that mentally disordered people who commit offences should receive specialist mental health treatment rather than being punished, wherever that can safely be achieved. It is the responsibility of the sentencing court to determine the subsequent management of an offender when the Court decides, on disposal of its case, whether or not to divert the offender from a criminal justice disposal. There have been a number of changes to the sentencing options and their implications since implementation of the 1983 Act, most notably in the Crime (Sentences) Act 1997, the Criminal Justice Act 2003 and the Domestic Violence, Crime and Victims Act 2004.

1.3 The primary function of the changes to the 1983 Act is to improve the ability of mental health professionals to provide treatment for mental disorder at the time people need it, rather than after a person's disorder has led to serious self harm or offences against others. The changes do not alter the intention that where, nonetheless, mentally disordered people do offend and come before the courts, they should have the same right to assessment and treatment by specialist health services as people who have not offended.

1.4 This circular offers guidance for magistrates' courts and the Crown Court on the effects of the changes to the Mental Health Act 1983 made by the Act, and how they impact on remand and sentencing powers for mentally disordered people before the courts (see Section 2 below). Subsequent sections discuss the implications of the whole range of sentencing options following the Act's coming into force.

2. Changes effected by the 2007 Act

The definition of mental disorder

2.1 Section 1 of the Act removes from section 1 of the 1983 Act the subdivision of the definition of mental disorder into four categories: mental illness, psychopathic disorder, mental impairment and severe mental impairment. The single question whether a person is mentally disordered is now to be determined by medical opinion whether the person is under "any disorder or disability of the mind".

2.2 There is one caveat to the single definition, introduced by section 2 of the Act, which provides that people who are learning disabled are not mentally disordered for purposes of most provisions of the Act by reason of that disability alone unless it is associated with abnormally aggressive or seriously irresponsible behaviour.

Exclusions

2.3 Section 3 of the Act amends section 1(3) of the 1983 Act, replacing the list of conditions and behaviours excluded from the definition of mental disorder. The only explicit exclusion which remains is dependence on alcohol or drugs. The intention is to prevent anyone being treated under Mental Health Act powers solely on grounds of dependence. It does not exclude any drug or alcohol dependent person who has another mental disorder (even if that other disorder is associated with alcohol or drug use).

Appropriate treatment test

2.4 Section 4 of the Act repeals the treatability test which governed the detention under Mental Health Act powers of persons suffering from psychopathic disorder or mental impairment. It replaces the test with an "appropriate treatment" test. To detain any person under the Act for treatment, the decision maker must be satisfied that medical treatment is available to that person which is not only clinically appropriate to their condition but also to their personal circumstances. This does not apply to remand to hospital for report, which does not authorise treatment without consent.

Age appropriate accommodation for young offenders

2.5 Section 31 extends the power of the courts to require information from mental health services about accommodation and facilities for mentally disordered offenders under the age of 18 (see 4.26 and 4.27 below).

Duration of restriction orders

2.6 Section 40 repeals the provision at section 41 of the 1983 Act which enabled restrictions to be made for a finite period, when the Crown Court adds a restriction order to a hospital order.

Approved clinicians and responsible clinicians

2.7 The Act introduces the concepts of the approved clinician, and the responsible clinician. The effect is to broaden the professional base from which decision makers under the Act can be appointed. Mental health professionals with appropriate skills and experience can take over many of the roles given to registered medical practitioners under the 1983 Act. Section 145 of the 1983 Act is amended to provide that an " 'approved clinician' means a person approved by the Secretary of State (in relation to England) or by Welsh Ministers (in relation to Wales) to act as an approved clinician for the purposes of this Act". An approved clinician will in practice be a doctor, chartered psychologist, mental health or learning disability nurse, registered occupational therapist or registered social worker approved by the Strategic Health Authority or Primary Care Trust (PCT) (or Local Health Board (LHB) in Wales).

2.8 The role of the responsible medical officer is taken over by the responsible clinician, defined as "the approved clinician with overall responsibility for the patient's case". The change only affects the courts' powers in that the clinician who is responsible for the patient's case, if they are detained in hospital, will no longer automatically be a doctor. Evidence that a person is mentally disordered to a nature or degree requiring detention in hospital for treatment must still be given in the first place by registered medical practitioners. Doctors are still the sole arbiters of whether a person is mentally disordered as a preliminary to considering their admission.

