



Mental Health Tribunal for Scotland

Members' Newsletter

September 2026

INSIDE

New legislation on recorded matters

**Refusals and revocations
Part Two: Fatally Flawed**

Reflecting on 20 years at MHTS

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Message from Laura J Dunlop KC



Dear All,

We are firmly into Autumn now. I will turn to what that means in terms of developments for the Tribunal but, first, I am sharing the photo above (courtesy of the editor, who took it) as a seasonal sign. It's a Perthshire scene, and is far better than the photo I originally included!

New Minister – Kirsten Oswald MSP, who now has Scottish Government responsibility for Tribunals, visited MHTS in Hamilton on 15 September. She met members of the PO team, and then toured the operations centre in Bothwell House, meeting representatives of the casework, CORO, scheduling and clerking teams. She was struck by the dedication of the people she met, and impressed by the work done, every day, to keep tribunals all over Scotland running as well as they do.

New Portal – The most important development on the horizon this Autumn is the transfer from the remaining part of our old website, namely the secure portal. At the time of writing, it appears likely that this will happen in October. Further detailed communications and written guidance will be sent to members. But I can say now that members will need to adopt two-factor authentication on the new portal. You have probably encountered this elsewhere. It means that you will have an ID for the new site – the email address you have already provided – and then your ID will be confirmed by two factors. The first will be a password chosen by you. The second will be a code sent by text message or email, which you will then type in to the site. We believe the simplest way of receiving this code will probably be via text message to your phone, but further information on this will follow. Our plan at this stage is to group members and ask each group to set up their access on a particular day. This is to ensure as best we can that enough support will be available for people who experience difficulty in setting up their new credentials, should that occur.

You will not have hearings for which the papers are on the new portal for a few days at least after setting up your access. Once you are using the new portal, you will find that your current cases are listed with their status shown (upcoming, or FFR pending) and you will be able to open any one case by clicking on its name. You will then be taken to the papers for that case, as if they were sitting in a box for you. Members who have seen the portal in development and testing have been positive about the improvement they think it will bring.

New venues – As ever, we are monitoring the proportion of visual hearings, which appears to have plateaued between 55 and 60%. I continue to press for new suites; at present, we are liaising with two Health Boards to try to improve (or sometimes retain) the present facilities. And there are new community venues in the centre of Edinburgh and in Springburn in Glasgow. A lot of work has gone into developing these facilities; we appreciate that members will take time to become used to the character of these suites but, in each case, it is good that we have them.

New legislation – In November, the legislation making recorded matters available to people on compulsion orders (with and without restriction orders) and to those on statutory directions will come into force. The amendments to the 2003 Act are many in number. Work is going on to revise the mental health law forms that we use. Changes are also being made to our case management system. Fortunately, members are already familiar with the concept and use of recorded matters. We will, however, communicate further on the detail of these changes nearer the commencement date. At present, that is scheduled to be Friday 13 November, our training day in Stirling. As you know, member training is happening just now, with two days in Glasgow already completed. I look forward to seeing all those still due to attend in the next few months.

As ever, I am grateful to you all for the service you give on hearings all-round the country, every week of the year. And I thank Jane and Jenna for their work in preparing this newsletter, which they do every four months without fail. This edition includes much of interest and use, including some more photos, information about upcoming events or activities you might want to attend, a tribute to Lesley Sylvester, one of our longest serving team leaders in Operations, whom many of you will know, and part 2 of Lindsey Reynolds's analysis of the implications of flaws in applications and/or process in tribunal cases. These articles represent a great deal of work, and will be very helpful on an ongoing basis to any of us facing such an issue.

**Laura Dunlop KC
President**

News

A Quick RMinder

Intimating a recorded matter

If you are making a recorded matter directed towards a particular individual or post holder who is not present or represented at the hearing, consideration must be given as to how the recorded matter is to be communicated to that post holder. This could take place by, for example, securing an undertaking from another party to communicate the recorded matter or by the issuing of a Direction to Tribunal Administration to send a copy of the recorded matter and, if necessary for context, a copy of the FFR to the relevant individual or post holder. If you secure an undertaking, please record that in your FFR. Please ensure any Direction also includes accurate contact information.

If it is not clear to the caseworker how a recorded matter is to be communicated then we will likely need to contact you after the hearing to discuss this.

Completion of orders

To be completed by Mental Health Tribunal for Scotland			
Recorded Matter (Compulsory Treatment Orders only)			
Complete A or B as appropriate			
A	☒ The Mental Health Tribunal for Scotland wishes to specify as recorded matters within this order the following medical treatment, community care services, relevant services, other treatment care or service. (Note: this must include ALL recorded matters appropriate to the order, and not just those that have been varied): <table border="1"><tr><td>5</td><td>SEE FFR</td></tr></table>	5	SEE FFR
5	SEE FFR		

When completing the order forms after the hearing please record the full recorded matter, don't simply put 'see FFR'. A recorded matter forms part of any order made so there is a specific box to capture the details. The form also gets sent to Medical Records and if details are missing it becomes an incomplete record.

The same applies for the box in the order form about advance statements, where the tribunal has made a decision in conflict with it. The order form is a stand-alone document and it requires the information stated and highlighted below to be specified in it (as opposed to 'see FFR').

