Chapter 14

MENTAL DISORDER AT THE TIME OF THE TRIAL

14.01 *Introduction*
A. TRANSFER TO HOSPITAL OF UNSENTENCED PRISONERS
14.02 *The Basic Provisions*
14.03 *Duration of Transfer Direction*
14.04 *Proposals for Reform*
B. UNFITNESS TO PLEAD
14.05 *Terminology and Background*
14.06 *Who can raise the Issue of Disability*
14.07 *The Substantive Test to be Applied*
14.08 *Postponement of the Issue of Disability*
14.09 *Determination by a Jury*
14.09A *Finding that the Accused Did the Act or Made the Omission charged*
14.10 *Appeal*
14.11 *Powers to deal with Persons found Unfit to Plead*
14.12 *Proposals for Reform leading to the 1991 Act*
C. REMANDS TO HOSPITAL AND INTERIM HOSPITAL ORDERS
14.14 *Remand to Hospital for Report*
14.15 *Remand to Hospital for Treatment*
14.16 *Interim Hospital Order*

14.01 Introduction

Where a defendant is suffering from a substantial mental incapacity such that it would be legally improper for him to stand trial, there are procedures under the Mental Health Act 1983 and the Criminal Procedure (Insanity) Act 1964 which can prevent him from being tried. The Home Secretary under section 48 of the Mental Health Act is empowered, after receiving medical evidence, to transfer unsentenced prisoners to hospital. This will have the effect either of postponing the trial or preventing it from taking place. The Home Secretary exercised similar powers under the old Criminal Lunatics Act 1884 only where "it would not be practicable to bring him [the accused] before a court, or that trial is likely to have an injurious effect on his mental state". The basis for this practice as set out in the Report of the Royal Commission on Capital Punishment[1] is presumably still applicable: "that the issue of insanity should be determined by the jury whenever possible and the power of the Home Secretary should be exercised only when there is likely to be a scandal if the prisoner is brought up for trial".

---

[1] (1953) *Cmnd.* 8932, HMSO, London, para. 219.

Where the accused is brought up for arraignment or trial, he may be found to be unfit to plead under the Criminal Procedure (Insanity) Act 1964. In pursuance of section 4 of that Act, the issue of fitness to plead is determined not by the Home Secretary, but by a jury.

A. TRANSFER TO HOSPITAL OF UNSENTENCED PRISONERS

14.02 The Basic Provisions

Under section 48 of the Mental Health Act the Home Secretary is empowered by warrant to remove to hospital unsentenced prisoners.

The provision applies to:

(*a*) persons not serving a sentence of imprisonment who are in a prison or remand centre, not being a person falling within any of the following categories;
(*b*) persons remanded in custody by a magistrates' court;
(*c*) civil prisoners; and
(*d*) persons detained under the Immigration Act 1971 (s. 48(2)).

Categories (*a*)–(*d*) together are intended to cover all unsentenced prisoners.

14.02.1 *Grounds and Procedures*

The Home Secretary must be satisfied by reports of at least two registered medical practitioners (one of whom must be approved under section 12 (s. 54(1)) that the person is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and that he is in urgent need of such treatment. There is no power to transfer an unsentenced prisoner who is suffering only from psychopathic disorder or mental impairment, for these disorders are not considered sufficiently serious to justify removal to hospital before sentencing. The concept of "urgent need" was introduced in the Mental Health (Amendment) Act 1982 (s. 23(2)) to indicate that section 48 is intended to be an emergency procedure to be invoked only where there is an urgent need for hospital treatment which the prison cannot provide.[1] A transfer direction must specify the form or forms of mental disorder which, based upon the medical reports, the patient is found

[1] While the Mental Health (Amendment) Act 1982 introduced the wording "urgent need" the concept was applied in practice under the 1959 Act. Otherwise any person likely to be made subject to a hospital order could have been transferred to hospital before trial, thus anticipating the remand to hospital provisions (see paras. **4.14** and **4.15** below). In fact, the papers on the 1959 Act reveal that the words "urgent need" were intended to be in the 1959 Act but were omitted in error!

by the Home Secretary to be suffering. He cannot make a direction unless the patient is described in each report as suffering from the same form of disorder, whether or not he is also described as suffering from another form. A transfer direction ceases to have effect unless the prisoner is actually admitted to the hospital specified in the direction within 14 days of the date it is given (s. 48(3)).

14.02.2 *Effect of transfer direction*

A transfer direction has the same effect as a hospital order (s. 48(3)). The Home Secretary **may**, if he thinks fit, by warrant further direct that the person is to be subject to restrictions on discharge (called a "restriction direction"). But where a transfer direction is made in respect of any person who falls within category (*a*) or (*b*) in paragraph **14.02** above, the Home Secretary **must** make a restriction direction.

14.03 Duration of Transfer Direction

14.03.1 *Persons detained in prison or remand centre*

Section 51 of the Act contains further provisions as to patients detained under category (*a*)—*i.e.*, unsentenced persons detained in prison or remand centre, other than a person falling within any of the other categories. Such a person is referred to in the Act as a "detainee" (s. 51(1)). Category (*a*) is a widely inclusive category. For the most part it relates to persons committed in custody awaiting trial, judgment or sentence in the Crown Court, but also includes other unsentenced prisoners not covered by categories (*b*)–(*d*)[1] All persons in category (*a*) given a transfer direction will invariably be detained in hospital subject to restrictions on discharge.

The transfer direction has no fixed limit of time. It can be terminated in the following ways. First, the **Home Secretary** has the power, at any time before the case is disposed of by the court,[2] by warrant to direct that the detainee be remitted to any place (*e.g.* back to the prison or remand centre) where he might have been detained if he had not been removed to hospital. He will then remain there to be dealt with as if

[1] Section 73(2)(*a*)–(*c*) of the 1959 Act (repealed) was thought to be insufficiently comprehensive to cover persons before the Crown Court without having been committed by a magistrates' court—*e.g.*, where proceedings were commenced by a voluntary bill of indictment.

[2] The words "disposed of by the court" replace "brought before the court" in the 1959 Act. The words in the 1959 Act caused difficulty because prisoners awaiting trial in the Crown Court are often brought before the court to plead and, if they plead not guilty, are further committed in custody to await trial. Where a transferee is brought before the the Crown Court from hospital and, after pleading not guilty, is returned to hospital, the Home Secretary technically lost the power to remit him to prison even if he no longer required treatment. The new words enable the Home Secretary to remit to prison a person who no longer requires treatment until his case is finally disposed of by the Crown Court.

he had not been transferred to hospital and the transfer direction ceases to have effect. Before remitting the person back to a place where he could have been kept, the Home Secretary must first receive notification that the detainee no longer requires treatment in hospital for mental disorder; or that no **effective** treatment for his disorder can be given at the hospital.[1] The Home Secretary can receive such notification from the responsible medical officer, any other registered doctor or a Mental Health Review Tribunal (s. 51(3)).[2] It is to be observed that the statutory provision envisages an urgent need for effective treatment for mental disorder. It does not countenance the use of the transfer provision where humane care is the only objective or where treatment is only for a physical illness.

