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GOOD PRACTICE GUIDE

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## What we do

We protect and promote the human rights of people with mental health problems, learning disabilities, dementia and related conditions.

We do this by:

- Checking if individual care and treatment are lawful and in line with good practice.
- Empowering individuals and their carers through advice, guidance and information.
- Promoting best practice in applying mental health and incapacity law.
- Influencing legislation, policy and service development.

## The Mental Health Act in general hospitals

The Mental Health (Scotland) Act 2003 <sup>1</sup>(the Act) can be used to provide compulsory treatment for mental disorder, or for physical disorder which is a direct cause or consequence of the mental disorder.

## What steps should be taken before using the Act

There are a number of situations where it may be felt necessary for a patient to remain in hospital or be transferred to a mental health unit for further assessment.

In the first instance, care should be taken to explain to the patient the reasons why further psychiatric assessment or ongoing inpatient stay is desirable. If the patient is still not willing to remain in hospital, the clinician should consider whether or not there are outpatient measures that may be a safe alternative. Could the patient attend for day treatment? Is there a relative or carer who would be able to supervise the individual at home? Any alternative plan should be discussed with the most senior member of the healthcare team available, with all carers aware of the avenues of support should that plan break down.

There will be cases where care can only be delivered in an inpatient setting. Under these circumstances, attempting to ascertain why the patient wishes to leave may prove helpful. There may be a number of reasons that lead a patient to wish to leave, and addressing these may provide a solution. Examples could include a patient feeling overwhelmed in a dormitory room, lack of access to stress relievers such as music or television, or a lack of understanding of the significance of their condition. By talking to the patient, it may be possible for reasonable adjustments to be made that can make the ward environment more tolerable and thus make the patient more willing to stay for treatment.

The patient may have an advance statement setting out their views on treatment which should be taken into account.

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<sup>1</sup> <http://www.legislation.gov.uk/asp/2003/13/contents>

If the patient cannot be persuaded to stay voluntarily despite all reasonable efforts, the practitioner should ascertain whether or not the patient will agree to wait for assessment by an approved medical practitioner. If the patient is unwilling to wait, or time does not allow for this, the practitioner should consider whether criteria to detain the patient under an emergency detention certificate (EDC) are met.

## What is “Mental Disorder”?

The Mental Health Act defines mental disorder as one of the following:

- mental illness
- learning disability
- personality disorder.

It also details those presentations that, on their own, are not considered mental disorders.

These include:

- Dependence on, or use of, alcohol or drugs
- sexual orientation
- sexual deviancy
- trans-sexualism
- transvestism
- behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person
- acting as no prudent person would act

Whilst dependence on, or use of, alcohol or drugs is not considered a mental disorder in and of itself, a resulting delirium or psychosis could be considered a mental disorder.

## Using the Act

### What legal measures could be used to detain a patient in hospital?

There are different orders that may be used to detain a patient in a general hospital in order to manage their mental disorder. Most likely to be used are an emergency detention certificate (EDC) or a short term detention certificate (STDC).

## What are the criteria for emergency detention?

- That it is likely the individual has a mental disorder.
- That as a result of this mental disorder, the individual's decision-making ability about medical treatment is significantly impaired.

In addition, the practitioner must also be satisfied that:

- There is a risk to the individual's own health, safety or welfare or that the safety of another person would be in jeopardy were the individual not detained.
- It is necessary as a matter of urgency to detain the patient in hospital to determine what treatment for the suspected mental disorder is required.
- Making arrangements for granting a STDC would result in undesirable delay.
- There is no consensual way to agree treatment.

The consent of a mental health officer (MHO) should be obtained unless the situation is too urgent to safely allow that.

## Granting an Emergency Detention Certificate

### Who has the authority to detain?

Any medical practitioner fully registered with the General Medical Council<sup>2</sup> has the authority to grant an EDC. This means in practice a second year foundation doctor or higher grade doctor. The first step in the process is the completion of a medical examination (*see box 1*). Following this the practitioner should seek the consent of a MHO. An MHO is a social worker who has undertaken specialist mental health training that includes the relevant legislation. All local authorities maintain a duty MHO service and make provision for out of hours cover.

The process of consent involves the MHO interviewing and assessing the individual and their circumstances. Following this, the MHO will then either give or withhold consent depending on their determination as to whether the criteria for detention are met. If an MHO refuses consent following their assessment, then emergency detention cannot be lawfully implemented.

An EDC *can* be issued without MHO consent, in circumstances where waiting for the assessment would be considered "impracticable" and result in undesirable delay. Should this occur the doctor must document the reasons for the lack of consent within the relevant section of the certificate.

Once consent is obtained (or the reasons for its absence documented), the EDC form should be completed and passed to the hospital managers or those acting on their behalf.

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<sup>2</sup><http://www.gmc-uk.org/>

This is usually the medical records department of the hospital or a member of nursing staff on the admitting ward if out of hours. The medical records officers will then notify the relevant parties, leaving a copy within the individual's case notes. This step is necessary for the lawful detention of a patient in hospital. Failure to do so will result in the detention being open to challenge.

