Information on Restricted Patient Cases

This document includes the following:

(1) the text of a talk entitled “The role of the Mental Health Tribunal for Scotland in considering restricted patient cases” delivered by the President at a recent seminar;
(2) a copy of section 193, as amended, of the 2003 Act which accompanied the President’s talk;
(3) a copy of the note entitled “The section 193 tests: sequential and cumulative” which accompanied the President’s talk.

The texts cover:

(a) the background to the 2003 Act;
(b) the Millan Committee, its remit and report;
(c) the introduction of the Mental Health (Scotland) Bill, criticism of its short title and the amendment of its short title to make reference to “Care and Treatment”;
(d) the principles of the 2003 Act;
(e) who a “restricted patient” is and the effect of a restriction order;
(f) how a restricted patient’s case comes before the Tribunal;
(g) the Tribunal’s powers under section 193 of the 2003 Act;
(h) what happens when a restricted patient’s case comes before the Tribunal; and
(i) the sequential and cumulative nature of the section 193 tests.
Background to the 2003 Act

Previous legislation

Prior to the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") the principal source of mental health law in Scotland was the Mental Health (Scotland) Act 1984 ("the 1984 Act"), the reform of which had been undertaken in piecemeal legislative fashion since its enactment. The 1984 Act itself did not introduce new law: it consolidated existing legislation and re-enacted the Mental Health (Scotland) Act 1960 ("the 1960 Act") and its amendments.

The 1960 Act itself was a consolidating Act. It followed a major reform of mental health law and consolidated the Lunacy (Scotland) Acts 1857 to 1913 and the Mental Deficiency (Scotland) Acts 1930 and 1940. The 1960 Act was at the time a “liberalising measure” brought about by the Dunlop Committee in Scotland (following on from the Percy Commission (1954 – 1957)), which tried to ensure that those with mental disorders would not automatically be detained and to protect the rights of those with mental disorders.

The Millan Committee

The work of the Millan Committee – known after its chair, the Right Honourable Bruce Millan, a former Secretary of State for Scotland and European Commissioner – from March 1999 to November 2000 was the first comprehensive review of mental health law in Scotland for a number of decades.

The remit of the Millan Committee was:

"In the light of developments in the treatment and care of persons with mental disorder, to review the Mental Health (Scotland) Act 1984, taking account of issues relating to the rights of patients, their families and carers, and the public interest; and having particular regard to:

- the definition of mental disorder;
- the criteria and procedures for detention in and discharge from hospital;
- leave of absence and care outwith hospital;
- the role of the Mental Welfare Commission for Scotland;
- the findings of the Committee set up to review the arrangements for the sentencing and treatment of serious violent and sexual offenders, including those with personality disorders;

and to make recommendations" (underlining added).
The need for review arose not simply from the passage of time since the last major review of mental health legislation in Scotland and from the increasing recognition and awareness of the rights of those suffering from mental disorder over that period (and one need only note the change in the names of the various Acts over time to get a flavour of that growing recognition and awareness), but also from the European Convention on Human Rights, to which Scotland was subject as a result of the Scotland Act 1998.

**The Millan Report**


The Mental Health (Scotland) Bill was introduced in the Scottish Parliament on 16 September 2002; the Bill was amended at Stage 2 to make reference to “Care and Treatment” in its title; the Bill was passed in March 2003; and received Royal Assent on 25 April 2003.

I pause here to say something about that amendment to the (short) title of the Bill by the introduction of the words “Care and Treatment”.

During Stage 1 of the Bill when the Health and Community Care Committee was taking evidence a significant minority, in particular service-user groups, expressed the view that the (short) title of the Bill was inappropriate as:

- the Bill was not, in fact, about mental health (it is about mental disorder);
- the (short) title sends out the signal that “mental health” is a bad thing whereas mental health, just like physical health, is something positive to be promoted.

The amendment was brought forward by Adam Ingram, MSP. He explained:

“Amendment 266 is designed to change the short title from the Mental Health (Scotland) Act to the Mental Health (Care and Treatment) (Scotland) Act.

The Bill is not as comprehensive as its title suggests, as it does not cover all aspects of the mental health agenda. The Bill is concerned with the care and treatment of people with mental illness and disorder and its label should describe its contents accurately.

Amendment 266 might also help in a small way to lessen the stigma that people with mental ill health suffer. That stigma would be reinforced every time the media mentioned people being detained under the Mental Health (Scotland) Act. The addition of the words “Care and Treatment” would give the bill more positive connotations.”

