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# Hospital-based forensic psychiatric observation pursuant to Section 167 of the Criminal Procedure Act

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HEALTH AND LAW

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**According to Section 167 of the Criminal Procedure Act, hospital-based forensic psychiatric observation of an assumed perpetrator can be undertaken by committing him or her to a psychiatric hospital or another suitable place of observation. The roles of the health personnel during hospital-based forensic psychiatric observation are different from those involved in the provision of health assistance. An observee is not regarded as a patient, unless he or she may need health assistance during the period of observation.**

## **Findings made during the observation should not be documented in the regular patient records, but in another documentation system so as to keep these separate.**

Chapter 13 of the Criminal Procedure Act authorises use of the knowledge and skills of health personnel to undertake forensic psychiatric examinations of assumed perpetrators (1). The court appoints two psychiatrists, alternatively a psychiatrist and a psychologist, to undertake the examination according to a mandate given to them by the court. In this article, a person who is subject to hospital-based forensic psychiatric observation will be referred to as an observee. Forensic psychiatric observation undertaken in a psychiatric hospital or another suitable place of observation will be referred to as hospital-based forensic psychiatric observation (1). Observations like this may continue over a period of time lasting from some days to several weeks.

As a rule, forensic psychiatric observations are undertaken through interviews with the observee and collection of health information and relevant information from the next of kin, as well as information from the prosecutor and possibly from the observee's defence counsel. Further examinations with the aid of psychometric, neuropsychological, neurological or other somatic examination methods may also be relevant. When the examination is completed, a written forensic report is submitted to the court, with a copy to the psychiatry group of the Board of Forensic Medicine, who will be responsible for quality control, as well as to the prosecutor and the defence counsel. The experts must give an account of their examination and their conclusion during the main proceedings in court.

If the court-appointed experts fail to obtain sufficient information about the mental health condition of the observee to form a conclusion with regard to the questions in the mandate, they may either decide to observe the observee during the trial or else request a hospital-based forensic psychiatric observation of the observee in accordance with Section 167 of the Criminal Procedure Act. Such lack of information may occur if the observee refuses to talk to the experts or fails to provide adequate information to them, refuses collection of health information, or if the information produced by ordinary methods is insufficient to fulfil the mandate that the court has given to the experts.

For the court-appointed experts to obtain acceptance of a request for hospital-based forensic psychiatric observation, a psychiatric hospital with capacity to undertake the assignment must be available. The experts clarify the assignment and the time it will require with the psychiatric hospital and submit their wish for a hospital-based forensic psychiatric observation to the court. If the court grants this request, after the prosecutor and the defence counsel speaking on behalf of the observee have been consulted with and a possible appeal of the decision has been processed, the observee can be transferred to the psychiatric hospital.

Neither of the court-appointed experts needs to be employed at the psychiatric hospital to which the observee is committed for hospital-based forensic psychiatric observation. The health personnel who undertake the hospital-based forensic psychiatric observation work on assignment from the court-

appointed experts, without an independent mandate from the court. Nor will they normally be appointed as experts in the case. As a rule, the health personnel will be organised according to normal health-service practices, and the observation will be undertaken by a team of nurses, assistant nurses and other staff members working under the supervision of a psychiatrist or a specialist in psychology. The psychiatrist or specialist in psychology may perform additional assignments given by the court-appointed experts, such as psychometric or somatic examinations or interviews with the observee. The observation team prepares a summary report to the court-appointed experts. As a rule, members of the observation team have not been summoned as witnesses to give an account of the observation findings during the main proceedings in court.

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## Challenges to the health services

A decision to subject a person to hospital-based forensic psychiatric observation gives rise to several challenges that have legal, medical and ethical implications. Health institutions and health personnel who receive an observee must relate to these challenges in order to be able to undertake a good forensic psychiatric observation while also safeguarding the legal and possibly health interests of the observee.

These challenges have undeservedly attracted little attention in the health services, most likely because of the small number of hospital-based forensic psychiatric observations. They are not registered publicly, either by the Board of Forensic Medicine or by the Norwegian Courts Administration (personal communication). It can be estimated that during the last decade there have been 4 – 5 cases per year. The Regional Department for Forensic and Security Psychiatry at Brøset has been most frequently used for forensic psychiatric observations. The Regional Department for Forensic and Security Psychiatry at Dikemark has also accepted a growing number of such assignments, especially in recent years. Only one case is known where the hospital-based forensic psychiatric observation was undertaken in another type of institution, in this case a prison, because of the strict security requirements around the observee.

