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Our reference: MNP/84 1/74/1

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11 September 1984

Judges of the Crown Court  
The Circuit Administrator  
The Courts Administrator  
The Chief Clerk to the Crown Court  
The Clerk to the Justices (with a copy for the  
Chairman of the Bench for the information of  
the Justices)  
Chief Officers of Police  
Chief Probation Officers

Sir

HOME OFFICE CIRCULAR NO 71/1984  
SECTIONS 35, 36, 38 AND 40(3) OF THE MENTAL HEALTH ACT 1983: IMPLEMENTATION

Home Office Circular No 69/1983 gave notice that the majority of the provisions of the Mental Health Act 1983 would come into effect on 30 September 1983. The exceptions to this were sections 35, 36 and 38, which give the courts powers to order remand to hospital for reports or for treatment and to make interim hospital orders, and the related section 40(3). The purpose of this Circular is to inform you that these sections will come into effect on 1 October 1984. A commentary on the provisions of these sections is given in the attached Annex which supplements that attached to HOC No 69/1983. Reference should also be made to the memorandum on the Act issued by the Department of Health and Social Security, a copy of which was enclosed with that circular.

I am Sir  
Your obedient Servant

R R G WATTS

PATIENTS CONCERNED IN CRIMINAL PROCEEDINGS OR UNDER SENTENCE  
PROVISIONS OF SECTIONS 35, 36, 38 AND 40(3)

Section 35: remand to hospital for report

Subsection (1) empowers the courts, subject to the other provisions of the section, to order the remand to hospital of an accused person for the preparation of a report on his mental condition. This provides an alternative to remanding the accused person in custody for a medical report, in circumstances where it would not be practicable to obtain the report if he were remanded on bail (for instance, if he decided to break a condition of bail that he should reside at a hospital, the hospital would be unable to prevent him from discharging himself).

2. Subsection (2) provides that the power applies in relation to the following categories of person:

(a) where the power is being exercised by the Crown Court, to any person who is awaiting trial before that court for an offence punishable with imprisonment or who is at any stage of such a trial prior to sentence (other than a person convicted of murder: see subsection (3));

(b) where the power is being exercised by a magistrates' court, to any person

(i) convicted of an offence punishable on summary conviction with imprisonment; or

(ii) charged with such an offence, if the court is satisfied that he did the act or made the omission charged or if he has consented to the exercise of the power.

3. Subsection (3), read in conjunction with section 54(1), provides that the power may be exercised only if:

(a) the court is satisfied, on the written or oral evidence of a registered medical practitioner, approved by the Secretary of State under section 12 as having special experience in the diagnosis or treatment of mental disorder, that there is reason to suspect that the accused person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and

(b) the court is of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail.

The power may not be exercised in respect of a person convicted of an offence for which the sentence is fixed by law (in practice, murder).

4. Subsection (4) requires that the court must be satisfied, on the written or oral evidence of the registered medical practitioner who would be responsible for making the report or some other person representing the managers of the hospital, that the patient will be admitted to hospital within 7 days beginning with the date of the remand. If the court is so satisfied it may, pending his admission, direct his detention in a place of safety as defined in section 55(1).

5. Subsections (5) and (7) together provide that the remand is in the first instance for up to 28 days, after which the accused person may be further remanded for periods of up to 28 days, but only:

(a) if it appears to the court, on the written or oral evidence of the registered medical practitioner responsible for making the report, that this is necessary for completing the assessment; and

(b) up to a maximum total period of 12 weeks.

The court may terminate the remand at any time.

6. Subsection (6) provides that the power of further remanding the accused person may be exercised by the court in his absence if he is legally represented and his representative is given the opportunity to be heard.

7. Subsection (8) provides that the accused person is entitled to obtain a separate medical report from a registered medical practitioner of his own choice, and at his own expense, and to apply to the court on the basis of it for his remand to be terminated.

8. Subsection (9) provides that where an accused person is remanded under this section, the court shall direct a constable (or any other person chosen by the court) to convey the accused person to the hospital specified in the order within the period mentioned in subsection (4), and that the court shall entrust responsibility for his admission, detention and reappearance in court to the managers of the hospital.

9. Subsection (10) provides that if the accused person absconds, he may be arrested without warrant by any constable and is then to be brought before the court that remanded him, which may thereupon terminate the remand and deal with the accused person in any way in which it could have dealt with him if he had not been remanded to hospital; but there is nothing to prevent the court returning him to the hospital under the existing order for remand to hospital or a renewal of it.

#### Section 36: remand to hospital for treatment

10. Section 36 empowers the Crown Court to order the remand to hospital of an accused person for treatment. This provides an alternative to the Home Secretary's power under section 48 to transfer unsentenced prisoners to hospital in an emergency (see also paragraph 26 below).