The (then) Scottish Executive was not minded to accept the amendment. Mr Ingram pressed his amendment, despite being requested not to do so by the Minister, and the amendment was agreed by a majority of the Committee.

What Mr Ingram says, it seems to me, is self explanatory. It is a simple point but one worth noting. His amendment was small but, I think, significant.
The 2003 Act became operational in October 2005 when the bulk of its provisions came into force. The 2003 Act established the Mental Health Tribunal for Scotland (“the Tribunal”), removing jurisdiction in respect of mentally disordered patients from the Sheriff Court and granting to the Tribunal sole jurisdiction to hear applications and references by, and in respect of, mentally disordered patients, subject to review by the Superior Courts, (namely the Sheriff Principal and the Court of Session).

In short, the 2003 Act makes provision as to:

• when and how people can be given medical treatment, if they have a mental disorder;
• when people can be treated or taken into hospital against their will;
• what people’s rights are and what safeguards there are to make sure that those rights are protected.

Relatively unusually for legislation in this country, the 2003 Act makes provision in section 1 for a series of principles, setting out how the legislation is to be applied to those affected by it.

The 2003 Act provides a set of fundamental principles which apply throughout the operation of the whole of the 2003 Act.

In discharging any function under the Act, the person discharging the function is required to have regard to the matters specified in section 1(3) (in respect of any patient who has attained the age of 18 years and subject to certain specified exemptions: namely the patient, named person, primary carer, advocacy worker, solicitor, etc).

These include:

• the present and past wishes and feelings of the patient (relevant to the discharge of the function);
• the views of the patient’s named person, carer, guardian and welfare attorney (relevant to the discharge of the function);
• the importance of the patient participating as fully as possible (in the discharge of the function);
• the importance of providing such information and support to the patient as is necessary to enable the patient to participate as fully as possible (in the discharge of the function);
• the range of options available in the patient’s case;
• the importance of providing maximum benefit to the patient;
• the need to ensure that, unless it can be shown to be justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation;
• the patient’s abilities, background and characteristics including, without prejudice to that generality, the patient’s age, sex, sexual orientation, religious persuasion, racial origin, cultural and linguistic background and membership of any ethnic group;

After having regard to each of these matters, the person discharging the function under the 2003 Act must discharge the function in the manner that appears to the person to involve the minimum restriction on the freedom of the patient that is necessary in the circumstances.
The Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland was established by the 2003 Act.

As I have already indicated, the role of the Tribunal is to have oversight of, and ultimately make certain decisions in respect of, the care and treatment of mentally disordered patients who are the subject of compulsory measures imposed by the relevant authorities, and so it will be seen that the work of the Tribunal has broad application.

However, the focus of my talk today is the role of the Tribunal in respect of a particular category of patients: namely “restricted patients”, and so we require to identify in the first instance just who a restricted patient is.

Who is a “restricted patient”?

A restricted patient is a patient in respect of whom a criminal court has imposed a compulsion order and a restriction order.

At this point, we should be clear that there are two categories of patients subject to a compulsion order (the compulsion order is the order which authorises for the period of 6 months, for example, the patient’s detention in hospital; the giving to the patient of medical treatment under Part 16 of the 2003 Act; the requirement on the patient to attend specified places at specified times to receive such medical treatment; and the requirement on the patient to allow the mental health officer, the responsible medical officer and any person responsible for providing medical treatment or community care services to visit the patient where the patient resides):

So, the two categories of patients subject to a compulsion order are:

1. those who the court is content to subject to a time limited (6 month) compulsion order which can be revoked by the responsible medical officer alone; and
2. those patients who, if they were unwell in the community, are considered to pose a risk of serious harm to the public and who the court determine should be subject to a compulsion order without limitation of time and whose care should therefore be subject to the scrutiny of the Scottish Ministers and whose cases should be determined by the Tribunal.

Therefore, a restricted patient is a patient who is subject to both a compulsion order and a restriction order.

What is the effect of a restriction order?

So what is the effect of a restriction order? As I have indicated, one of the effects of a restriction order is to make the compulsion order “without limitation of time” (section 57(A)(7) of the Criminal Procedure (Scotland) Act 1995).

