

dignity &

rights

ADVICE NOTES

ethical treat

respect ca

& equality

About the Mental Welfare Commission

Much of our work is at the complex interface between the individual's rights, the law and ethics and the care the person is receiving. We promote best practice in applying mental health and incapacity law to individuals' care and treatment.

The Commission produces good practice guidance on a range of subjects related to mental health and incapacity legislation in Scotland. We encourage ethical practice that respects the rights of the individual and we provide good practice guidance to promote best practice.

We aim to ensure that care; treatment and support are lawful and respect the rights and promote the welfare of individuals with mental illness, learning disability and related conditions. We do this by empowering individuals and their carers and influencing and challenging service providers and policy makers.

Often our guidance can be lengthy depending on the subject matter but we wanted to produce shorter, easily accessible advice notes on a variety of subjects in addition to our usual longer documents.

We hope that these advice notes will be used by professional staff, service users and carers and help to improve good practice across Scotland.

These advice notes

The Commission monitors operation of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the Act) across Scotland and we report annually on the use of various provisions of the Act. We have consistently reported on a low rate of reporting on the use of the nurse's power to detain and variances in its rate of use across the country.

We think there may be several reasons for this including nurse's uncertainty about how and when to complete the appropriate documentation and possibly an assumption that using "common law duty of care" is adequate.

It is important that when nursing staff stop someone from leaving, they are aware that they are in effect detaining the person and that this should be done with appropriate legislative authority. Failure to do so may be a breach of article 5 of the European Convention on Human Rights (ECHR).

In our 2012 monitoring report on the use of emergency detention certificates (http://www.mwscot.org.uk/media/98818/edc_report.pdf) we raised our concern that we found several situations where individuals were prevented from leaving hospital without proper recording and notification of the use of the nurse's power to detain. We recommended in that report that hospital managers must ensure that nursing staff comply with the law. We hope that this guide will help to ensure that Section 299 is better understood and appropriately used to afford individuals and staff the safeguards provided by the Act.

Nurse's power to detain, Section 299

What the Act says

Section 20 of the Mental Health (Scotland) Act 2015 amends section 299 of the 2003 act. These changes were introduced to allow greater clarity on the timescales involved and to increase the likelihood of a Mental Health Officer attending.

The updated code of practice can be found at:

www.gov.scot/Resource/0052/00521756.pdf

Section 299 of the Act relates to the nurse's power to detain pending medical examination. The section applies where a patient is in hospital and being given medical treatment. The intention of this is to allow nurses to detain a patient in hospital for a period of three hours for the purpose of enabling arrangements to allow for a medical examination of the patient to be carried out.

A nurse of the prescribed class may detain a person in hospital for three hours in order that a medical examination can be carried out, if it is not practicable to secure the immediate medical examination of the patient by a medical practitioner.

The nurse needs to be satisfied that it is likely that the conditions are met i.e.

- that the patient has a mental disorder and
- that it is necessary for the protection of the health, safety or welfare of the patient or
- the safety of another person that the patient be immediately restrained from leaving the hospital and
- that it is necessary to carry out a medical examination of the patient for the purpose of determining whether the granting of an emergency detention certificate or a short term detention certificate is warranted.

What that means in practice

Deciding about using the power to detain

The meaning of mental disorder under the Mental Health Act is any mental illness, personality disorder or learning disability however caused or manifested.

The nurse's power to detain can only be used by a registered mental health or learning disability nurse; it cannot be exercised by any other class of nurse.

The 2003 Act allows this for a person who is "in hospital and receiving medical treatment". We are often asked what "in hospital and receiving medical treatment" means.

Does this include general hospital wards, accident and emergency departments or clinics held on hospital premises?

The revised code of practice states that it is reasonable to use the nurse's power to detain people who meet the criteria in all three of these locations.

We interpret "in hospital" as being within the hospital premises. The process of assessment by a mental health or learning disability nurse involves care and therefore constitutes medical treatment under the Act.

In non-mental health hospital settings we recognise that there may be some difficulty in interpreting medical treatment.

