



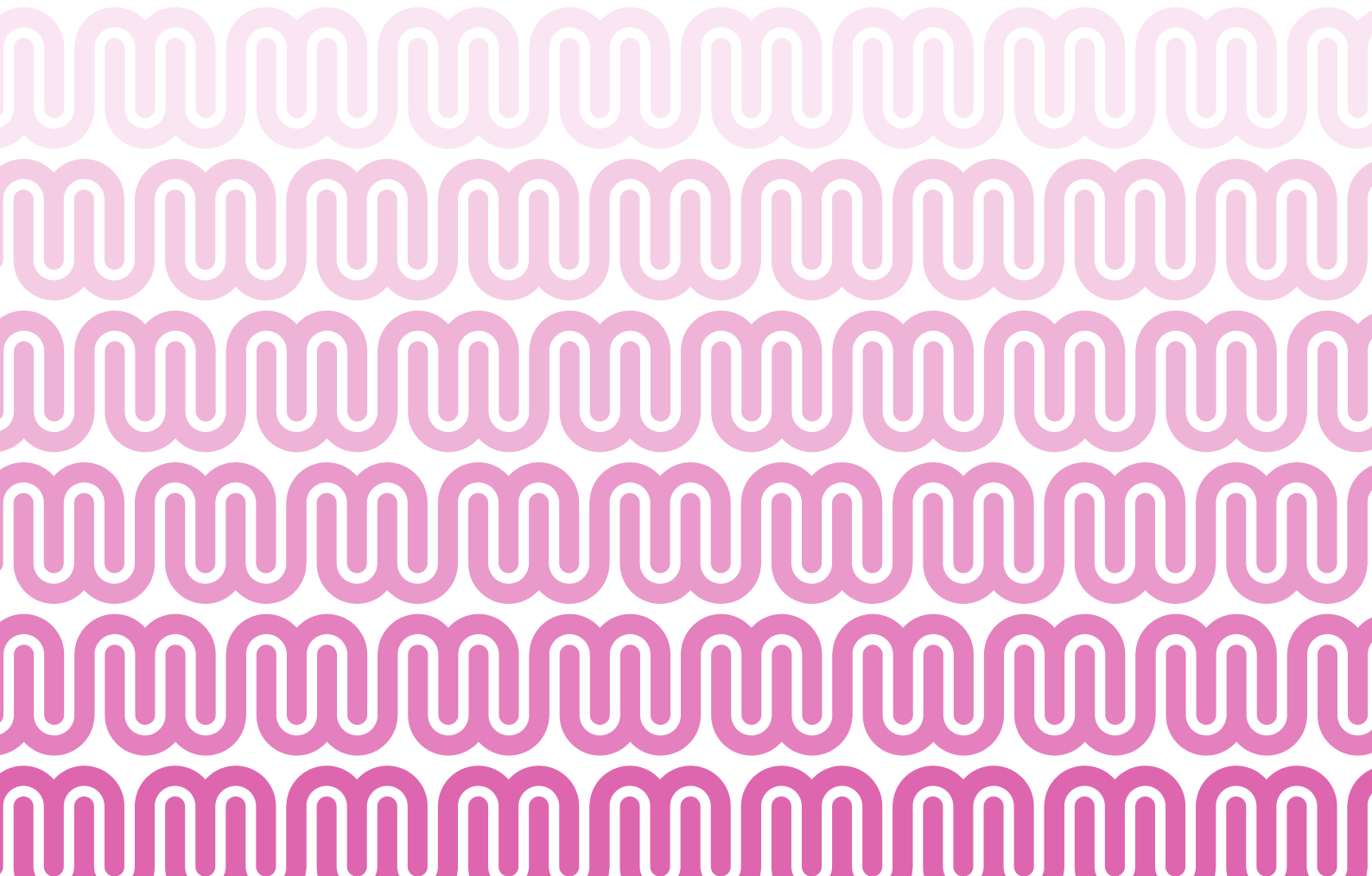
mental welfare
commission for scotland

Appeals against detention in conditions of excessive security

Basic summary overview

Good practice guide

December 2021



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

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

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

Appeals against detention in conditions of excessive security – basic summary overview

Who can appeal, and when?

A person who is detained in the State Hospital or a named medium secure unit under a compulsory treatment order or one of the three main forensic mental health orders (a compulsion order, a hospital direction or a transfer for treatment direction) can appeal against detention in conditions of excessive security. Their named person, guardian or welfare attorney can also appeal¹.

Excessive security relates to where a person is in a hospital setting which is a higher level of security and restrictions than what that individual person needs.

The appeal cannot be made during the first six months of the order or direction. Only one application can be made during the first 12 months of the order or direction, and each 12 month period thereafter. Legal aid is available.

Appeal Stage One

The Mental Health Tribunal considers the appeal.

The tribunal must allow the person, the responsible doctor and other key people and organisations the opportunity to provide information to the tribunal.

The tribunal has to decide to make, or not to make, an order declaring the person is being kept in excessive security.

If the tribunal makes an order saying that the person is being detained in excessive security, they will specify a period of no more than three months for the person's health board to identify a hospital at an appropriate level of security which has a bed available for the person. For restricted patients, Scottish ministers need to agree the placement with the health board.

The health board is under a legal duty to find a suitable bed.

Recall of order

At any time before the expiry of the period set by the tribunal, the health board or the person's doctor (for restricted patients, Scottish ministers) may ask the tribunal to recall the order.

The most likely justification for seeking a recall is that the person's condition has deteriorated, such that they can no longer move to a place of lower security safely.

¹ In exceptional circumstances the Commission can also instigate an appeal- please see detailed Commission guidance for further information.

Tribunal Stage 2

If at the end of the specified period the health board has failed to identify a suitable bed, there must be a hearing before the tribunal. No further application is required. The hearing will automatically be arranged by the tribunal administration.

At this second stage, the minimum period the tribunal must provide for the health board to discharge its responsibilities is 28 days, but it can specify a longer period up to 3 months.

Effect of a tribunal ruling – Stage 2

The duties on the health board are the same as after a Stage 1 ruling – they need to find a suitable place within the timescale, whether in their own services, from another NHS board, in a private hospital or even in another part of the UK.

As at Stage 1, the health board can seek to have the order recalled.

The Act does not specify whether recall can be sought after the expiry of the period set by the tribunal at Stage 2. In the Commission's view, this would not be appropriate.

The key difference at Stage 2 is what happens should the health board fail to fulfil the requirements of the order within the specified time. At Stage 1, it leads to a further review by the tribunal. At Stage 2, once the time period set by the tribunal has run out, the tribunal's role is at an end. The failure of the health board to fulfil the order makes them liable to a range of civil court proceedings.

By the time Stage 2 has ended, the health board will have had up to six months to find an appropriate place for the person. This should, in the view of the Commission, be more than enough time to make the necessary arrangements.

Stage one:
Appeal to the MHTS.



Appeal upheld
The health board has up to three months to find a suitable placement.



The health board has failed to identify a suitable alternative placement.
No grounds for recall.



Stage two:
Automatic return to the MHTS.



The health board is given between 28 days and three months more to finally find a suitable placement.



The health board therefore has up to six months in law to find a placement and should have done so within this timescale (unless there are grounds for recall).



If appropriate placement has still not been found the health board is liable to a range of civil proceedings, having not met its duties in law.



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