A second effect is, as it were, to “plug” the patient into Part 10 of the 2003 Act, imposing obligations upon mental health officers and responsible medical officers, requiring decisions of the responsible medical officer to be subject to the scrutiny and consent of the Scottish Ministers and requiring certain decisions to be left to the determination of the Tribunal. Before I go on to discuss what those decisions are which are to be left to the determination of the Tribunal, I would like to look at the various mechanisms by which the case of a restricted patient may come before the Tribunal.
How does a restricted patient’s case come before the Tribunal?

Section 192
First, the restricted patient (or the restricted patient’s named person: a person nominated by the patient or appointed by operation of the 2003 Act who is entitled to be advised and consulted about compulsory measures under the 2003 Act and who has the same rights to apply to, and be heard by, the Tribunal as does the patient) may make an application to the Tribunal under section 192 of the 2003 Act for an order (under section 193 of the 2003 Act):

1. revoking the compulsion order;
2. revoking the restriction order to which the patient is subject (leaving the patient subject to the compulsion order only);
3. revoking the restriction order and varying the compulsion order by modifying the measures specified in it; or
4. conditionally discharging the patient.

Although the term “absolute discharge” is not used in the 2003 Act, revocation of the compulsion order is commonly referred to as “absolute discharge”, as the effect of revocation of the compulsion order is to cause not only the compulsion order to cease to have effect but is to cause the restriction order to cease to have effect also (see section 197 of the 2003 Act), thus leaving the patient subject to neither the compulsion order nor the restriction order (in other words, completely at liberty).

Section 185
Second, the Scottish Ministers are obliged to make a reference to the Tribunal under section 185 where they receive from the patient’s responsible medical officer an annual report (in terms of section 183) that includes a recommendation; or where they receive at any other time a report from the patient’s responsible medical officer making one of the recommendations set out in section 184 (namely for revocation of the compulsion order, revocation of the restriction order, variation of the compulsion order, or conditional discharge).

Section 187
Third, the Scottish Ministers are obliged to make a reference to the Tribunal under section 187 where they are required to do so by the Mental Welfare Commission for Scotland (under section 186 of the 2003 Act).
Section 191

Fourth, the Scottish Ministers may make an application to the Tribunal on their own initiative under section 191 of the 2003 Act. It should be noted that the 2003 Act does not impose upon only responsible medical officers the obligation (under sections 182 and 184) to keep compulsion orders and restriction orders under review, but, quite separately, it imposes upon the Scottish Ministers an independent obligation (under section 188) to keep compulsion orders and restriction orders under review. Accordingly, where the Scottish Ministers come to the view that the restricted patient meets the necessary criteria, then they must make an application to the Tribunal for, as appropriate, an order revoking the compulsion order; or revoking the restriction order (and varying the compulsion order if necessary); or conditionally discharging the patient.

Section 189

Fifth, the Scottish Ministers are obliged to make a reference to the Tribunal where required to do so by the provisions of section 189. These references are commonly referred to as “two year reviews”. In fact, the review must be carried out annually, but it looks back over the two year period preceding the review. Where during that two year period:

- no reference has been made to the Tribunal by Ministers under sections 185 or 187;
- no application has been made to the Tribunal by Ministers under section 191;
- no application has been made to the Tribunal by the patient (or the patient’s named person) under section 192,

then the Scottish Ministers must make a reference to the Tribunal under section 189.

Clearly, the intention of section 189 is to ensure that, even where the responsible medical officer has made no recommendation, the Mental Welfare Commission has not required a reference to be made, the Scottish Ministers have not made an application off their own bat and the patient (or his or her named person) has not made an application to the Tribunal, then each restricted patient will still have his or her compulsion order and restriction order reviewed by the Tribunal on a biennial basis.

Section 201

As well as the foregoing means by which a restricted patient’s cases may be brought before the Tribunal, a restricted patient may also bring his or her case before the Tribunal, in circumstances where that patient is on conditional discharge and subject to conditions imposed by the Tribunal and where those conditions of discharge have been varied by the Scottish Ministers. In such circumstances, the patient may, under section 201 of the 2003 Act, appeal against the variation of the conditions of discharge.