The **court** also has the power to remit the detainee back to prison or other place where he might have been detained, or to release him on bail; the effect is the cessation of the transfer direction. The court must apply the same criteria as the Home Secretary (*i.e.* the detainee no longer requires treatment or that no **effective** treatment can be given). The court can act only after receiving written or oral evidence from the responsible medical officer (not the tribunal or another doctor) (s. 51(4)).

Finally, the transfer direction ceases to have effect once the court has disposed of the detainee's case. However, this does not prevent the court, if it has power to do so, from making a hospital order (s. 51(2)). If the detainee is still in hospital (*i.e.*, no direction has been given by the Home Secretary or the court to remit him back to prison) then the court is empowered to make a hospital order (with or without restrictions) in his absence; if the person has been in custody awaiting trial, the court can make a hospital order without convicting him. It must first appear to the court that it is impracticable or inappropriate to bring him before the court (s. 51(5)). The court must also be satisfied, on the written or oral evidence of at least two registered medical practitioners (one of whom must be approved under section 12, see para. **6.17.5** *ante*), that the person 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. The court must be of the opinion, after considering any depositions or other documents, that it is proper to make such an order (s. 51(6)). Thus, if

---

[1] This extends the grounds on which the Home Secretary could remit a transferee to prison under the 1959 Act. It may be that the person still requires treatment for his mental disorder, but he can be remitted if the hospital cannot **effectively** provide that treatment.

[2] This extends the number of persons who may notify the Home Secretary in order to "trigger" his discretionary authority to remit a transferee back to prison. In particular it takes into account the possibility that an unsentenced prisoner will make an application to a Mental Health Review Tribunal (see para. **18.17** *post*). The Home Secretary may remit to prison any patient transferred to hospital with restrictions if a tribunal has notified him that the patient is suitable for absolute or conditional discharge (s. 74).

the court is to make a hospital order in the absence of the person and, in the case of a person awaiting trial, without convicting him it must find that he is suffering from a major form of mental disorder. This is without prejudice to the power of the court to bring the person before it and to make a hospital order under section 37 after conviction.

In sum, the transfer direction will eventually cease to have effect in any of the following ways:

(*i*) on arrival of the person remitted to prison etc by the **Home Secretary** on notification of the RMO, any other doctor or a tribunal that the person no longer requires treatment for mental disorder or that no effective treatment can be given (s. 51(3)); or

(*ii*) on arrival of the person remitted to prison etc or his release on bail by the **Crown Court** on evidence by the RMO to the same effect as in (*i*) above (s. 51(4)); or

(*iii*) on the Crown Court making a hospital order in his absence on evidence of two doctors that he is suffering from a major form of mental disorder which makes it appropriate for him to be detained in hospital for treatment (s. 51(5)(6)); or

(*iv*) on disposal of the case by the Crown Court, which can if it is appropriate, make a hospital order, with or without restrictions, in the usual way (s. 51(2)).

14.03.2 *Persons remanded by the Magistrates' Court*

Section 52 of the Act contains further provisions as to persons under category (*b*) referred to in para. **14.03**—*i.e.*, persons transferred to hospital while remanded in custody by a magistrates' court—referred to as "the accused" (s. 52(1)). All persons in category (*b*) given a transfer direction will invariably be detained in hospital subject to restrictions on discharge.

The transfer direction ceases to have effect on the expiration of the remand, unless the accused person is committed in custody to the Crown Court for trial or to be otherwise dealt with (s. 52(2)). The power to further remand the accused under section 128 of the Magistrates' Court Act 1980 may be exercised without him being brought before the court (s. 52(3)); but he must have appeared before the court within the previous six months (s. 52(4)). The effect of these provisions is that the magistrates' court can further remand the accused person in his absence, and if the court further remands him in custody the transfer direction continues in force. This covers the case where the magistrate would prefer to postpone the continuation of the proceedings in the hope that the patient will recover sufficiently to be brought before the court. The transfer direction also continues in force where the accused

is committed in custody to the Crown Court for trial, for sentencing or for the making of a restriction order (see s. 43).

The magistrates' court has the power to direct that the transfer direction will cease to have effect, even if the period of remand has not expired or the accused is committed to the Crown Court. The magistrates' court must be satisfied, on the written or oral evidence of the responsible medical officer (defined at para. **6.17.1** *ante*) that the accused no longer requires hospital treatment for mental disorder; or that no **effective** treatment for his disorder can be given in that hospital (s. 52(5)). After the magistrates' court directs that the transfer direction should cease to have effect, the transferee will be remanded in custody, or on bail, or committed to the Crown Court.

If the accused is committed to the Crown Court, and the magristrates' court has not directed that the transfer direction should cease to have effect, section 51 (see para. **14.03.1** above) applies as if he were a person falling within category (*a*) above (s. 52(6)).

The magistrates' court may, in the absence of the accused, inquire as examining justices into the offence with which he is charged, and commit him to the Crown Court for trial under section 5 of the Magistrates' Court Act 1980. This provides the magistrates with a means of sending cases to the Crown Court where the accused could, for example, be dealt with, if appropriate, under the Criminal Procedure (Insanity) Act 1964.[1] The court must first be satisfied, on the written or oral evidence of the responsible medical officer that the accused is unfit to take part in the proceedings. The accused must be represented by counsel or a solicitor (s. 52(7)). It sometimes occurs that prisoners transferred to hospital while remanded in custody by a magristrates' court remain in hospital for a considerable period awaiting committal to the Crown Court because the magistrates take no steps to start the committal proceedings. One reason for such a delay is that the court is informed that the transferee is not fit to appear in court.

Under the 1959 Act (s. 77(4)) where a transfer direction ceased to have effect the accused was automatically made liable to further detention as if he had been admitted for treatment under the civil provisions of the Act. This provision has now been repealed so that where a transfer direction ceases to have effect the person will not automatically be liable to detention in hospital. If such detention is considered necessary, the provisions of Part II of the 1983 Act must be complied with in full.

---

[1] The magistrates' court cannot make a finding of unfitness to stand trial under the Criminal Procedure (Insanity) Act 1964 but can send the case to the Crown Court where the issue of fitness can be put to the jury. The magistrates can make a hospital order without recording a conviction even where the defendant cannot consent to a summary trial. See further para. **15.05** *post*.