Hospital-based forensic psychiatric observations are described in various legal and forensic-psychiatry sources, with regard to individual cases or in terms of problems of a more general nature [\(2\)](#) – [\(4\)](#). The commentaries to the Criminal Procedure Act by Bjerke, Keiserud and Sæther provide a comprehensive discussion of matters related to criminal procedure in the context of hospital-based forensic psychiatric observations [\(5\)](#).

The purpose of the Criminal Procedure Act is to regulate trial proceedings in criminal cases [\(1\)](#). With regard to hospital-based forensic psychiatric observations, it is reasonable to assume that the Criminal Procedure Act will be the relevant legal basis, despite the fact that it provides only a limited amount of practical guidance for the executing health personnel. The Health Personnel Act regulates the conduct of health personnel in their role as experts to the courts, cf. Sections 12, 15 and 27, but provides no specific information

regarding hospital-based forensic psychiatric observations [\(6\)](#). This has given rise to various interpretations as to how hospital-based forensic psychiatric observations should be undertaken, and hence to different practices in the psychiatric hospitals involved.

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## Is the observee a patient?

The objective of hospital-based forensic psychiatric observations is not to clarify whether the observee needs or wants health care, but to find out whether he or she suffers from a mental condition which is relevant with regard to the ongoing trial, cf. Sections 44, 56 and 39 of the General Civil Penal Code [\(7\)](#). Chapter 13 of the Criminal Procedure Act, which describes forensic psychiatric examinations, does not clarify the status or the rights of an observee in the psychiatric hospital during the period of observation.

Section 1 – 3 A of the Patients' and Users' Rights Act defines a patient as «...a person who contacts the health service requesting health care, or to whom the health service provides or offers health care as the case may be» [\(8\)](#). Thus, the definition of a patient consists of two elements, whereof one concerns whether the person in question requests health care, and the second refers to how the health services may offer or provide health care to a person, irrespective of whether he or she has requested it or not. The court may decide to undertake hospital-based forensic psychiatric observation independently of the observee's wishes. However, this does not constitute sufficient grounds for arguing that an observee is not a patient, since health care can be provided to people against their will. A key issue is thus whether health personnel provide health care when the observee is committed for hospital-based forensic psychiatric observation.

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## Health care and hospital-based forensic psychiatric observation.

Section 1 – 3 of The Patients' and Users' Rights Act defines health care as «acts which have a preventive, diagnostic, therapeutic, health-preserving or rehabilitating effect and are carried out by health personnel for the purposes of nursing and care» [\(7\)](#). The same definition of health care is used in Section 3 of the Health Personnel Act [\(6\)](#). The objective of health care is thus to clarify whether the patient is ill, and to provide treatment wherever appropriate measures are available.

The objective of hospital-based forensic psychiatric observation is not to prevent illness, to rehabilitate or preserve the observee's health. Such types of health care will not be discussed in the following. The other elements in the definition of health care – diagnostics, treatment, nursing and care – are more interesting in this context.

When observees are received for hospital-based forensic psychiatric observation, any signs of illness and symptoms are expected to be clarified. The observee's functioning, behaviour and utterances should be observed as accurately and objectively as possible. The observation findings should be communicated to the court-appointed experts as clearly and distinctly as humanly possible. This is to allow the experts to incorporate and interpret the observation findings and undertake an assessment, partly on the basis of the observation findings and partly based on their own findings and other available information. Since the court-appointed experts will not normally be employed at the institution that undertakes the hospital-based forensic psychiatric observation, they will partly base their conclusion on observation findings produced by others. This applies in particular when the observee refuses to talk to the court-appointed experts.

The psychiatric group of the Board of Forensic Medicine requires that ICD-10 diagnoses are used in forensic psychiatry reports (9). In other words, a forensic psychiatric examination includes a diagnostic assessment, but with no purpose of offering health care to the observee.

The concern for good observational findings and the observee's need for treatment represent another challenge. The use of psychotropic drugs during hospital-based forensic psychiatric observations may affect the observation and lead to other observational findings. Moreover, other types of treatment may have an effect on observational findings, for example medication for diabetes or hypothyroidism. An observee may want to continue a course of treatment that he/she is already involved in, or else may want new treatment to be initiated. The psychiatric hospital will normally not object to continuation or initiation of somatic therapies, but the use of psychotropic drugs must be assessed in each individual case, since they may obscure important observational findings. By administering medication or other forms of therapy, the health personnel will provide health care to the observee while undertaking hospital-based forensic psychiatric observation at the same time.