As you will have understood from the foregoing, there is a complex series of mechanisms by which a restricted patient’s case may come before the Tribunal. The good news is that, despite the various mechanisms by which a restricted patient’s case may come before the Tribunal, the powers of the Tribunal in all of these circumstances are contained in one single section of the 2003 Act, namely section 193. The bad news is that section 193 is, in its detail, quite a complex section.
Section 264

Before I discuss with you the various disposals available to the Tribunal under section 193, I should perhaps refer you at this stage to one other provision of the 2003 Act by which a restricted patient’s case may come before the Tribunal. This is section 264, in terms of which a patient who is detained in the State Hospital may make an application to the Tribunal for an order declaring that the patient is being detained in conditions of excessive security. This is commonly, but erroneously, referred to as “an appeal against excessive security” (it is not an appeal; it is an “application”).

Section 264 and its associated provisions are themselves complex. I will not have time in the course of this talk today to discuss those provisions. I simply take this opportunity to emphasise that section 264 applies to all patients who are detained in the State Hospital, both restricted and non-restricted patients.

The Tribunal’s powers under section 193 of the 2003 Act

As I have said, section 193 – which sets out the powers of the Tribunal when a reference or application (other than a section 264 application) comes before it – is complex in its detail and I recommend that you read and re-read the provisions of section 193, as only by fully understanding the tests that the Tribunal must apply can you be sure that you are able to provide the Tribunal with the information which it needs.

I also recommend that you read the Opinion of the Court of Session (Lords Wheatley and Clarke and Lady Cosgrove) in the Appeal by the Scottish Ministers against a decision of the Tribunal (to revoke a restriction order) in the case of JK: http://www.scotcourts.gov.uk/opinions/2009csih9.html.

However, for the moment, it is sufficient for me to indicate that the powers of the Tribunal under section 193 are:

1. to revoke the compulsion order to which the restricted patient is subject (effectively “absolutely discharging” the restricted patient, as the effect of revoking the compulsion order is, by virtue of section 197, to cause the restriction order to cease to have effect);

2. to revoke the restriction order, and vary the compulsion order by modifying the measures specified in it (which has the effect that Part 10 of the 2003 Act no longer applies to the patient and so the particular obligations imposed upon responsible medical offers in respect of restricted patients no longer apply; the obligations and responsibilities imposed upon the Scottish Ministers no longer apply, and so Ministers no longer have any role in scrutinising decisions made in respect of the care of the patient; and the powers of the Tribunal under section 193 are no longer available to it in respect of the patient);

3. to conditionally discharge the patient (allowing the release of the patient into the community, while still subject to the compulsion order and restriction order, subject to such conditions of discharge as the Tribunal considers appropriate – which conditions, for example, commonly specify the address that the patient is to reside at; prohibit or limit the consumption of alcohol by the patient; prohibit the consumption of illicit substances by the patient; require the patient to attend meetings with the responsible medical officer; and the like).
What happens when a restricted patient’s case comes before the Tribunal?

When the case of a restricted patient comes before the Tribunal – by any of the mechanisms to which I have already referred, excluding section 264 – then on receipt of the application or reference the Tribunal will circulate the papers lodged with it.

The hearing will generally be scheduled for a date not less than 12 weeks after the date on which the application or reference has been received by the Tribunal to allow parties to instruct and lodge the necessary relevant reports.

The hearing, as in non-restricted patient cases, will take place before a 3 member tribunal. The tribunal will comprise a legally qualified member, a medical member and a general member. The difference in the case of a restricted patient is that the legal member must be the President of the Tribunal or a Sheriff (as opposed to simply a legally qualified member, as is the case in non-restricted patient cases).

Where an application is made by or on behalf of the patient, the Tribunal generally receives a letter requesting that the Tribunal fix a hearing to consider the patient’s case under section 192. Thereafter an independent report may be lodged (as may also happen where a patient responds to a reference made by the Scottish Ministers).

Where a reference is made by the Scottish Ministers (or in response to a section 192 application made by or on behalf of the patient), the Ministers produce a number of papers. These generally comprise – in the form of Inventories of Productions – the report of the responsible medical officer which has triggered the reference (or which has been prepared in response to the section 192 application, along with previous historical responsible medical officer reports which give detail as to the progress made by the patient through the mental health system; available reports of the mental health officer; the charges faced by the patient in the criminal proceedings which resulted in the imposition of the compulsion and restriction orders, reports of proceedings before the Criminal Court, the Schedule of Convictions that was before the Criminal Court and the psychiatric reports that were before the Criminal Court which have been provided to the Scottish Ministers by Crown Office. Where the Ministers oppose a recommendation made by the RMO they will provide an independent report, instructed by them.

