

Citizen Participation and Public Petitions Committee
Wednesday 9 October 2024
15th Meeting, 2024 (Session 6)

PE2108: Obtain a second medical opinion before detainment under the Mental Health (Care and Treatment) (Scotland) Act 2003

Introduction

Petitioner Andrew Muir

Petition summary Calling on the Scottish Parliament to urge the Scottish Government to require medical professionals to obtain a second medical opinion before a person is detained under the Mental Health (Care and Treatment) (Scotland) Act 2003.

Webpage <https://petitions.parliament.scot/petitions/PE2108>

1. This is a new petition that was lodged on 19 June 2024.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition collects signatures while it remains under consideration. At the time of writing, 25 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered.
6. The Committee has received submissions from the Minister for Social Care, Mental Wellbeing and Sport, and the Petitioner, which are set out in **Annexe C** of this paper.

Action

7. The Committee is invited to consider what action it wishes to take.

Clerks to the Committee
October 2024

Annexe A: Summary of petition

PE2108: Obtain a second medical opinion before detainment under the Mental Health (Care and Treatment) (Scotland) Act 2003

Petitioner

Andrew Muir

Date Lodged

19 June 2024

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to require medical professionals to obtain a second medical opinion before a person is detained under the Mental Health (Care and Treatment) (Scotland) Act 2003.

Background information

Under the above Act, a person can be detained and treated for 28 days under a Short-Term Detention Certificate based on the medical opinion of a single psychiatrist. Two signatures should be required on the certificate before detention.

In the English version of the Mental Health Act, it requires two medical opinions before someone can be treated against their will.

The first phase of the introduction of Martha's Rule will be implemented in the NHS in England and Wales from April 2024. Once fully implemented, patients, families, carers and staff will have round-the-clock access to a rapid review from a separate care team if they are worried about a person's condition.

Currently a person's treatment can be reviewed by a Mental Health Tribunal after 28 days or by a Designated Medical Practitioner after 2 months. However, these opinions occur after a person has commenced medication and may already have gone through a personality change or suffered restraint and do not get a true picture of a person's state of mind.

Annexe B: SPICe briefing on PE2108



Brief overview of issues raised by the petition

The petition calls on the Scottish Parliament to urge the Scottish Government to require medical professionals to obtain a second medical opinion before a person is detained under the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#).

It refers specifically to the short-term detention certificate rather than emergency detentions or compulsory treatment orders.

Short-term detention certificates

A short-term detention certificate (STDC) authorises the patient's detention in hospital for 28 days in order to determine what medical treatment needs to be given to the patient and to provide that treatment.

[Part 6](#) of the Mental Health (Care and Treatment) (Scotland) Act 2003 makes provision for using a STDC. The Act specifies the criteria which an Approved Medical Practitioner (AMP) must consider likely to have been met before a STDC is used. (An AMP is someone who has been approved by a health board or by the State Hospital Board for Scotland as having specialist training experience in the diagnosis and treatment of mental disorder).

All five conditions within the following criteria must be met in order to use a STDC:

1. the patient has a mental disorder
2. because of the mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired
3. 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
4. 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
5. the granting of a short-term detention certificate is necessary.

The Act also requires the consent of a [Mental Health Officer](#) (MHO) (a specialist social worker) to the STDC. If the patient has a named person, they must also be consulted and their views taken into account.

A [Code of Practice](#), published by the Scottish Government, outlines the detailed conditions which apply to using a STDC. It explains that there is an expectation that a thorough medical examination is carried out before determining if a STDC is justified. The AMP should also take into account the patient's wishes and the views of the wider medical team.

In deciding whether to give consent to the STDC, the MHO must take into account the views of the patient and of other mental health professionals. They must also consider other views, such as those of the patient's named person. In making their decision, the MHO must also consider other alternatives to detention, whilst weighing up the impact on the patient's family if they are not detained. Section 45 of the Act outlines some specific duties for the MHO:

- interview the patient
- ascertain the name and address of the patient's named person
- inform the patient of the availability of independent advocacy services
- take appropriate steps to ensure that the patient has the opportunity to make use of these advocacy services.

[Section 49 of the Act](#) places a duty on the patient's Responsible Medical Officer (RMO) to keep under review the continued necessity for the STDC. If they believe the detention criteria are no longer met, they must revoke the STDC. The guidance suggests that a weekly review is carried out, involving the wider multi-disciplinary team.

[Section 50 of the Act](#) gives the patient and their named person the right to appeal a STDC to the Mental Health Tribunal Scotland. The Tribunal's Annual Report for 2022/2023 notes that 16.43% of applications made to them (which totalled 5,314 that year) were applications to revoke STDCs.

[Research by the Mental Welfare Commission](#) in 2021 explored how long short-term detentions usually last, and how they end (for example, whether they are revoked, or lapse after the full 28 days). Between 2006 and 2018, 39% of STDCs were revoked, 22% lapsed, and 39% were extended. The research found that during that period, STDCs were increasingly revoked at an earlier stage - compared to 2006, STDCs were 10% shorter in 2018. Given the requirement in the Act to keep detentions under review, the Commission considers that "allowing a detention to lapse is poor practice and at worst it might suggest that the principles of the Mental Health Act are not being followed."

