

NATIONAL ESCALATION GUIDANCE

Background

There is nationally accepted difficulty in consistently ensuring timely access to an inpatient mental health bed for someone who has been deemed to require admission to hospital under the Mental Health Act 1983. Whilst this can occur in a number of settings, there have been well-publicised examples of significant delays occurring in police custody or following the use of s136 MHA and therefore this escalation guidance may become relevant at the point where, either -

- a MHA assessment has occurred in police custody in respect of someone who is under arrest for an alleged offence or a non-MHA related reason; OR
- the maximum time limit is soon to be reached in respect of someone detained in custody OR in a health-based Place of Safety under ss135/6 of the MHA.

Difficulties in either of these situations following the inability of an Approved Mental Health Professional to complete an application under the MHA, in accordance with their duties under s13 MHA, are ultimately a matter for Clinical Commissioning Groups (England) and Local Health Boards (Wales) to ensure they commission sufficient provision to ensure admission in a way which protects patients' rights.

Where someone arrested for an offence is indicated to require admission, the custody sergeant and investigating officer will need to take an early view on whether a criminal investigation with a view to prosecution should continue, or be brought to an end in order to prioritise that person's healthcare needs. This will usually be determined by the seriousness of offence under investigation and the management of serious risks to the public.

- Where diversion from justice is to be considered, consideration should be given to the potential use of s136 MHA to remove the person to a Place of Safety, having released from detention (without charge, under investigation or on bail).
- This has the advantage of ensuring the person is removed to a clinical environment pending further decisions about their healthcare; it also ensures that the detention of the person pending their admission to hospital does not amount to unlawful detention.

However, if unexpected circumstances or a lack of Place of Safety spaces mean it may be thought necessary to keep someone in custody in order to keep them safe from an obvious



risk brought about by the AMHP's inability to comply with s13 MHA, the escalation process below should be considered.

Principles

The following principles govern this escalation policy –

- No police officer of any rank may 'authorise' something which is, itself, unlawful.
- No police officer of senior rank may direct other officers to act unlawfully.
- In some of the situations where these may difficulties arise, they can do so at short-notice and in circumstances where release from police custody would potentially violate Article 2 of the European Convention on Human Rights; whilst ongoing detention may violate the principles of Article 5.
- Where police officers are effectively forced to make invidious decisions, choosing between options which all carry very real risks, there is some protection afforded by s139 of the Mental Health Act 1983 (see below) – this protocol aims to ensure that in the event of any challenge or inquiry in to the actions of police officers or their force, they may properly resist any allegations of acting in 'bad faith' or 'without reasonable care'.
- Nothing prevents any officer, of any rank, escalating to NPCC rank officers or Gold Commanders, for support in navigating situations where all options already appear to be unlawful and undesirable.
- In any circumstances where an officer is going to detain or continue to detain an individual without a legal power, the officer must refer the decision to an NPCC officer responsible for the detaining force for ratification before the detention becomes unlawful or as soon as reasonably practicable

Escalation Guidelines

As soon as it seems likely to the custody sergeant (or the detaining officers in a PoS) that time will expire, undertake the following actions –

- inform the duty inspector and the AMHP who coordinated the MHA assessment.
- ask that the DR who led the assessment be informed and to identify a **single-point of contact** pending the resolution of the patient's admission process.
- state for the record, "We are approaching the point where it will become unlawful to continue to hold this person under [*PACE / MHA, as appropriate*] unless there is a duly completed application for this person's admission to hospital under the MHA. By the admission of the AMHP leading the assessment, the grounds for making such an application were reached at [*time of MHA conclusion being notified to officers*]. Upon reaching this time limit, the police service will face very real legal difficulties in continuing to detain this person and to do so would amount to a human rights violation. We have been placed in an invidious position for reasons beyond our control. I want to draw your attention to ss13 and 140 MHA as well as articles 3, 5 and 8 of the ECHR. We ask that you escalate the non-availability of a bed to the Chief Executive or on-call Director of both the provider Trust and [*the CCG or NHS England, as appropriate to the kind of bed being sought*]. We urge the swiftest resolution to this situation to protect the unambiguous legal rights of the detained person, which seem threatened."

