

# Section 38 of the Mental Health Act

## Interim hospital orders by the criminal courts

This factsheet looks at how criminal courts issue interim hospital orders under section 38 of the Mental Health Act. It looks at when and how the courts issue interim hospital orders and the professionals you might come across. It tells you what your rights are whilst you are in hospital and what could happen afterwards. This factsheet is for people who are convicted and experience mental illness, and their carers, relatives and friends.

### Key Points.

- The criminal courts can issue interim hospital orders under section 38 of the Mental Health Act. They can do this if they find you guilty of an offence that you could go to prison for.
- Section 38 allows the court to detain you in hospital for assessment and treatment before they decide your sentence.
- Being detained in hospital under the Mental Health Act is sometimes known as being 'sectioned'.
- You can be in hospital for up to 12 weeks. This can be extended, but you can't be in hospital for longer than 12 months on an interim hospital order.
- The hospital can treat you with medication without your permission for up to 3 months.
- The professional responsible for your care will see how you respond to treatment and tell the court. They are known as your 'responsible clinician.'
- You have a right to appeal the hospital order and the underlying conviction.
- You have the right to get advice from an independent mental health advocate (IMHA).
- The court will decide what sentence to give you. You could stay in hospital on a different type of hospital order or be sent to prison.

## **This factsheet covers:**

1. [When do courts issue interim hospital orders?](#)
2. [How do courts issue interim hospital orders?](#)
3. [How long will I be in hospital?](#)
4. [What are my rights?](#)
5. [Can doctors treat me with medication if I don't agree to it?](#)
6. [Will I have to go back to court if the hospital order is extended?](#)
7. [What can happen once my interim hospital order ends?](#)

## **A list of professionals you might come across on an interim hospital order**

There are different professionals that might be involved in your care while you are in hospital under the Mental Health Act. We talk about some of these professionals in this factsheet.

**Approved clinician (AC).** An AC is a mental health professional who is allowed to use the Mental Health Act. A doctor, psychologist, nurse, occupational therapist, or social worker can be an AC. They are trained to assess and treat your mental health and they are involved in your care planning.

**Responsible clinician (RC).** Your RC is the approved clinician who is responsible for your care and treatment. They can decide if you are well enough to leave hospital and they can renew your hospital order. Your RC is usually a psychiatrist.

**Second opinion appointed doctor (SOAD).** A SOAD is an independent doctor who can make decisions about your treatment under the Mental Health Act. Your RC might want to give you treatment against your will after your first 3 months in hospital. They will need the agreement of a SOAD.

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## **1. When do courts issue interim hospital orders?<sup>1</sup>**

The criminal courts can issue interim hospital orders under section 38 of the Mental Health Act. They can do this if:

- they find you guilty of an offence that you could go to prison for, and
- you have a mental disorder that needs treatment and assessment in hospital.

A mental disorder can include mental illness and things like dementia, and developmental disorders including autism.

It's called an 'interim' hospital order as it's a short term one, while the court decides on the next steps.

You'll be detained in hospital for assessment and treatment before the court decides your sentence.

The court can see how you respond to mental health treatment whilst you're in hospital. This can help them to decide what sentence to give you.

Being detained in hospital under the Mental Health Act is sometimes known as being 'sectioned'.

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## **2. How do courts issue interim hospital orders?**

Before the court can issue an interim hospital order 2 doctors must assess you. They must tell the court that you have a mental disorder that needs treatment in hospital.<sup>2</sup>

One of the doctors should be from the hospital where you will be staying.<sup>3</sup>

If the 2 doctors agree that you need to stay in hospital, the managers of the hospital should find you a bed within 28 days.<sup>4</sup>

You might have to wait in prison until a bed is available. Some prisons have healthcare units where you can stay.

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## **3. How long will I be in hospital?**

You can be detained in hospital for up to 12 weeks on an interim hospital order.

Your responsible clinician might think you need to stay in hospital longer than 12 weeks. They can ask the court for your interim hospital order to continue for a further 28 days. This can be renewed for a further 28 days when it ends. But the maximum time you can be kept in hospital under an interim hospital order is 1 year.<sup>5</sup>

At the end of your interim hospital order, you might remain in hospital. This is if the court sentences you to a different type of hospital order. See [section 7](#) for more information.

