

## **Guidance on Transfer for Treatment Directions and Obtaining Mental Health Officer Agreement**

### **Introduction**

1. This guidance is about the requirement under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') for mental health officer agreement to the making of a Transfer for Treatment Direction ('a Direction') or for it to be impracticable to obtain such agreement. A Direction allows someone serving a prison sentence, who has a mental disorder and needs treatment to keep them and others safe, to be taken to hospital for care and treatment.
2. This guidance is non-statutory guidance for mental health officers ('MHOs'), medical practitioners who are involved in prisoner healthcare and approved medical practitioners involved in the making of a Direction. It is intended to incorporate this guidance into the Code of Practice for the Mental Health (Care and Treatment) (Scotland) Act 2003 when it is revised. It may be of interest to others including the Mental Welfare Commission, service users, carers and advocates.
3. The legislative requirements around transfer for treatment directions are set out in Annex A.

### **Seeking Mental Health Officer agreement**

4. Section 136 of the 2003 Act makes clear that the medical practitioner who initiates the transfer for treatment direction and second medical practitioner must consult and seek the agreement of an MHO to the making of the Direction. However, the Act also recognises that there may be occasions where it is not practicable for such consultation to take place. On such occasions it is permissible for a transfer for treatment direction to be made without the agreement of an MHO, the reason why it was not practicable to obtain agreement should be recorded in the MHO Report.
5. However, the identification of a mental disorder in a prisoner and consideration of a transfer from prison to hospital is not usually an emergency situation but a planned and considered action. The circumstances where it is impracticable for MHO agreement to be obtained will therefore be exceptional. In every case where a transfer to hospital is considered, the medical practitioner who initiates the transfer for treatment direction must contact the appropriate MHO service. It cannot be considered impracticable for MHO agreement to be obtained if an MHO service was not approached.
6. If the MHO does not agree to the making of a transfer for treatment direction, it will not be appropriate to seek the opinion of a second MHO in order to obtain the necessary agreement for a Direction to be made.

### **The two medical reports**

7. For a transfer for treatment direction to proceed, the two reports must agree on the category of primary mental disorder: that is, a report must specify at least one

type of mental disorder that is also specified in the other report. (These types of mental disorder are defined in section 328(1) of the 2003 Act, that is mental illness; personality disorder; and learning disability).

**What steps should be taken by the MHO before agreeing to the making of the Direction?**

8. The MHO will have, wherever practicable, to try to:
  - obtain the views of the prisoner about the proposed transfer and to any alternative courses of action, and
  - obtain relevant information about the prisoner's personal and social circumstances from other mental health professionals who have knowledge of the prisoner. This could involve:
    - a discussion with the medical practitioner who initiates the transfer for treatment direction and the second medical practitioner about their views on why a transfer for treatment is appropriate; what they have observed; and why they individually feel that the person's health, safety or welfare or the safety of others is at significant risk as a result of the mental disorder. Much of this information could be obtained from copies of the two reports from the medical practitioner who initiates the transfer for treatment direction and the second medical practitioner.
    - seeking information on such issues from other sources where they are available and where this proves to be practicable. These other sources could include the person's named person, where the person already has one, or carers/relatives. Any advance statement, where one exists, should also be considered. All such information will be of relevance not only to the MHO in his/her decision about agreeing but also to Scottish Ministers who are considering whether or not to make the Direction.
  
9. Where practicable, the MHO may also wish to establish which risks, if any, were known previously as being associated with a deterioration in the prisoner's mental health. For example, is there knowledge of current or historical drug misuse and if so has this been associated in the past with the onset of serious mental illness? The MHO should also identify if the prisoner is subject to any notification requirements or a sexual offences prevention order in terms of the Sexual Offences Act 2003.
  
10. Once the MHO is in possession of as much of the above information as is possible and practicable in the circumstances, he/she will need to assess any possible alternatives to the proposed transfer and period of formal detention in hospital. He/she should therefore make sure that any other available forms of informal treatment within the prison setting have been explored before agreeing to the making of a Direction. As the person is serving a sentence of imprisonment, treatment in the community as an alternative to hospital is not an option; in these cases the options are either voluntary treatment in prison or compulsory treatment in hospital.