In sum, the further provisions relating to the transfer to hospital of persons remanded by the magistrates' court are:

(*i*) The transfer direction ceases at the expiration of the period of remand, unless the person is committed to the Crown Court for trial, sentencing or for a restriction order to be made (s. 52(2));

(*ii*)The accused can be further remanded in his absence (s. 52(3)) but must have appeared before the court within the previous six months (s. 52(4));

(*iii*) The magistrates' court can terminate the transfer direction and remit the accused to prison if satisfied, on the written or oral evidence of the responsible medical officer, that he no longer requires treatment for mental disorder or that no such effective treatment can be given (s. 52(5));

(*iv*) The magistrates' court can conduct committal proceedings in the absence of the accused if satisfied, on the oral or written evidence of the RMO, that the accused is unfit to take part and if he is legally represented (s. 52(7)).

14.03.3 *Civil Prisoners and Persons Detained under the Immigration Act 1971*

Section 53 contains further provisions affecting persons under category (*c*) or (*d*) referred to in para. **14.03** above—*i.e.*, civil prisoners and persons detained under the Immigration Act 1971. (The latter is the statutory provision under which persons are held in custody pending deportation.) Persons in either of these categories can be transferred with or without a restriction direction as the Home Secretary may direct. The transfer direction ceases to have effect on the expiration of the period during which the person would, but for his transfer to hospital, be liable to be detained in the place from which he was removed.

The Home Secretary may remit a transferee, who has been made the subject of a restriction direction,[1] to any place where he might have been detained if he had not been removed to hospital. The Home Secretary must first be notified by the responsible medical officer, any other registered medical practitioner, or a Mental Health Review Tribunal that the person no longer requires treatment in hospital for mental disorder, or that no such **effective** treatment can be given in the hospital. When a person is remitted back to a place where he could

[1] Prior to the 1983 Act a civil prisoner or person detained under the Immigration Act 1971 could not, once they were transferred, be remitted by the Home Secretary to a place where they could have been detained. While the Home Secretary now has this power where a restriction direction has been made, he does not appear to have it in cases where the transferee is not subject to a restriction on discharge.

have been detained then the transfer direction ceases to have effect. If a transferee is still detained in hospital when his normal liability to detention would have expired, he will no longer continue to be detained in hospital; the ordinary procedures and criteria for compulsory admission under Part II of the Act would have to be used for that purpose.

14.04 Proposals for Reform

MIND and NACRO have criticised the provisions for transfer of unsentenced prisoners because a restriction order can be imposed by the Home Secretary with relatively few safeguards. Firstly, the provisions enable persons to be kept in the hospital to which they have been transferred for substantial periods of time, subject to the serious consequences of a restriction order, without any determination having been made by a court that they actually committed the offence. Secondly, in certain circumstances, the Crown Court may dispose of the case of a person who is unfit to appear in court by making a hospital order, with or without restrictions, in his absence and without having arrived at any findings of fact as to whether he committed the criminal act for which he is charged. The White Paper on the Mental Health Act accepted that these were unsatisfactory features of the law,[1] but there is no current intention to reform the law accordingly.

B. UNFITNESS TO PLEAD

14.05 Terminology and Background

A person who is unable to plead or to take part in the proceedings of a trial can be excused from pleading or standing trial. The marginal note to section 4 of the Criminal Procedure (Insanity) Act 1964[2] refers to this as a finding of "unfit to plead" but the text of the statutory provision refers to an accused person being under a "disability" in relation to the trial.[3]

The law relating to unfitness to plead was transformed with the passage of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.[4] The Act has two main purposes as described in the Parliamentary

---

[1] DHSS *et. al* (1978) *Review of the Mental Heath Act 1959*, Cmnd. 7320, HMSO, London, paras. 5.52–5.58.

[2] Substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 2.

[3] The Committee on Mentally Abnormal Offenders (1975; Butler) Cmnd. 6244, para. 10.2, recommended that the terminology "under disability in relation to the trial" should be adopted.

[4] The 1991 Act was implemented on 1st January 1992. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (Commencement) Order 1991, No. 2488 (C. 72). The 1991 Act is described in detail in Home Office Circular No. 93/1991.

debates.[1] First, there is a requirement for the first time for the Crown Court to hold a trial of the facts to determine if the accused person did the act or made the omission charged. The trial of the facts that follows a finding of unfitness to plead looks only at the facts of the case – i.e. the actus reus element of the element. It does not consider the criminal intent of the person – i.e. the mens rea element of the offence. If intent is not established by the prosecution at the end of the presentation of its case, the court has the opportunity to acquit the person.[2] After the trial of the facts, if the court is satisfied that the accused committed the act or make the omission charged, it will make a finding to that effect. Such a finding is not the same as being convicted of the offence since no criminal intent was established.

The second major purpose of the 1991 Act is to provide the Crown Court with a wider range of options for disposal of the case. Before the 1964 Act was amended, the court had no choice but to make a hospital order with restrictions without limit of time. The 1991 Act provides the court with wide discretion in dealing with a person found unfit to plead. Except in cases where the person was charged with murder,[3] the court can make a hospital order with or without restrictions on discharge, a guardianship order, a supervision and treatment order, or an order for absolute discharge.

14.06 Who Can Raise the Issue of Disability?

Section 4(1) refers to the issue of disability arising "at the instance of the defence or otherwise. . .". The issue arises whenever before arraignment[4] the prosecution or the defence informs the judge that there is a preliminary question as to whether the accused person is unfit to plead, or if the judge decides that he should raise the issue. The judge should raise the issue if he has any doubts about the fitness of the accused person; he may resolve his doubts by reading the medical reports, but it is undesirable for him to hear medical evidence.[5]

14.06.1 *Burden of Proof*

The burden of proof in establishing unfitness to plead rests with the party that alleges the disability. Where the question is put forward by the defence, it carries the onus of proof by a balance of

[1] Official Report, 19 April 1991, p. 729; Official Report, 1 March 1991, p. 1271, 1278–79.

[2] Id., at 726.

[3] If the person was charged with murder the court must make a restriction order without limit of time following a finding that the person is under a disability and committed the act or made omission charged.

[4] An arraignment is when the accused person is called to the bar of the court by name. He is read the substance of the indictment and asked whether he pleads guilty or not guilty.

[5] *R. v. McCarthy* [1967] 1 Q.B. 68.

probabilities.[1] Where the question is raised by the prosecution, it carries the onus of proof beyond a reasonable doubt.[2]

14.07 The Substantive Test to be Applied

Section 4(1) does not state the substantive test to be applied to determine whether the person is unfit to plead: the disability in relation to the trial is "any disability such that apart from this Act it would constitute a bar to his being tried. . .". This would include **any** disability (including inability to communicate with legal advisers) if at common law it operated to bar the trial.[3] The disability is the one which previously had been dealt with in the Criminal Lunatics Act 1800, Section 2.[4] The test was enunciated in *Pritchard*[5] which put three points to the jury: (1) whether the accused person is mute of malice (*i.e.*, he **refused** to plead) or mute by visitation of God (*i.e.*, deaf and **unable** to speak); (2) whether he is able to plead; (3) whether he is sane or not and, in particular, whether he is of sufficient intellect to comprehend the course of the proceedings in the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of the evidence.[6] The mere fact that the accused person could not conduct his case "properly" or is "incapable of acting in his best interests" is insufficient for the jury to find the person unfit to plead.[7]

The test in *Pritchard* is quite precise and is not synonymous with statutory or medical definitions of mental disorder. Even if the accused person would be the proper subject of compulsory admission to hospital, he is not necessarily under a disability in relation to the trial; he may still be able to follow the proceedings of the trial and therefore be fit to stand trial. Further the fact that a person cannot hear or speak is not of itself sufficient to find him unfit to plead; he may still be capable of pleading and standing trial and of understanding and following the proceedings.[8] A deaf mute who is unable to communicate at all is under a disability. However, this could not be extended "to include persons who are mentally normal . . . and are perfectly capable of instructing

[1] *R. v. Podola* (1960) 43 Cr. App. R. 220

[2] *R. v. Robertson* (1968) 52 Cr. App. R. 690, at 596.

