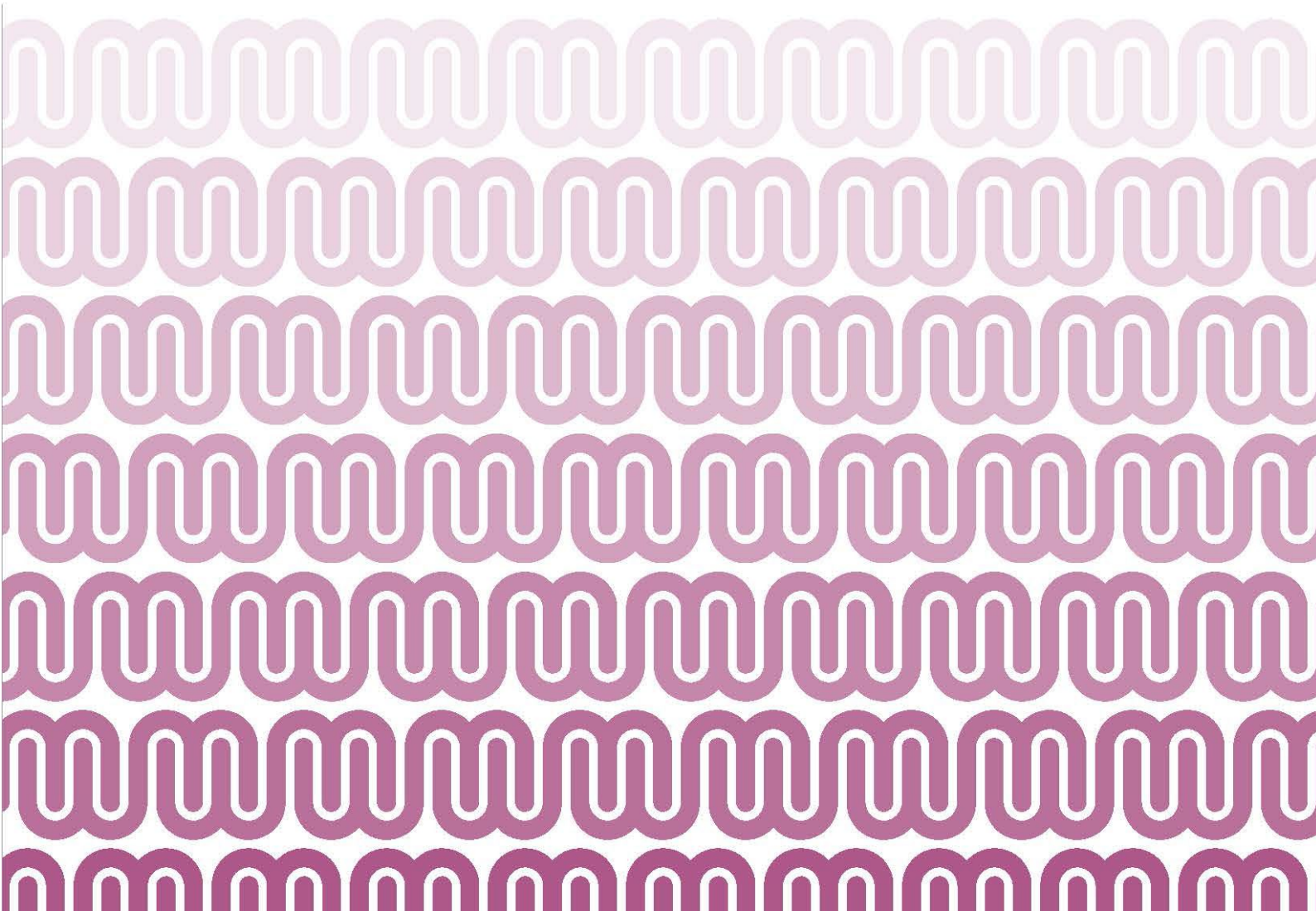
mental welfare commission for scotland

Can you detain someone who won't talk to you?

Advice note

July 2026



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

This guidance was last published in June 2020. It was reviewed and updated in July 2026.

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Purpose of this advice note

Questions frequently arise where a person who may require compulsory care and treatment refuses to engage with a mental health assessment. This may range from declining to answer questions, remaining mute, terminating an interview, refusing to leave a room or vehicle, or otherwise limiting the ability of practitioners to conduct a full assessment.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (Mental Health Act) requires a medical practitioner or approved medical practitioner to examine a person before exercising a range of statutory functions, including emergency detention, short-term detention and assessment for compulsory treatment orders. However, neither the Act nor the Code of Practice provides a comprehensive definition of what constitutes a medical examination in circumstances where a person is unwilling or unable to participate fully.

This advice note considers the statutory requirement to examine, the role of clinical interview, observation and collateral information, and the issues practitioners should consider when assessing a person who is unwilling or unable to engage.