3. Diversion

3.1 This guidance does not address the issues of whether to prosecute a mentally disordered person, or the need for early assessment of persons before the courts who appear to be mentally disordered. Guidance on the balance between criminal justice action and mental health care is being issued separately. This circular confines itself to discussing the statutory provision for remand and sentencing of defendants who are not diverted at an early stage, but whose trial proceeds. The issue of mental disorder may arise at any stage of the trial process. It may be raised by the defence or the prosecution, or arise in the pre sentence report.

3.2 Section 157 of the Criminal Justice Act 2003 requires the Court to obtain and consider a medical report on a defendant who is, or appears to be mentally disordered, before passing a custodial sentence.

3.3 To assist the Court in meeting that requirement, and finding out what facilities are available for diverting an offender to hospital on sentencing, section 39 of the 1983 Act places a duty on the Primary Care Trust (Local Health Board in Wales) for the area where the defendant was last resident to furnish that information at the request of the Court.

4. The courts' powers as amended

4.0 The courts have powers to:

- **inform** their sentencing decision, by remanding in hospital for a medical report or treatment , or making an interim hospital order, (paragraphs 4.1 to 4.15, and 4.22 to 4.25)

- **divert** the offender from punishment by ordering detention for treatment in hospital in lieu of prison, (paragraphs 4.16 to 4.21 and 4.29 to 4.31),or

- **combine** hospital treatment with a prison sentence, by making a hospital direction (paragraphs 4.33 and 4.34).

Section 35 remand for report

4.1 The Court will need a single medical opinion from a doctor approved under section 12 of the 1983 Act that the defendant is "mentally disordered" to meet the condition in section 35 (3)(a) for remanding a defendant to hospital for a medical report.

4.2 Evidence that arrangements have been made for admission to hospital within seven days can be provided either by the approved clinician who would be responsible for making the report (who will not necessarily be a doctor) or by someone representing the hospital managers. Evidence that further remand is necessary to complete the report on the accused person's mental condition will be provided by the approved clinician responsible for making the report.

4.3 As well as any doctor, an approved clinician who is not a doctor can also provide the independent report on behalf of the accused person if he wishes to apply to the court for termination of the remand.

4.4 The courts' power to remand a defendant for a medical report during the course of trial is otherwise substantially unchanged, except that they are now empowered to request evidence of the availability of age appropriate hospital facilities for offenders under the age of 18 (see 4.26 and 4.27 below).

4.5 The effect as amended is that the Crown Court may remand any defendant before it to hospital for a report on his medical condition, if he is charged with, but not yet sentenced for, an offence punishable with imprisonment, except where the penalty is fixed by law. It will need evidence of arrangements to admit to hospital within seven days of the remand, during which period it may remit to a place of safety. The maximum duration of the remand is for twelve weeks, with renewal

required by the Court every 28 days. Renewal may be ordered without the defendant being produced in court, provided the defendant is represented by Counsel or a solicitor who has rights of audience.

4.6 The power is similarly available to magistrates, but for defendants convicted of an offence punishable on summary conviction with imprisonment, or who have been arraigned before the court for such an offence and not yet sentenced or otherwise dealt with.

Section 36 remand for treatment

4.7 The Court will need reports from two registered medical practitioners confirming that the defendant is "mentally disordered" to meet the condition in section 36(1)(a) for remanding to hospital for treatment. Prior to the Act, a defendant had to be diagnosed as mentally ill or severely mentally impaired to be remanded under section 36. The change enables the Court to consider remanding personality disordered and mentally impaired defendants, for example, subject to clinical evidence that appropriate treatment is available.

4.8 The doctors must also provide evidence that appropriate medical treatment is available. Appropriate treatment is defined in section 3(4) of the 1983 Act, as amended, as "medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case".

4.9 Evidence that arrangements have been made for the accused person's admission to hospital within seven days can be provided either by the approved clinician who would have overall responsibility for a patient's case (who need not necessarily be a doctor) or by someone representing the hospital managers.