Detention in England

In England, [Section 2 of the Mental Health Act 1983](#) makes provision for the detention of patients for assessment and/or treatment for 28 days. The decision whether to detain a patient is made by an approved mental health professional (who may be a social worker, nurse, occupational therapist or psychologist), following assessment by two doctors, one of whom is trained and qualified in the use of the

Act (usually a psychiatrist).¹ [When the 1983 Act was being debated](#), the importance of the independence of the two doctors making medical recommendations was stressed, in order to avoid collusion, influence or interference with clinical judgement.

The professionals involved in the assessment must follow the [Mental Health Act Code of Practice](#)

Patients or their nearest relatives have the right to apply to the Mental Health Tribunal to be discharged. The appeal must be made within 14 days of the start of the detention period.

Scottish Government action

In 2019, the Scottish Government commissioned an independent review of mental health law in Scotland, chaired by Lord Scott KC. Its purpose was to consider how best to improve the rights and protections of people subject to mental health, incapacity or adult protection legislation, because of a mental disorder.

In response to the concluding [report](#), the Scottish Government [committed to establishing](#) a Mental Health and Capacity Reform Programme which will

“co-ordinate and drive further change and improvement over time in line with the Review ambitions. This necessarily long-term programme will modernise our legislation to better reflect international human rights standards, particularly the United Nations Convention on the Rights of Persons with Disabilities. It will also seek to bring about improvements across mental health services and strengthen accountability for upholding and fulfilling human rights.”

In June 2024, an initial [Delivery Plan](#) for the programme was published by the Scottish Government, covering October 2023 to April 2025. There are no specific actions regarding the conditions for detention. However, one of the Scottish Government’s priorities is around reducing coercion and it will scope a programme of work with the aim of reducing the use of coercion and restrictive practices, such as seclusion and restraint.

Scottish Parliament action

In a [Parliamentary Question \(S6W-22234\)](#) in October 2023, Tess White MSP asked the Scottish Government:

“To ask the Scottish Government what its response is to figures from the Mental Welfare Commission for Scotland showing that in 60% of cases where someone is detained for compulsory mental health care and treatment, there was no mental health officer consent, in light of the Mental Health (Care and Treatment) (Scotland) Act 2003 requiring that both a doctor and a mental health officer should be responsible for emergency detentions.”

¹ See [Section 2: admission for assessment - Mental Health Law Online](#)

In its response, the Scottish Government said:

“there may be occasions where the urgency of the situation is so great that it would not be practicable for such consultation to take place. In such cases, the practitioner must inform hospital managers who must then inform the Mental Welfare Commission and notify the relevant authority of the reasons why it was impracticable to consult and seek the consent of an MHO.”

The Minister for Social Care, Mental Wellbeing and Sport, Maree Todd MSP, also goes on to acknowledge that capacity is a contributory factor and says that, while it is the responsibility of local authorities to have appropriate levels of MHOs, the Scottish Government has provided additional funding and support.

The Public Audit Committee has undertaken an [inquiry into Adult Mental Health](#). Its concluding report includes a brief reference to an increase in the use of detention, but the Committee did not recommend any changes in this area.

When the Mental Health (Care and Treatment) (Scotland) Act 2003 was scrutinised by the Scottish Parliament’s Health and Community Care Committee in 2002, the following points were made in its [Stage 1 Report](#):

105. An additional requirement is that an MHO must be consulted and must agree to the detention, although in the case of emergency detention, this requirement is waived if it would be "impracticable" to do so.

106. Most of the witnesses who expressed a view were generally satisfied with the gateway criteria set out in Parts 5 and 6.

110. However, witnesses generally welcomed the requirement on a doctor to get agreement from an MHO before authorising detention, especially in relation to emergency detention, where the MHO would be the "experienced partner" compared to most GPs in considering detention cases.

**Katherine Byrne, Assistant Clerk, and Lizzy Burgess, Senior Researcher
SPICe Research
09/08/2024**

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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Annexe C: Written submissions

Minister for Social Care, Mental Wellbeing and Sport submission of 15 July 2024

PE2108/A: Obtain a second medical opinion before detainment under the Mental Health (Care and Treatment) (Scotland) Act 2003

Thank you for your e-mail dated 19 June 2024 seeking a view on the contents of Mr Muir's petition which calls on the Scottish Parliament to urge the Scottish Government to require medical professionals to obtain a second medical opinion before a person is detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 ('2003 Act').

Short-Term Detention Certificate

Firstly, it might be helpful to set out the criteria and steps that must be taken before a Short-Term Detention Certificate (STDC) can be granted. The Approved Medical Practitioner (AMP) must consider it is likely that all of the five criteria at section 44(4) of the 2003 Act are met, namely that;

- 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;
- 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; and
- the granting of a short-term detention certificate is necessary.

The 2003 Act also imposes two specific duties on the AMP. These are;

- to consult and obtain the consent of a mental health officer (MHO) to the granting of the certificate; and
- to consult and have regard to the views of the patient's named person, where it is practicable to do so.