C	☐ The patient has made and not withdrawn an advance statement under S275 of the Act. This advance statement IS in conflict with current/proposed care and treatment authorised by measures in this order. Please record in the box below: - The date of the advance statement(s). - Details of treatment that is in conflict with the advance statement and how. - Where the conflict with the advance statement concerns treatment the patient specified wishes to receive, that they are not receiving, please provide details of this. - Reasons for authorising measures that allow this treatment to be given/not given, despite the conflict with the advance statement, with reference to the Principles of the Act. <table border="1"><tr><td>6</td><td></td></tr></table>	6	
6			

FFRs

This should narrate everyone who attends the hearing, including their name, designation or how they are related to the patient.

The wording of recorded matters should also be stated in the FFR. This can be copied and pasted from the order form.



Recorded matters in COs, COROs, HDs and TTDs

On 13 November 2026, the Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 will come into effect. This Order inserts provisions into the Mental Health (Care and Treatment) (Scotland) Act 2003, in order to allow recorded matters to be specified for patients subject to a Compulsion Order, Compulsion Order with Restriction Order, Hospital Direction and Transfer for Treatment Direction.

[The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 Remedial Order 2026](#)

This is being covered in more detail at this year's training and specific guidance will follow.



Access to WIFI at venues

A reminder that currently SCTS does not provide Wi-Fi access to guests, including tribunal members, in any of their buildings in which MHTS holds hearings. This includes Hamilton House.

Most of the MHTS suites are in local authority or NHS premises. While some of these do offer free Wi-Fi, the reliability of the services can be variable. So members should make advance provision for accessing papers while they are at a hearing, particularly if it is at a SCTS venue, by downloading them and any templates required beforehand.



Solicitor and Curator *ad litem* forum

This was held on 11 June 2026 and attended by 26 solicitors. Topics discussed included the use of interpreters and the translation of documents and the use of rule 46 and 48 interlocutors. A note of this meeting can be found on the Tribunal's website - [solicitor curator forum note 11 june 2026.pdf](#)

Secure venues – permitted equipment

There is an information sheet on equipment and other protocols for in-person hearings at secure venues. This is currently available on the first page of the Judicial Members' Area and is repeated below. **In addition, it is always best to take photo ID to all these venues.**

State Hospital ('TSH')

- Spiderphone available
- Hearing Loop available
- Members may bring in laptops.
- Tablets are not permitted. Mobile phones and other electronic devices, e.g. smart watches, will have to be left in a locker at reception.
- Dress code: [Safety and Security Requirements - August 2025](#)

See also fuller article with helpful information about TSH in the September 2025 edition of the newsletter.

Rowanbank

- Spiderphone available
- No hearing loop
- Members may bring in a laptop, iPad, tablet and mobile telephone. Phones should only be used in an emergency and calls should not be made or taken outside the tribunal room.

Murray Royal, Rohallion

- No Spider phone
- No hearing loop
- Members may bring in a laptop, iPad or tablet
- Mobile telephones not permitted

Orchard Clinic

- In person hearings may take place in the suite within the Royal Edinburgh, rather than the Orchard Clinic.
- Spiderphone available.
- Members may bring in laptops.
- Tablets, smart phones and smart watches are not permitted.

The information sheet on the website will be updated as and when the Tribunal receives new information about these matters.

Royal Garden Party 2026

Members will recall that MHTS was given the opportunity to nominate three of our members to attend this year's Garden Party at Holyrood Palace. Ruth Buchanan, Dr Mark Fulton and Dr Douglas Gray had their names picked from a hat and attended. The rain stayed off and they all had an enjoyable afternoon.



MHTS Nurses' Forum

The Nurses' Forum will celebrate its first anniversary in October. Our group meets quarterly online and our next meeting will take place at 7pm on Wednesday 9th December 2026.

The forum aims to provide professional support and learning & development. Forum members also provide help with the revalidation process. If you are a Registered Nurse appointed as a general member and have yet to attend the forum and would wish to do so, then please email myself and we will provide details of future meetings and how to attend.



Nurse Escorts

There have been a couple of recent incidents of a nurse escort not attending a hearing with a patient and the tribunal being advised that there is no nurse available. As the Guidance on the presence of escort nurses at hearings states, it is the responsibility of the Health Boards to provide at least one nurse escort to look after a detained patient during the entirety of the hearing. The hearing should not start until an escort is present. If there is any difficulty with this, please contact the in-house convener for advice.

[202401GuidanceEscortnurses1.pdf](#)

MHTS Members' Association

Currently there is NO COST to becoming a member of MHTSMA. All it takes is an email.

The Committee met in June.

We wrote to and received a response from Tribunals Policy Unit in relation to Subsistence Rates (accommodation rates) and were advised that Scottish Government are considering the applicable mileage rates following the change to the HMRC limits.

We continue to explore members' experience of claiming a cancellation fee when having to show financial loss and would welcome hearing from members who have experience of this.

We wrote to MHTS President's Office regarding the work involved in preparation for CORO hearings which are then cancelled and were pleased to hear that consideration is given to trying to book the same tribunal members for the rescheduled hearing.

We were also contacted by members in relation to the frequency of hearings being cancelled and intend to explore this further.

I would encourage members to contact Peter (or any member of the committee) if there are items they would wish MHTSMA to consider.

If any member is interested in joining MHTSMA, please can you contact Peter Bennie (secretary) by email.