This advice note provides general guidance on the Commission's interpretation of the statutory framework and does not constitute legal advice. Practitioners may wish to seek case-specific legal advice where uncertainty arises.

Statutory context

The Mental Health Act requires a medical practitioner to examine a person before exercising a number of important statutory functions. These include the granting of an emergency detention certificate (EDC) under section 36 and a short-term detention certificate (STDC) under section 44.

In both cases, the registered medical practitioner or approved medical practitioner must form a number of statutory opinions before compulsory powers may be exercised.

These include opinions regarding the presence of mental disorder, the availability of appropriate medical treatment, the existence of significant risk, and the necessity of detention.

The Act requires that the person be examined before these opinions are formed. However, the Act does not define the term "examination" and does not prescribe the precise manner in which an examination must be conducted.

In practice, psychiatric examination is a holistic process that commonly includes direct interview, observation of appearance, behaviour and mental state, consideration of physical health where relevant, review of clinical records and previous assessments, and collateral information provided by relatives, carers and other professionals. The contribution of each element will vary according to the circumstances of the individual case.

Where a person is unwilling or unable to participate fully in an assessment, practitioners may face difficulties in obtaining information that would ordinarily be available through clinical interview. The Act does not define what constitutes an examination where a person is unwilling or unable to participate fully, although the Code of Practice provides guidance in a number of specific situations. The key questions are therefore, first, whether the practitioner has undertaken a sufficient examination in the circumstances to satisfy the statutory requirement to examine the patient and, secondly, whether the information available from that examination, together with any reliable collateral information, is sufficient to establish the statutory criteria for the compulsory measure under consideration. These are separate, although closely related, questions. The adequacy of any examination will depend upon the particular circumstances of the case and may be subject to scrutiny by the Mental Health Tribunal for Scotland or the courts.

Code of Practice and non-cooperation with examination

The Mental Health Act is accompanied by a statutory Code of Practice issued by the Scottish Ministers. Whilst the Code does not have the force of statute, those exercising functions under the Act are required to have regard to it and would ordinarily be expected to follow its guidance unless there is a clear and justifiable reason to depart from it.

The Code consistently identifies direct, face-to-face examination as the expected standard when compulsory powers are being considered. However, it also recognises that practitioners may encounter situations in which a person refuses to participate in examination or where a complete examination cannot reasonably be undertaken.

Emergency detention certificates (EDCs)

The Code states that best practice would be for an examination to include a direct, face- to-face, personal examination together with a mental state examination, assessment of decision-making ability, assessment of risk and consideration of relevant collateral information (Volume 2, Chapter 7, paragraph 30).

The Code recognises that exceptional circumstances may arise where a complete examination is not possible because the situation presents too great a danger to the practitioner or because the person will not consent to any form of examination (Volume 2, Chapter 7, paragraph 31).

In these circumstances, the Code states:

"It would therefore be possible for a patient to be detained after a medical examination carried out by observation only (for example, through a letter box, or a window into a police cell)."

The Code makes clear that this should only occur after the medical practitioner has first exhausted all other appropriate means of communication with the patient (Volume 2, Chapter 7, paragraph 31.

The Code also notes that where consent to examination cannot be obtained, consideration may need to be given to the use of a warrant under section 35 of the Act to facilitate a medical examination (Volume 2, Chapter 7, paragraph 32).

The principal purpose of an EDC is to authorise a short period of detention to enable urgent assessment and determine whether further compulsory measures are required. Unlike a STDC, an EDC does not itself confer authority for medical treatment under Part 16 of the Act. Where the statutory criteria are met, however, urgent treatment may be provided under section 243. This reflects the emergency and interim nature of an EDC, which is intended to provide a limited period during which a fuller assessment can be undertaken and decisions made about any ongoing compulsory care and treatment.

Short-term detention certificates (STDCs)

The Code states that, because an STDC authorises a longer period of detention and treatment under Part 16 of the Act, a sufficiently thorough examination should be undertaken before it is granted (Volume 2, Chapter 2, paragraphs 25–26).

The Code nevertheless recognises that a patient may refuse examination. It states:

“Where the patient will not consent to being examined, the medical practitioner should weigh up whatever information is available in the context of the patient's current presentation, their past psychiatric history and the views of other members of the multi- disciplinary team to make a pragmatic decision balancing the right of the patient to treatment with the need to provide such treatment in the least restrictive environment." (Volume 2, Chapter 2, paragraph 27).

The Code goes on to state:

"It may well be that an emergency detention certificate would be the most appropriate detention authority to grant in such cases, assuming that the relevant detention criteria are met." (Volume 2, Chapter 2, paragraph 27).

Assessment for compulsory treatment orders (CTOs)

The Code also addresses situations where a patient in the community refuses examination during assessment for a CTO. It states:

"Where a patient is in the community (and therefore not subject to compulsory measures) when the medical examination takes place but refuses to consent to the examination, the medical practitioners and the mental health officer (MHO) will need to decide whether they have each been able to carry out a good enough assessment." (Volume 2, Chapter 3, paragraph 22).

