

Immediate re-detention

**A report into the
incidence of immediate
re-detentions under short
term detention certificates**

Who we are and what we do

We put individuals with mental illness, learning disability and related conditions at the heart of all we do: promoting their welfare and safeguarding their rights.

There are times when people will have restrictions placed on them to provide care and treatment. When this happens, we make sure it is legal and ethical.

We draw on our knowledge and experience as health and social care staff, service users and carers.

Our Goals

- Help individuals using mental health or learning disability services to get the best possible care and treatment
- Help people working in mental health and learning disability services to provide the best possible care and treatment for each person using those services
- To provide independent expertise in applying best ethical and legal practice in care and treatment

Our Values

Individuals with mental illness, learning disability and related conditions have the same equality and human rights as all other citizens. They have the right to

- be treated with dignity and respect
- ethical and lawful treatment and to live free from abuse, neglect or discrimination
- care and treatment that best suits their needs
- lead as fulfilling a life as possible

ANALYSIS OF MENTAL WELFARE COMMISSION DATA

INTRODUCTION

This piece of work was prompted by a request from the Equality and Human Rights Commission (EHRC). They had some concerns, particularly where a person was detained immediately after a compulsory treatment order (CTO) had been refused by a Tribunal. We looked further into this, including a wider look at immediate re-detention of people subject to the Mental Health (Care and Treatment) (Scotland) Act 2003.

Usually, an episode of compulsory treatment starts with the granting of a short-term detention certificate (STDC). This authorises detention in hospital for up to 28 days (extended in some circumstances) and the giving of medical treatment, subject to the safeguards in part 16 of the Act. Longer term treatment requires to be authorised by a Mental Health Tribunal.

We were asked to identify any case where an individual had been detained under a further STDC following a decision by the Tribunal to refuse an application for a CTO. We did this, but also looked at other circumstances where an individual had been further detained after the expiry of an STDC.

THE LEGAL SITUATION

In relation to short term detention certificates (STDCs), section 44 of the Act requires that a person shall not be detained if, immediately before the medical examination, he/she was subject to:

- a STDC,
- a STDC which has been appropriately extended by either sections 47 or 68, or
- certificate granted under section 114 or 115 (patient on a community based CTO or ICTO, who has failed to comply with measures and has been detained).

The STDC form (DET 2) also requires the AMP to certify that the above requirements of section 44 are met. In that way, immediate re-detention is identified. Where it was not identified, it was possible retrospectively to look back at our data to determine whether a patient had been immediately re-detained.

The Act does not specify the meaning of “immediate”. Our legal advice is that, while there is a lack of case law in this area in relation to mental health, it would be reasonable to consider that a detention within 24 hours of one of the prohibited certificates having expired may be regarded as immediate re-detention.

The Act has no remedy if the application to the Tribunal for a CTO is late or incompetent. Under section 47, it is possible to extend an STDC by three working

days in order to apply to the Tribunal, but only if the patient's condition has changed. Further detention under another STDC could be regarded as unlawful in terms of section 44.

MWC DATA

Under the Act, most forms and notifications are sent to the Commission. We use this to build up an episode history for each individual. We also do our best to determine whether there may be any impropriety in relation to the detention. One of the actions that we take is to follow up where individuals have been "immediately re-detained".

In order that we could look at a wider variety of cases, we examined all emergency and short term detention certificates granted within a 6 month period that were either within 48 hours of a previous certificate having been revoked or 5 days of the order having expired.

In doing this, we identified specific cases where a person had been re-detained after a certificate expired and where we had information that there would be an application to the Mental Health Tribunal for Scotland for a compulsory treatment order prior to the expiry of the STDC. This is a statutory notification, is recorded on the episode history and we automatically regard the short term detention certificate as being likely to extend for a further 5 days as per section 68 (unfortunately, our information system cannot differentiate between working days, weekend days and public holidays). This gave us a further opportunity to look back over the year from 1 July 2011 to 30 June 2012. We looked to identify any person who had been detained under a further short term detention certificate where an application had been made to the Tribunal for a compulsory treatment order.

FINDINGS

RE-DETENTION WITHIN 48 HOURS/FIVE DAYS OF CERTIFICATE BEING REVOKED OR HAVING EXPIRED

We looked at 6 months worth of data on this. We identified 26 cases that met this criterion and looked individually at all of them to determine the reasons for re-detention. The findings were:

The majority of this group were individuals with bipolar disorder or borderline personality disorder where there had been significant changes. In all cases where the order had been revoked, it was the RMO who revoked the order. We found no cases during this period where an individual had been re-detained after the Tribunal revoked the STDC. One example of revocation was:

Person with bipolar disorder was admitted under a short term detention certificate during a manic episode. After a few days, the responsible medical officer revoked the certificate because the patient was willing to stay. Unfortunately, following a visit from a family member the next day, the patient became more agitated and distressed and wished to leave hospital.

We were satisfied that the grounds for detention were met, that it had been appropriate to revoke the order because it appeared to be no longer necessary but also appropriate to detain the patient further because the situation had changed, the necessity criterion was now met and the above criteria remained met. This was typical of the cases that we looked at and we were satisfied that the clinicians did their best to apply the principles and criteria for compulsion as best they could in changeable situations.

During this time, we found three cases where a patient had been detained on a further short term detention certificate because there had been an application for a CTO but an order had not been granted, for various reasons. We were able to identify more cases over the full year and report on these further below.

STDC GRANTED FOLLOWING FAILED CTO APPLICATION

In the 12 month period, we found 8 cases where a short term detention certificate had been granted following notification of an intention to apply for a compulsory treatment order. We looked into these cases in more detail.