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## **4. What are my rights?**

### **What are my rights to information?**

After you are detained in hospital, you should be given information as soon as possible on:<sup>6</sup>

- how the Mental Health Act applies to you,
- complaints, advocacy and legal advice,
- safeguarding, and
- the role of the Care Quality Commission (CQC).

You must be given information:<sup>7</sup>

- verbally and in writing, and
- in a format and language to help you understand.

You should be told your rights about staff physically restraining you.<sup>8</sup>

### **Do I have the right to appeal?**<sup>9</sup>

You can appeal:

- the conviction on which the hospital order was based, and
- the hospital order itself.

You must appeal to the Court of Appeal, Criminal Division or to the Crown Court.

If you want to appeal you can contact the court that gave you the hospital order. They will give you information on what you need to do to appeal.

You can try to get legal advice before appealing.

You can find more information about:

- Legal advice, and
- Criminal courts and mental health

At [www.rethink.org](http://www.rethink.org). Or call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheet.

### **Do I have the right to see an independent mental health advocate?**

You have the right to see an independent mental health advocate (IMHA).<sup>10</sup>

An IMHA can help you understand the following.<sup>11</sup>

- Your rights under the Mental Health Act.
- The rights that other people have in relation to the Act.
- The parts of the Act that apply to you.

- Any conditions or restrictions to which you are subject.
- Any medical treatment you are receiving and the reasons for that treatment.

With your agreement, the IMHA can do the following things.<sup>12</sup>

- Meet with you in private.
- Look at your medical and social services records.
- Speak to the people treating you.
- Go with you to meetings with the people treating you.
- Represent you by speaking or writing on your behalf.

An IMHA can help you if you are unhappy about any part of your care and treatment while in hospital.

Hospital staff can tell you about the IMHA service at your hospital. You can usually find details of the local IMHA service by typing the following into an internet search engine, “Independent mental health advocacy [name of borough, county, town or city].”

You can contact the IMHA service directly if you want to.

### **Can I make a complaint about my care or treatment?**

You have a right to complain if you are unhappy about your care, treatment, or any other aspect of your detention.

You can ask your named nurse or responsible clinician for a copy of the complaints policy.

You can also speak to an Independent Mental Health Advocate (IMHA). They can help you to raise any issues you have or help you to make a complaint.

You can find more information about ‘**Complaints about the NHS or social services**’ at [www.rethink.org](http://www.rethink.org). Or call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheet.

### **Am I allowed to have visitors and contact people?**

You have the right to:<sup>13</sup>

- see anyone you want to see, such as family or friends,
- see your visitors in private, including your own bedroom if you want, and
- contact people by phone or in writing.

You should be encouraged to have visitors. Visits should be made as easy and as comfortable as possible for you and your visitors.<sup>14</sup>

But in some circumstances your responsible clinician (RC) can stop a visitor seeing you. The reasons for this will usually be:<sup>15</sup>

- if your RC thinks the visitor will have a bad effect on your wellbeing or mental health, or
- if your RC thinks your visitor is disruptive and a risk to security.

If your RC stops a visitor from seeing you an Independent Mental Health Advocate (IMHA) can explain your rights to you.

### **Can I get welfare benefits?**

You might be able to claim some welfare benefits while you are in hospital.

You can find more information about '**How do I manage my money if I have to go into hospital?**' at: [www.rethink.org/advice-and-information/living-with-mental-illness/money-benefits-and-mental-health](http://www.rethink.org/advice-and-information/living-with-mental-illness/money-benefits-and-mental-health)

### **Where can I get further information?**

The Equality and Human Rights Commission have published guides on your rights when detained under the Mental Health Act in England. You can download free copies of the guides here:

[www.equalityhumanrights.com/en/publication-download/your-rights-when-detained-under-mental-health-act-england](http://www.equalityhumanrights.com/en/publication-download/your-rights-when-detained-under-mental-health-act-england).

Please see 'Download forensic introductory guide' and 'Download forensic full guide' at the bottom of the page.

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## **5. Can doctors treat me with medication if I don't agree to it?**

Doctors can treat you with medication even if you don't agree to it:<sup>16</sup>

- for 3 months, and
- after 3 months, only once they have got a second opinion.

An independent doctor will visit you to give a second opinion. This doctor is called a second opinion appointed doctor (SOAD).

If the SOAD agrees you need medication, this can continue even if you don't want it.<sup>17</sup>

Your treatment under the Mental Health Act must:<sup>18</sup>

- be appropriate to your mental health condition, and
- take account of your wishes, feelings, and any advance decisions you've made.