The certificate can only be granted if the MHO has given his/her consent. Where it has not been practicable for the AMP to consult the named person in advance of granting the certificate, it would be best practice for him/her to attempt to consult the named person as soon as practicably possible after the certificate has been granted.

It is useful to note that once the STDC is in place section 49 of the 2003 Act places a duty on the patient's Responsible Medical Officer (RMO) to consider from time to time the continued necessity of the STDC.

If the RMO is satisfied that the patient no longer meets the detention criteria listed in section 49(1) of the 2003 Act or that the continued detention of the patient in hospital is no longer necessary, then the RMO must revoke the STDC.

Right of Appeal

Mental health legislation in Scotland is based on rights and principles and provides for rigorous safeguards in respect of individuals' human rights where compulsory treatment is necessary. Safeguards include a right to independent advocacy and an efficient and independent Mental Health Tribunal which grants and reviews orders for compulsory treatment.

Section 50 of the 2003 Act provides the patient and the named person the right to apply to the Tribunal for revocation of the STDC.

The Tribunal must allow certain persons, including the patient and the named person, the chance to make representations orally or in writing and to lead or produce evidence. This includes the right to obtain and lodge as evidence their own medical evidence in the form of an independent psychiatric report. If the Tribunal determine that the detention criteria are no longer met or it is no longer necessary for the patient to be detained in hospital the STDC is revoked.

Mental Health and Capacity Reform Programme

While the Scottish Mental Health Law Review did not make any specific recommendations in relation to this matter the Review was asked to look at ways in which people's human rights could be improved through the law, and what could be done to make it easier to get care and support.

In the Scottish Government's initial response to the Review, we committed to establishing the Mental Health and Capacity Reform Programme. In June 2024, the initial delivery plan under the Programme was published. The plan sets out a range of actions that are either underway or planned in the period up to April 2025, against the priorities identified in our initial response. One of these priorities is around reducing coercion - scoping a programme of work with the aim of reducing the use of coercion and restrictive practices, such as seclusion and restraint, over time.

Kind regards,

MAREE TODD

Petitioner submission of 25 July 2024

PE2108/B: Obtain a second medical opinion before detainment under the Mental Health (Care and Treatment) (Scotland) Act 2003

The Short-Term Detention Certificate does not contain sufficient safeguards as the mental health officer is not independent of the Approved Medical Practitioner (AMP)

and may too easily acquiesce. The AMP can easily ignore the named person's views too.

Once the certificate is in place, a determined Responsible Medical Officer (RMO) will not revoke it.

There needs to be safeguards against the opinions of someone like Zholia Alemi, a woman who faked a medical degree certificate to work as a psychiatrist.

<https://www.dailyrecord.co.uk/news/scottish-news/bogus-nhs-shrink-convicted-after-29226019>

A Mental Health Tribunal is not a fair hearing either. The RMO will be present to give evidence.

Learning Disability Alliance Scotland found in their 2016 survey that 98% of Mental Health Tribunals agreed with the psychiatrist.

Outcomes from Mental Health Tribunal held in Scotland for Jan-Aug 2016

- Section: 63
- Brief Description: Application for Compulsory Treatment Order
- Total: 1378
- Granted: 1321 (98.2%)
- Refused: 24 (1.8%)

In my view, at Mental Health Tribunals:

- There is no "equality of arms" between the patient and the treating psychiatrist and therefore too many people are subject to compulsory treatment.
- There is a presumption that the patient has a mental illness.
- A patient is likely to be heavily sedated and cannot properly represent themselves.
- The National Health Service (NHS) controls all the documentation. Therefore, they have more time to prepare and can also withhold information that is unfavourable to them.
- The constitution of the tribunal (a lawyer, psychiatrist and usually an NHS employee) is such that the diagnosis of the treating psychiatrist is less likely to be challenged than if they were drawn from the public.
- They are held in secret and can therefore not be scrutinised.
- Witnesses are not on oath and are thus more likely to make misleading statements.

- The Limited Review of the Mental Health (Care and Treatment) Act 2003 (published in 2009) describes the quality of legal representation as poor.
- Tribunal members are paid about £400 per day. It is possible that it might be in their financial interest for people to be on compulsory treatment.
- The tribunal too often functions as a tick box exercise where judicial process is seen to be done but is not really fair or proper. Usually, it seems to boil down to the opinion of the Responsible Medical Officer which the tribunal team will rarely go against unless the patient can afford to get another psychiatrist as an alternate expert. The cross-examination process is quite feeble and clinical judgements such as how an opinion on lack of capacity was made are not tested.

The Scottish Mental Health Law Review was not fit for purpose. I believe that the executive team had a vested interest in a very conservative outcome, with members being affiliated to, or employed by, large organisations like the Mental Health Tribunal for Scotland and the Mental Welfare Commission; organisations which are integral to the system that is supposed to be making improvements to itself for the benefit of the users.

Three people, including myself were banned from the Review “for being abusive”. I totally reject this allegation.

Users external to the system, that have more significant complaints, tended to be marginalised.

The Review states that there should be a reduction in coercion without explaining how this will be done.

I would like supported decision making to be the norm rather than substituted decision making.