Ruth Buchanan
General member and chair of MHTS Members' Association



Retired Tribunal Members

The following members are recently retired – or on the verge of retiring - from MHTS:

Medical: Dr Julie Curran, Dr Ciara Flanigan

Legal: Anne McCamley, Jane Reid, Ronald Franks

General: Professor Juliet Cheetham, OBE, Katherine Dickie

We thank them for their contributions, and wish them a long and happy retirement.

Update from MacMillan Mighty Hike in the Lake District

Shiona Macdonald, Becky Carleton and friends walked a hilly and challenging 12.4 miles along the side of Ullswater in the pouring rain on Saturday 6th June 2026 in support of MacMillan Cancer Support. 'It took walkers from the team between 4.5 - 6 hours to complete. On the hilly parts of the route, we walked along in single file, reminiscent of scenes on Mount Everest! Despite the conditions we all had an uplifting and enjoyable day and managed to raise a whopping £5350 for MacMillan as a team. A big thanks to those who supported us in MHTS.'



Legal Walks 2026

If anyone is interested in following in Eleanor McLaren's footsteps (see the last edition of the newsletter) this is the link for other legal walks taking place in 2026 in aid of The Access to Justice Foundation.

[Join or Organise a Legal Walk | The Access to Justice Foundation](#)



Scottish Mental Health Arts Festival

The 20th Scottish Mental Health Arts Festival will take place from 19 October to 8 November 2026, exploring the theme of Reflections. This is an annual celebration of the arts and mental health across Scotland, led by the Mental Health Foundation. It aims to provide a platform for everyone to create and share art inspired by mental health.

[Home | Scottish Mental Health Arts Festival](#)

Articles

Refusals and revocations Part Two: Fatally Flawed

Introduction

As regular readers will recall, prompted by a festive disagreement with an extended family member, I turned to the anonymised [‘Table of Decisions’](#) (available on our website) for back up. In Part One (May 2026), I analysed STDCs or CTOs which had been revoked/refused on the basis of the tribunal’s analysis of the evidence. In Part Two, I will consider the same category of decisions where the tribunal considered a procedural flaw to be fatal. There were fatal flaws in eleven anonymised CTO/CO cases. There were no fatal flaws relating to STDCs, but I have discussed one non-fatal case, for context. I wonder why we don’t get many social invites?

When is a flaw fatal?

When faced with even the most glaring procedural flaw, it does not necessarily follow that the order should be ‘chucked’ along with some murky bathwater. Members looking for a refresher in this area could review the slides from the 2022 training: *‘When is a flaw fatal?’* (available in the judicial members area). These materials remind us of the principles established in *R v Soneji*¹ and *Paterson v Kent*². Hot, or at least lukewarm off the press, we have a decision from September 2025, *DR v MHTS*³, considering a missed two-year review. Sheriff Principal Dowdalls KC followed the approach of Sheriff Principal Stephen in *D v MHTS*,⁴ agreeing that,

*“...it is inconceivable that Parliament intended that the consequence of failure to follow the statutory requirements to the minutest degree would invalidate treatment orders necessary for the benefit of the patients.”*⁵

These materials remind us to pause for breath, pour a strong coffee, and take the following five steps:

1. Define the flaw
2. Search the Act for the consequences of the flaw
3. Look for any prior judicial decisions on the flaw
4. In the absence of judicial guidance, look for the purpose of the requirement
5. Consider substantial compliance and prejudice to the patient.

¹[2006] 1 AC 340

²2007 SLT (Sh Ct) 8

³ [2025] SC HAM 72

⁴ 2014 SLT (Sh Ct) 39 at para 39

⁵ Ibid, DR at para 43

I would also add a sixth step:

6. For 'fatal' cases, decide 'which way to skin' the flaw.

We will explore each of these in more depth.

Step 1: Define the flaw

The procedural flaw most commonly identified in STDCs relates to 'immediate re-detention,' explored further below.

A wider range of flaws were identified in the CTO cases, loosely falling into three categories: flawed mental health reports, absent patients, and failure to carry out essential duties in the mandatory review process.

Flawed medical reports

The largest group (50% of the sample) concerned flawed medical reports. Three of these related to section 58 (2) and (4) of the 2003 Act, the requirement for a second medical examination to be carried out either by an AMP or by the patient's GP.

Examples: flaws in the second mental health report

AC 00626/25, 1st May 2025 (CTO application, misconceived, flawed examination)

The patient was in the community. One of the mental health reports was completed by the patient's GP, who had met with the patient. The RMO had spoken to the patient through a letterbox, receiving no response. The RMO's report was based on background knowledge of the patient as well as letters and emails exchanged with the patient. The tribunal formed the unanimous view that the patient had not been assessed by the RMO.

LM 04759/25, 14th August 2025 (CTO application, misconceived, medical report author not the patient's GP)

This application was refused in the context of a severe storm causing transport disruption in the local area. The second medical report had been prepared by a GP employed as an emergency rural physician, who also provides accident and emergency cover. As the doctor was neither s.22 approved nor the patient's own GP, the second report did not comply with the requirements of s.58.

CM 07419/25, 30th October 2025 CTO application, misconceived, medical report author not an AMP)

The author of the second medical report was neither an AMP nor the patient's GP. The author was a medical practitioner on the patient's ward who was not s.22 approved. The application was therefore dismissed.