[3] *R. v. Burles* (1969) 54 Cr. App. R. 196, C.A. There is Crown Court authority that if the jury find the accused person is unable to communicate with his legal advisers, he should be found unfit to plead. *R. v. Sharp* (1957) 41 Cr. App. R. 86 (Salmon, J.).

[4] See *R. v. Robertson* (1968) 52 Cr. App. R. at 692; and para. **1.03.3** *ante*.

[5] (1836) 7 C. & P. 303; approved in *R. v. Berry* (1876) 1 Q.B.D. 447; *R. v. Governor of Stafford Prison, ex parte Emery* [1909] 2 K.B. 81; and *R. v. Robertson* (1968) 52 Cr. App. R. at 694.

[6] H.M. Judges recommended to the Butler Committee, *op. cit.*, para. 10.3, that the reference to challenging a juror should be omitted and two further criteria should be added: whether he can give instructions to his legal advisers, and plead with understanding to the indictment.

[7] *R. v. Robertson* (1968) 52 Cr. App. R. at 694.

[8] *R. v. Governor of Stafford Prison, ex parte Emery* [1909] 2 K.B. 81.

their solicitors as to what submission their counsel is to put forward. . .".[1] Other forms of disablement also do not necessarily place the person under a legal disability in relation to the trial. For example, neither hysterical amnesia (where the person has no memory of the events surrounding the alleged crime) nor persecution mania (where the person is unable properly to act in his own interests at the trial)[2] constitutes in itself a sufficient basis for a finding of unfitness to stand trial. The finding of disability apparently turns upon the **capacity** of the accused person to comprehend the deliberations of the court; the **content** of the defence—*i.e.*, whether he can put up a good defence—is not relevant for this purpose. A person's disability may handicap the defence, but this does not operate to bar the trial.

14.08 Postponement of the Issue of Disability

Prior to the 1964 Act the issue of disability had of necessity to be decided before arraignment. If the jury found unfitness to plead, then the court had to make an order detaining the accused person at H.M. Pleasure.[3] Devlin, J. in *Roberts*[4] said that this might result in "the grave injustice of detaining as a Broadmoor patient [defined at para. **1.03.1** *ante*] a man who was quite innocent. . .". One of the main objects of the 1964 Act was to enable the accused person to avoid indefinite detention where the defence was in a position to destroy the case for the prosecution.

Section 4(4) of the 1964 Act maintains the general principle of the issue of unfitness to plead by requiring it to be determined "as soon as it arises". (If it is decided by the jury that the accused person is unfit to plead the trial proceeds no further.) However, this is subject to section 4(2) which allows the court to postpone consideration of the question until any time up to the opening of the case for the defence. This means that the court may require the prosecution to deploy its case, and the defendant will be acquitted by decision of the judge if the prosecution case is insufficient to be left to the jury. If the judge does put the case to the jury before the person's fitness to be tried is determined, and the jury return a verdict of acquittal, the question of the person's fitness to be tried will not be determined (s. 4(3)).

The criterion in section 4(2) to be applied in exercising the court's discretion to postpone the determination of the question of disability is "having regard to the nature of the supposed disability the court is of the opinion that it is expedient . . . and in the interests of the accused". The general principle is that if there are reasonable chances

---

[1] *R. v. Podola* [1960] 1 Q.B. 325, at 356. See *R. v. Harris* (1897) 61 J.P. 792 (although the accused was unable to read or write and—owing to an unhealed throat wound—could not speak, he was fit to plead).

[2] *R. v. Robertson* (1968) 52 Cr. App. R. at 694.

[3] See *R. v. Burles* (1969) 54 Cr. App. R. at 198–99.

[4] (1953) 37 Cr. App. R. 86, at 89.

of the evidence for the prosecution being successfully challenged so that the defence would not be called, the question of disability should be postponed until some time before the defence is opened.[1] The judge must first consider the apparent strength or weakness of the prosecution's case as disclosed in the committal documents. He must then consider the nature and degree of the suggested disability as disclosed in the medical reports. On the basis of these two factors the judge must determine what is expedient and in the interests of the accused person. If the prosecution case is strong and the disability is substantial the question should be tried immediately. If the case for the prosecution is weak, whatever the degree of disability, the question should be postponed.[2] This would be so even if, whatever the outcome, the accused would be likely to be detained under the Mental Health Act.

14.09 Determination by a Jury

Section 4(5) provides that the question of disability is to be determined by a jury. Where the determination is made on arraignment, and if the trial proceeds, the accused person must be tried by a jury other than the one which determined that he was fit to stand trial. Where the determination takes place later, it will be made either by a separate jury or by the jury before which the accused person is being tried, as the court may direct.

A jury cannot make a determination that a person is unfit to plead without the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved (s. 4(6)).

14.09A Finding that the Accused Did the Act or Made the Omission Charged

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 provides an important new protection for persons found to be under a disability in relation to the trial. Where it is determined by a jury that a person is unfit to be tried, the trial can proceed no further. The jury must determine whether they are satisfied, on each count, that the person accused did the act or made the omission charged against him.[3] The jury must make this determination based upon any evidence already given in the trial and any evidence further adduced by the prosecution or by a person appointed by the court to put the case for the defence. The jury can make either of two findings in respect of each count: (i) that the accused person did the act or made the omission charged; or (ii) if they find he did not do the act or make the

---

[1] *R. v. Webb* (1969) 53 Cr. App. R. 360.
[2] *R. v. Burles* (1969) 54 Cr. App. R. at 200.
[3] Criminal Procedure (Insanity) Act 1964, s. 4A, substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 2.

omission charged, they must return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.

Where the question of disability was determined on arraignment, the fact findings must be made by a jury other than the one which determined that the person was under a disability. Where the question of disability was determined after arraignment, the fact findings will be made by the jury by whom the accused was being tried.

The trial of facts should examine only if the person committed the act or made the omission charged – *i.e.*, the *actus reus* element of the offence. The jury should not examine criminal intent – *i.e.*, the *mens rea* element of the offence. Since the person is unfit to stand trial it would be inequitable if the jury assessed his ability to form the requisite criminal intent.

