

# Section 38 of The Mental Health Act

## Criminal courts giving an interim hospital order

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This factsheet looks at section 38 of the Mental Health Act. It looks at the professionals you might come across in hospital, when and how the courts use this section. It explains what your rights are during this section and what could happen afterwards.



KEY POINTS

- The criminal courts can use section 38 of The Mental Health Act 1983. They can use it if they find you guilty of an offence that you could go to prison for. Section 38 allows the court to send you to hospital for assessment and treatment before you are sentenced.
- Going to hospital under The Mental Health Act is sometimes known as being 'sectioned'.
- An order under Section 38 of the Mental Health Act is known as an 'interim hospital order.' This means it is short-term while the court decides what sentence to give you.
- The hospital can treat you without your permission for up to 3 months.
- The psychiatrist responsible for your care will see how you respond to treatment and tell the court. They are known as your 'responsible clinician.'
- The court will decide what sentence to give you. You could stay in hospital on a hospital order (section 37 or 37/41) or go to prison.

## This factsheet covers:

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### 1. What professionals might I come across in hospital?

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 and social worker can be ACs. They are trained to assess you for mental illness.

**Responsible Clinician (RC):** the RC is responsible for your care or treatment. The RC decides if you can leave hospital or they can renew your section. A RC is an Approved Clinician with more training.

**Second Opinion Appointed Doctor (SOAD):** a SOAD is an independent doctor who can make decisions about your treatment under the Mental Health Act. They decide if you should continue getting treatment and if your views and rights have been considered.

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### 2. When do the courts use this section?<sup>1</sup>

The criminal courts can use section 38 of The Mental Health Act. They can use it if they find you guilty of an offence that you could go to prison for.

Section 38 allows the court to send you to hospital for assessment and treatment before you are sentenced. The court can do this if you have a mental illness that needs treatment in hospital.

An order issued under Section 38 is known as 'an interim hospital order'. This means it is short-term while the court decides what sentence to give you.

The court can see how you respond to treatment and this will help them to decide what sentence to give you.

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### **3. How do the courts use this section?**

Before the court can issue an interim hospital order two doctors must assess you. They must tell the court that you have a mental illness 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>

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 could stay which are like being in hospital.

You will stay in a secure hospital. There are three types of secure hospitals - low, medium or high security.<sup>5</sup> The judge will decide what level of security is needed for you.

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### **4. How long will I be on this section?**

You will be in hospital on section 38 for up to 12 weeks at first.

If your responsible clinician thinks you can stay in hospital they can ask for your section 38 to continue for a further 28 days. They can keep doing this but the maximum time you can be kept in hospital for is 1 year.<sup>6</sup>

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

#### **The right to information**

As soon as possible after you are detained in hospital you should be given information on:<sup>7</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>8</sup>

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

## **The right to appeal**

If you do not think the court should have given you a hospital order you can appeal.

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 need to appeal within 21 days if the magistrates court gave you the hospital order.<sup>9,10</sup> And within 28 days if it was the Crown Court.<sup>11,12</sup>

You can try to get legal advice before appealing.

You can find more information about '**Legal advice**' 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.

## **The right to see an Independent Mental Health Advocate (IMHA)**

You have the right under The Mental Health Act to see an Independent Mental Health Advocate (IMHA).<sup>13</sup>

An IMHA can help you understand the following.<sup>14</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>15</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.

## **The right to complain**

You can complain if you are unhappy about your treatment or any other aspect of your detention.

You can ask your named nurse or psychiatrist 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 to complain.

You can find more information about '**Complaints**' 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.

### **The right to have visitors and contact people**

You have the right to:<sup>16</sup>

- see anyone you wish 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>17</sup>

But in some circumstances your Responsible Clinician (RC) can stop a visitor seeing you. The reasons for this will usually be:<sup>18</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 (IMHS) can explain your rights to you.