The Scottish Ministers also generally provide in advance of the substantive hearing a non-statutory statement, a “Position Statement”, setting out, from the Scottish Ministers’ perspective, the background and history to the case and the views of the Scottish Ministers as to the appropriate determination of the case. Perhaps surprisingly this approach has not, so far as I am aware, been adopted by patient’s representatives. It would be a useful means by which the issues in dispute before the Tribunal might be more clearly focused.

What information does the Tribunal require?

The information that the Tribunal requires to enable it to discharge its function and apply the various tests in section 193 of the 2003 Act – and that those submitting information to, or giving evidence before, the Tribunal should focus their minds on addressing – depends upon the outcome desired.

Clearly, the onus is on those who argue that the patient:

- should remain detained in hospital (whether because of the risk the patient poses or for any other reason); or
- should remain subject to the compulsion order; or
- should remain subject to the restriction order,

to satisfy the Tribunal of those things.
Nevertheless, it seems to me that whoever you are – whether RMO, MHO, legal representative for the patient, legal representative for the named person or legal representative for the Scottish Ministers – it can only assist you, and the Tribunal, if you have a clear view as to the order that you wish the Tribunal to make and if you endeavour to provide the Tribunal with the information that will satisfy it that the criteria necessary for that order to be granted are met, whether by the provision of relevant reports or risk assessments or by appropriate and relevant questioning of witnesses.

Section 193 sets out a sequential list of tests that the Tribunal must work through and apply when considering the cases of restricted patients. The tests are also cumulative, by which I mean that in determining the first criterion set out in section 193(2) (the “risk of serious harm requiring detention in hospital, whether or not for medical treatment” test) – namely, does the patient have a mental disorder – then that factor has already been considered and determined by the time one comes to consider it again in, for example, the test for conditional discharge (at section 193(7)(a)(i)).

The sequential nature of section 193 is quite clear. It is more difficult to explain the cumulative effect of the various tests and so I have provided you with a copy of section 193 (as amended) and a short note – wittily entitled “The section 193 tests: sequential and cumulative” – which I urge you to work through at your leisure.

For now let’s work through those tests in order to see what information you should be seeking to bring before the Tribunal.

1. **Does the patient have a mental disorder?**
   
   (Sections 193(2)(a), 193, 193(4)(a), 193(5)(a) and 193(7)(a)(i))

   Clearly, this goes to the very heart of the matter before the Tribunal. It is not for the patient to satisfy the Tribunal that he or she does not have a mental disorder. It is for others to satisfy the Tribunal that the patient does have a mental disorder.

   If the patient does not have a mental disorder (defined at section 328 of the 2003 Act: mental illness; personality disorder; or learning disability, however caused or manifested) then the Tribunal must revoke the compulsion order (absolutely discharging the patient).

   Accordingly, those who wish the patient to remain subject to the compulsion order need, in the first instance, to ensure that the issue of diagnosis is properly addressed. Where there is any dispute as to the diagnosis then it may seem appropriate for an independent report to be instructed. Where, for example, the diagnosis is one of Personality Disorder the tribunal would expect to see a full explanation on the face of the responsible medical officer’s report setting out the relevant criteria which have been met on the basis of which the diagnosis has been made or the report of a suitably experienced psychologist which has formed part of the basis of the diagnosis.

   Without pre-judging any case, where the responsible medical officer provides a cogent and reasoned diagnosis it seems that if a party wishes the Tribunal to find that the patient does not have a mental disorder then that party would be wise to martial evidence and arguments to challenge that diagnosis.

   That martalling of evidence and arguments may comprise an independent report lodged with the Tribunal. This would allow a clear focussing of the issues in dispute and would provide a basis in precognition for cross-examination of the responsible medical officer.
The Court of Session has specifically referred to the role of the responsible medical officer in the statutory regime as being “of the highest importance” and emphasised the need for the Tribunal to give “clear and intelligible reasons for the rejection” of cogent parts of a responsible medical officer’s evidence (Opinion of the Court in the case of JK at paragraph [52]).

Clearly, this is a matter that the Tribunal itself will have in mind. However, if you wish the Tribunal to reject cogent parts of the responsible medical officer’s evidence then it can only assist your case if you identify clear and intelligible reasons as to why it should do so.

2. **Is it, as a result of the patient’s mental disorder, necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment?**

   (Section 193(2)(b))

If the Tribunal is satisfied that the patient has a mental disorder and that it is “as a result of the patient’s mental disorder, necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment” then it must “make no order”.