You can find more information about '**Planning your care - Advance statements and advance decisions**' at [www.rethink.org](http://www.rethink.org). Or call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheet.

## What about electroconvulsive therapy (ECT)?

Doctors can only give you electroconvulsive therapy (ECT) if:<sup>19,20</sup>

- you agree,
- you lack mental capacity and a SOAD agrees that you need it, or
- it's an emergency.

You can find more information about '**Electroconvulsive therapy (ECT)**' at [www.rethink.org](http://www.rethink.org). Or call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheet.

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## 6. Will I have to go back to court if the hospital order is extended?

As [section 4](#) of this factsheet explained, the court can extend your interim hospital order.

If you don't have a solicitor to represent you, you'll have to go back to court. But if you do have a solicitor, you don't have to.<sup>21</sup>

Your responsible clinician can ask the court to delay your hearing if you're not well enough to attend.

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## 7. What can happen when my interim hospital order ends?

Your responsible clinician will see how you respond to treatment in hospital. They will report back to the court and suggest what should happen next.

The court will decide what sentence to give you. They could decide the following.

- You should stay in hospital. The court can change your interim hospital order to a full hospital order under section 37 or 37/41 of the Mental Health Act. Or,
- You don't need to be in hospital any longer. The court can give you another type of sentence, like a prison sentence.

## Further Reading

You can find more information about:

- Section 37 of the Mental Health Act
- Section 37/41 of the Mental Health Act
- Prison – Going in
- Prison – What happens while I am in prison?

at [www.rethink.org](http://www.rethink.org). Or you can call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheets.

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## References

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- <sup>1</sup> s38, Mental Health Act 1983 c.20.
  - <sup>2</sup> s38 (1), Mental Health Act 1983 c.20.
  - <sup>3</sup> s38 (3), Mental Health Act 1983 c.20.
  - <sup>4</sup> s38 (4), Mental Health Act 1983 c.20.
  - <sup>5</sup> s38 (5), Mental Health Act 1983 c.20.
  - <sup>6</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. Paragraphs 4.12.
  - <sup>7</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraphs 4.10.
  - <sup>8</sup> s4(3), Mental health units (force of use) Act 2018 c27
  - <sup>9</sup> Department of Health. *Reference Guide to the Mental Health Act*. Paragraph 15.21.
  - <sup>10</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraph 6.8.
  - <sup>11</sup> s130B, Mental Health Act 1983 c.20.
  - <sup>12</sup> s130B (3), Mental Health Act 1983 c.20.
  - <sup>13</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraph 11.4.
  - <sup>14</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraph 11.5.
  - <sup>15</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraphs 11.12, 11.4 & 11.15.
  - <sup>16</sup> s58(1), Mental Health Act 1983 c.20.
  - <sup>17</sup> s58(3)(b), Mental Health Act 1983 c.20.
  - <sup>18</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. paragraph 24.2.
  - <sup>19</sup> s58A, Mental Health Act 1983 c.20.
  - <sup>20</sup> s62, Mental Health Act 1983 c.20.
  - <sup>21</sup> s38(2), Mental Health Act 1983 c.20



This factsheet is available in large print.

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## Rethink Mental Illness Advice Service

**Phone 0808 801 0525**  
**Monday to Friday, 9:30am to 4pm**  
**(excluding bank holidays)**

**Email a**

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**Patient Information Forum**

### Did this help?

We'd love to know if this Information helped you

**Drop us a line at:** [feedback@rethink.org](mailto:feedback@rethink.org)

**or write to us at Rethink Mental Illness:**

RAIS  
PO Box 18252  
Solihull  
B91 9BA

**or call us on 0808 801 0525**

We're open 9:30am to 4pm

Monday to Friday (excluding bank holidays)



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For further information on Rethink Mental Illness Phone 0121 522 7007  
Email [info@rethink.org](mailto:info@rethink.org)



**rethink.org**

### Need more help?

Go to [rethink.org](https://rethink.org) for information on symptoms, treatments, money and benefits and your rights.

### Don't have access to the web?

Call us on 0121 522 7007. We are open Monday to Friday, 9am to 5pm, and we will send you the information you need in the post.

### Need to talk to an adviser?

If you need practical advice, call us on: 0808 801 0525 between 9:30am to 4pm, Monday to Friday. Our specialist advisers can help you with queries like how to apply for benefits, get access to care or make a complaint.

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