Two cases involved breaches of the conflict of interest regulations.⁶ Under regulation 5(2) of the 2017 Regulations where the RMO is employed by or contracted to provide services to an independent health care service in which the patient is or will be detained, an external AMP report is required.

Examples: conflict of interest regulations

DC 00144/25, 21st May 2025 (2 year review, determination revoked, late AMP report)

In this case the independent AMP report was carried out on 28th April 2025, 22 days after the putative extension of the CTO by the RMO.

AE 01504/25, 27th June 2025 (2 year review, determination revoked, no AMP report)

In this case, a second AMP report was not obtained at all, due to the RMO having received conflicting advice.

⁶ Mental Health (Conflict of Interest) (Scotland) Regulations 2017

Absent patients

Three cases involved the effect on the CTO/CO of the patient's unauthorised absence. The fourth case involved the effect of a patient moving to England.

Examples: absent patient

WK 07720/25, 21st November 2025 (application to vary CTO, dismissed as misconceived, miscalculation of 200 days)

The patient was in the community under a suspension certificate dated 16th May 2025 which appeared to indicate the 200 days would expire on 2nd December 2025. The date was changed to 1st December 2025, "by persons unknown." The RMO was not able to shed any light on this change and had not signed it off.

The tribunal dismissed the application, finding, *"The state of the suspension certificate was unsatisfactory. If the attempted correction in the suspension certificate is ignored, then the purported period of suspension with the typed figures and as signed off by Dr X is 201 days. Having considered the decision in DC Petitioner 2012 SLT 521 we were of the view that the purported grant of a suspension certificate which exceeded 200 days would be unlawful. This means that the patient was on unauthorised absence from 16th May 2025 to date. In terms of section 304 of the Act the order ceased to have effect after a period of 3 months. This being so an attempt to vary a CTO which had in effect lapsed was misconceived."*

MM 09668/25, 14th April 2025 (2 year review of CO, misconceived, 3-month unauthorised absence)

This two year review of a CO concerned a patient in the community. The order had been varied in February 2022 to require the patient to live at a specified address in a care home. The patient had not been living there since some time in 2023, after the placement broke down. No variation had been requested. The tribunal found the order had lapsed due to a three-month unauthorised absence by 31st March 2024 at the latest, possibly earlier, depending on the date on which the patient ceased residing in the care home. The tribunal therefore has no jurisdiction to consider the application. The tribunal directed the clerk to refer the matter to the Mental Welfare Commission.

DS 01166/25, 19th May 2025 (extension and variation of CO refused, CO revoked, 342 day continuous absence)

Similar issues arose for DS, whose hospital-based CO was suspended in May 2024, nearly a year before the application to extend and vary was submitted. This oversight had occurred because the RMO was off work when the CO was converted from a community-based order to a hospital-based order. When she returned to work, she was advised that the patient had been discharged. She had initially intended to extend the CO, but when she realised the patient was residing in a care home, she realised an application for the CO to be varied would have to be made. By the time of the tribunal, there was broad agreement that the patient's care could be managed under his guardianship order. The RMO agreed the CO should be revoked.

SG 09672/25, 16th January 2025 (Application to vary CTO refused as misconceived, patient living in England)

This case concerned an application to vary a CTO from hospital to community. The order was due to expire on 3rd March 2025. The patient had been residing at home since October 2024. The home address was outwith Scotland and cross-border transfer provisions had not been utilised. The decision states:

"This tribunal is being asked to grant an application to vary the CTO, requiring the clinical services in a different legal jurisdiction to administer medical treatment under the authority of an order issued under the Scottish Act and requiring the patient, who is no longer in Scotland, to accept that medical treatment. We are unanimously satisfied the tribunal does not have jurisdiction to consider this application or to issue such a variation."

The hospital-based CTO remained in place.

Failure to carry out duties

Two procedural flaws related to failures in relation to the duties of RMOs and MHOs in the context of a mandatory review of a CTO.

Examples: failure to carry out duties

NK 10300/25, 19th May 2025 (application for revocation of CTO dismissed as misconceived, no valid CTO)

An application for revocation of a community-based CTO was dismissed as misconceived. The solicitor argued the MHO had failed to comply with duties under section 85 in October 2024 by omitting to interview the patient or to provide information about the patient's rights. The MHO was following an agreed 'light touch' approach but had not had any contact since July 2024. The MHO accepted he could have made contact by phone but did not. He was aware of the requirement and chose not to do it.

The tribunal dismissed the application as misconceived, because the effect of non-compliance was to invalidate the RMO's determination. Having come to that conclusion, there was then no valid CTO for them to consider.

JP 00729/25, 11th June 2025 (application for revocation of CTO, revoked, wrong patient details on determination)

This example is, we would hope, an unusual one. The previous RMO who completed the determination, had correctly noted the patient's details, type of mental disorder and diagnosis. All of the remaining written evidence in support of the determination related to a different patient. No amending pages had been lodged. The tribunal considered that the patient had not been validly detained since 9th April 2025. Therefore, the application was misconceived on the basis that no valid appeal could be made against an order which no longer had an effect. For clarity, the tribunal made a revocation.

Step 2: Search the for the consequences of the flaw

A quick scan of the Act tells me there are approximately 750 uses of the word 'shall.' However, the Act rarely sets out the effect of a procedural failure. The clearest example of consequences is found in relation to unauthorised absence over three months.