#### Box 1. Medical Examination Components

- a direct, face-to-face, personal examination of the patient;
- a mental state examination;
- an assessment of the patient's decision-making ability and of whether the patient will agree to treatment on a voluntary basis;
- a basic assessment of the patient's physical state in order to help decide whether the patient should be sent to a psychiatric hospital or to a medical hospital;
- a basic assessment of the potential risk to the patient and/or others; and
- consideration of as much available and relevant information on the patient's medical and social circumstances as is possible, in the circumstances of an emergency, including, where available and practicable, what is contained in past records, as well as the views of carers and any other parties who may be providing care and treatment to the patient.

*\*Best practice would involve all of the components in Box 1 being performed. However, in exceptional circumstances it may not be possible (e.g. for safety) to conduct a full medical examination. In these cases a full record should be made in the case notes explaining the relevant reasons.*

#### How long does a period of emergency detention last?

Once complete, an EDC gives authority to detain for a period of up to 72 hours within hospital. If the individual is not in hospital at the time of the granting of the certificate, transfer to hospital is authorised and must take place within 72 hours of the completion of the certificate. The 72 hour period of detention then begins once the patient has been admitted and the detention papers have been passed to the hospital managers. It is stressed in the Act that these timescales be considered an upper limit and that any transfer happens as soon as possible.

An individual detained under an EDC cannot leave the hospital until the order is revoked following an assessment by an approved medical practitioner, or the 72 hour period expires.

## What happens if a patient is actively trying to leave and an EDC is not in place?

A patient with a mental disorder, for example schizophrenia, may try to leave hospital. However, a doctor may not be readily available to conduct an examination, and nursing staff may feel that it is necessary to keep the patient in hospital as part of their duty of care. In all cases the nurse should assess the likely consequences of the patient leaving hospital immediately, taking into account factors such as the harm that might occur to the patient or others. Consideration should also be given to the risks inherent with physically keeping a patient restricted to the ward. Local security policies should be followed and involvement of the police, if felt necessary, could be considered.

Under section 299 of the Act, there are provisions for a nurse of the prescribed class to use nurse's power to detain to keep a patient for up to two hours to allow for medical examination, if the medical practitioner arrives during the second hour then an hour is allowed for the completion of their examination. A nurse of the prescribed class includes registered mental health or learning disability nurses; it cannot be exercised by any other class of nurse.

The availability of a nurse of the prescribed class in a general hospital may not be expected regularly. All healthcare practitioners have a duty of care. Other classes of nurse could use their common law duty of care, where necessary, to prevent a person from leaving hospital, if it appears immediately necessary to prevent harm to the patient or to protect others. This would then allow for an urgent assessment by a registered medical practitioner.

## What happens once a patient has been detained under an EDC?

The main purpose of granting an EDC is to allow further psychiatric assessment. Any individual detained under an EDC in the general hospital setting should undergo an assessment by an approved medical practitioner (AMP) as soon as is practicable. An AMP is a doctor approved by a Health Board under section 22 of the Act as having specialist training in the assessment and treatment of mental disorder. This is usually a consultant psychiatrist, but can be a trainee or specialty grade doctor with the relevant training.

Following a medical examination, the AMP will decide the further legal status of the patient. One option may be to revoke the EDC if the criteria for detention are no longer met. This would then remove the restrictions placed on the patient and allow them to leave the hospital, or remain as a voluntary patient. Alternatively, if it is felt that a period of psychiatric treatment is necessary and the individual does not consent, the AMP can apply for a STDC.



## What medical treatment can be given under an EDC?

The Act cannot be used to treat an unrelated physical health condition. If this is required, the patient's capacity should be assessed and treatment given under the Adults with Incapacity Act<sup>3</sup>, if the patient lacks capacity.

An EDC cannot be used to authorise treatment for mental disorder without a patient's consent, unless criteria for urgent treatment are met.

Should urgent treatment for mental disorder be necessary for a patient detained under an EDC, this can be given under section 243 of the Act with the following indications:

- To save the patient's life.
- To prevent serious deterioration in the patient's condition.
- To alleviate serious suffering on the part of the patient.
- To prevent the patient from behaving violently.
- To prevent the patient from being a danger to themselves or to others.

Should a patient have an episode of treatment that falls under this category, a T4 form<sup>4</sup> must be completed within 7 days and sent to the Mental Welfare Commission.

## Other common orders

General hospital staff may encounter patients on either a short-term detention certificate (STDC) or compulsory treatment order (CTO): some familiarity with these longer term orders may therefore be useful.

## Short-Term Detention Certificate

An STDC is an order that can last for up to 28 days. It can only be applied for by an AMP with the consent of an MHO. When considering use of an STDC, the AMP will determine whether or not the following legal criteria are met:

- The patient has a mental disorder.
- Because of the mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired.
- It is necessary to detain the patient in hospital for the purpose of determining what medical treatment should be given to the patient or giving medical treatment to the patient.