The intention of Section 299 was clearly that it was to be used in mental health settings where an informal patient wished to leave hospital and the nursing staff perceived a need to detain them until a doctor could carry out an examination.

We believe that the issue of whether someone in a general hospital could be said to be receiving treatment for mental disorder would have to be considered on a case-by-case basis. For example, a person being treated following deliberate self-harm may satisfy the criteria. However it may be more difficult to argue that someone being treated for a co-existing physical disorder unrelated to their mental disorder fits the criteria.

All healthcare practitioners have a duty of care. Other classes of nurses would use their common law duty of care, where necessary, to prevent a person from leaving hospital, if it appears immediately necessary to prevent a person from coming to harm or to protect others.

The code of practice states that before deciding whether or not to exercise the power, a nurse should weigh up the likely arrival time of a medical practitioner (doctor) against the likely intention of the patient to leave. Many patients who express a wish to leave hospital may be willing to wait until a doctor arrives to discuss the options further. The nurse should also 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. The nurse should always consider whether preventing the person from leaving without using their power to detain is “de facto detention”.

The code of practice (COP Vol 2, Ch7, para 18) states

“Where an informal patient wishes to leave hospital against medical advice, they should not be placed in the position of feeling they must agree to stay in hospital purely because of the possibility of being detained under the Act. Such ‘de facto detention’ places restrictions on an informal patient without according them the protection of the rights they would be accorded were they to be formally detained. It is important to remember that the patient’s perception of whether or not they are likely to be detained if they do not comply with the medical practitioner’s wishes is an important factor in deciding whether or not the patient is subject to de facto detention”.

The nurse’s power to detain cannot be used if a doctor is immediately available. If, for example, a doctor is available and on call within the hospital but it would take time to contact them and a short time for them to arrive, this is not immediately available and it would be appropriate to consider using the nurse’s power to detain.

Implementing the power to detain

It is not necessary for the nurse to complete the documentation (NUR1) prior to detaining the patient. The NUR1 form is a notification that the patient has been detained.

When the nurse does exercise the power they should attempt to communicate to the patient under what authority they are acting, as clearly as the situation will allow. The nurse should note the time of authorisation under Section 299. The detention lasts for up to three hours from that time.

Under the direction of the nurse who authorised the detention, other staff may need to be involved in preventing the patient from leaving. It would be expected that the nurse who authorised the detention would remain during the detention period.

The Section 299 does not come to an end with the arrival of the doctor.

The Section 299 detention comes to an end when:

- A medical examination has been carried out within the timescale above and the patient is further detained under an emergency or short term certificate.

or

- A medical examination has been carried out within the timescale above and the result is the patient is not further detained under the Act but remains in hospital on a voluntary basis or chooses to leave hospital.

or

- After three hours' detention, there has not been a medical examination of the patient carried out.

The nurse's power to detain should not be used consecutively e.g. if three hours has elapsed and no doctor has attended, it should not be used to immediately re-detain the patient under Section 299 of the Act. The nurse would need to consider whether they needed to continue to prevent the patient from leaving under their common law duty of care. It would, of course, be concerning if a doctor was not able to attend during this timescale and managers would need to address this.