4.10 Evidence that further remand is warranted will be provided by the responsible clinician (i.e. the approved clinician with responsibility for the patient's case).

4.11 As well as any doctor, an approved clinician who is not a doctor can also provide the independent report on behalf of an accused person if he wishes to apply to the Court for termination of the remand.

4.12 The effect, as amended, is that the Crown Court may remand an accused person to detention in hospital for treatment if it is satisfied on the written or oral evidence of two registered medical practitioners that he is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment, and appropriate medical treatment is available.

4.13 "An accused person" for purposes of section 36 is a person in custody during trial or before sentencing, charged with or convicted of an offence punishable with imprisonment, but not one for which the offence is fixed by law.

4.14 As with the remand for report, the Court requires evidence of arrangements to admit the person to hospital within seven days of the remand. That evidence may come from the approved clinician who would have overall responsibility for his case, or anyone representing the hospital managers. If the court does not have the requisite evidence to make a remand for treatment under section 36, an alternative is to remand in custody and rely on the Secretary of State to use his power under section 48 to direct the defendant's transfer to hospital. The effectiveness of that course in achieving treatment will depend on clinical staff in the remand prison negotiating a suitable hospital bed. If adequate evidence can be given in Court, admission to hospital ordered under section 36 is likely in practice to be swifter and more reliable.

4.15 Like the remand for report, the duration of the remand for treatment is at the discretion of the Court, in 28 day intervals up to a maximum of twelve weeks. Renewal can occur without production in court of the defendant, provided he is represented and his representatives have rights of audience.

Section 37 hospital order

4.16 The medical evidence requirement is amended in line with the single definition of mental disorder and the appropriate medical treatment requirement. The Court will need two medical reports from doctors confirming that the offender is "mentally disordered" to meet the condition in section 37(2)(a) for making a hospital order.

4.17 The amendments under the Act do not otherwise substantially alter the power to make a hospital order, or a guardianship order.

4.18 The purpose of the hospital order is also unchanged, to divert the convicted mentally disordered offender from punishment in the criminal justice system, and direct his care and treatment at the discretion of mental health professionals. The Court's discretion to divert is not limited by the question of criminal responsibility, except that a hospital order is not an alternative to a life sentence where that sentence is fixed by law. The hospital order is an alternative to any other prison sentence, including sentences for public protection under Part 12 of the Criminal Justice Act 2003. Section 37(2)(b) provides that the Court has to be of the opinion that the hospital order is "the most suitable method of disposing of the case".

4.19 The Court requires evidence from two registered medical practitioners that the offender is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment, and that appropriate medical treatment is available for him. (See paragraph 4.8 above for the definition of appropriate treatment.)

4.20 The Court will also require evidence from the approved clinician who would have overall responsibility for the offender's case (who need not be a doctor) or the hospital managers, that arrangements are in place to admit him to hospital within 28 days of the order, pending which he may be admitted to a place of safety. Where evidence is given that a bed will be made available within that timescale, the hospital managers must ensure that the commitment is met.

4.21 Magistrates' powers are as above, but in respect of a person they have convicted of an offence punishable on summary conviction with imprisonment. They can also make a hospital order in respect of a mentally disordered offender where they are satisfied that he did the act or made the omission charged, under section 37(3).

Section 38 interim hospital order

4.22 The Court will need two medical reports from doctors confirming that the offender is "mentally disordered" to meet the condition in section 38(1)(a) for making an interim hospital order.

4.23 The evidence of arrangements for the offender's admission to hospital within 28 days can now be given by the approved clinician who would have overall responsibility for the patient's case, or anyone representing the hospital managers. That approved clinician (the responsible clinician), who need not be a doctor, can also furnish the evidence that the order needs to be continued.

4.24 On conviction for an imprisonable offence (for magistrates, an offence punishable on summary conviction with imprisonment) the court can

make an interim hospital order where it has the medical reports described in paragraph 4.22, and is of the opinion that a hospital order or hospital direction may be appropriate. The order is not available where the conviction is for an offence where the sentence is fixed by law.

4.25 The initial order may not exceed twelve weeks, but is renewable by the court for periods of not more than 28 days at a time up to the maximum of twelve months. The order is terminated when the court makes a hospital order or direction or disposes of the case in another way. The offender does not have to be produced in court for renewal of the order, or the making of a hospital order, provided he is represented by Counsel or a solicitor who has rights of audience.

