

Practice Direction

DOCUMENTARY AND EVIDENTIARY REQUIREMENTS FOR ESTABLISHING THAT A PERSON IS MENTALLY DISORDERED (updated 23 September 2015)



Purpose

The purpose of this Practice Direction is to clarify the basis upon which persons may be lawfully detained as mentally disordered under the *Mental Health Act 2007* (the Act), including the consequences of any detention.

Background

The Tribunal has no jurisdiction to review or hold mental health inquiries for mentally disordered persons under the Act. It does, however, have jurisdiction to hear appeals under s 44 of the Act in respect of any person detained (including a person detained as a mentally disordered person). The Tribunal has issued this practice direction in order to clarify the circumstances in which a person is detained as mentally disordered, rather than mentally ill person under the Act, as well as the applicable time limits. This Practice Direction sets out:

- the documentary and evidentiary requirements of the initial detention under s.18
- the assessment steps under s27/27A leading to a finding that the person is to be detained as a mentally disordered person
- the time limits for detention of mentally disordered persons.

Initial detention under s18

A person's initial detention must be in accordance with s.18 and the following documentation/evidence is required and appropriate records reflecting these requirements should be kept by the Mental Health Facility:

- **If detained under s19 or s23 of the Act**, a completed form as set out by Schedule 1 of the Act. This is known as a Schedule 1 certificate or a 'Schedule'.*
- **If detained under s20**, evidence that the person was brought in by ambulance, preferably using the form made available by the Ministry of Health. (If the Ministry of Health form is not used, the mental health facility staff should be able to provide that evidence themselves or identify the relevant clinical notes.)
- **If detained under s22**, evidence that the person was apprehended by a police officer and taken to a mental health facility, preferably using the form made available by the Ministry of Health entitled Request by member of NSW Police Force for Assessment of Alleged Mentally Ill or Mentally Disturbed Person. (If the Ministry of Health form is not used, the mental health facility staff should be able to provide that evidence themselves or identify the relevant clinical notes.)
- **If detained under s24**, a Magistrate's or bail officer's order.

- **If detained under s25** acceptable written or oral evidence confirming the decision by either the medical officer of the transferring facility, or the AMO of the receiving mental health facility as to:
 - the arrangement to transfer and
 - confirming his or her opinion that the person is a mentally ill person or a mentally disordered person.
- **If transferred under s80**, acceptable written or oral evidence confirming the arrangement between the medical officers of each facility to transfer the patient, or, where the transfer is by order of the Director General, a copy of the order.
- **If detained under s26**, a copy of the written request to detain by a designated carer, principal care provider, relative or friend and a copy of the notation in the patient's file or other acceptable written or oral evidence of the decision to detain.
- **In the case of a voluntary patient** who has been caused to be detained by an AMO under s10 of the Act, acceptable written or oral evidence of this fact.

Where a patient self-presents at a mental health facility (including being brought in by family/friends) a Schedule 1* certificate must be completed.

- * A schedule 1 certificate certifying someone as mentally disordered must **not** be used to detain a person more than one day after it is given (s. 19 (4)). This means that if a person is not admitted or detained within one day the schedule is defunct.

As an example, if a Schedule 1 certificate is completed on a Tuesday it is valid up until midnight on Wednesday. This is because Tuesday is not counted and counting starts the next day.

Following the detention of a person in accordance with s18, s27 stipulates the step 1, 2 and 3 (if necessary) examinations that must take place to determine if the person should be further detained. The assessments are completed on a Form 1 (or s27A Form if applicable). One of the first two assessments must be by a psychiatrist. Any third assessment must also be by another psychiatrist. The medical practitioner on whose certificate or request the person has been admitted to a mental health facility must not examine the person under s27

Certification that a Person is Mentally Disordered

Section 27(e) sets out the assessment steps in leading to a finding that a person is mentally disordered.

'STEP 5 mentally disordered persons

If a person is found to be a mentally disordered person by an authorised medical officer in initial examination in step 1, and is found to be a mentally disordered person in step 2 or step 3, the person may be detained in the mental health facility as a mentally disordered person'.