11. It is expected that, where practicable, if the prisoner has been in receipt of mental health services previously, members of the multi-disciplinary team providing those services will be consulted. These parties may be able to provide knowledge of the possible and viable care and treatment for the person if the Direction is made.

12. The MHO should be taking into account the following questions when deciding whether to agree to the making of the transfer for treatment direction:

- do you believe, after appropriate assessment, that all the detention criteria have been met?
- do you believe that the principles of the Act (see sections 1 and 2 of the Act) have been adhered to in both letter and spirit? For example, have the person's views been taken into account and their rights respected? And have all relevant, less restrictive alternatives been considered?
- is there strong reliable evidence that the prisoner's treatment could be provided on a voluntary basis? Do you believe that recourse to compulsory measures of mental health care and treatment could be avoided whilst protecting the prisoner's rights?
- are you in possession of sufficient information on which to base a sound professional judgement?

13. In order to be in a position to answer the questions above, it will be best practice for the MHO to undertake a series of duties. The MHO should:

- interview the prisoner;
- where practicable ascertain whether a Named Person has been nominated and accepted this role;
- inform the prisoner of their rights and the availability of independent advocacy services following transfer to hospital; and
- inform the prisoner of their right to make an application to revoke the TTD if one is made.

### **The MHO's interview with the prisoner**

14. During the interview, the MHO should explain to the prisoner what transfer and detention in hospital can involve in the event of the Direction being made. The MHO should also attempt to learn the prisoner's views on:

- his/her circumstances,
- his/her attitude towards the assessment of mental disorder and the proposed treatment (where this is known) and the proposed hospitalisation.

15. It will also be good practice to provide the prisoner with an explanation of his/her right to make an application to the Tribunal to revoke a Direction if one is made and with advice on how to access legal support, as well as the support of an

independent advocate in the event of the Direction being granted. All parties should contribute to making sure that any communication barriers are addressed by, for example, ensuring that a translator/interpreter is provided if necessary; ensuring that relevant documents are made available in Braille, audio-cassette format, etc.

16. The MHO may wish to consider the prisoner's views and the two medical practitioner's assessments as to the capacity of the prisoner to make a decision about their treatment and the proposed transfer to hospital.

17. There are only a small number of circumstances in which the MHO might consider agreeing to the making of the Direction without, at the very least, having been in the physical presence of the person who it is proposed be made subject to the Direction. Circumstances which would not preclude the MHO giving his/her agreement to the certificate being granted without having interviewed the prisoner could include:

- where communication difficulties with the prisoner cannot be overcome speedily; and
- where the prisoner is extremely dangerous or violent; and
- where the prisoner refuses to co-operate or participate in the interview.

18. Under such circumstances, it is expected that the MHO will elicit as much information as possible about the proposed transfer from the medical practitioner who initiates the transfer for treatment direction, the second medical practitioner, any records about the person, the person's family, friends, carers, GP, psychiatric nurse, advance statements, social work records in advance of giving his/her agreement to the Direction.

19. There may be other exceptional circumstances (such as a ferry strike, etc) which would prevent the MHO from interviewing the prisoner. Given that such circumstances are by their nature exceptional and given that standard practice routinely includes a face-to-face MHO assessment, it is appropriate for agreement to be given where the MHO is satisfied that the medical practitioner who initiates the transfer for treatment direction and the second medical practitioner's assessments are based on the fullest set of information available. It will be good practice for the MHO to make available to the hospital managers, the relevant local authority/authorities and the Commission a full account of the exceptional circumstances which led to the MHO agreeing to the Direction without interviewing the prisoner. It will also be best practice for an MHO to ensure that he/she undertakes an assessment of the prisoner as soon as possible after the Direction has been made.

### **Ascertaining if there is a nominated Named Person**

20. Section 205 of the Mental Health (Care and Treatment) (Scotland) Act 2003 states that the MHO must take such steps as are reasonably practicable to ascertain the name and address of the prisoner's named person as soon as possible after the Direction is made. However, given that the Mental Health (Scotland) Act 2015 made it a requirement for MHO agreement to be sought before the Direction is made it is best practice to ascertain if practicable whether there is a Nominated Named Person

before deciding whether to agree to the making of the Direction. This may necessitate discussion with the medical practitioner and/or the second medical practitioner who are considering asking for a Direction to be made and other relevant professionals as to whether the prisoner has the capacity to nominate a named person.