In five cases, the application was not submitted in time or was withdrawn by the applicant. The reasons were:

- Mental health officer failing to submit within 14 days of the later of the two medical reports;
- Miscalculated the dates and ran out of time.
- Failure in the transmission of the application (not received by post in one case, failed attempt at electronic transmission in another)
- Withdrawn because the applicant discovered errors in the process.

There were three cases where the Tribunal ruled the CTO application incompetent.

- In two of these cases, the two medical recommendations had come from doctors in the same hospital without an explanation as to why the permitted conflict of interest was justified because fully to carry out the examination would result in delay which would involve serious risk to the health, safety or welfare of the patient or to the safety of other persons (paragraph 5 of the

Mental Health (Conflict of Interest) (Scotland) (No 2) Regulations 2005). There remains some uncertainty as to when there is taken to be a conflict of interest.

- In one case, the tribunal refused the application because there was some confusion as to the measures sought. All indications in the text of the application were that hospital detention was sought, but the form presented to the tribunal applied for community measures. Unfortunately, the applicant (mental health officer) was unable to attend to clarify. The tribunal refused the application but this did not involve testing the grounds. The patient was detained under a further STDC within 48 hours. We will write to the Tribunal about this case.

In all but one the above eight cases, the patient was re-detained within 24 hours of the expiry of the previous episode or the failure of the CTO application. The other patient was detained within 48 hours. We examined the short term detention certificates and were satisfied with the explanations given as to why the grounds were met. Note that in all these cases, the Tribunal had not tested the grounds.

We had been contacted for advice in some situations. We cannot recommend detaining under a further short term detention certificate. If the RMO decides to do so, we recommend legal advice and, if the patient is further detained, he/she should be told that it could be ruled unlawful and should be advised to obtain legal advice him or herself. Section 291 of the Act has been interpreted as allowing an application to be made to the Tribunal in these circumstances. Also, we emphasised the importance of fully discussing the situation with the patient, giving the patient the opportunity to remain informally in hospital while taking care not to use excessive coercion to achieve this.

Our greatest concern was the delay between the first short term detention certificate and the eventual testing of the grounds at Mental Health Tribunal. We would have expected that, where an immediate further detention under a short term detention certificate was considered necessary, there would be an early CTO application to the Tribunal in order that the grounds for further detention/compulsory treatment could be properly tested. We were disappointed and concerned to find significant delays. In one case, the Tribunal had conducted a CTO hearing within four days of the second short term detention certificate. In the others, the time between the original short term detention and the eventual hearing ranged from 46 to 66 days. We think this is unacceptable. This may or may not constitute unlawful deprivation of liberty under Article 5 of the European Convention on Human Rights but it certainly is not consistent with the intention of Parliament when the 2003 Act was passed.

The patient or named person could apply to the tribunal for the order to be revoked on the basis that the grounds are not met. Also, as previously mentioned, the Tribunal could be asked to declare the detention unlawful by means of an application under S291. If neither of these events occurs, the Tribunal has no opportunity to test the grounds for compulsory treatment until a further application is made for a CTO.

SUMMARY AND RECOMMENDATIONS

It was the intention of the Scottish Parliament that compulsory treatment beyond an initial short term detention period should be subject to a Mental Health Tribunal testing the grounds for compulsion and making a determination that the grounds are met. We found eight cases over a recent 12 month period where the Tribunal did not have the opportunity to do this. In several of those cases, this resulted in the patient being detained on “back to back” short term detention up to a maximum of 66 days without a judicial test of the grounds. We considered this to be contrary to the intention of Parliament and it has the potential to be a breach of Article 5 of the European Convention on Human Rights. We recommend the following steps to reduce the likelihood of this situation.

RECOMMENDATIONS FOR THE MENTAL WELFARE COMMISSION

We did not identify as many of these cases as we might have been able to do. This was because the form did not indicate to us that the patient had previously been immediately detained on one of the prohibited orders. Also, when this had been identified, our instructions to staff were misinterpreted and were not as clear as they could have been. As a result, we have taken the following action.

- Revised our instructions to staff and are arranging further training to identify possibly unlawful detention.
- Revising alerts on our information system so that, even if the appropriate notification is not made in the form, we can identify immediate re-detention following either revocation of a prohibited order or its expiry.

RECOMMENDATIONS TO NHS AND SOCIAL WORK SERVICES

We have concerns that health and social work practitioners, when they found it necessary to re-detain a patient in this situation, delayed in making a further application to the Tribunal their compulsory treatment order. In our view, they should do this with some urgency. We will issue this guidance in forthcoming advice notes.

RECOMMENDATIONS TO THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

From discussions with the Tribunal, we are aware that there are now fewer instances where the Tribunal will regard an application for a compulsory treatment order as “misconceived” and reject it without testing the grounds for compulsion. We recommend that:

- The President gives further consideration to giving directions regarding “misconceived” cases. We are writing separately on this matter;

- When a further application is submitted, the Tribunal does all it can to hear the case as speedily as possible under the circumstances.

RECOMMENDATIONS TO THE SCOTTISH GOVERNMENT

We are satisfied from reading these cases that failing to detain the patient further following a technical failure in the application to the Tribunal would have resulted in a risk to the patient's health, safety or welfare or the safety of others. The Government should consider an amendment to the Act in order that a further detention is permitted in this situation but is strictly time limited in order to submit a further application to the Tribunal. We would suggest that Section 47 could be extended to cover this situation.

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