11. Subsection (1) provides that subject to the other provisions of the section the power may be exercised only if the court is satisfied on the written or oral evidence of 2 registered medical practitioners, one of whom must be approved by the Secretary of State under section 12, that the accused is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment.

12. Subsection (2) provides that the power applies to a person who is in custody awaiting trial before the court for an offence punishable with imprisonment (other than murder) or who is in custody at any stage of such a trial prior to sentence.

13. Subsection (3) provides that the court must be satisfied on the written or oral evidence of the registered medical practitioner who would be in charge of the accused person's treatment, or of some other person representing the managers of the hospital, that the patient will be admitted to hospital within 7 days beginning with the date of the remand. If the court

is so satisfied it may, pending his admission, direct his detention in a place of safety as defined in section 55(1).

14. Subsections (4) to (8) of section 36 make similar provision in relation to remands to hospital for treatment as those made in relation to remands to hospital for reports by section 35(5) to (10). Accordingly, paragraphs 5 to 9 above also apply to remands to hospital for treatment under section 36, with the difference that since the purpose of the remand is the accused person's treatment rather than the preparation of a report on him, further remands depend on written or oral evidence from the responsible medical officer simply that a further remand is warranted; but the patient can still apply for the remand to be terminated on the basis of a medical report he has obtained himself.

#### Section 38 and Section 40(3): interim hospital orders

15. To assist the courts and the hospitals in determining whether it is appropriate to make a hospital order in respect of an offender, section 38 empowers the courts to make an interim hospital order so that the offender's response in hospital can be evaluated without any irrevocable commitment on either side to this method of dealing with the offender if it should prove unsuitable.

16. Subsection (1) provides that the power to make an interim hospital order applies to persons convicted before the Crown Court of an offence punishable with imprisonment (other than a person convicted of murder) and to persons convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, that is, to the same categories of persons in respect of whom hospital orders can be made except that, unlike hospital orders - see section 37(3) - a magistrates' court cannot make an interim hospital order in respect of an unconvicted person; and that the power may be exercised only if:

(a) the court is satisfied, on the written or oral evidence of 2 registered medical practitioners, one of whom must be approved by the Secretary of State under section 12, and one of whom must be employed at the hospital to be specified in the order (see subsection (3))

(i) that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and

(ii) that there is reason to suppose that the mental disorder is such that it may be appropriate for a hospital order to be made in his case.

17. Subsection (2) provides that where an offender is subject to an interim hospital order the court may make a hospital order in his case without his being brought before the court, provided that he is legally represented and his representative is given the opportunity to be heard.

18. Subsection (4) requires that the court must be satisfied, on the written or oral evidence of the registered medical practitioner who would be in charge of the offender's treatment, or of some other person representing the managers of the hospital, that the offender will be admitted within 28 days beginning with the date of the order. If the court is so satisfied it may, pending his admission, direct his detention in a place of safety as defined in section 55(1).

19. Subsection (5) provides that an interim hospital order may be made in the first instance for a period of up to 12 weeks, and may be renewed for further



periods of up to 28 days to a maximum total period of 6 months. The court may also terminate the interim hospital order after considering the written or oral evidence of the responsible medical officer, if it makes a hospital order or decides to deal with the offender in some other way.

20. Subsection (6) provides that the power of renewal of an interim hospital order may be exercised by the court in the absence of the offender if he is legally represented and his representative is given the opportunity to be heard.

21. Subsection (7) provides that if the offender absconds, he may be arrested without warrant by any constable and is then to be brought before the court that made the order, which may thereupon terminate the interim hospital order and deal with him in any way in which it could have dealt with him if the interim hospital order had not been made; but there is nothing to prevent the court deciding to return him to hospital under the interim hospital order.

22. Section 40(3) provides that where an interim hospital order is made the court shall direct a constable (or any other person chosen by the court) to convey the offender to the hospital specified in the order within the period mentioned in subsection (4) of section 38, and the court shall entrust responsibility for his admission, detention and reappearance in court to the managers of the hospital.

#### OPERATION OF THE NEW PROVISIONS: SPECIAL CONSIDERATIONS

##### Limitations on the courts' power to order remand to hospital for reports

23. The power of the courts to remand to hospital for a report on mental condition can be used in the same circumstances as their existing power to remand the defendant in custody or on bail for the purpose of obtaining medical reports. The discretion allowed to the courts to obtain reports by remanding the defendant to hospital will be more limited than that which they may exercise when remanding the defendant in custody or on bail for a medical report, in that section 35(3) requires the court to be satisfied on the evidence of a registered medical practitioner approved by the Secretary of State under section 12 that there is reason to suspect that the accused person is suffering from one of the four forms of mental disorder in respect of which a hospital order may be made. Section 35(4) further requires the court to be satisfied that a place in hospital will be available within 7 days.