Examples: consequences of the flaw

MM 09668/25, 14th April 2025 (2 year review of CO, misconceived, 3-month unauthorised absence)

The facts are set out above, relating to a three-month period of unauthorised absence under a CO. The tribunal stated:

"The Tribunal carefully considered whether or not the failure to apply to vary a CO is a technical or nugatory breach that Parliament would not have intended to nullify or cause an order to lapse especially a compulsion order made in respect of an offender. The Tribunal considers the drafting to be very clear. ... Regulation 9 (3) goes on to set out what happens if there is unauthorised absence for over 3 months and it states, 'Where in the case of a patient who is subject to a compulsion order without a restriction order, the patient's unauthorised absence continued for a period of 3 months the order shall then cease to have effect.'"

DR v MHTS [2025] SC HAM 72 (Sheriff Principal appeal re missed 2 year review, appeal dismissed)

In contrast, in relation to a missed two-year review, Sheriff Principal Dowdalls stated, *"Nowhere in the Act are the consequences of failure to review a determination under section 101 prescribed. Critically, there is no timeframe within which a review under section 101 must be commenced or completed."*

Step 3: Look for any prior judicial decisions on the flaw

The Act has now been in force for over twenty years. During this time, we have gathered some judicial guidance on procedural flaws, most of which is covered in the two-volume [Case Digest](#) (available on our website). Examples include minor flaws in completion of non-statutory forms,⁷ sequencing delays in giving notice of a CTO application,⁸ MHO duties to interview a patient and provide notice,⁹ late lodging of medical reports,¹⁰ and most recently, a missed two-year review, discussed above.¹¹ Given the shortage of STDC cases in the 2025 sample, we will focus here on authorities relating to immediate re-detention.

Immediate re-detention

An AMP may not grant an STDC where ‘immediately before’ the medical examination, the patient is subject to an STDC, an extension certificate, or a five working day extension under section 68 of the 2003 Act.¹² In *R v Lothian Health Board (No.2)*¹³ Lord MacLean considered a case by case approach was required in the context of the Mental Health (Scotland) Act 1984, stating:

“It must, I consider, be a matter of impression in each case whether it can truly be said whether the patient has been further detained immediately after a period of detention....”

In *Greater Glasgow Health Board v MHTS*,¹⁴ Sheriff Principal Kerr stated,

“The mischief which section 44(2) is intended to prevent is the granting of one valid STDC followed immediately by the granting of another and another and so on. The subsection is not concerned with invalid STDCs or for that matter with unlawful detentions but with attempts to repeat lawful detentions by the mechanism of the STDC, which it disallows. When therefore the statute speaks in section 44(2) of a patient being “subject to a STDC” that means in my opinion a valid STDC and not one which is for some reason invalid.”

Cases of this nature are listed on our spreadsheet under s.291 and logged as “sequential STDCs.” They are often conjoined with a s.50 application for revocation. There was only one within the 2025 sample, which was refused. I have included it for its demonstration of the importance of referring to any prior judicial authority on the flaw.

⁷ Beattie v Dunbar and MHTS 2006 SCLR 777

⁸ JG v MHTS 2010 GWD 40-817

⁹ SL v MHTS (unreported, available on our website)

¹⁰ N v Borland and MHTS 2011 SLT (Sh Ct) 135

¹¹ DR v MHTS [2025] SC HAM 72

¹² S.44 (2)

¹³ 1993 SLT 1021

¹⁴ 27th February 2013 (unreported, available on our website) at para 4

Example: immediate re-detention

AX 09131/25, 24th December 2025 (s.50 and s.291 conjoined, refused)

STDC 1 was due to expire at midnight on 1st December 2025. The patient's mental health had deteriorated twice during the course of STDC, most recently on 28th November 2025. His care team did not apply for a CTO at this time. A multidisciplinary team meeting was scheduled for 2nd December 2025, to discuss a community-based care plan. On 1st December there was a "dramatic" deterioration in the patient's mental health. By the time of the meeting on 2nd December 2025, STDC1 had expired. The option of lodging a CTO application, and extending the detention under s.68 was no longer available. The RMO considered the circumstances were exceptional and granted STDC2 on 2nd December 2025.

The tribunal applied the two judicial authorities outlined above, alongside the Mental Welfare Commission for Scotland's report on immediate re-detention, stating,

"On the issue of the meaning of "immediate", the Commission noted that while there was a lack of case law in this area of mental health legislation, it was generally considered that a detention within 24 hours of one of the prohibited certificates having expired might be regarded as "immediate" re-detention."

Despite being "unimpressed" with the RMO's explanation for failing to apply for a CTO during STDC1, the tribunal considered "...it could not have been the intention of parliament that a patient should be denied ongoing treatment to safeguard his welfare simply because his care team, through poor management and lack of action had failed to apply for a CTO and a subsequent rigid interpretation of the word "immediately" rendered it impossible for a further STDC to be granted to safeguard him. The word "immediately" had to be read in a way which is consistent with the purpose of the section and the Human Rights Act 1988. If the circumstances which arose between the expiry of one STDC and the granting of a new STDC were exceptional and created a risk that the patient's own welfare was in danger then that had to be a relevant factor to be considered by the tribunal in its deliberations."

Step 4: In the absence of judicial guidance, look to the purpose of the requirement

The overall purpose of the legislative scheme has been described as, "To provide care and treatment to individuals who require it, if necessary on a compulsory basis".¹⁵

Various sample cases have also considered the purpose of specific provisions, for example in the cases concerning the conflict of interest regulations.