Section 39 evidence about facilities

4.26 In relation to defendants under the age of 18, section 39 of the 1983 Act has been amended to assist the courts in identifying suitable facilities for assessment of their condition during the trial period. The amendment extends the range of powers in respect of which the Court may seek information from the appropriate PCT or Health Authority (or Local Health Board in Wales). It may now require information about facilities for a remand for report under section 35, a remand for treatment under section 36, or committal by a magistrates' court under section 44.

4.27 This change is made in support of the new provision at section 131A that young people should only be treated for mental disorder as hospital in-patients in an environment which is suitable given their age and individual circumstances. The intention in respect of young offenders is to make it easier for the courts to identify facilities for specialist assessment and limit the need for remands in custody to obtain reports.

4.28 Section 39 is otherwise unchanged and provides for the court to require information from relevant Trusts and Local Health Boards when contemplating making an interim hospital order, hospital order or hospital direction in respect of an offender of any age.

Section 41 restriction orders

4.29 From 1 October 2007, the Crown Court can no longer make restrictions of finite duration. A restriction order made to complement a hospital order will remain in place until lifted by the Secretary of State for Justice under section 42, or discharged by the Tribunal under sections 73 or 75 of the 1983 Act.

4.30 Section 41 empowers the Crown Court to add a restriction order to a hospital order where it considers, "having regard to the nature of the offence, the antecedents of the offender, and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do". If magistrates conclude that restrictions are necessary for an offender in respect of whom they could

make a hospital order, they may commit the convicted offender to the Crown Court under section 43.

4.31 The Court must hear oral evidence from one of the doctors providing the medical evidence which justifies the hospital order, before it makes a restriction order. But the decision whether to add restrictions is not a clinical decision. It is a device to reserve to the Secretary of State the ultimate responsibility for decisions in respect of public protection. Discretion to add a restriction order lies with the Court, once it has the necessary evidence. The implications of making a restriction order are discussed in paragraphs 5.9 to 5.21 below.

Section 44 committal

4.32 The magistrates' power to order a person's admission to hospital on committal to the Crown Court is amended in two ways. Firstly, the power at section 39 to require information from the appropriate PCT or LHB about the availability of suitable facilities is extended to section 44, where the offender is under the age of 18. Secondly, the evidence that arrangements have been made to admit the person to hospital can be given by the approved clinician who will be responsible for his treatment.

Section 45A hospital direction

4.33 The Court will need two medical reports confirming that the offender is "mentally disordered" to meet the conditions in section 45A(2)(a) for adding a hospital direction to a prison sentence. This provision was previously available only in respect of offenders suffering from psychopathic disorder. The effect of the change is that the Court can make a hospital direction in respect of any mentally disordered offender who has received a prison sentence, provided all the conditions in section 45A are met. Those conditions exclude sentences fixed by law.

4.34 The evidence that arrangements have been made for the offender's admission to hospital within 28 days, can now be given by the approved clinician who would have overall responsibility for his case.

5. The effect of different disposals

5.1 The following discussion of the hospital order, prison sentence and prison sentence with a hospital direction is offered to assist the Court's deliberations on the most appropriate disposal in the individual circumstances of each case, by explaining the practical implications of those disposals.

Hospital order

5.2 The implication of the unrestricted order is that the Court has decided against imposing any punishment, and does not see a need for any special restrictions to protect the public. The Court of Appeal described the effect in R v Birch (1989) 11 Cr.App. R.(S) 202, 210.

> *"Once the offender is admitted to hospital pursuant to a hospital order …without restriction on discharge, his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the Court nor the Secretary of State has any say in his disposal…"*

5.3 The offender becomes a patient to be managed at the discretion of his responsible clinician. He can be discharged at any time by the responsible clinician. The question informing a decision to discharge is whether the patient's disorder, and the risk arising from it, justifies his continuing detention for medical treatment. The order will lapse after six months, if it has not already been discharged, unless renewed by the responsible clinician. From the point where renewal is made, the patient is entitled to seek review of his detention by the Mental Health Review Tribunal (the Tribunal), as is the patient's nearest relative.