21. It will be best practice for the MHO to explain to the prisoner, the status and rights of the Named Person with respect to the Direction and beyond. The MHO will consequently also need to explain the difference between the roles of the Named Person, listed initiator and independent advocate.

22. It will also be best practice for either of the two medical practitioners or the MHO to ascertain whether the prisoner has an advance statement.

### **Informing the prisoner of independent advocacy rights**

23. The MHO should provide an explanation to the prisoner of the role of an independent advocate and of how an independent advocate might be able to help them both now and in the future. Wherever possible, this should be done in person. The MHO may also make this information available in printed form in appropriate languages/format, etc. As with any process of information giving, consideration should be given to the prisoner's capacity to understand and retain the information. Merely handing a leaflet to the prisoner is unlikely to be considered as acceptable, unless all other options have been tried and have failed.

24. The MHO will need to ensure that hospital ward staff (if the prisoner is ultimately transferred) are aware of the extent of independent advocacy involvement in that prisoner's case. The designated MHO will want to monitor effective access to independent advocacy services and to intervene more actively where problems arise.

25. It should be noted that section 260(2)(a)(iii) of the 2003 Act places a duty on hospital managers to inform the prisoner, subsequent to a range of events taking place, of the availability of independent advocacy services and to take appropriate steps to ensure that the prisoner has the opportunity to make use of those services. One such event is the making of a transfer for treatment direction.

### **Information for the medical practitioners and Scottish Ministers**

26. The MHO is required to make a decision as to whether to agree or disagree to the making of a transfer for treatment direction. The MHO should provide sufficient information by recording their decision and reasons on the MHO Report. This should be communicated to the medical practitioner who initiated the transfer for treatment direction as well as to Scottish Ministers who will consider the making of the Transfer for Treatment Direction. The information should be provided within 5 days of being notified about the proposed transfer. The information provided could usefully include:

- the steps which the MHO has taken;
- the reason it was impracticable to interview the prisoner, if this proved to be the case;

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- the views of the prisoner and their named person about the proposed transfer;
- details of the personal circumstances of the prisoner in so far as they are relevant for the making of a transfer for treatment direction;
- information on any previous periods of hospitalisation because of mental disorder (whether formal or informal) and their effect on the prisoner;
- confirmation that the prisoner has been made aware of his/her rights;
- details of whether the prisoner has an advance statement and the extent to which the wishes set out in the advance statement have been taken into account in the proposals for the prisoner's care and treatment;
- the views of the MHO on the 2 medical reports and on the extent to which he/she supports the making of a Direction, including the MHO's views on whether the criteria for compulsory powers are satisfied and on whether there are viable courses of action which could be taken other than those recommended in the mental health reports, particularly those which could avoid recourse to compulsory mental health treatment;
- an assessment of whether it is necessary to compel the prisoner to accept treatment and of how likely it is that the treatment could be provided informally. This should include consideration of the risks involved if the prisoner were not made subject to compulsory powers. The fundamental decision which Scottish Ministers are making is whether the prisoner's autonomy should be overridden when it comes to making decisions about treatment. It is therefore crucial that the MHO address the appropriateness of making the Direction;
- an indication as to the views of the prisoner's informal support networks, including the named person and carers;
- any other information that the MHO considers relevant to Scottish Ministers' determination of the application.

### **The outcome of considerations**

*MHO disagrees with the making of a Direction*

27. **If the MHO refuses to agree to the making of a transfer for treatment direction, a transfer for treatment direction cannot be made.** The MHO will still need to justify his/her refusal to agree to the Direction against the opinion of the medical practitioner who initiates the transfer for treatment direction and the second medical practitioner. It is best practice for the MHO to submit the MHO Report which includes justification of his/her refusal to the Mental Welfare Commission and for the medical practitioner to ensure that this report is included in the person's medical notes.

*MHO agrees with the making of a Direction or it is impracticable to obtain MHO agreement*

28. If it has been impracticable to obtain MHO agreement to the making of the Direction or if the MHO agrees to the making of a Direction, Scottish Ministers may make the transfer for treatment direction if they are satisfied as to the matters set out under '*Making the Direction*' in Annex A.