The Court of Session has made clear in its Opinion in the case of JK that the Tribunal must first consider this test in every restricted patient case. Accordingly, this is a matter which responsible medical officers, mental health officers and parties must turn their minds to because it is a matter that Tribunals must turn their minds to and they will require clear evidence to allow them to make a finding. It is, in the words of the Court:

   “a threshold requirement on the Tribunal, which must be dealt with before it can turn its attention to any other part of [section 193]” (Opinion of the Court in the case of JK, paragraph [33]).

Again, I emphasise that it is for those who consider that this test (“the risk of serious harm requiring detention in hospital, whether or not for medical treatment” test) is met to satisfy the Tribunal that it is met. But again, it seems to me that any party who believes that the test is not made out would be wise to martial evidence and arguments in support of that view. This allows for clear focussing of the issues in dispute and allows the best possible basis for consideration of the test by the Tribunal.

3. **“(a) … 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 patient; and

   (b) that if the patient were not provided with such medical treatment there would be a significant risk—

   (i) to the health, safety or welfare of the patient; or
   (ii) to the safety of any other person”**

   **OR**

   “that it continues to be necessary for the patient to be subject to the compulsion order”.
These are, respectively, the section 182(4) conditions referred to in section 193(4) and the compulsion order “necessity” test, which form a vital part of the test for revocation of the compulsion order under section 193(4).

To have reached the point of considering the test in section 193(4) the Tribunal must already be satisfied that the patient has a mental disorder (otherwise it would have revoked the compulsion order under section 193(3)).

And it must already be not satisfied that the “the risk of serious harm requiring detention in hospital, whether or not for medical treatment” test is met (otherwise it would require to have made no order under section 193(2)). This is what I mean by the cumulative nature of the tests in section 193.

So, on considering section 193(4), if the Tribunal is “not satisfied” as to either of these matters then it must revoke the compulsion order under section 193(4).

Again, it is for those who do not want the compulsion order revoked to persuade the Tribunal that the patient satisfies either, or both, of these tests and I would expect these tests to be addressed in the responsible medical officer’s report.

I should emphasise – for the avoidance of doubt – that it is of no use to the Tribunal to have a report, or even oral evidence, from the responsible medical officer baldly stating that the patient does meet either or both of these tests. The Tribunal is exercising a judicial function and, accordingly, it requires evidence of the basis upon which the responsible medical officer concludes that either or both of these tests are met.

The Tribunal will not – cannot – accept assertions. It requires evidence to allow it to determine whether a test is met or not. It is perhaps worth noting that the tests set out in section 193 of the 2003 Act are tests which the Tribunal must decide are met or not. Responsible medical officers, mental health officers and others, as a matter of good practice, will consider these tests, but their views are not conclusive. The Tribunal’s views are conclusive.

If a Tribunal does not take the same view as those giving evidence before it as to whether the tests are met or not, it is NOT a matter of disagreement between equals. It is the case that the Tribunal, having weighed all the evidence, has reached its own determination on the basis of the evidence placed before it by the responsible medical officer, mental health officer and others.

4. The Tribunal is not satisfied that it continues to be necessary for the patient to be subject to the restriction order

Given the sequential nature of section 193 that I have already referred to, if the Tribunal is considering this test in section 193(5) then this test will be the only show in town because to have got this far the other parts of the test in section 193(5) must already be made out.

This is, despite appearances, a complex test. There is not sufficient time to go into it in detail here but I refer you to the Court of Session’s comments at paragraphs [6], [33], [37] and [39] of its Opinion in the case of JK: I urge all of you to read and re-read it along with section 193 itself.
The Court said that the test is:

“a high one, but it is not arbitrary … Rather it is a clear and separate test based on historical and policy considerations, which the Tribunal must consider in every case in the context of the factual and opinion evidence it finds established”.

Accordingly, it seems to me that it is to the benefit of responsible medical officers, mental health officers and parties – and, indeed, of the Tribunal – for those giving evidence before the Tribunal, and for parties, to give very serious consideration to the relevant factual and opinion evidence and to lead and to challenge that evidence appropriately.