Example: consideration of the purpose of a provision

DC 00144/25, 21st May 2025 (2 year review, determination revoked, late AMP report)

The tribunal considered the purpose of conflict of interest regulations relating to employees of independent healthcare providers.

"The availability of the AMP's report during the review period ensures that independent medical examination is carried out before the CTO is extended preventing situations where professionals involved in a patient's ongoing care might have a personal or financial interest that could compromise their objectivity. Rule 5(2) provisions can be seen as a safeguard protecting patient rights and forming part of the checks and balances within mental health services promoting transparency, accountability and fairness."

¹⁵ Paterson v Kent 2007 SLT (SHCT) 8

Step 5: How do the considerations of substantial compliance and prejudice to the patient apply to the facts?

Example: substantial compliance

NK 10300/25, 19th May 2025 (application for revocation of CTO dismissed as misconceived, no valid CTO)

Flaws in relation to the MHO's duties in the context of a mandatory review were distinguished from other cases where there had been substantial compliance. The tribunal found, *"It goes without saying that if Parliament creates a statutory duty, then Parliament's expectation is that it will be complied with. In both D¹⁶ and SL¹⁷ it was established that the statutory requirements in section 85 and section 147 of the Act had been substantially achieved by informal means. There was regular communication between the RMO and MHO about the patient's care, the patient had been engaged with decisions about his treatment and participated at tribunal hearings with representation. The non-compliance had not been prejudicial to the patient."*

In contrast, the MHO's 'light touch' approach in NK had involved no contact in a ten-month period and flawed and incomplete information being sent out to the patient.

Example: prejudice to the patient

DR v MHTS [2025] SC HAM 72 (Sheriff Principal appeal re missed 2 year review, appeal dismissed)

In relation to a missed two-year review, the consequences in terms of the patient's liberty were weighed up, although the Sheriff Principle ultimately refused the appeal, stating, *"There can be no doubt that the appellant's liberty is a matter of considerable importance. The consequence for him of the respondent's failure and thus deviation from the statutory provision is not a minor matter. Nonetheless, the consequences must be seen in the context of the overall purpose of the legislation and the appellant's need for compulsory treatment."*

AE 01504/25, 27th June 2025 (2 year review, determination revoked, no AMP report)

In this case, regarding conflict of interest regulations, the failure to obtain an independent AMP report was described as, *"...highly prejudicial to a patient. The patient has been denied the important safeguard of an objective opinion from a medical practitioner who is not employed by the independent health care provider."*

Step 6: More than one way to skin a procedural flaw

Having considered the foregoing five steps, if the tribunal considers the flaw to be 'fatal,' a decision must then be made on the disposal. A procedural flaw can be tackled in one of two ways:

Option one: as a misconceived case under Rule 44, or

Option two: the order could be refused or revoked.

Option One: Misconceived case under Rule 44

A case before the Tribunal is misconceived under Rule 44 (1) if it is:

- (a) Outwith the jurisdiction of the Tribunal;
- (b) Made otherwise than in accordance with these Rules and has no reasonable prospect of success; or
- (c) Frivolous or vexatious.

¹⁶ D v MHTS 2014 SLT (Sh Ct) 39

¹⁷ SL v MHTS (unreported) 2021

Misconceived CTO applications

Misconceived cases are more straightforward when they concern an initial application for a CTO. The casework team may identify a Rule 44 (1) (a) and (c) issue in an initial application and refer it to an in-house convener at an early stage. It is therefore no surprise that all three of the CTO applications deemed misconceived were determined under Rule 44(1)(b). All three concerned the mental health reports accompanying the application (see *LM*, *CM* and *AC* above).

Misconceived cases relating to existing CTOs

Misconceived cases are more complicated where a CTO has already been granted, and potentially extended. The 'case' before the tribunal may have been perfectly competently made in accordance with 'these Rules', but the procedural flaw happened at an earlier stage, and relates to compliance with the Act. In these 'time machine' cases, tribunals are having to look back at events often several months earlier, where the patient and the care team have proceeded meantime on the understanding a CTO is place.

Tribunals have approached this with a considerable degree of head scratching. Some have been deemed 'misconceived' under Rule 44, but it is not always clear which category of misconceived case the flaw falls under. *MM* and *SG* (summarised above) were Rule 44(1)(a) (no jurisdiction) cases. The tribunal determining *MM* reasoned the CO had lapsed, therefore the tribunal had no jurisdiction to consider the two year review. *SG* concerned a patient living in England, and therefore outwith the tribunal's territorial jurisdiction.

Referring a misconceived case to the Mental Welfare Commission

When dismissing a case as misconceived, the Convener may refer the matter to the Mental Welfare Commission for Scotland where appropriate.¹⁸ Auchie and Carmichael suggest that this course of action might be reserved for situations where there are concerns about the preparation for, or the conduct of the case which merit further investigation, bearing in mind the scope of the Commission's jurisdiction.¹⁹ This was done in *MM*²⁰ in the context of concerns about an extensive unauthorised absence of the patient.

The availability of this route might be one factor to consider when deciding which way to skin the procedural flaw. However, the language of Rule 44(1)(b) should also be borne in mind, as it refers to "these Rules," as opposed to the 2003 Act.