24. The effect of these provisions is expected to be that the initiative for a remand to hospital will generally come either from the defendant's legal representative (who may already have taken steps to obtain the necessary evidence from an approved medical practitioner before suggesting to the court that remand to hospital might be appropriate) or from the medical officer of the prison to which the defendant has been remanded in custody at an earlier court appearance. Prison medical officers are being asked to explore the possibility of a remand to hospital in appropriate cases. Prison medical officers will of course continue to comply to the best of their ability with requests from the courts for medical reports on prisoners remanded in custody for that purpose.

25. If the court itself is considering the suitability of a remand to hospital and no prior arrangements with a hospital have been made, it will generally be necessary to adjourn the case so that the necessary medical recommendation can be sought and arrangements made for the defendant to be admitted to a hospital.

### Remand to hospital for treatment

26. Section 36 provides the Crown Court with an alternative to the procedure laid down by the Criminal Procedure (Insanity) Act 1964 of finding a defendant under disability ("unfit to plead"). The power in section 36 can be used in cases in which if the defendant could receive treatment in hospital for a period it might be possible to proceed with the full trial. The Crown Court may prefer in appropriate cases to proceed in this way rather than under the Criminal Procedure (Insanity) Act, under which the defendant would thereafter have to be detained as a restricted patient (which may not be appropriate in relation to the nature of the alleged offence).

27. The magistrates' courts will not be similarly empowered to order remand to hospital for treatment. However, such courts have the alternative, under section 37(3) of the 1983 Act, of making a hospital order in respect of a defendant charged but unconvicted, a power which has recently been clarified by the Divisional Court judgment in the case of R v Lincoln (Kesteven) Justices ex parte O'Connor ([1983] 1 WLR 335: [1983] 1 All E R 901).

### Interim hospital orders

28. The courts are already familiar with the procedure for making a hospital order, and the criteria for making an interim hospital order are identical, the advantage being that there is no irrevocable commitment to detention in a hospital by either the court or the hospital. This should facilitate the process of making a hospital order in appropriate cases. Section 39 of the Act, which requires Regional Health Authorities to provide assistance to the courts wishing to make a hospital order in finding hospital places (see paragraph 9 of Home Office Circular No 69/1983) applies also where the court wishes to make an interim hospital order. The same procedure for approaching the Regional Health authority should be used.

### Availability

29. It is important to appreciate that the availability of suitable facilities for the operation of the new provisions may be limited and uneven, especially at the outset, and accordingly it should not be expected that the full range of these services will immediately become available to every court. The provision of information on the development of the necessary resources will be a matter for local liaison.

## OPERATION OF THE NEW PROVISIONS: GENERAL CONSIDERATIONS

### Forms

30. The Lord Chancellor's Department has made arrangements for the supply of the necessary additional forms to the Crown Court (numbers 5034 A-F). The new powers, together with other changes necessary as a result of the provisions of the Act already in force, require amendments and additions to the Magistrates' Courts (Forms) Rules 1980. It is intended that shortly Forms Amendments Rules will be made and sent to magistrates' courts.

### Responsibility for returning the patient to court

31. The effect of a remand to hospital or an interim hospital order (like that of the transfer of a remand prisoner to hospital by direction of the Home Secretary under section 48 of the Act) is that the patient will remain

throughout under the jurisdiction of the court before which he was remanded to appear or committed for trial. It follows that responsibility for complying with any subsequent direction by that court for the production of the patient will rest with the managers of the hospital to which he has been admitted. Normally, therefore, it will fall to hospital staff to escort the patient to court. An exception may arise where the patient is very violent or dangerous, in which case the police may be asked by the hospital managers to assist. It is open to the court to renew a remand or an interim hospital in the patient's absence provided that the patient is legally represented and that his legal representative is present in court and is given the opportunity of being heard.

32. Once the patient has arrived at court the normal arrangements for the detention there of defendants remanded in custody should apply, and the Home Secretary would be grateful for the co-operation of the courts and of the police with members of hospital staff in this respect.

33. In cases where it appears likely that the accused person's trial may last for some time, the responsible medical officer or the managers of the hospital may advise the court of difficulty over producing him in court from the hospital each day and enquire whether in these circumstances the court would consider remanding the accused person in custody or on bail for the duration of the trial, after his initial production in court by the hospital. At this point the court would have power to order further remands in whatever manner it thinks appropriate.

Time spent on remand (or subject to an interim hospital order) counting towards subsequent sentence of imprisonment

34. In some cases the result of a remand to hospital or of an interim hospital order is likely to be that the court is advised not to make a hospital order in respect of the defendant, and that the court will then impose a sentence of imprisonment. In calculating dates of release from prison, time spent in hospital pursuant to the patient being remanded there by the court or as the subject of an interim hospital order is counted by the Prison Department towards any subsequent sentence of imprisonment for the purpose of section 67(1) of the Criminal Justice Act 1967 (computation of sentences).