

# Judicial Commission on Mental Health

## Emergency Detention Round Table Discussion

Tuesday, December 4<sup>th</sup>, 2018

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Dr. Courtney Harvey	HHSC
Judge Guy Herman	Travis County
Judge Barbara Hervey	Texas Court of Criminal Appeals
Judge Dave Jahn	Denton County
Dr. Floyd Jennings	Harris County Public Defender's Office
Lee Johnson	Texas Council of Community Centers
Louise Joy	Joy & Young, LLP
Judge Oscar Kazen	Bexar County
Judge Lynn Kelly	Tarrant County
Chris Lopez	HHSC
Beth Mitchell	Disability Rights Texas
Sian Schilhab	Texas Court of Criminal Appeals
Professor Brian Shannon	Texas Tech School of Law
Officer Scott Soland	Fort Bend County
Judge Charles Stephens	Comal County
Kristi Taylor	JCMH
Steve Wohleb	Texas Hospital Association

### Introduction

Emergency detention (ED) is the legal procedure by which a person experiencing a severe mental health crisis may be detained for a preliminary examination and crisis stabilization, if appropriate. Law enforcement officers have significant discretion to make a warrantless apprehension for an emergency detention if the statutory criteria are met rather than choosing to make an arrest. Emergency detention may be necessary and appropriate when a person apparently experiencing a mental health crisis will not submit to voluntary services. The person must be placed in the least restrictive, most appropriate setting, while safeguarding the person's legal rights to a subsequent judicial determination of their need for involuntary mental health services. See [Tex. Health & Safety Code §§ 571.004, 576.021\(a\)\(1\)](#).

Unless a written order for protective custody (OPC) is obtained under [Tex. Health & Safety Code § 574.022](#), a person accepted for a preliminary examination may be detained in custody for no more than 48 hours *after the time the person is presented to the facility*. That includes any time the person spends waiting in the facility for medical care before the person receives the preliminary examination. [Tex. Health & Safety Code § 573.021\(b\)](#). If the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4 p.m. on the first succeeding business day, the person may be detained until 4 p.m. on the first succeeding business day. If the 48-hour period ends at a different time, the person may be detained only until 4 p.m. on the day the 48-hour period ends. [Tex. Health & Safety Code § 573.021\(b\)](#).

## **Texas Health and Safety Code § 573.021 Preliminary Examination**

(a) A facility shall temporarily accept a person for whom an application for detention is filed or for whom a peace officer or emergency medical services personnel of an emergency medical services provider transporting the person in accordance with a memorandum of understanding executed under [Section 573.005](#) files a notification of detention completed by the peace officer under [Section 573.002\(a\)](#).

(b) A person accepted for a preliminary examination may be detained in custody for not longer than 48 hours after the time the person is presented to the facility unless a written order for protective custody is obtained. The 48-hour period allowed by this section includes any time the patient spends waiting in the facility for medical care before the person receives the preliminary examination. If the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4 p.m. on the first succeeding business day, the person may be detained until 4 p.m. on the first succeeding business day. If the 48-hour period ends at a different time, the person may be detained only until 4 p.m. on the day the 48-hour period ends. If extremely hazardous weather conditions exist or a disaster occurs, the presiding judge or magistrate may, by written order made each day, extend by an additional 24 hours the period during which the person may be detained. The written order must declare that an emergency exists because of the weather or the occurrence of a disaster.

(c) A physician shall examine the person as soon as possible within 12 hours after the time the person is apprehended by the peace officer or transported for emergency detention by the person's guardian.

(d) A facility must comply with this section only to the extent that the commissioner determines that a facility has sufficient resources to perform the necessary services under this section.

(e) A person may not be detained in a private mental health facility without the consent of the facility administrator.

## **Issues for Discussion**

1. If the 48-hour emergency detention period expires and an OPC has not been issued due to a failure in the process, does Texas Health and Safety Code Chapter 573 allow another emergency detention to be initiated if the criteria set forth in section 573.022 continue to be met?
2. What is the appropriate action when an OPC has not been issued in the 48 hours and there is still substantial risk of serious harm to self or others?

## **Conclusions**

1. No, participants agreed that the Texas Health and Safety Code does not expressly permit consecutive emergency detentions. Instead, the relevant statutory provisions are structured to require the county or district attorney, as applicable, to seek an OPC under Texas Health & Safety Code §§ 574.021-.022 if further restraint of the individual is appropriate. The policy concern with consecutive emergency detentions is that an applicant or judge could effectively circumvent commitment procedures—and thus due process protections—by seeking or issuing serial emergency-detention orders under Texas Health and Safety Code, Chapter 573. Participants also reached consensus that the legislative intent of the statute was to allow a consecutive emergency detention if there were a new nexus of events. For example, if a patient were being released from an emergency detention and then made a new claim that he intended to harm himself or others, a new emergency detention could be initiated.