The Code further states:

"If they cannot, and if sufficient concern exists about the patient's need for treatment and the potential risk to the person or others, then consideration should be given to whether the person meets the criteria for the granting of a short-term detention certificate. This would allow for a period of hospital detention during which a fuller and more satisfactory examination of the person can take place." (Volume 2, Chapter 3, paragraph 22).

Taken together, these provisions suggest a consistent approach within the Code of Practice. Where examination is limited by non-cooperation, practitioners should carefully consider whether the available information is sufficient to justify the proposed compulsory measure and whether a shorter or less restrictive compulsory measure would be more appropriate to allow a fuller assessment to take place.

Approach where assessment is limited by non-cooperation

A person's refusal to answer questions or otherwise participate in an assessment does not necessarily prevent a medical examination from taking place. Equally, the fact that some examination has been possible does not automatically mean that the statutory criteria for detention can be established.

The medical practitioner or approved medical practitioner must consider whether sufficient information is available to assess the statutory criteria for the proposed compulsory measure. The extent and quality of the available information will vary from case to case.

Relevant sources of information may include:

- direct observation of the person's appearance, behaviour and apparent mental state;
- information obtained during any part of the assessment with which the person does engage;
- previous psychiatric history and known patterns of relapse;
- clinical records;
- information provided by relatives, carers and other professionals;
- information regarding recent behaviour, risks or deterioration; and
- information obtained by the MHO as part of their assessment.

The weight that can properly be attached to such information will depend on the circumstances of the individual case. Practitioners should consider both the reliability of the information available and any significant gaps in the assessment caused by the person's refusal to engage. They should be able to explain what information was available, what information could not be obtained, and how the available evidence supports the conclusions reached.

Where assessment remains limited, practitioners should consider what further steps may be available. These may include further attempts at engagement, involvement of a trusted professional, family member, named person, independent advocate or carer, or seeking additional collateral information from those involved in the person's care.

Practitioners should also consider which statutory route is most appropriate in the circumstances.

An EDC may be appropriate where urgent detention is necessary to allow further assessment and to determine what medical treatment should be provided.

An STDC may be appropriate where sufficient information is available to establish all of the statutory criteria and where the practitioner can justify the longer period of detention and the authority to provide medical treatment under Part 16 of the Act.

In some circumstances, an MHO may consider seeking a warrant under section 35 of the Act to facilitate a medical examination. This may be relevant where concerns exist regarding mental disorder, but meaningful examination cannot otherwise be achieved.

The extent of a person's cooperation may change over time. Practitioners should remain alert to opportunities to undertake a fuller assessment where this has not initially been possible. Decisions should be kept under review and compulsory measures should not continue longer than is necessary.

Clear documentation is particularly important where a person has declined to participate in some or all aspects of the assessment. Practitioners should record the steps taken to engage with the person, the information available from other sources, any limitations in the assessment, and the reasons for the conclusions reached. Where examination has been limited by non-cooperation, practitioners should also record why they considered the examination to be sufficient for the statutory purpose.

Case example

Ms X was known to have a mental disorder and had a history of serious self-harm when unwell. Her relatives contacted mental health services with serious concerns about her wellbeing. An approved medical practitioner and an MHO attended to assess her.

When they arrived, Ms X was sitting in a friend's car outside her home. She declined to participate in an interview. Attempts were made to engage with her through the car window, but she did not cooperate with the assessment. Taking account of her presentation, previous psychiatric history and information provided by her family, an STDC was granted.

This case illustrates some of the difficulties which can arise when a person declines to participate in an assessment.

The key question was whether sufficient information was available to enable the approved medical practitioner to establish all of the statutory criteria for an STDC. The answer depended on the particular facts and circumstances of the case.

The Code of Practice recognises that, where a person will not consent to being examined, the medical practitioner should make a pragmatic decision based on the information available. It also recognises that, in some such cases, an EDC may be the more appropriate detention authority.

It may therefore have been appropriate in this case to consider whether an EDC would have provided a more proportionate means of permitting a fuller assessment to take place where there was uncertainty as to whether sufficient information was available to satisfy all of the statutory criteria for an STDC. However, practitioners should also recognise that an EDC carries different statutory safeguards from a

STDC. In particular, a STDC requires the consent of an MHO and provides the patient with rights of application to the Mental Health Tribunal for Scotland. The choice between these statutory powers should therefore reflect a careful balance between the need for further assessment and the availability of sufficient evidence to justify the more extensive compulsory powers of an STDC. Other options may also have required consideration depending on the circumstances, including further attempts at engagement or, where appropriate, the use of statutory powers to facilitate examination.

The Commission discussed these issues with the professionals involved. While concerns were identified regarding the extent of the examination that had been possible before the STDC was granted, the Commission does not determine the legal validity of detention certificates. That is a matter for the Mental Health Tribunal for Scotland and, where necessary, the courts.

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