5.4 His responsible clinician may discharge him into the community subject to conditions, under a community treatment order. This order is described in sections 17A to 17G and 20A and 20B of the 1983 Act as amended. The community treatment order will include conditions that the patient be available to his care team as directed to ensure that he receives the treatment he requires, or for purposes of assessment. He may be recalled to hospital by his responsible clinician if that becomes necessary, to ensure that he receives the treatment he needs, for his own health and safety or for the protection of others. Like the hospital order, the community treatment order lapses after six months if not renewed, and can be lifted at any time by the responsible clinician or the Tribunal. Unless a community treatment order is made, discharge from hospital signals the end of any obligation on the patient to accept treatment. His responsible clinician, or the Tribunal, can discharge him absolutely at any time.

5.5 He can also apply for a discharge by the hospital managers. Hospital managers' reviews are in practice delegated to volunteers who may have no legal or clinical knowledge, but are nonetheless empowered to override the opinion of the responsible clinician. It is essential where doubt in relation to future risk exists at the time of a court disposal to make a restriction order, since otherwise a patient under a hospital order may be discharged without regard to the criteria which his clinical supervisor would have to apply.

5.6 The Tribunal has discretion to discharge the patient from hospital even where the criteria for detention are met, and must do so if it is not satisfied that he remains mentally disordered to a nature or degree which justifies his continuing detention in hospital for medical treatment; or if it is not satisfied that his detention is not necessary for his own health or safety or for the protection of others.

5.7 The Tribunal has no power to discharge subject to a community treatment order, so a Tribunal discharge invariably terminates an unrestricted hospital order absolutely.

Victims

5.8 Victims of offenders convicted of sexual or violent offences who receive unrestricted hospital orders have the right to be informed of pending decisions to discharge the patient, and to make representations. If a community treatment order is made, victims have the right to be told of any conditions imposed for their protection. The responsibility to keep them informed falls to hospital managers.

Restriction order

5.9 Where the Court adds a restriction order to a hospital order, it is still ordering treatment as a substitution for punishment. The distinction from the unrestricted order is that the Court has concluded, in the light of the circumstances of the offender and the offence, that decisions on liberty should not be left to clinical discretion. The patient's management will still be determined by clinical assessment of his mental disorder and the risks arising from it, but the Secretary of State for Justice becomes responsible for the risk assessment informing decisions to grant greater liberty and, consequently, for taking those decisions. (See paragraph 5.16 below on the functions of the Tribunal.)

5.10 The making of a restriction order has a number of significant effects on the hospital order.

5.11 It converts it into an order of indefinite duration. It does not require regular renewal to prevent it from lapsing, but remains in force indefinitely until it is discharged by the responsible clinician with the agreement of the Secretary of State under section 23, by the Secretary of State under section 42 or by the Tribunal under section 73 or 75 of the 1983 Act.

5.12 Nearest relatives have no powers in respect of restricted patients. Nor can a restricted patient be discharged by hospital managers, unless the Secretary of State for Justice agrees.

5.13 Restrictions relieve the responsible clinician of ultimate responsibility for protecting the public from further harm, by requiring him to obtain the Secretary of State's agreement to certain decisions. Section 41(3)(c) of the 1983 Act provides that the agreement of the Secretary of State is required before the patient can be given leave in the community, transferred to a different hospital or discharged into the community. (See paragraph 5.16 below for the role of the Tribunal.)

5.14 A restricted patient can be, and usually is, discharged into the community subject to conditions. This is to ensure that the patient continues to receive the medical treatment he needs, and to protect the public. He can be made subject to supervision by social and psychiatric supervisors who are charged with keeping the Secretary of State informed of his progress and behaviour in the community. The patient can be recalled to hospital by the Secretary of State at any time if he decides it is necessary for the protection of the public, and provided he has current medical evidence of mental disorder. A duty officer from Mental Health Casework Section is available at all times to respond to concerns from the supervisors of conditionally discharged patients, so that recall does not have to await normal working hours. In terms of protecting the public from repeat serious offending, the restricted hospital order has proved statistically at least as effective as the life licence, for as long as it remains in place.