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## **6. Can the doctor treat me if I don't want it?**

Doctors can treat you even if you don't want it:<sup>19</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 treatment, this can continue even if you don't want it.<sup>20</sup>

Your treatment under the Mental Health Act must:<sup>21</sup>

- be appropriate to your mental health condition, and
- take account of your wishes or feelings and advance decisions.

## What about Electroconvulsive therapy (ECT)?

Doctors can't give you electroconvulsive therapy (ECT) unless:<sup>22,23</sup>

- you agree,
- you lack mental capacity and a SOAD agrees that you need it, or
- it is 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.

## What can I do if I am unhappy about my treatment?

If you are unhappy with your treatment you can try the following.

- Speak to your responsible clinician – this is the psychiatrist in charge of your care.
- Speak to your named nurse.
- Speak to an Independent Mental Health Advocate (IMHA) - they can help raise any issues you have about your care and treatment.
- Make a complaint.

You can find more information about '**Complaints**' 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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## 7. Will I have to go back to court if the order is extended?

As section 4 of this factsheet explained, the court can extend your interim hospital order.

You don't need to back to court if you have a solicitor who can represent you. If you don't have a solicitor, you will need to go to court.<sup>24</sup>

You might not be well enough to go to court. Your Responsible Clinician (RC) can write to the court to tell them this. And your RC can ask for the hearing to be delayed until you are well enough.

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## 8. What might happen after this section?

Your Responsible Clinician (RC) 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.
- You don't need to be in hospital and give you another type of sentence.

You can find more information about:

- **Section 37**
- **Section 37/41**
- **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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FURTHER  
READING



REFERENCES

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<sup>1</sup> s38, Mental Health Act 1983 c.20.

<sup>2</sup> As note 1 (MHA 1983), s38 (1).

<sup>3</sup> As note 1 (MHA 1983), s38 (3).

<sup>4</sup> As note 1 (MHA 1983), s38 (4).

<sup>5</sup> Joint Commissioning Panel for Mental Health. *Guidance for commissioners of forensic mental health services*. 2013. Page 7.

<https://www.rcpsych.ac.uk/pdf/jcpmh-forensic-guide.pdf> (accessed 31st July 2018).

<sup>6</sup> As note 1 (MHA 1983),s38 (5).

<sup>7</sup> Department of Health. *Mental Health Act 1983: Code of Practice*. London: TSO; 2015. Paragraphs 4.12.

<sup>8</sup> As note 7, paragraphs 4.10.

<sup>9</sup> Department of Health. *Reference Guide to the Mental Health Act*. Paragraph 15.21.

<sup>10</sup> Gov.uk. *Appeal a sentence or conviction – Appeal a magistrates' court verdict*. <https://www.gov.uk/appeal-against-sentence-conviction> (accessed 31<sup>st</sup> July, 2018).

<sup>11</sup> As note 9, paragraph 15.21.

<sup>12</sup> Gov.uk. *Appeal a sentence or conviction – Appeal a crown court verdict*. <https://www.gov.uk/appeal-against-sentence-conviction/crown-court-verdict> (accessed 31<sup>st</sup> July, 2018).

<sup>13</sup> As note 7, paragraph 6.8.

<sup>14</sup> As note 1 (MHA 1983), s130(B).

<sup>15</sup> As note 1 (MHA 1983), s130(B).

<sup>16</sup> As note 7, paragraph 11.4.

<sup>17</sup> As note 7, paragraph 11.5.

<sup>18</sup> As note 7, paragraphs 11.12, 11.4 & 11.15.

<sup>19</sup> As note 1 (MHA 1983), s58(1).

<sup>20</sup> As note 1 (MHA 1983), s58(3)(b).

<sup>21</sup> As note 7, paragraph 24.2.

<sup>22</sup> As note 1 (MHA 1983), s58(A).

<sup>23</sup> As note 1 (MHA 1983), s62.

<sup>24</sup> As note 7, paragraph 18.7

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## Rethink Mental Illness Advice Service

Phone 0300 5000 927

Monday to Friday, 9:30am to 4pm  
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We're open 9:30am to 4pm  
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