14.10 Appeal

The Criminal Appeal Act 1968 has a number of provisions for appeal relating to a person's fitness to stand trial.

14.10.1 *Right of appeal against a finding of disability*

Section 15 of the Criminal Appeal Act 1968 provides that where there has been a determination by the jury under section 4 of the 1964 Act that the accused person is under disability, the person may appeal to the Court of Appeal against the finding.[1] The appeal may be on any ground involving a question of law alone; and with leave of the Court of Appeal, on any ground which involves a question of fact alone or a question of mixed law and fact, or on any other ground which appears sufficient to the Court of Appeal. However, if the judge of the trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact or of mixed law and fact, an appeal lies without leave of the Court of Appeal.

14.10.2 *Substitution of finding of unfit to plead on appeal against conviction*

There is no right of appeal against a refusal to find the person unfit to plead. If, however, the person is found fit to plead and he is convicted, he may appeal against his conviction on the ground that the hearing of the preliminary issue could be challenged for error in law, so that he should never have been tried on the substantive charge at all.[2]

[1] The Court of Appeal is entitled to make an order for defendant's costs when it allows an appeal against a finding that the defendant is under disability or it substitutes such a finding for the original verdict. Prosecution of Offenders Act 1985, s. 16(4) (a) (b).

[2] *R. v. Podola* [1960] 1 Q.B. 325.

If on an appeal against conviction, the Court of Appeal are of opinion that the accused should have been found under a disability and that he did the act or made the omission charged, they can dispose of the case in any of the following ways: a hospital order with or without restrictions on discharge, a guardianship order, a supervision and treatment order, or an order for the person's absolute discharge.[1] The detailed provisions for these various orders are to be found in Schedules 1 and 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, and are described fully in para. 14.11 below and para. 13.05 ante.

In order to make a finding that the accused was under a disability and that he did the act or made the omission charged, the Court of Appeal must have the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved.[2]

14.10.3 *Substitution of findings of unfitness to plead for verdict of not guilty by reason of insanity*

A person can appeal under section 12 of the 1968 Act against a verdict of not guilty by reason of insanity (see para. 13.05A ante). The Court of Appeal may find, on the written or oral evidence of two or more medical practitioners (at least one of whom is duly approved), that the case is not one where there should have been a verdict of acquittal, but the person should have been found to be under a disability and that he did the act or made the omission charged.

The Court of Appeal can then make a hospital order with or without restrictions on discharge, a guardianship order, a supervision and treatment order, or an order for his absolute discharge.[3] (As to the effects of these orders, see Schedules 1 and 2 of the 1991 Act and para. **13.05** *ante*).

14.11 Powers to Deal with Persons Found Unfit to Plead

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 provides for a range of flexible powers to deal with a person under a disability who was further found to have committed the act or made the omission charged.[4] In such cases, the court can make a hospital order with or without restrictions on discharge,[5] a guardianship order,

---

[1] An order for guardianship, supervision and treatment, or absolute discharge cannot be made where the offence to which the appeal relates is murder.

[2] Criminal Appeal Act 1968, s. 6, substituted by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 4(1).

[3] Criminal Appeal Act 1968, s. 14, substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 4(2). The Court of Appeal cannot make an order for guardianship, supervision and treatment, or absolute discharge where the offence to which the appeal relates is murder.

[4] Criminal Procedure (Insanity) Act 1964, s. 5, substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 3.

[5] See Schedule 1 to the 1991 Act.

a supervision and treatment order, or an order for absolute discharge.[1] The details relating to each of these orders are the same as those relating to orders following an acquittal by reason of insanity. The reader is referred to para. **13.05** *ante* for a discussion.

14.12 Proposals for Reform Leading to the 1991 Act

In making a determination that the accused person is under a disability, the court's intent is that he should receive treatment at the earliest possible time. This saves the accused person from the stress of a court appearance; it is better for the dignity of the legal process; and it authorises detention in a therapeutic environment. It would be unfair to convict such a person because, if he were competent to understand the course of the proceedings, he might be able to exculpate himself. However, the inability of the accused person to defend himself should not prevent an investigation as to whether he committed the criminal act charged. A simple showing that the accused person is incompetent at the time of the trial does not justify his compulsory confinement for an indefinite period of time, unless there is also proof that he committed an imprisonable offence. Even for the person who is so mentally disordered as to be an appropriate subject of compulsory admission under Part II of the Mental Health Act, a finding of facts is important. Admission to hospital following a finding of disability is likely to result in considerably longer detention and within more secure conditions. This is because the authorities will assume that he committed the criminal act with which he was charged. For some defendants, such as those suffering from certain forms of organic psychiatric illness, severe mental handicap or those who are deaf and unable to communicate, there is little or no chance that their mental capabilities will significantly improve; they become subject to potentially life-long involuntary confinement.[2]

To rectify these problems the Butler Committee and MIND recommended that there should be a determination of the facts of the case before any final disposition is made. Further, the court should have greater discretion so that it could make any 'therapeutic' order such as a psychiatric probation order or a hospital order with or without

---

[1] The effects of a guardianship order and a supervision and treatment order are described in Schedule 2 to the 1991 Act. The court cannot make an order for guardianship, supervision and treatment, or absolute discharge where the offence to which the findings of disability relate is an offence the sentence for which is fixed by law. In cases of murder the court must make a hospital order with restrictions on discharge without limit of time.

[2] In *Jackson v. Indiana*, 406 U.S. 715 (1972), the United States Supreme Court reviewed an incompetency statute very similar to the provisions of the Criminal Procedure (Insanity) Act 1964. Two psychiatrists testified that the defendant was a deaf mute and was unlikely ever to recover from this disability. The Supreme Court held that indefinite confinement without a finding of facts was unconstitutional, denying the defendant equal protection of the law and his right to substantive due process.

restrictions or any disqualification (*e.g.* from driving) or an absolute discharge.[1]

Glenn Pearson's case provided an illustration of the kind of problem envisaged by MIND and the Butler Committee. Mr. Pearson was found unfit to plead following a charge of burglary of a £5 note and three light bulbs from a dwelling house. The finding of disability automatically resulted in a hospital order with restrictions on discharge without limit of time. Mr. Pearson was deaf and mentally handicapped, but appeared not to be mentally ill and would not benefit from treatment in hospital. The need for law reform was demonstrated by the use of the mental health system in a clearly inappropriate case.[2]

In January 1991 the Government announced that it intended to amend the Criminal Procedure (Insanity) Act 1964 by providing for a trial of the facts in cases of disability and by increasing the powers of the courts.[3] The Act, implemented on 1st January 1992, resolves many of the concerns that have persisted about a finding of disability in relation to the trial.