5.15 The conditionally discharged patient remains liable to detention in hospital, and consequently to recall, unless and until the Secretary of State lifts his restrictions under section 42(1), or until the Tribunal orders absolute discharge from his restrictions under section 75 of the 1983 Act.

5.16 The role of the Tribunal is to protect the patient from arbitrary detention. It is required to order the discharge of the patient if not satisfied that the nature or degree of his disorder, on the day of the hearing, justifies his liability to detention in hospital. Unlike applications from unrestricted patients the Tribunal has no general discretion to discharge if it finds the criteria for detention are met. The Tribunal cannot sanction continuing detention of the patient simply because he is dangerous. A result of the Tribunal's function is that a restricted hospital order will be absolutely discharged in the great majority of cases well within the offender's lifetime, when his mental disorder is assessed as insufficiently serious to justify continuing liability to detention. Unlike the life or indeterminate sentence, a restricted hospital order is not, therefore, a device which can invariably protect the public from further harm for the offender's lifetime. Restrictions can, however, remain in place for as long as all parties, including the Tribunal, assess that they are necessary in the light of risk arising from the offender's mental disorder.

Naming a hospital unit

5.17 Where the Court makes a restriction order, it acquires a discretionary power to direct that a restricted patient be detained in hospital at a level of security the Court deems necessary to ensure protection of the public. Section 47 of the Crime (Sentences) Act 1997 provides that the Court can name a hospital unit when directing admission of a restricted patient to hospital under a hospital order or a hospital direction.

5.18 This power responds to the situation that the majority of hospital trusts manage accommodation ranging from medium secure to locked wards or unlocked wards. Thus a hospital order directing admission to a Primary Care Trust or an NHS Trust in Wales or a major psychiatric hospital, gives to hospital managers discretion over the level of security under which the patient is detained, from the day of his admission. The Court may wish to specify a level of security if the offender has been found to present a risk of serious harm to others, where he presents a serious escape or abscond risk, or where his hospital admission is attached to a life, or indeterminate sentence under a hospital direction (see paragraphs 5.29 and 5.30 below).

5.19 A hospital unit can be any unit of an individual hospital which the Court chooses to name. The intention is that it should be a ward or secure unit which offers a specific level of security, so that in naming it, the Court is directing the offender's detention under that category of security. If the Court does not have adequate knowledge of the levels of security available in the hospital to which it wishes to order admission, section 39 can serve to acquire that information. Clinicians who would be responsible for the patient's care are likely to be ready to advise the Court on the naming of hospital units, but discretion lies with the Court.

5.20 The practical effect of naming a hospital unit is that the Secretary of State's authority is required to move the offender to a different level of security, whether in a different hospital or the one to which the offender was admitted. The responsible clinician for a restricted patient will otherwise have discretion to give the patient leave to the grounds of the hospital in which he is detained. That generally means allowing the patient into grounds which are not secure. Naming a hospital unit allows the Court to require that the patient be detained under the level of security it deems appropriate. For example, if a medium secure unit is named, the patient cannot be allowed into the insecure grounds of the hospital which contains the unit, without the Secretary of State's authority. The Secretary of State can agree, in due course, to remove the requirement to detain within a named unit, allowing the offender to be managed more flexibly within the hospital. This would happen after a risk assessment had concluded that the offender's management could safely be managed without the constraints of a named unit.

Victims

5.21 Victims of offences for which the convicted offender receives a restricted hospital order have similar rights to information about deliberations on discharge, and conditions for their protection, as those where the offender receives an unrestricted hospital order. However, responsibility for advising the victims remains with the Victim Liaison Officer ('VLO') of the appropriate local probation services. The Tribunal or the Secretary of State, if considering discharge, is responsible for informing the VLO. Conditions prohibiting contact with the victim can be included in the list of conditions of discharge. Victims will also be informed if the offender is absolutely discharged, at which point responsibility to inform the victim ceases.

Discussion of relative merits of the disposals

5.22 The Court is required by section 157 of the Criminal Justice Act 2003 to consider a medical report on a mentally disordered offender before passing a custodial sentence, other than one fixed by law. However, whilst case law indicates that the hospital order is the right disposal where the Court has heard the necessary medical evidence of the offender's mental state at the time of sentencing, section 37 of the 1983 Act gives wide discretion to do otherwise, requiring only that the Court is of the opinion that it is "the most suitable method of disposing of the case".