2. There was much discussion about the appropriate action to take when an OPC has not been issued in the 48 hours and a substantial risk of serious harm to self or others remains. Participants agreed that the local bright ideas enumerated below can help prevent a situation in which a person who needs further detention is released due to a failure in the process to timely secure the OPC. Many participants agreed that if the 48-hour period lapses and there is no OPC, then the only option is to release the patient and ask the LMHA to make a community safety plan and to follow up with the patient while an OPC is being pursued. Some participants expressed a strong concern that they felt it was irresponsible to the patient and to the community to release a person who is at substantial risk to cause serious harm to self or others, and that because the practice of consecutive emergency detentions is not expressly prohibited, they would still consider it as an option of last resort to be used sparingly.

## Identified Barriers and Causes of Delays

- Courts sometimes require a “bed letter” that identifies which facility has an available bed before they will accept an application for an order of protective custody.
- Courts may have local rules requiring all filings to occur before 2:30 p.m.
- LE officers are sometimes hesitant to execute EDs of juveniles because involuntary commitment is not possible.
- MH facilities ask LE officers to execute EDs after a voluntary admittance, but LE officers are sometimes reluctant.
- Counties use different processes for EDs.
  - In some counties, EDs go from the hospital to the District Attorney/County Attorney.
  - In some counties, the EDs go from the hospital to the County Clerk.
- Counties use different forms which leads to problems in the completion of the application for OPC.
- When patients under ED are transferred, sometimes the second hospital requests a second ED so it will reflect the name of the second hospital.
- The lack of appropriate inpatient psychiatric beds is a problem. The Legislature appropriated funds for private beds; however, not every private bed is the same. Local business practices affect how well this works.
- Some facilities are hesitant to file for OPC because they erroneously believe the doctors will spend hours in court involved in the probable cause hearing. (Participants noted that Texas Health & Safety Code §§ 574.022(c) and 574.025(f) permit the judge or magistrate to make a determination to issue or order continued detention under an OPC based solely on a review of the application for court-ordered mental health services and a written certificate of medical examination for mental illness under Texas Health & Safety Code section 574.011.)
- Private hospitals sometimes will not accept the LMHA designation as an appropriate facility for EDs.
- Hospitals do not want contracts for state beds because rates are low.
- The OPC application may not be completed if there is no bed available.
- Extended observation unit may not have the license to hold the person for longer than 48 hours.
- Hospitals may be afraid of indictment for holding patients too long.
- Facilities sometimes are under the misapprehension that juveniles age 16/17 cannot provide their own consent for psychoactive medication.

## Bright Ideas

- Create local collaborations with high level stakeholders including judges, facility administrators, LMHAs, district and county attorneys, defense attorneys, and law enforcement. Judicially-led collaborations have the most success. Meet monthly to:
  - improve communication and collaboration to meet statutory deadlines;
  - develop training or offer existing training; and
  - evaluate judicial resources.
- Develop and distribute statewide forms. Until those are developed, see Travis County forms from Judge Guy Herman attached to this report.
- Designate a magistrate to ensure access to the probate courts and give the hospitals notice of such.
- Develop procedures and consider signing MOUs regarding transferring patients on ED. One county uses an Application to Transfer to be heard by the justices of the peace. Other counties use automatic transfers and have set procedures that the first hospital keeps the original copy of the ED and sends a copy to the second facility who will file for the OPC.
- Ask LMHAs to send a letter to hospitals designating them as appropriate facilities for EDs.
- Develop multidisciplinary education on issues such as the correct completion of the applications for OPC, who needs to be present at probable cause hearings, and issuing OPCs to a facility even if there is not yet an identified available bed.
- Create a Statewide CIT Coordinator position for better education and coordination with law enforcement.
- Mandate multidisciplinary teams in counties or clusters of counties using the model of the Child Fatality Review Teams.

## Suggested language for the JCMH Bench Book

### **Subsequent applications for emergency detention**

There are statutory limits on the allowable period for an emergency detention. Texas Health & Safety Code § 573.021(b) provides that “[a] person accepted for a preliminary examination may be detained in custody for not longer than 48 hours after the time the person is presented to the facility unless a written order for protective custody is obtained.” (Note, however, that this subsection extends the 48-hour period until 4:00 p.m. on the first succeeding business day if “the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4:00 p.m. on the first succeeding business day.”)

The statute contemplates that, if after a preliminary examination, additional involuntary inpatient mental health services are required, the state must take steps and document to seek and obtain an order for protective custody during the emergency detention period. The legislative intent of 573.021 bolsters the interpretation that a second consecutive emergency detention order arising out of the same nexus of events would not be authorized. In contrast, however, a subsequent emergency detention order following the expiration of the statutory period would be permissible if supported by a **new or different nexus of events** that meet the statutory criteria. Similarly, sequential warrants should not be issued based on a single nexus of events.