5. The Tribunal is not satisfied that it is necessary for the patient to be detained in hospital

(Section 193(7)(b)(ii))

This is the final part of the test in section 193(7) for conditional discharge of a patient. Given the sequential nature of section 193, for the Tribunal to have got to the stage of considering this test then the other legs of the section 193(7) test must already have been met (i.e. the Tribunal is satisfied that the patient has a mental disorder; the Tribunal is satisfied that the section 182(4) criteria are met; and the Tribunal is not satisfied that “the risk of serious harm requiring detention in hospital, whether or not for medical treatment” test is made out).

Those who argue that the patient should not be conditionally discharged must seek to persuade the Tribunal that it is necessary for the patient to be detained in hospital. Those who take a different view will doubtless seek to lead evidence and adduce arguments that it is not so necessary.

If the Tribunal is not satisfied “that it is necessary for the patient to be detained in hospital” then it may exercise its discretion to conditionally discharge the patient and, perhaps, to defer conditional discharge under section 195. But the matter of the exercise of discretion and the deferral of conditional discharge are themselves complex and must remain to be discussed another day … .

Concluding remarks

The provisions of the 2003 Act are complex, and it that complexity with which Tribunals are faced every day. I trust that these remarks have thrown some light on that complexity and given some indication of the issues that, in my view, we all require to address.
Section 193, as amended

193 Powers of Tribunal on reference under section 185(1), 187(2) or 189(2) or application under section 191 or 192(2)

(1) This section applies where—
   (a) an application is made under section 191 or 192(2) of this Act; or
   (b) a reference is made under section 185(1), 187(2) or 189(2) of this Act.

(2) If the Tribunal is satisfied—
   (a) that the patient has a mental disorder; and
   (b) that, as a result of the patient's mental disorder, it is necessary, in order to protect
      any other person from serious harm, for the patient to be detained in hospital, whether
      or not for medical treatment,
   it shall make no order under this section.

(3) If the Tribunal is not satisfied that the patient has a mental disorder, the Tribunal shall
    make an order revoking the compulsion order.

(4) If the Tribunal—
   (a) is satisfied that the patient has a mental disorder; but
   (b) is not satisfied—
      (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect
          any other person from serious harm, for the patient to be detained in hospital, whether
          or not for medical treatment; and
      (ii) either—
          (A) that the conditions mentioned in paragraphs (b) and (c) of section
              182(4) of this Act continue to apply in respect of the patient; or
          (B) that it continues to be necessary for the patient to be subject to the
              compulsion order.
   it shall make an order revoking the compulsion order.
(5) If the Tribunal—

(a) is satisfied—

(i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and
(ii) that it continues to be necessary for the patient to be subject to the compulsion order; but

(b) is not satisfied—

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
(ii) that it continues to be necessary for the patient to be subject to the restriction order,

it shall make an order revoking the restriction order.

(6) If the Tribunal—

(a) makes an order, under subsection (5) above, revoking the restriction order; and
(b) is satisfied that the compulsion order should be varied by modifying the measures specified in it, it shall make an order varying the compulsion order in that way.

(7) If the Tribunal—

(a) is satisfied—

(i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and
(ii) that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order; but

(b) is not satisfied—

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
(ii) that it is necessary for the patient to be detained in hospital,

the Tribunal may make an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit.

(8) Before making a decision under this section the Tribunal shall—

(a) afford the persons mentioned in subsection (9) below the opportunity—

(i) of making representations (whether orally or in writing); and
(ii) of leading, or producing, evidence; and

(b) whether or not any such representations are made, hold a hearing.
(9) Those persons are–

(a) the patient;
(b) the patient's named person;
(c) the patient's primary carer;
(d) any guardian of the patient;
(e) any welfare attorney of the patient;
(f) any curator ad litem appointed by the Tribunal in respect of the patient;
(g) the Scottish Ministers;
(h) the patient's responsible medical officer;
(i) the mental health officer; and
(j) any other person appearing to the Tribunal to have an interest.

(10) Nothing in section 102 (state hospitals) of the National Health Service (Scotland) Act 1978 (c.29) prevents or restricts the detention of a patient in a state hospital as a result of a decision of the Tribunal not to make any order under this section.

(A) substituted by section 69(4) of the Adult Support and Protection (Scotland) Act 2007 (asp 10)
The section 193 tests: sequential and cumulative

1. **Does the patient have a mental disorder?**
   If the tribunal is not satisfied that the patient has a mental disorder then the tribunal shall make an order revoking the compulsion order (and therefore effectively absolutely discharging the patient: see section 197 of the 2003 Act): *section 193(3).*
   If the tribunal is satisfied that the patient has a mental disorder go to 2, below.