Option two: revocations

The tribunal took a different route in relation to the conflict of interest regulations in *AE*²¹. Having concluded that the determination extending the CTO was not validly completed and the order had lapsed, they looked to the scope of their powers under s.102 and revoked the determination.

¹⁸ R44 (5)

¹⁹ Carmichael QC, A and Auchie, DP: *The Scottish Mental Health Tribunal: Practice and Procedure* (2010) Dundee university Press, Para 3.96

²⁰ *MM* 09668/25, 14th April 2025

²¹ *AE* 01504/25, 27th June 2025

In *JP* and *DC* the tribunal opted for a 'belt and braces' approach, making matters clearer for the patient and care team.

Case example: revoking the determination in a misconceived case

DC 00144/25, 21st May 2025 (2 year review, determination revoked, late AMP report)

The tribunal held: *"The tribunal further determined that the review case before them was misconceived in terms of Rule 44(1) of the Rules. In their view two possible grounds exist for this conclusion, the first being that under Rule 44(1)(a) the tribunal, having determined that the CTO ceased to authorise the measures at midnight on 6th April 2025, has no jurisdiction hear a review of the CTO under section 101(2)(b) of the Act. Equally it may be argued, in terms of Rule 44(1)(b) of the Rules, that the putative extension of the order was made otherwise than in accordance with the Rules, (see above) and has no reasonable prospect of success, given that the CTO expired on 6th April 2025. In all the circumstance of this case the tribunal considered revoking the determination to be the only course of action open to them given that the CTO itself was no longer extant."*

JP 00729/25, 11th June 2025 (application for revocation of CTO, revoked, wrong patient details on determination)

We considered whether the application to revoke the CTO was misconceived in terms of Rule 44 of The Mental Health Tribunal for Scotland Practice and Procedure) (No 2 Rules) 2005. Initially this appeared to the tribunal to be the correct approach in that we considered the CTO no longer had any effect after 9 April 2025 and therefore no valid appeal could be made against such an order after that date. However, the CTO itself would still require to be removed from the patient's medical record. Any order under Rule 44 would only have effect in respect of this application albeit the reasons for that decision would be clear.

For the avoidance of doubt and ex proprio motu, we also revoke the CTO which is on the record as having been extended for 12 months by the previous RMO's determination of 2 April 2025. This will make the patient's position clear in his medical record that he is no longer subject to a CTO.

These cases demonstrate the clear advantages of the revocation route. It is clearer for all involved, and accords with a strict reading of the tribunal's powers under the Act and "these Rules."

The principles of the Act

This article has focussed on decisions where the procedural flaw has been found to be fatal. It is clear from the careful reasoning that tribunals did not take these decisions lightly. These hearings will inevitably have been challenging, not least for any patients and named persons in attendance. In six of the eleven CTO/CO cases reviewed the patient was represented, with a 50:50 split of curators and solicitors. In *CM* the curator brought the flaw to the tribunal's attention, and in *AE* the curator agreed the failure to comply with regulations was concerning. However, in the remaining four cases, the patient appears to have been unrepresented. In *DC*, the tribunal considered the parties' experience, stating, *"What follows paraphrases the legal provisions and refers only to considerations relating to the circumstances of this Review, in an attempt to make this Decision more accessible and understandable to all parties."*

Due to the focus of these decisions on safeguarding the patient's procedural rights, there was limited discussion about the wider principles of the Act. Where there is a fatal flaw, the principles are unlikely to provide effective defibrillation.

Where the flaw is more finely balanced, the principles may have more relevance. In a decision from 2023 regarding the notice requirements for hospital transfers, the tribunal discussed the principles in depth.

Example: discussion of the principles of the Act

AS 10491/23, 15th August 2023 (2 year review, determination confirmed, flaws in transfer notification process)

A CTO had been made authorising detention of the patient in hospital A. In a later determination extending the CTO, hospital B (an offsite facility four miles away) was specified, where the patient had been transferred four years prior to the hearing. There were flaws in the transfer notification process and accompanying paperwork. The tribunal concluded that although there had been failures in the giving of notice as required by section 124, they did not impede the operation of section 124(14) to effect a change in the hospital specified in the CTO.

The tribunal considered there had been compliance with the spirit of the notification requirements. In doing so, the tribunal discussed the principles of the Act. *"We did recognise, however, that the provisions concerning notice are very important, connected as they are to the rights of patients and those who support them. They reflect many of the matters focused in the section 1 principles, such as the patient's wishes and feelings; the views of any welfare attorney; and the importance of a series of matters - patient participation, the provision of information and support, the range of options available in an individual case, non-discrimination and the taking into account of factors personal to the individual patient. Moreover, it is part of the idea of reciprocity that if someone is subject to compulsory measures affecting their liberty, they are entitled to have the rights conferred upon them recognised and applied. If notice is not properly given, including information about the right of appeal, an opportunity for these matters to be taken into account in relation to the transfer may be lost."*

Notably a curator had been appointed to AS. The tribunal discussed the importance of notification requirements for a patient who lacks capacity, commenting:

"To say that the person lacks capacity to understand, therefore notice is not required, as has been suggested in another case, is similarly unattractive, especially seen in the context of concepts such as supported decision making, and the statutory provisions about information. And a patient who is significantly incapacitated may have a welfare attorney, nearest relative or guardian. Notice to them would be expected (even if that is not specifically stated in the section)."