5.23 The sequence of the Court's structured approach to the decision being made is described in R v Birch (see 5.2 above).

> *"First he (the Judge) should decide whether a period of compulsory detention is apposite. If the answer is that it is not, or may not be, the possibility of a probation order with a condition of in- or out- patient treatment should be considered."*

Under the Criminal Justice Act 2003, the relevant disposal following that conclusion would now be a community order under Part 12 of that Act, with a mental health treatment requirement under section 207. This disposal is only available where medical evidence finds that the offender's disorder is not such as to warrant the making of a hospital order.

> *"Secondly, the judge will ask himself whether the conditions contained in section 37(2)(a) for the making of a hospital order are satisfied. Here the judge acts on the evidence of the doctors. If left in doubt, he may wish to avail himself of the valuable provisions of sections 38 and 39 (which are not used as often as they might be) to make an interim hospital order……and to require the Health Authority to furnish information on arrangements for the admission of the offender. If the judge concludes that the conditions empowering him to make an order are satisfied, he will consider whether to make*

such an order, or whether 'the most suitable method of disposing of the case' (s37(2)(b) is to impose a sentence of imprisonment."

5.24 The Court of Appeal went on to discuss what factors might lead to the conclusion that a prison sentence was "the most suitable method of disposing of the case". It found two types of circumstances:

i) If the offender is dangerous and no suitable secure hospital accommodation is available and

ii) where the sentencer considers that notwithstanding the offender's mental disorder there is an element of culpability in the offence which merits punishment. This may happen where there is no connection between the offender's mental disorder and the offence, or where the defendant's responsibility for the offence is 'diminished' but not wholly extinguished.

The power to make a hospital order, however, is not determined by the question of criminal responsibility, which question will be dealt with by the conviction. Unless the conviction is for murder, section 37 gives the Court discretion, "having regard to all the circumstances" to make the disposal which appears to be "the most suitable method of disposing of the case".

R v Birch remains an apt description of the Court's options, except that, since the Court of Appeal's ruling (1989), the Court has acquired the further option of adding a hospital direction to a prison sentence (see paragraphs 5.29 and 5.30 below). The Government's intention is to give the Court the fullest possible flexibility to respond to the needs both of the offender to receive treatment, and of the public to be protected from further serious harm.

5.25 In assessing the availability of appropriate facilities for purposes of section 37(2)(a), the courts may wish to use the powers at section 39 to require the relevant PCT or LHB to inform them.

Prison sentence

5.26 A sentenced prisoner can be transferred to hospital for treatment by warrant of the Secretary of State at any time during sentence, if two medical reports confirm that he is suffering from mental disorder and that detention in hospital for treatment is appropriate. A prison sentence does not, therefore, automatically deprive the offender of treatment during his sentence. (See also paragraphs 5.29 and 5.30 below for the Court's power to combine a prison sentence with hospital treatment.)

5.27 Decisions on the release of the transferred prisoner will continue to be governed by his tariff. The Tribunal can only recommend discharge, and not order it, until the prisoner reaches his release date. The result of a Tribunal recommendation for discharge before release date will usually

be a return to prison to complete the sentence. The responsible clinician can recommend to the Secretary of State that the prisoner no longer needs detention in hospital for treatment. The Secretary of State will normally then use his power at section 50 of the 1983 Act to return the prisoner to prison to complete his sentence.

5.28 A determinate sentence prisoner, if still in hospital on his release date, will be managed as a civil patient, at the discretion of his responsible clinician. A life sentence, or imprisonment for public protection, entails supervision for life. Whether or not the prisoner is subsequently transferred to hospital, his release will be determined by the Parole Board exclusively on the basis of the risk he may continue to pose. His release will be under licence, and he can be recalled to resume his prison sentence at any time, in the event of dangerous or offending behaviour.