2. **Is it, as a result of the patient’s mental disorder, necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment?**
   The tribunal must already have been satisfied under 1, above, that the patient has a mental disorder (otherwise it would have required to revoke the compulsion order and there would be no need to go further) and so it is satisfied in respect of section 193(2)(a).
   The tribunal must now consider the test referred to in the heading to this part of the note, being the test set out at section 193(2)(b).
   If the tribunal is satisfied that it is, “as a result of the patient’s mental disorder, necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment” then both parts of the test in section 193(2) are made out and the tribunal “shall make no order”: *section 193(2).*
   If the tribunal is not so satisfied go to 3, below.

3. **The tribunal is not satisfied that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of the 2003 Act continue to apply in respect of the patient?**
   **OR**
   **The tribunal is not satisfied that it continues to be necessary for the patient to be subject to the compulsion order?**
   To have reached this point the tribunal is already:
   - satisfied that the patient has a mental disorder (see 1, above);
   - not satisfied that it is necessary to detain the patient in hospital to protect any other person from serious harm (see 2, above).
   Accordingly, the criteria set out at section 193(4)(a) and 193(4)(b)(i) are already met. Therefore the tribunal must consider whether *either* of the criteria referred to in the heading to this part of the note are met (see section 193(4)(b)(ii)).
   If *either* criteria is met (i.e. if the tribunal is not satisfied in respect of either of them) then the test set out in section 193(4) is met in full and the tribunal shall revoke the compulsion order: *section 193(4).*
   If *neither* criteria is met (i.e. if the tribunal is, in fact, satisfied that both criteria are met – namely that the section 182(4)(b) and (c) conditions continue to apply AND that it continues to be necessary for the patient to be subject to the compulsion order) go to 4, below.
4. **The tribunal is not satisfied** that it continues to be necessary for the patient to be subject to the restriction order?

To have reached this point the tribunal is already:

- satisfied that the patient has a mental disorder (see 1, above);
- that the section 182(4)(b) and (c) conditions continue to apply (see 3, above);
- that it continues to be necessary for the patient to be subject to the compulsion order (see 3, above);
- not satisfied that it is necessary to detain the patient in hospital to protect any other person from serious harm (see 2, above).

Accordingly, the criteria set out at section 193(5)(a)(i) (NB this combines both mental disorder *and* the section 182(4)(b) and (c) conditions simply by referring to the “section 182(4)” conditions; the section 182(4)(a) condition is that the patient has a mental disorder), 193(5)(a)(ii) and 193(5)(b)(i) are already met.

Therefore the tribunal must consider whether the criterion referred to in the heading to this part of the note is made out (see section 193(5)).

If the tribunal is **not satisfied** that it continues to be necessary for the patient to be subject to the restriction order then it shall revoke the restriction order: *section 193(5)*.

If the tribunal is **satisfied** that it continues to be necessary for the patient to be subject to the restriction order go to 5, below.

5. **The tribunal is not satisfied** that it is necessary for the patient to be detained in hospital

To have reached this point the tribunal is already:

- satisfied that the patient has a mental disorder (see 1, above);
- that the section 182(4)(b) and (c) conditions continue to apply (see 3, above);
- that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order (see 3 and 4, above);
- not satisfied that it is necessary to detain the patient in hospital to protect any other person from serious harm (see 2, above).

Accordingly, the criteria set out at section 193(7)(a)(i) (NB this combines both mental disorder *and* the section 182(4)(b) and (c) conditions simply by referring to the “section 182(4)” conditions; the section 182(4)(a) condition is that the patient has a mental disorder), 193(7)(a)(ii) and 193(7)(b)(i) are already met.

Therefore the tribunal must consider whether the criterion referred to in the heading to this part of the note is made out (see section 193(7)).

If the tribunal is **not satisfied** that it is necessary for the patient to be detained in hospital then it *may* exercise its discretion (see the use of the phrase “may make an order that the patient be conditionally discharged”) to order conditional discharge and impose such conditions as it thinks fit.

If the tribunal is **satisfied** that it is necessary for the patient to be detained in hospital then it has been through section 193, it has not exercised any of its powers as the relevant criteria have not been met to enable it to do so and therefore, having exhausted section 193 it can go no further and must maintain the *status quo* and, by default, make no order.