---

[1] The Butler Report, *op. cit*, chap. 10; L. Gostin (1977; vol. 2) *A Human Condition*, chap. 1. Note also that, because there is no determination **at the time of sentencing** as to whether the person is mentally disordered and in need of hospital treatment, the person may be inappropriately placed in a mental hospital. As to the position under the European Convention of Human Rights and the patient's right to a tribunal, see the arguments at para. **13.04.1** *ante*.

[2] See Emmins, C (1986) Unfitness to Plead: Thoughts prompted by Glen Pearson's Case, *Criminal Law Review*, p. 6. Other cases where injustices occurred were presented by Mr. John Greenway during the second reading of the Criminal Procedure (Insanity and Unfitness to Plead) Bill on 1 March 1991, p. 1269–1282. Valerie Hodgson was a mentally handicapped woman who was found unfit to plead following her father's murder. No findings of fact were made and she was detained in hospital under a restriction order without limit of time. Had the court examined the forensic evidence, it would have shown she did not commit the crime.

[3] Mr. John Greenway, supported by others, presented the Bill on 5 December 1990, Official Report, p. 306–307. Mr. Kenneth Baker announced the Government's intention to act on 28 January 1991, *Official Report*, 28 January, vol. 184, c. 372.

C. REMANDS TO HOSPITAL AND INTERIM HOSPITAL ORDERS

14.14 Remand to Hospital for Report

Both the Crown Court and the magistrates' court sometimes have a need to adjourn a trial for medical reports to be made on the mental condition of the accused person. A Crown Court has power to remand an accused person in custody; and medical reports could be made while the person was confined in prison. However, remand in custody may be unhelpful in view of the limited facilities for assessment of persons with mental disorder in prison. The Crown Court can also grant bail with a condition that the accused person attends a hospital where a psychiatric report can be made. However, this gives the hospital no power to detain the person should he break this condition by discharging himself. Further, where the person poses a serious danger to the public, a remand on bail would be inappropriate.

A magistrates' court may similarly remand in custody or on bail. Section 10(3) of the Magistrates' Court Act 1980 gives the magistrates' court a general power to adjourn a case after conviction for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. The adjournment cannot be for more than four weeks at a time; but if the accused person is remanded in custody, it cannot be for more than three weeks at a time. Section 30 of the 1980 Act enables a magristrates' court to remand an accused person for a medical report without convicting him where it is satisfied that he did the act or made the omission charged. The medical report can be obtained while in custody. Alternatively, the court can impose conditions under Section 3(6)(*d*) of the Bail Act including the requirement that: he undergoes an examination of his mental condition by two registered doctors; and, for that purpose, he attends such an institution or place as the court directs.

The effect of the law, prior to the implementation of the Mental Health Act 1983, was that the court did not have a general power to remand a person to hospital for the purpose of obtaining a report. It could only remand in custody, or as a condition of bail, with the disadvantages referred to above. The Home Secretary is authorised to transfer to hospital a person remanded or committed in custody awaiting trial or sentence (see paras. **14.02–14.03** above). However, this does not give the court any power to obtain a report on the accused

while detained in hospital. Further, the Home Secretary has to be satisfied that the accused person is suffering from a serious form of mental disorder; this is the very question which the remand to hospital for medical report is intended to answer.

The Mental Health Act 1983 gives the courts a general power to remand directly to hospital.[1] The power should not be exercised where a custodial remand is not necessary; the granting of bail should always be considered first. Remands in custody to a hospital wing of a prison or remands on bail with a condition of undergoing psychiatric examinations will continue to be used where appropriate. The remand order under the 1983 Act can be to any kind of hospital including a special hospital, a regional secure unit or a local hospital; however, hospitals taking potentially dangerous patients on remand should be able to provide some degree of security. Hospitals should not become alternative remand centres. Once the purpose of the remand to hospital is achieved, the accused person should be returned to the court for trial or sentencing; or, if necessary, an alternative form of remand, either in custody or on bail, should be substituted.

A report prepared while the person is on remand should state whether the person is suffering from a specified form of mental disorder; set out the relevant social factors; and make recommendations on the most appropriate setting for care and treatment.

A patient remanded for report or treatment is entitled to obtain, at his own expense, an independent medical report by a doctor of his own choosing for the purpose of applying to the court for termination of the remand. The managers should help the patient to exercise this right. (Code of Practice, paras. 17.1, 17.4).

14.14.1 *To Whom Does a Remand for Report Apply?*

The Crown Court or a magistrates' court may remand an accused person to a hospital specified by the court for the purposes of obtaining a report on his mental condition (s. 35(1)). For these purposes an *accused person* is:

(*i*) **Crown Court**—any person who is awaiting trial for an offence punishable with imprisonment or who has been arraigned but not yet sentenced or otherwise dealt with. Note that a remand to hospital for report cannot be made in respect of a person convicted of murder as a life sentence is mandatory. There would be no purpose in allowing a remand to hospital for report on a person who has been convicted of murder because

[1] Sections 35, 36, 38 and 40(3) (*i.e.* remands to hospital for report or treatment or an interim hospital order) did not come into force on September 30, 1983 (s. 149(3)) along with the rest of the Act. They were brought into force on October 1, 1984. S.I. 1984, No. 1357.

the sentence is fixed by law. However, **before** conviction in a trial for murder, medical reports may be important, for example on the issue of diminished responsibility. A remand for report can be made in a murder trial before conviction. Further, in the case of a person accused of murder, the court must, unless it considers that satisfactory psychiatric reports have already been obtained, impose as a condition of bail: (*a*) the requirement that the person is examined by two registered doctors (at least one of who is approved under section 12) who will prepare reports on him; and (*b*) he attends an institution or place as directed by the court for the purpose of having these reports prepared.[1] Reports thus obtained may be disclosed to the Crown at the discretion of the trial judge once he has reviewed them.[2]

(*ii*) **Magistrates' Court**—any person who has been convicted of an offence punishable on summary conviction with imprisonment; or any person charged with such an offence if the court is satisfied that he did the act or made the omission for which he is charged or if he has consented to the remand (s. 35(2)).

14.14.2 *Grounds and Procedures*

The court must be satisfied, on the written or oral evidence of one registered medical practitioner (approved for the purpose of section 12 (s. 54(1)), that there is **reason to suspect** that the person is suffering from any of the four specific forms of mental disorder—*i.e.*, mental illness, psychopathic disorder, severe mental impairment or mental impairment (see paras. **9.01–9.05** *ante*). The court must also be of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail (s. 35(3)); in cases where bail is justified it is preferable to have a report prepared by a psychiatrist while the accused attends hospital on either an in-patient or out-patient basis. The effect of section 35(3) is to make a remand for report an alternative to remand in custody; it should not cause persons who are at present given bail to be detained in hospital. The court cannot remand an accused person unless it is satisfied, on the written or oral evidence of the registered medical practitioner who would be responsible for making the report, or of another person representing the hospital managers, that arrangements have been made for his admission to that hospital within seven days of the date of remand. This means that the court can only remand if a place is made available by the hospital and admission can be effected within seven days. Pending his admission to the hospital, the court can give directions for the person's conveyance to and detention in a place of safety (s. 35(4)).[3]

---

[1] Bail Act 1976, s. 3(6A), amended by the Mental Heath (Amendment) Act 1982, s. 34.