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29. If the prisoner has capacity to make decisions about their care and treatment and the proposed transfer to hospital for such treatment, and opposes the proposed transfer, Scottish Ministers will consider whether it is necessary and proportionate to make the Direction taking into account the principles in Section 1 of the 2003 Act, as well as the prisoner's human rights. In short, Scottish Ministers need to ensure that in making the decision to make a Direction, respect has been given to the rights, will and preferences of the prisoner.

30. If a transfer for treatment direction is made, Scottish Ministers will inform the following in writing of that fact:

- the prisoner;
- any appointed named person;
- the medical practitioner who initiates the transfer for treatment direction;
- the second medical practitioner;
- the MHO;
- the Mental Welfare Commission; and
- the Prison Governor.

The letter to the prisoner and the prisoner's named person will, where possible, provide information about the transfer (where and when). In all cases, the letter should set out the prisoner and prisoner's named person's right to make an application to the Mental Health Tribunal Scotland for the revocation of the Direction.

31. The prisoner and their named person can make an application to revoke the Direction within 12 weeks beginning with the day on which the Direction is made. This means that it is possible for an application to be made before the prisoner is transferred from prison to hospital (this must happen within 7 days of the Direction being made). The legislation does not prevent the transfer taking place while the matter is considered by the Mental Health Tribunal Scotland, indeed the transfer must happen within 7 days.

32. The medical practitioner who initiates the transfer for treatment direction should inform the MHO and Scottish Ministers that the transfer has taken place as soon as practicable after the transfer has happened.

Forensic Mental Health Unit  
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## **Guidance on Transfer for Treatment Directions and Mental Health Officer Agreement**

### **Legislative Requirements**

#### *Making the Direction*

1. The Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') allows Scottish Ministers to make a transfer for treatment direction if they are satisfied, on the written reports of an approved medical practitioner and a medical practitioner that:

- a) the prisoner has a mental disorder. The descriptions of the prisoner's mental disorder by each of the medical practitioners must specify, by reference to the appropriate paragraph (or paragraphs) of the definition of "mental disorder" in section 328(1) of the 2003 Act, at least one type of mental disorder that the prisoner has. Both practitioners must specify the same type(s) of mental disorder;
- b) medical treatment which would be likely to—
  - (i) prevent the mental disorder worsening; or
  - (ii) alleviate any of the symptoms, or effects, of the disorder, is available for the prisoner;
- c) if the prisoner were not provided with such medical treatment there would be a significant risk—
  - (i) to the health, safety or welfare of the prisoner; or
  - (ii) to the safety of any other person;
- d) the making of a transfer for treatment direction in respect of the prisoner is necessary;
- e) a mental health officer has agreed to the making of the direction, or it has been impracticable to obtain the agreement of a mental health officer;
- f) the prisoner could be admitted to the hospital to be specified in the direction before the expiry of the period of 7 days beginning with the day on which the direction is made;
- g) the hospital to be so specified is suitable for the purpose of giving medical treatment to the prisoner.

2. In addition, a transfer for treatment direction may authorise detention in a state hospital only if, on the written reports of the approved medical practitioner and the medical practitioner, it appears to the Scottish Ministers that:

- a) the prisoner requires to be detained in hospital under conditions of special security; and
- b) such conditions of special security can be provided only in a state hospital.

3. Under section 136 of the 2003 Act, if made, a transfer for treatment direction:

- a) shall specify, by reference to the appropriate paragraph (or paragraphs) of the definition of "mental disorder" in section 328(1) of this Act, the type (or types)

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- of mental disorder that each of the medical practitioners specifies that the prisoner has; and
- b) may include such directions as the Scottish Ministers think fit for the removal of the prisoner to, and the detention of the prisoner in, a place of safety pending the prisoner's admission to the specified hospital (or hospital unit) in the Direction. A place of safety means a hospital; premises which are used for the purpose of providing a care home service (as defined in paragraph 2 of schedule 12 to the Public Services Reform (Scotland) Act 2010); or any other suitable place (other than a police station) the occupier of which is willing temporarily to receive mentally disordered persons;
  - c) authorises the following measures:
    - i. the removal, before the expiry of the period of 7 days beginning with the day on which the direction is made, of the prisoner to the specified hospital (or hospital unit) in the Direction by:
      - a constable;
      - a person employed in, or contracted to provide services in or to, the specified hospital who is authorised by the managers of that hospital to remove persons to hospital; or
      - a specified person;
    - ii. the detention of the prisoner in the specified hospital (or hospital unit) in the Direction; and
    - iii. the giving to the prisoner, in accordance with Part 16 of the 2003 Act, of medical treatment.