- *For those under arrest in custody –*

Request that the provider MH trust arrange **24/7 nursing support** in police custody until such time as the person is admitted.

Document any response to this.

- *For those detained in a PoS that is not normally staffed other than by the police –*

Request nursing support in the PoS until such time as the person is admitted or released.

Document any response to this.

- If there is no resolution within 2hrs of this, escalate to the duty Superintendent for the policing area.
- Superintendent to seek a phone conversation with the Chief Executive or on-call Director.

In addition to the above, state for the record –

- "We are now considering legal advice about the position the police [*will be / are*] in, given that the police's authority to detain someone has legal limits unless and until an MHA application is made. There should be provision in all areas to ensure patients can be swiftly admitted to hospital where necessary. This situation amounts to a human rights violation that you are obliged to prevent or end, quite possibly on more than one basis. We reserve the right, on advice, to consider legal action to defend the rights of the person detained and the liabilities of the officers and the police force who are now in an invidious position for reasons entirely beyond their control."
- If nursing support has not yet been secured, as above, **request it again** and document any response.
- Ask for confirmation that ALL of the following have been considered and tried or rejected as not possible;
 - Out of areas beds.
 - Private sector provision.
 - Admission to a different kind of unit to the one required, with necessary supports to << This may not be ideal, but it would at least be lawful. It could include a temporary offer of police support, if thought likely to bring forward the admission of the patient.
 - Consideration of whether a PoS facility could be used as a temporary 'bed' for admission under s2 or s3, etc.. Again, could include an offer of police support.

- If no resolution within 2hrs, or ASAP if the detention has already become unlawful, **escalate to duty NPCC / Gold commander** for the force.
- Where the gold commander is not an officer of NPCC rank, local arrangements should allow for the escalation to an officer of NPCC rank, if required.
- Consider legal advice from your force solicitor: consider the potential that Article 3, 5 and 8 are being breached (particular circumstances will determine which, if any are relevant - Art 5 will always be relevant if someone is detained without obvious authority in domestic law.)
- Consider a proactive media approach to highlight the problem publicly, but anonymously, in order to motivate compliance by NHS partners with the law. This could include a force press release or senior officer / official account 'tweet', as per ACC (now DCC) Netherton (Devon and Cornwall) in 2014.
- Decide following advice whether the force will seek a Judicial Review of the LA / MH trust / NHS England inability to end this **human rights violation**.

Post-incident –

- Consider self-referral to the IPCC.
- Consider asking the MH Trust to record the matter as a SUI for review.
- Consider a request for review to the Care Quality Commission.
- Consider a vulnerable adult safeguarding referral.

History shows that professionally conducted escalation of the legal and risk issues by the police service, along one or more of the above lines, may bring quicker resolution than would otherwise be seen, ending an unlawful detention. By not escalating to senior NHS managers, it renders the force and its officers potentially liable for breaching s6(1) HRA and complicit in the overall issues.

Finally, consider the relevance of s139 MHA: are you doing an act in pursuance of an objective under the MHA? If the AMHP had finalised an application the person would have remained detained and safe: is continuing to ensure this safety more likely to be defensible than releasing a person known to be a risk to themselves or others? If you fear you'd be defending the un-defensible in the Coroner's Court, consider the potential for this provision to protect you in the Civil Court for keeping people safe.

Notes –

- [Section 13](#) – obligation on AMHPs to make MHA applications when grounds are met.
- It is the *Doctor's* responsibility, not the AMHPs, to identify the bed for the MHA application.
- [Section 139](#) –
(1) "No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, unless the act was done in bad faith or without reasonable care.

(2) "No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions."

- [Section 140](#) – obligation on CCGs to identify hospitals for the purposes of urgent admissions.
- **Once an MHA application is made to an identified hospital for the patient's admission, the person is in legal custody pending conveyance there.**
- Protracted detention in police custody, even if lawful under timescales in domestic law, can still amount to **inhumane and degrading treatment** – *MS v UK* (2012).
- Financial considerations can never amount to a defence of violating the ECHR – *Dankeovich v Ukraine* (2005).