Accordingly, a person may only be detained as a mentally disordered person if:

- Assessed in step 1 to be mentally disordered, which triggers the second assessment in step 2, and
- In step 2 the person is assessed to be mentally disordered;

However, if in step 2 the examiner is not of the opinion that the person is mentally ill or mentally disordered, a third examination must take place (step 3).

- If, at that third examination (step 3) the person is found to be mentally disordered, the person is a mentally disordered person for the purposes of the Act.

A person is formally detained as a mentally disordered person only after they are found to be mentally disordered on the first and second (or third) assessment. These assessments are to be completed on Form 1s or s.27A forms as appropriate.

Consequences of being assessed as mentally disordered person under s27(e) and time limits

Under s31 a mentally disordered person must **not** be detained in a mental health facility for a continuous period of more than three days (not including weekends and public holidays). Section 31(5) states that a person cannot be admitted and detained on more than three occasions in any one calendar month.

The three days start from midnight after the person was formally detained as a mentally disordered person, that is, after the second (or third) assessment (as the case may be) and NOT from the time that the person was first admitted. Of course, all Form 1 assessments should be done within the strict time frames stipulated in the Act.

Meaning of Days

For the purpose of determining the time limits associated with the use of a schedule for a mentally disordered person and the periods of time that such persons can be detained in a mental health facility the word “Day” means : a twenty four hour period, reckoned from one midnight to the next. The day of the initial detention is not included in the calculation (see *Interpretation Act, 1987*, s21(1) and s36(1)).

Therefore, ‘three days’ referred to in s31 does not include the day that the person was formally detained as a mentally disordered person and counting commences at the start of the following day.

For example, if a person is found to be a mentally disordered person on a Monday (after two or three assessments), he or she cannot be detained beyond midnight on Thursday. Monday, the day on which the person is detained is excluded and counting commences on the following day, Tuesday, and includes Tuesday, Wednesday and up until midnight on Thursday.

If a person is found to be mentally disordered on Friday, he or she cannot be detained beyond midnight on Wednesday. Friday is excluded, as are Saturday and Sunday and counting commences on Monday, and includes Monday, Tuesday and until midnight on Wednesday.

The time limit of three days means that a mentally disordered person must be discharged from the mental health facility at the end of that period. Accordingly, should a person require a longer period of treatment they must first be discharged from the mental health facility and admitted again in accordance with s18. This would require a new Schedule 1 certificate and the s27/27A assessments. **Mental health facilities cannot extend the person’s detention**

as a mentally disordered person by completing further s27/27A examinations unless a new Schedule 1 certificate is first completed.

Similarly, if a mentally disordered person is subsequently assessed as being a mentally ill person who requires detention, then a new Schedule 1 certificate must be completed and new s27/27A examinations carried out. A person cannot be simply 'reclassified' as a mentally ill person by completing one or more Form 1 or s27A assessments.

The new Schedule is necessary even if the person is already in the facility. The purpose of the Schedule is not just to 'transport' a person to a mental health facility. It is also used to start the process to further detain a person who is already in a mental health facility and then allows for the steps under s.27/27A to be completed.

Meaning of calendar month

The Act permits the detention of a mentally disordered person 'on no more than three occasions in any one calendar month'.

The *Interpretation Act 1987* defines 'calendar month' as:

'calendar month' means a period commencing at the beginning of a day of one of the 12 named months and ending:

- (a) immediately before the beginning of the corresponding day of the next named month, or
- (b) if there is no such corresponding day, at the end of the next named month.

Therefore, for example a person detained as a mentally disordered person on 15 May 2014 can only be detained three times up until midnight on 14 June 2014. If a person is detained on 31 January 2014 they can only be detained three times up until midnight on 28 February 2014.

It is impermissible to regard a 'calendar month' as simply a named month. For example, a person cannot be detained as a mentally disordered person on six occasions between 15th May 2014 and 14th June 2014 simply because the period straddles two named months.

This practice direction is issued pursuant to s160(3) of the *Mental Health Act 2007*.

**Professor Dan Howard SC
President**

Dated: 23 September 2015