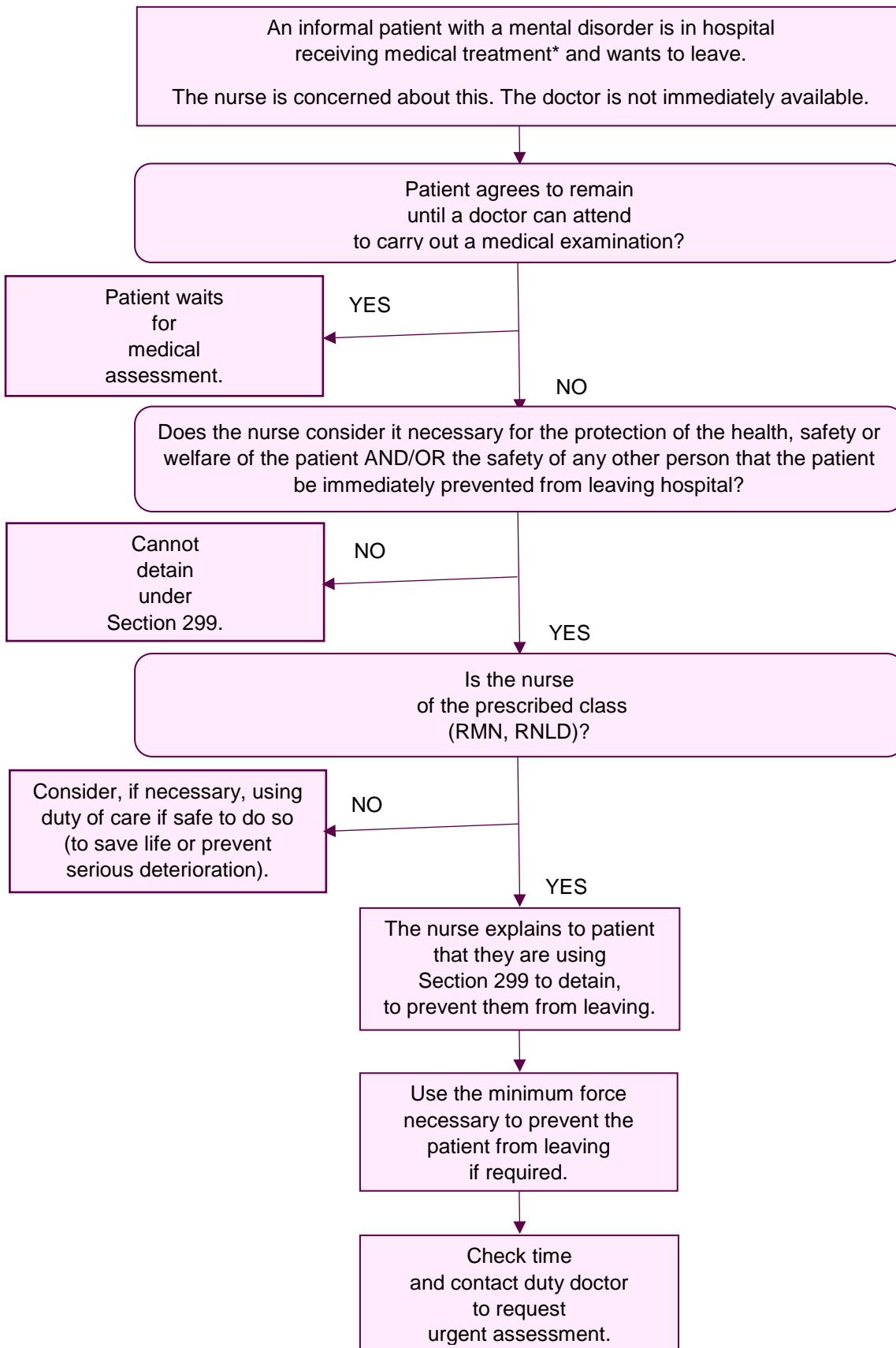
As highlighted earlier, it is not necessary for the nurse to complete the documentation prior to detaining the patient. The Act says that this should be done as soon as practicable after the holding period begins. The form that is used to record this is a NUR1.

The form asks the nurse to give the reasons why they believed that the conditions mentioned in the Act were met in respect of the patient. The nurse should provide reasons in the text box as to why it was necessary. It is important that the nurse gives a reasoned opinion as to why it was necessary. We have seen some forms that give very little information e.g. "was psychotic and at risk". This may well have been the case but further information should be given about why they were at risk and why the nurse thought Section 299 was required.

The nurse, as soon as is practicable after the period begins, should take all reasonable steps to inform a mental health officer of the detention.