Hospital direction

5.29 The hospital direction enables the Court to combine the effects of an order for treatment in hospital with the tariff associated with a prison sentence. Under the Act, the Court can add a direction to hospital to a prison sentence if it has also heard evidence which would justify making a hospital order. The hospital direction was introduced in the Crime (Sentences) Act 1997 to enable the Court to deal with cases where it concluded that a prison sentence was necessary to protect the public, but where medical evidence indicated that appropriate treatment was available in hospital. Under the 1997 Act, a hospital direction could only be made for offenders categorised as psychopathically disordered. Under the 2007 Act, there is no sub-categorisation of mental disorder, and a hospital direction is available in respect of any offender who receives a prison sentence, except where the sentence is fixed by law.

5.30 A prisoner subject to a hospital direction will subsequently be managed exactly as if he had been transferred to hospital after sentence by the. Secretary of State. He can be transferred to prison by the Secretary of State at any time, on the responsible clinician's advice that his detention in hospital for treatment is inappropriate. His release will be determined by his sentence, as if no hospital direction had been made. The Tribunal can recommend, but cannot order his discharge, under section 74. If his sentence is determinate, he may be detained in hospital as if a civil patient, if he is still there after his release date. If he has an indeterminate sentence, his release will be determined by the Parole Board once his tariff is served. He will be released on life licence and subject to recall to prison.

5.31 In selecting a disposal, the Court may be seeking to balance the offender's treatment needs with the long term protection of the public from further harm. A summary table of the implications of each disposal is at Annex A. In sum, except where the conviction is for an offence for which the penalty is fixed by law, the Court has discretion under the 1983 Act as amended to:

i.) divert the offender from punishment by way of a hospital order, and if it does so,

- delegate decisions on management and discharge to the care team on clinical criteria, (unrestricted hospital order under section 37), or
- require the Secretary of State to oversee the risk management of the case for the protection of the public, (restriction order under section 41).

Or to:

ii.) pass the prison sentence indicated by the offence and either,

- rely on the Secretary of State's power to direct transfer to hospital for treatment, or
- use its own power to direct treatment by adding a hospital direction.

5.32 If in doubt about the relative merits of the above options for an offender, the Court may wish to use section 38 to make an interim hospital order. That power permits assessment by the Court for up to twelve months of the effects of treatment in hospital. It was drafted to enable the Court to inform itself on, and assess the merits of a hospital disposal, when they are not clear at the time of conviction.

6. Criminal Procedure (Insanity) legislation

2.1 Mental Health Act disposals are also available to the Court where it has made a finding under the Criminal Procedure (Insanity) legislation, as amended by the Domestic Violence, Crime and Victims Act 2004.

3.1 The 2004 Act amends the Criminal Procedure (Insanity) Act 1964 to provide that the Court which has made a finding of not guilty by reason of insanity or unfitness to plead may make a hospital order where it has the necessary medical evidence. That evidence is the same as that at section 37 of the 1983 Act except that the hospital does not have to have identified an available bed. This distinction is deliberate and reflects the point that, because the finding is not a conviction, the Court cannot make a prison sentence as an alternative to a hospital order. Its only alternatives are a supervision order or an order for absolute discharge, neither of which may be appropriate where an offender is in need of detention in hospital for treatment.

4.1 It is nonetheless good practice for the appropriate hospital managers to be given the maximum possible notice of the Court's intention to make such an order, particularly where the defendant is not already remanded in a hospital. Section 39 may serve for this purpose. Whilst mental health services do not have the option of declaring that no suitable bed is available in these cases, they nonetheless need notice of a potential order, to enable preparations to be made to receive the patient.

5.1 When making a hospital order as a disposal following an unfitness or insanity finding, the Court has the same discretion to add restrictions as when doing so on conviction. Where the finding is in respect of an offence for which the sentence is fixed by law, the Court must make a hospital order with restrictions if it has the requisite evidence under section 37, as amended. The Court's disposal options are set out in detail in Home Office Circular 24/2005.

Annex A: Decision making under the relevant disposal powers

	Unrestricted hospital order	Restricted hospital order	Determinate prison sentence	Indeterminate prison sentence
Decision on release	Clinical	SofS or tribunal	Release date	Parole Board
Criteria for release	Mental state and consequent risk	Mental state and consequent risk	Automatic	Risk
Can it lapse?	Yes	No	Yes	No
Can it be discharged absolutely?	Yes	Yes	Yes	No