[2] *R. v. Central Criminal Court, ex parte Porter* [1992] Crim. L.R. 121, CO/1456/91 (Transcript: Marten Walsh Cherer) 7 August 1991, Q.B.D.

[3] 'Place of safety' is defined in s. 55(1).

14.14.3 *Duration of Remand for Report*

A remand to hospital for report can be made for 28 days (s. 35(7)). A further remand can be made by the court if it appears, on the oral or written evidence of the doctor responsible for making the report, that a further period of remand is necessary for completing the assessment of the person's mental condition (s. 35(5)). A further remand can be made in the absence of the accused person if he is represented by counsel or a solicitor who is given the opportunity of being heard (s. 35(6)). Further remands can be made for 28 days at a time, but for no more than a period of remand of 12 weeks in total. These are maximum periods with the court having the power to terminate the remand at any time (s. 35(7)). The doctor responsible for preparing the report should notify the court when the purpose of the remand has been achieved; there is no reason in continuing the remand once the doctor has completed his assessment and is able properly to prepare a report. The accused person himself is entitled to obtain an independent report at is own expense of a doctor of his own choosing. He is entitled to apply to the court on the basis of the report for his remand to be terminated (s. 35(8)).

14.14.4 *Effect of Remand for Report*

A remand order authorises a constable, or any other person directed by the court, to convey the accused person to the hospital specified by the court within a period of seven days of the order. The hospital managers (who must already have given evidence that a bed is available) **must** admit him within that seven day period and thereafter detain him for the period of the remand or further remand (s. 35(9)). If the accused person absconds from a hospital to which he has been remanded, or while being conveyed to that hospital, he can be arrested without warrant by any constable and brought as soon as practicable before the court that remanded him. The court then may terminate the remand and deal with him in any way in which it could have if he had not been remanded (s. 35(1)); nothing precludes the court from continuing the remand.

During the period of detention in hospital the accused person is **not** subject to the consent to treatment provisions of Part IV of the Act; the person is entitled to consent to, or refuse, treatment in the same way as any informal patient under the common law (s. 56(1)(b)). See paras **20.10–20.18** *post*). If a patient remanded for report requires medical treatment and will not consent, he should be referred back to court with a recommendation for a remand for treatment.

The Code of Practice (para. 17.3) suggests that if there is a delay in securing a date in the Crown Court, a civil admission for treatment under section 3 could be considered. However, the lawfulness of such a civil admission is open to question. Section 3 does not appear to

expressly preclude admission for persons already subject to detention under a different part of the Act. However, section 3 is intended for admission to, and detention in hospital. Since the person remanded for report is already admitted and detained, the question arises whether another part of the Act can be used to, in effect, supersede section 35. The patient is ultimately under the jurisdiction of the court, and the court has not given authority to compel treatment. More importantly, section 35 patients are expressly excluded from Part IV so that Parliament had a clear intention not to compel them to be treated without consent.[1] To use another part of the Act to circumvent this clear intention is questionable. Finally, Parliament provided a means for compelling treatment under section 36. Simply because use of section 36 is time consuming or administratively difficult does not provide a lawful justification for circumventing the probable intention of Parliament.

14.15 Remand to Hospital for Treatment

Prior to the 1983 Act where a mentally disordered person had to be kept in custody on remand he would have had to remain, sometimes for a substantial period of time, in a prison while the prosecution prepared its case. A mentally disordered person's condition could deteriorate in prison because of the prison routine and the lack of adequate facilities and trained staff needed for treatment and care. A person committed in custody awaiting trial or sentence could be transferred to hospital by the Home Secretary. However this does not give **the court** power and it requires an initial committal to prison. The powers of the Home Secretary to transfer an unsentenced prisoner should be regarded as an emergency measure where there is an urgent need for treatment (see paras. **14.01–14.02** above). The remand to hospital for treatment has the different purpose of enabling a court to secure the admission to hospital of an accused person who appears to it, in light of medical evidence, to require treatment in hospital.

14.15.1 *To Whom Does a Remand for Treatment Apply?*

The Crown Court (but not a magistrates' court) may, instead of remanding an accused person in custody, remand him to a hospital specified by the court for the purpose of receiving care and treatment (s. 36(1)). For the purposes of section 36 an accused person is any person who is in custody awaiting trial before the Crown Court for an offence punishable with imprisonment or who is in custody at any stage of such a trial prior to sentence. However, a remand for treatment

[1] Lord Belstead for the Government in the House of Lords debate on remands for report said "this power is intended to be used only for diagnostic purposes. . . . There is no concern that a remand for a medical report would otherwise expose a person to the risk of receiving unnecessary treatment without his consent because . . . there is no intention that [he] should be regarded as 'detained for treatment'." *Hansard* 25 Jan. 1982, cols. 769–770.

cannot be made in respect of a person charged with murder (s. 36(2)). This is regrettable because a person accused of murder may be severely mentally ill or mentally handicapped, and in urgent need of treatment or care or appropriate training. The reason given for excluding persons accused of murder from being remanded to hospital for treatment is that it would prejudice any subsequent consideration of his mental condition during the course of the trial. However, the trial is concerned with legal, not medical, definitions of insanity. It is suggested that the importance of obtaining immediate treatment for a severely mentally disordered person outweighs the theoretical considerations of prejudice affecting the outcome of the trial.

14.15.2 *Grounds and Procedures*

The Crown Court must be satisfied, on the written or oral evidence of two registered medical practitioners (at least one of whom is approved for the purposes of section 12 (s. 54(1)), that he is suffering from one of the two **major** forms of mental disorders (*i.e.*, 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 (s. 36(1)). Persons suffering from psychopathic disorder or mental impairment alone cannot be remanded for treatment ostensibly because their need for treatment prior to sentencing is not as clearly established. (As to the various forms of mental disorder, see paras. **9.01–9.05** *ante*). The court cannot remand an accused person for treatment unless satisfied, on the written or oral evidence of the doctor who would be in charge of the accused person's treatment, or of some other representative of the hospital managers, that arrangements have been made for his admission within a period of seven days of the remand. Pending his admission to hospital, the court can give directions for his conveyance to, and detention in, a place of safety (s. 36(3)).[1]

14.15.3 *Duration of Remand for Treatment*

A remand for tratment can be made for 28 days, with periods of further remand for 28 days at a time, up to a total period of remand for 12 weeks in total (s. 36(6)). A further remand can be made by the court, on the oral evidence of the responsible medical officer, that it is warranted (s. 36(4)). "Warranted" appears to mean that the grounds for the initial remand are still met *i.e.*, he is still suffering from a serious form of mental disorder which requires treatment. The other requirements in respect of the duration and termination of a remand for treatment are the same as for a remand for report and reference should be made to para. **14.14.3** above for a more complete discussion: a further remand can be made in the absence of the accused provided his representative has the opportunity of being heard (s. 36(5)); the

---

[1] 'Place of safety' is defined in s. 55(1).

court can terminate the remand at any time (s. 36(6)); and the accused person can get a psychiatric report at his own expense and, on the basis of that report, apply to the court for the termination of the remand (s. 36(7)).