Conclusion

This article has offered a refresher on the range of procedural flaws you might encounter, and suggests a structured way of approaching them next time you do. You may also benefit from consulting the table of decisions as a rich source of collective wisdom. I am grateful to the authors of the decisions reviewed for their clarity of reasoning, which assists us all in deepening our understanding of this thought-provoking area.

Lindsey Reynolds
Legal Member

Reflecting on 20 years at MHTS



The time has almost come to say goodbye to MHTS. It has been a huge part of my life and there have been many good days and many sad days. I was originally planning to leave at the end of May 2026 but was made aware of the issues with the Civil Service pension scheme so decided to postpone this until the end of September in the hope that any problems will have been ironed out. I am keeping my fingers crossed this will be the case but who knows.....

Over the 20 years since I joined MHTS I have seen many people come and go and worked with some amazing colleagues. Everyone in Operations works very hard with such short timescales to get the applications checked and processed. It never stops. I have worked alongside people who have had many big moments in their lives, engagements, weddings, babies and sadly bereavements, and been on the journey with them. I have written a poem or 2 for people leaving and special occasions and I used to organise all the sweeps for the Grand National and any football tournaments like the World Cup and Euros including the MHTS prediction league. I have worked alongside all three Tribunal Presidents and been to every Members' Conference that has been arranged. These were insightful and I will take away many good memories from them.

I remember the old days when I joined at first. Members were only asked to do one hearing a day, then this was changed to two a day, that was a particular challenge for everyone, then triples were also introduced at one stage, but this came with some problems so these do not happen now. Then of course, in 2020, we had to deal with Covid and set up the Tribunal so that there were teleconference hearings only. The work that went into this was unbelievable but not one hearing was missed. It was remarkable. And then trying to adopt a hybrid model of choice for the patient again presented its challenges which were all overcome.

Many years ago I worked alongside the President's Office in a newly created post of Quality Manager. This involved me getting out and about, meeting the members, attending members' liaison groups and turning up at hearings to chat to everyone there to see if there were any problems. I noticed the vast numbers of people turning up at hearings unannounced and could see it was a problem, not just a capacity issue but uncomfortable for the patient. I kept stats on this and spoke to the hearings clerks regularly before presenting my findings to the then President, Dr Morrow. A process was then put in place to monitor this more closely. That was just one of the many pieces of work I was involved with to try and make the Tribunal process better for everyone attending, especially the patient. I also spoke to many patients over the

years both in person at hearings and on the phone. It became obvious that staff needed proper training so we knew what to say and what not to say, so it was welcoming to receive specific training from staff at the Samaritans. To this day it is without doubt the best and most useful training I have ever attended and should be a must for everyone working in our office.

After receiving training for dealing with staff recruitment, I was in a position to interview potential employees with the Tribunal. This was a great experience and having worked in MHTS for a number of years it gave me a chance to interview my future colleagues to see if they met the criteria to work with us.

Along with this I attended Tribunal Member interviews with the President and took notes throughout the interview so that the panel could construct feedback for the applicants. The interviews at Saughton House in Edinburgh were a particular challenge as I had to walk from one end of the building to reception and escort the applicants to the interview as they were not allowed to walk around unaccompanied. The steps I put in those few days were off the charts. I remember one of the legal members asking me what kind of questions the panel would ask and I had to tell them I was not able to discuss this. I mean come on, could you imagine me giving away the preferred answers??

Anyway, I have had many happy as well as sad moments here with the untimely loss of a few colleagues and friends, good people who I will not forget. I will miss everyone especially my close friends and all the wonderful people I work with. I met many of the Tribunal members over the past 20 years and know that some of them have since passed away. Having worked in the scheduling team for many years you get to know the members and know where they live, member type, conflicts etc. Some of the existing members have been here from the start as well.

The Tribunal staff all work hard, liaise with each other and work miracles at times and they all should be applauded. They are some of the nicest people around and it is these very people that have kept me here for 20 years. I thank MHTS for giving me the job all those years ago. I cannot believe I have lasted so long so they must have been doing something right. Good luck to everyone for the future of the Tribunal and I will keep in touch to see how it is going and if we ever get into the Chamber. Now if you are needing a Member where do I apply lol.....

**Lesley Sylvester
CORO Team Leader
MHTS Administration**

Useful Information

MHTS

- [MHTS News](#)
- [MHTS Guidance on the Provision of documents in Tribunal applications](#) (This guidance sets out the documents which will form the Tribunal papers in each type of application, review, etc, under the relevant sections of the 2003 Act)
- [MHTS Caselaw and Decisions](#)
- [The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 Remedial Order 2026](#)
- [The MHTS Benchbook](#)

MWC Publications

- When things go wrong: Responding to errors in the application of mental health legislation June 2026
[Responding to error good practice guide](#)
- Alcohol-related brain damage: Good practice guide July 2026
[ARBD good practice guide 2026](#)

***Please note that links to informative publications are included for information only. Any views expressed in these publications are those of the author(s) and not those of the MHTS.**

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Newsletter Contributions

The Tribunal welcomes contributions to the Newsletter from all members.

Members who wish to contribute to the Newsletter should contact Jenna Swan at MHTSPresidentsOffice@scotcourttribunals.gov.uk

The following timescales will apply for contributions*:

January edition: contributions by the end of December

May edition: contributions by the end of April

September edition: contributions by the end of August

***Contributions may require to be edited**