### *Application to revoke the Direction*

4. Under section 214 of the 2003 Act, the prisoner; and the prisoner's named person may make an application to the Mental Health Tribunal Scotland for the revocation of the direction to which the prisoner is subject. Such an application:

- a) may be made during the period of 12 weeks beginning with the day on which the direction is made; but
- b) otherwise may not be made before the expiry of the period of 6 months beginning with the day on which the direction was made.

Neither the prisoner or the prisoner's named person may make more than one application during:

- a) the period of 12 months beginning with the day on which the direction was made; or
- b) any subsequent period of 12 months that begins with or with an anniversary of the expiry of the period of 12 months mentioned in (a) above.

Where a prisoner's named person makes an application, the named person has to give notice to the prisoner of the making of the application.

### *Keeping the Direction under review*

5. Under section 206 of the 2003 Act, the prisoner's responsible medical officer has to carry out a review of the direction during the period of 2 months ending with

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the day which falls 12 months after the day on which the direction is made (and every year thereafter). The requirements of the review are to:

- a) carry out a medical examination of the prisoner; or make arrangements for an approved medical practitioner to carry out such a medical examination;
- b) consider:
  - i. whether the following conditions continue to apply in respect of the prisoner:
    1. the prisoner has a mental disorder;
    2. medical treatment which would be likely to—
      - prevent the mental disorder worsening; or
      - alleviate any of the symptoms, or effects, of the disorder, is available for the prisoner; and
    3. if the prisoner were not provided with such medical treatment there would be a significant risk:
      - to the health, safety or welfare of the prisoner; or
      - to the safety of any other person.
  - ii. whether, as a result of the prisoner's mental disorder, it is necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital, whether or not for medical treatment; and
  - iii. whether it continues to be necessary for the prisoner to be subject to the direction; and
- c) consult:
  - the mental health officer; and
  - such other persons as the responsible medical officer considers appropriate.

6. The prisoner's responsible medical officer has an additional duty to keep the transfer for treatment direction under review from time to time. As soon as practicable after carrying out any review, the prisoner's responsible medical officer must submit a report to the Scottish Ministers. That report has to record the responsible medical officer's views on whether:

- a) the conditions in (b)(i) in paragraph 5 above continue to apply to the prisoner;
- b) as a result of the prisoner's mental disorder, it is necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital, whether or not for medical treatment; and
- c) whether it continues to be necessary for the prisoner to be subject to the direction.

7. Depending on the responsible medical officer's views, the report may include a recommendation that the Direction be revoked. This will be the case if the responsible medical officer considers that:

- a) the prisoner does not have a mental disorder;
- b) it is no longer necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital or
- c) medical treatment which would be likely to:
  - i. prevent the mental disorder worsening; or
  - ii. alleviate any of the symptoms, or effects, of the disorder,

is not available for the prisoner; and

- d) that if the prisoner were not provided with such medical treatment there would not be a significant risk:
  - i. to the health, safety or welfare of the prisoner; or
  - ii. to the safety of any other person; or
- e) that it continues to be necessary for the prisoner to be subject to the Direction.

8. Separately from the prisoner's responsible medical officer, Scottish Ministers also have a duty to keep the Direction under review under section 212 of the 2003 Act. They have to consider the same matters as the responsible medical officer.

#### *Revoking the Direction*

9. On receipt of a report from the prisoner's responsible medical officer's or following their own duty to keep the Direction under review, Scottish Ministers shall revoke the Direction if they are:

- a) not satisfied that the prisoner has a mental disorder; or
- b) so satisfied but are not satisfied—
  - i. that, as a result of the prisoner's mental disorder, it is necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital, whether or not for medical treatment; and
  - ii. either—
    - that the conditions mentioned in paragraph 5(b)(i)(2)&(3) above continue to apply in respect of the prisoner; or
    - that it continues to be necessary for the prisoner to be subject to the direction.

