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Original articles

Remands to hospital for psychiatric reports: a study of psychiatrists' attitudes to section 35 of the Mental Health Act 1983

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Section 35 of the Mental Health Act (MHA) 1983 empowers criminal courts to remand defendants to hospital for psychiatric reports. Despite concern about the conditions endured by the mentally disordered in prison (Home Office, 1990a) and the publication of official guidelines encouraging their diversion from custody (Home Office, 1990b), the number of remands to hospital under section 35 is small, averaging 300 per annum, approximately 5% of medical remands in custody.

There is currently a difference of opinion about the legality of compulsory treatment of patients detained in hospital under section 35. One view stresses the assessment function of the order and maintains that compulsory treatment is specifically excluded unless as an emergency under 'common law', while steps are taken to return the defendant to court (Chaffey, 1991). The opposing view set out in paragraph 17.3 of the Code of Practice produced by the Mental Health Act Commission (Department of Health, 1990), recognises the lack of a compulsory treatment option in section 35, but sanctions the use of 'dual detention', by applying a treatment order under section 3 of the MHA 1983, thereby avoiding a premature return to custody of a seriously disturbed patient who may be unfit to attend court. This study asks psychiatrists about their use of section 35 and their attitude to the principle of dual detention.

The study and the findings

An anonymous postal questionnaire was sent to all 2,094 psychiatrists in England and Wales, identified as being of consultant status from a list provided by the Royal College of Psychiatrists. Questions were asked about their current post and speciality and their use of section 35 in the previous year, roughly April 1990–91. They were then asked whether they objected in principle to using section 3 in conjunction with section 35 and written comments were invited. Of the 1,757 (84%) responders, 424 were discounted either because they did not have in-patient beds, were retired or were not of consultant status, leaving 1,333 (64%) of the original sample.

In the previous year, 271 (20%) had admitted at least one patient to hospital under section 35. Not surprisingly, forensic psychiatrists were over-represented, 57 (66%), had used section 35 compared to 214 out of 1246 (17%) psychiatrists from other specialities ($P<0.001$).

A total of 598 section 35 orders was made in the 12 month study period. The excess over official statistics, almost double, may reflect an underestimate of the 'official' figures (Dr D. Jones, Department of Health, personal communication). Of the 598 section 35 orders, 235 (39%) required compulsory treatment of whom 81 (34%) were detained under section 3; the remainder were treated under 'common law' and returned to court.

The final part of the questionnaire asked responders whether they objected in principle to the combined use of sections 35 and 3. Table I groups responders according to their use of section 35 in the previous year.

There is an excess of those who have never thought about it in the group who have not used section 35 in the last year ($P<0.0001$). However if the 'never thoughts' are excluded, then the difference between 'objectors' and 'non-objectors' across the two groups is not significant. If both groups are combined, then of the 814 who expressed an opinion, 701 (86%), a substantial majority, had no objection in principle to dual detention.

Of the 113 (14%) who objected to dual detention, 60 (53%) made additional comments. These included the view that such a course of action was illegal, unethical or against the spirit of the Mental Health Act. For some the question of compulsory treatment never arose as potentially disturbed patients were excluded. Concerns about the legality or otherwise of compulsory treatment had specifically influenced the decision of some not to admit patients under section

TABLE I.
Attitudes of consultant psychiatrists to the combined use of s.3 and s.35

	Used s35 in past year n = *271*	*Did not use s35* n = *1062*
	N (%)	N (%)
No objection	187 (69%)	514 (48%)
Never thought about it	49 (18%)	479 (45%)
Object	35 (13%)	78 (7%)

35. They avoided section 35 whenever possible by using other provisions within part III of the MHA 1983. Although some said they objected in principle, they would still consider using section 3 if the patient was seriously disturbed and an immediate return to court could not be arranged.

Of the 701 (86%) who did not object to dual detention, 163 (23%) made additional comments. Although the expression of the comments varied widely, a theme which was common to the overwhelming majority was the view that the doctor's duty of care to his patient was paramount and overrode any legal or administrative issues which were perceived to threaten it. Many of the comments reflected anger and cynicism towards lawyers and hospital administrators who were accused of being obstructive and not working in the interests of the patients. Some said the difficulties they had experienced in using section 35 had deterred them from using it in future. Others said that their hospital had a policy against dual detention as a result of which no admissions under section 35 were made. In common with the objectors, many used other provisions of the Mental Health Act or admitted patients from court on bail.

Although the Code of Practice was quoted by some as providing the legal justification for dual detention, many more made a plea for guidance and an end to the current confusion. The most common suggestion was that section 35 should be re-worded with compulsory treatment an explicit opinion.

Comment

This small study reveals a more widespread use of section 35 than suggested by the Department of Health's figures, with 20% of eligible psychiatrists making at least one admission in the previous year. A surprisingly high percentage (39%) of section 35 admissions subsequently required compulsory treatment and of these one third were subject to dual detention, a practice which has been declared 'illegal' by a disparate group of lawyers and Mental Health Act administrators and which in some hospitals has been explicitly prohibited.

It is clear that the vast majority of psychiatrists, whether they use section 35 or not, do not object to the principle of dual detention, and a small number of those who do object have still applied a section 3 when compulsory treatment has been required. The robust views expressed suggest that psychiatrists will act in the best interests of their patients, interpreting the ambiguities of the Mental Health Act in a way which conforms to clinical need. Nevertheless some psychiatrists are deterred from using section 35 either because of previous difficulties or because of hospital policy. Others have circumvented the need for section 35 by admitting patients on bail or under other provisions of the Mental Health Act notably section 48, the transfer of a remand prisoner to hospital for urgent treatment (Exworthy 1992).

As a number of psychiatrists commented in our study, it is time to end the legal confusion surrounding section 35. It is hard to believe that Parliament intended that those remanded to hospital under section 35, who subsequently became seriously mentally ill while in hospital, should be sedated in order to return them to custody to allow transfer back to hospital under a different provision of the Mental Health Act. Either the legality of the current practice of dual detention needs to be tested in a court of law or section 35 must be re-worded to include treatment as an explicit option.

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