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<sup>3</sup> <http://www.legislation.gov.uk/asp/2000/4/contents>

<sup>4</sup> <http://www.gov.scot/Resource/0040/00401113.pdf>

- If the patient were not detained in hospital there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person.
- The granting of a short term certificate is necessary.

Unlike an EDC, a STDC does authorise treatment for mental disorder. The code of practice<sup>5</sup> gives guidance that treatment for a physical disorder that is a direct cause or consequence of mental disorder can be given under the Act. This guidance is based on a small amount of non-Scottish case law, which does not define “direct”, “cause” or “consequence” in this context. Physical disorders that are unrelated to the mental disorder are not covered by the Act.

## Process of granting an STDC

In order to grant an STDC, the Act requires that the AMP completes two duties, as well as confirming that the criteria for detention are met. Firstly, the AMP should consult and obtain the consent of an MHO. The MHO will attempt to elicit the patient’s views on the proposed detention, as well as try and identify any safe alternatives. The AMP must also seek the views of the patient’s named person, wherever practicable. This is a person that can be chosen by a patient to support them and protect their interests under the Act.

Unlike an emergency detention certificate, there is a right of appeal to the Mental Health Tribunal<sup>6</sup> against an STDC either by the individual themselves, or by their named person. The MHO consenting to the STDC has a responsibility to make the patient aware of their rights, as well as informing them of their right to advocacy services.

Once completed, the papers must be given to hospital managers, in practice usually the medical records department, in order to allow consequential duties to be performed. Failure to lodge papers may make the STDC challengeable.

## Compulsory Treatment Order

A compulsory treatment order (CTO) is a longer term measure used for the treatment of mental disorder. They may last for up to six months and be renewed for a further six months, and then on a yearly basis. It is applied for by an MHO following the preparation of two medical reports and is granted by a mental health tribunal.

## Transferring patients who are detained under the Mental Health Act

There will be circumstances where transfer of a patient from a mental health unit to a general hospital (or vice-versa) will be necessary.

For patients who are detained under an EDC or an STDC, there are no legal procedures that must be followed when transferring individuals between hospitals.

<sup>5</sup> <http://www.gov.scot/Publications/2005/08/29100428/04289>

<sup>6</sup> [https://www.mhtscotland.gov.uk/mhts/Home/Welcome\\_to\\_the\\_Mental\\_Health\\_Tribunal](https://www.mhtscotland.gov.uk/mhts/Home/Welcome_to_the_Mental_Health_Tribunal)

Patients who are subject to detention under a CTO may need to be admitted to a general hospital for treatment of a physical health condition. Liaison between the relevant psychiatric hospital and general hospital medical records departments, and the responsible medical officer (RMO) is essential to ensure that the necessary arrangements are made to facilitate lawful transfer. The RMO retains responsibility for mental health care and treatment. There is no requirement under the Act that a patient should be cared for by mental health nurses *per se*, but local arrangements can be made if this is thought to be appropriate.

## Absconding

A patient, who is detained under the mental health act, may leave the hospital in which they have been detained. The Act has contingencies within it that allow professionals to lawfully ensure that a patient is safely returned to the relevant setting.

The most likely scenario in a general hospital would be that of a patient, detained under an EDC, who leaves the ward without authorisation.

Once it has been recognised that a detained patient has left the relevant department, a risk assessment should be conducted. The most senior member of the patient's medical team should be informed as well as the RMO. In the first instance informal measures, such as calling the patient on their mobile phone, may result in the patient returning to the ward. If this fails, the urgency of the situation should be considered. Could alternative community measures be used to manage the patient? Does it remain necessary for them to be in hospital? Is there a risk to the patient or others whilst they are out of hospital? The MHA code of practice makes it clear that there should be as much discussion as practicable between the patient's multidisciplinary team and their carers/relatives before a decision is made to take action.

Should it still be felt necessary for the patient to return to hospital, the Act has provisions under section 303 for the patient to be returned to hospital. Under these circumstances, the following actions may be taken:

- the absconding patient can be taken into custody
- the absconding patient can be returned or taken to the hospital in which he/she was detained or was to be detained. If this is not appropriate or practicable, the patient may alternatively be taken to any other place which is considered appropriate by the patient's RMO
- the absconding patient may be returned to or taken to any other place which he/she absconded from or where he/she failed to reside. If this is not appropriate or practicable, the patient may alternatively be taken to any other place which is considered appropriate by the patient's RMO

The code of practice also states that the following people are allowed to carry out the actions described above. They are:

- a mental health officer
- a police constable
- a member of staff of any hospital
- a member of staff of the establishment where the patient is required to reside as a result of a residence requirement being specified in a CTO and
- any other person who has been authorised to carry out any of the above actions by the patient's RMO (this should be an appropriately trained and qualified person)

The local health board psychiatric emergency plan may have a protocol relating to absconding and this could also be consulted. Failing this, a sensible first step may be to call the police, who may ask for contact details for the patient as well as a description. Any actions taken should be clearly documented within the casenotes.





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