#### *Mental Health Tribunal Scotland*

10. Where the Scottish Ministers do not, for some reason following a report from the prisoner's responsible officer, revoke the direction to which the prisoner is subject, they have to make a reference to the Mental Health Tribunal Scotland about the direction. That reference has to state the prisoner's name and address, the prisoner's named person's name and address and the recommendation of the prisoner's responsible medical officer. They have to give notice that a reference is to be made to:

- the prisoner;
- the prisoner's named person;
- any guardian of the prisoner;
- any welfare attorney of the prisoner;
- the prisoner's responsible medical officer;
- the mental health officer; and
- the Commission.

11. Separately, if it appears to the Mental Welfare Commission for Scotland that it is appropriate to do so, it may, by notice in writing to the Scottish Ministers, require them to make a reference to the Tribunal about the direction to which the prisoner is

subject. That notice must include their reasons for requiring Scottish Ministers to make a reference to the Mental Health Tribunal Scotland. These reasons must be included in the reference to the Tribunal alongside the details of the prisoner and the prisoner's named person in paragraph 10 above. Scottish Ministers must give notice that the reference is to be made to the same parties in paragraph 10.

12. If the Mental Health Tribunal Scotland has not made a determination about the Direction in the period of two years that ends on the day which falls 2 years after the day on which the direction is made (and every 2 years thereafter), then Scottish Ministers must make a reference to the Tribunal about the Direction to which the prisoner is subject. Scottish Ministers must include the reason for making the reference, alongside the details of the prisoner and the prisoner's named person to the Tribunal and must notify those parties in paragraph 10 of the reference.

13. In considering a reference from Scottish Ministers or an application from the prisoner or the prisoner's named person, the Tribunal must afford the persons mentioned below the opportunity:

- a) of making representations (whether orally or in writing); and
- b) of leading, or producing, evidence; and
- c) whether or not any such representations are made, hold a hearing.

14. Those persons are:

- the prisoner;
- the prisoner's named person;
- the prisoner's primary carer;
- any guardian of the prisoner;
- any welfare attorney of the prisoner;
- any curator ad litem appointed in respect of the prisoner by the Tribunal;
- the Scottish Ministers;
- the prisoner's responsible medical officer;
- the mental health officer; and
- any other person appearing to the Tribunal to have an interest.

15. if the Tribunal:

- a) is satisfied:
  - i. that the prisoner has a mental disorder; and
  - ii. that, as a result of the prisoner's mental disorder, it is necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital, whether or not for medical treatment, it must make no direction to the Scottish Ministers;
- b) is not satisfied that the prisoner has a mental disorder, it must direct the Scottish Ministers to revoke the direction to which the prisoner is subject;
- c) is satisfied that the prisoner has a mental disorder; but is not satisfied:
  - i. that, as a result of the prisoner's mental disorder, it is necessary, in order to protect any other person from serious harm, for the prisoner to be detained in hospital, whether or not for medical treatment; and

- ii. either:
- (that the conditions mentioned in paragraph 5(b)(i)(2)&(3) above continue to apply in respect of the prisoner; or
  - that it continues to be necessary for the prisoner to be subject to the direction.

the Tribunal shall direct the Scottish Ministers to revoke the direction to which the prisoner is subject.

16. If directed to do so by the Tribunal, Scottish Ministers must revoke the direction to which the prisoner is subject.

*Revocation of the Direction*

17. Where the Scottish Ministers revoke a direction they must direct that the prisoner be admitted to a prison, institution or other place in which the prisoner might have been detained had the prisoner not been detained in hospital by virtue of the direction. On the prisoner's admission to the prison, institution or place, the Direction ceases to have effect.

*Release in relation to Prison Sentence*

18. Where a prisoner is released in relation to their prison sentence, the direction to which the prisoner is subject ceases to have effect. If the prisoner, continues to require mental health care and treatment and meets the legislative requirements for detention under a civil order, the prisoner may continue to be detained in hospital under such an order.