14.15.4 *Effect of Remand for Treatment*

The effect of a remand for treatment is similar to a remand for report (s. 36(8)) and reference should be made to para. **14.14.4** above for a discussion. The only major difference is that a person remanded for treatment is subject to the consent to treatment provisions in Part IV of the Act (s. 56(1) (as to which see paras. **20.17–20.28** *post*).

14.16 Interim Hospital Orders

The court may be minded to make a hospital order but there may be some uncertainty whether such an order is appropriate. A doctor, for example, may have difficulty in deciding whether to recommend a hospital order where he has been able to examine the patient only briefly in the hospital wing of a prison, and it would be difficult to know how he would react within a hospital setting. Further, once a hospital order is made the offender is outside of the control of the court. If such a person subsequently shows himself to be unresponsive to treatment the hospital order cannot be replaced by a sentence of imprisonment; the responsible medical officer or a Mental Health Review Tribunal may have no alternative but to discharge the patient. The Mental Health Act 1983, therefore, introduced an interim hospital order where a person can be compulsorily admitted to hospital for a limited period where he will be assessed, cared for and treated. At the end of the period it is open to the court to make any disposal within its power, including a hospital order.

14.16.1 *To Whom Does An Interim Hospital Order Apply?*

An interim hospital order can be made by the Crown Court where a person is convicted of an offence punishable with imprisonment; however, such an order cannot be made in respect of a person convicted of murder. An interim hospital order can be made by a magistrates' court where the person is convicted of an offence punishable on summary conviction with imprisonment.

14.16.2 *Grounds and Procedures*

The court may, before making a hospital order or dealing with the offender in some other way, make an interim hospital order. The court must be satisfied, on the written or oral evidence of two registered medical practitioners (at least one of whom is approved under section 12 (s. 54(1)), that:

(*a*) the offender is suffering from one of the four specific forms of mental disorder (*i.e.*, mental illness, psychopathic disorder, severe mental impairment or mental impairment); and

(*b*) there is **reason to suppose** that the mental disorder is such that it may be appropriate for a hospital order to be made (s. 38(1)).

At least one of the two doctors giving evidence must be employed at the hospital to be specified in the order (s. 38(3)). This is intended to help ensure that the doctor who will be reporting back to the court at the end of the period for which the interim hospital order is in force is likely to be the doctor who advised the court that the order was appropriate in the first place. (There is nothing to prevent both doctors giving recommendations from being employed at the receiving hospital.)

Before making an interim hospital order, the court must be satisfied, on the written or oral evidence of the doctor who would be in charge of the person's treatment or some other representative of the hospital managers, that arrangements have been made for his admission to that hospital within a period of 28 days of the date of the order. The Secretary of State for Health may by order reduce the length of the 28 day period with which a patient must be admitted to hospital under section 37(4) and (5) and section 38(4).[1] The court may, pending the person's admission, direct that he is conveyed to, and detained in, a place of safety (s. 38(4)).[2]

14.16.3 *Duration of Interim Hospital Order*

An interim hospital order can be made for a period not exceeding 12 weeks. (The court can specify a period less than 12 weeks.) The court may renew the order for periods not exceeding 28 days at a time if it appears to the court, on the written or oral evidence of the responsible medical officer (RMO) that continuation of the order is warranted. However, an interim hospital order cannot continue in force for a total period of more than twelve months. The court may terminate the interim hospital order at any time on the written or oral evidence of the RMO (s. 38(5)). For example, if the RMO, before the expiry of any period of an interim hospital order, considers that the patient is not going to benefit from treatment or that it is otherwise inappropriate for him to be detained in hospital, he should immediately notify the court. In these circumstances the interim hospital order will have served its purpose of providing the court with evidence of the appropriateness of a hospital order. The court may then pass an appropriate sentence such as a fine or imprisonment. Once the court decides to make a hospital order or to deal with the offender in some other way, it **must** terminate the interim hospital order (s. 38(5)). The effect of section 67 of the Criminal Justice Act 1967 is that where a sentence of imprisonment is passed the length of the sentence is to be treated as reduced

[1] Mental Health Act 1983, s. 54A as inserted by the Criminal Justice Act 1991, s. 27(2).
[2] 'Place of safety' is defined in s. 55(1).

by any period during which the offender was detained in hospital under an interim hospital order.

The court is entitled to renew the interim hospital order in the absence of the offender provided his solicitor or counsel has the opportunity of being heard. This provision is intended to spare the mentally disordered person from appearing in court merely for the purpose of having the interim order renewed.

14.16.4 *Effect of Interim Hospital Order*

Where an interim hospital order is made a constable, or any other person directed to do so by the court, must convey the offender to the hospital specified in the order within a period of 28 days of the date of the order. If he is conveyed to the hospital within that period the managers **must** admit him, and detain him for the period specified by the court (s. 40(3)). Pending his admission to hospital, the court can give directions for his conveyance to, and detention in, a place of safety (s. 38(4)). It is to be observed that, unlike the case of a hospital order, the responsible medical officer cannot discharge the patient or grant him a leave of absence; nor can the patient apply to a Mental Health Review Tribunal. The reason for this is that the offender is still subject to the authority of the court. If the offender absconds from hospital or while being conveyed to or from the hospital, he may be arrested without warrant by any constable and must be brought as soon as practicable before the court. The court can then terminate the order and deal with him in any way within its power, for example, by imposing a fine, passing a sentence of imprisonment or even continuing the interim hospital order (s. 38(7)). A person admitted under an interim hospital order is subject to the consent to treatment provisions of Part IV of the Act. (See further paras. **20.17–20.28** *post.*)

14.16.5 *Referral for unduly lenient sentences*

For the purposes of the Criminal Justice Act 1988 "sentence" excludes interim hospital orders. Thus, the Attorney General may not refer an interim hospital order as an "unduly lenient sentence".[1]

14.17 Returning Remand or Interim Hospital Order Patients to Court

Professionals required to return a patient to court who is on remand or under an interim hospital order should be familiar with Home Office Circular 71/1984. The hospital is legally responsible for returning the patient to court. The court should give adequate notice of the hearing date, and the hospital should liaise with the court for arrangements for escorting the patient to or from hospital. The hospital must provide a suitable escort for the patient, and may seek the assistance of the police. The patient comes under the jurisdiction of the police or prison officers once he is on court premises. (Code of Practice, para. 28.6).

---

[1] Criminal Justice Act 1988, s. 35(6).