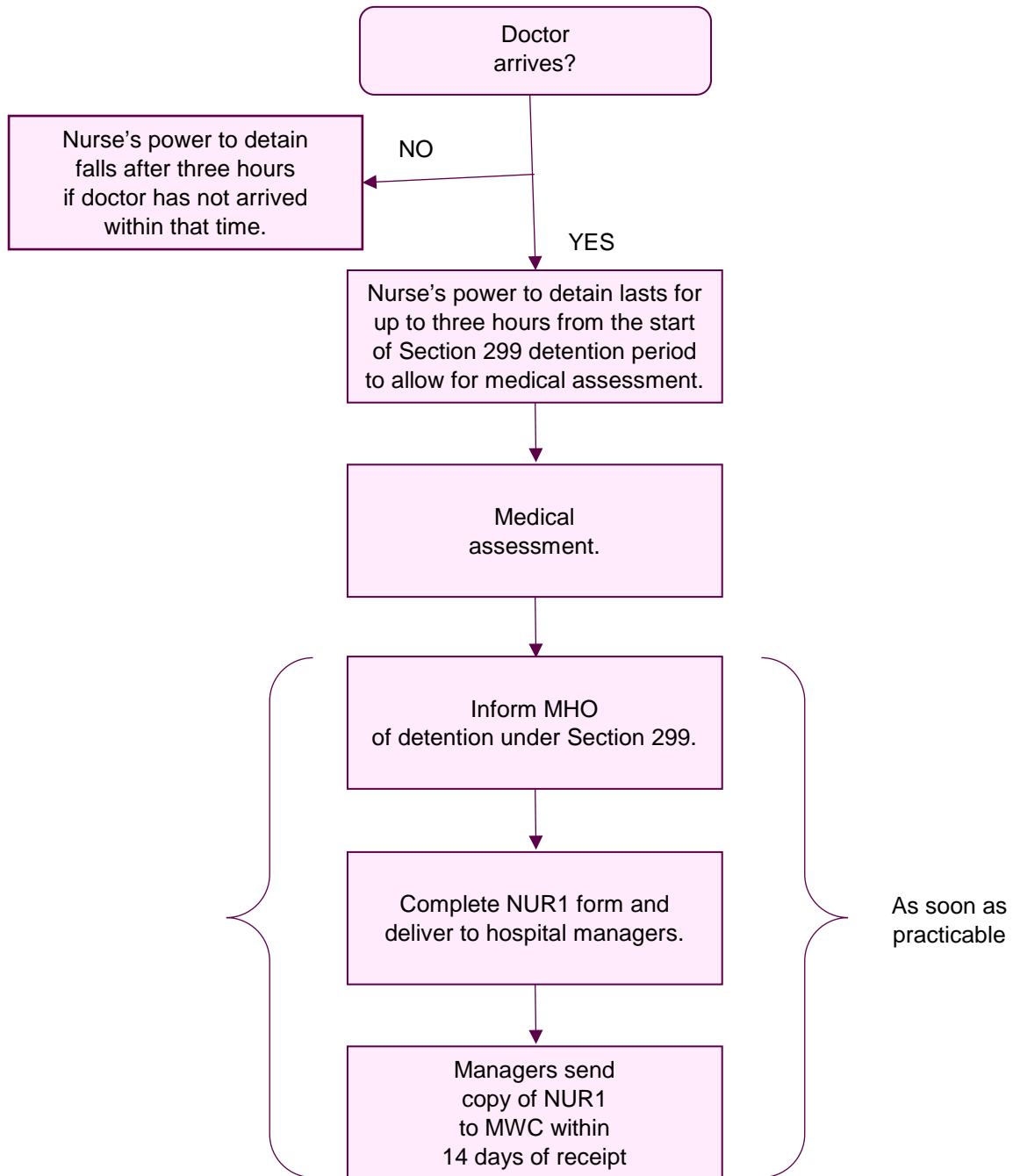
When the form is completed it should be delivered to the managers of the hospital in which the patient is detained and local arrangements should be in place with the medical records office about how this will be done out of hours. Once this is received by the managers, a copy of the form is sent to the Mental Welfare Commission within 14 days.

Nurse's power to detain, Section 299 – flowchart



**refer to full guidance document for further information.*

Nurse's power to detain, Section 299 – flowchart (continued)





Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

Tel: 0131 313 8777

Fax: 0131 313 8778

Service user and carer

freephone: 0800 389 6809

enquiries@mwscot.org.uk

www.mwscot.org.uk