During a hospital-based forensic psychiatric observation, the daily functioning of the observee is monitored over time. A need to undertake interventions or discontinue the observation for health reasons may occur, for example if the observee fails to eat or sleep over several days. If the observee fails to get enough sleep, symptoms of a possible psychosis will more likely be revealed, which will be an important observational finding. At the same time, if these sleep-related problems are extensive or of long duration, it will be difficult for health personnel to abstain from intervening to ensure that the observee can sleep. A hospital-based forensic psychiatric observation that continues over several days or weeks can hardly be undertaken without any concern for the daily well-being of the observee, despite the fact that the person involved may function satisfactorily in daily life. In some cases, an observee may need comprehensive nursing and care due to a reduced level of functioning. In such cases the boundaries between health care and hospital-based forensic psychiatric observation may become blurred.

To dispel all doubt, it must be emphasised that if the observee needs health care, and where the provision of such is urgent because of a risk of serious health impairment, health care should always take precedence over the hospital-based forensic psychiatric observation. Here, the regular rules for emergency health care will apply, as will as other rules concerning necessary health care (6, 8). A hospital-based forensic psychiatric observation may be interrupted to provide the observee with necessary health care. This is another reason why a professionally competent psychiatrist or specialist in psychology should act as responsible team leader. If the responsible team leader is a specialist in psychology, a doctor must also be included in the team to make somatic assessments. In this case, professional competence to continuously assess the situation will be ensured, so that the court appointed experts, as well as those responsible for provision of health care in the hospital concerned, can quickly be alerted to the situation. The responsible leader of the hospital-based forensic psychiatric observation should possess the necessary skills to undertake a unified assessment that adequately comprises somatic and psychiatric/psychological health requirements.

Hospital-based forensic psychiatric observation has been used when the observee refuses to cooperate with the court-appointed experts, and when the experts have insufficient information to draw a conclusion regarding the mental state of the observee. Hospital-based forensic psychiatric observation may also be useful in cases involving complex psychiatric disorders. It may improve the quality of forensic assessments in many of the cases that have only made use of methods that are commonly applied in current forensic psychiatry examinations.

The Criminal Procedure Act must be interpreted as saying that an observee is not a patient in the sense defined by healthcare legislation. The objective of a hospital-based forensic psychiatric observation is not to provide health care as defined by healthcare legislation. A preservation of the distinction between health care and hospital-based forensic psychiatric observation is important to ensure the observee due process. Health care and forensic psychiatric observation should not be confused, as this may distract both the observee and the observers with regard to their roles in relation to the observee, the court system and possibly others as well. This view on the distinction between health care and hospital-based forensic psychiatric observation is also supported by the letter from the Directorate of Health to the monitoring commissions regarding persons committed to psychiatric institutions pursuant to Section 167 of the Criminal Procedure Act (10).

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## Documentation

A patient has the right to inspect his/ her records, as well as the right to a copy of the record, renewed assessment, co-determination, correction and deletion of the record on certain conditions, and the next of kin of patients have the right to information pursuant to Sections 41 – 45 of the Health Personnel Act, Chapter 5 of the Patients' and Users' Rights Act and Sections 11 – 13 of the Regulations for Keeping of Patient Records (6, 8, 11). Since the observees are

not patients, they do not enjoy these rights with regard to observation documents. It is thus important to maintain the distinction between documentation made for purposes of health care and for purposes of hospital-based forensic psychiatric observation.

A patient can request a copy of his/her patient records, read them and change behaviour. If the findings made during a hospital-based forensic psychiatric observation were to be documented in a set of patient records, the observee would be in a position to request a copy of the records, and thus gain access to the observational findings and change his/her behaviour. If such access to the documentation were to be granted before the court-appointed experts had completed their assessment, interpretation and conclusion, this could have an impact on the forensic psychiatry report and the outcome of the trial.

An observee may disallow access to his/her former patient records for the court-appointed experts. Health information is protected by the duty of confidentiality of health personnel, cf. Section 21 of the Health Personnel Act, and in order to provide such information to third parties health personnel need the patient's consent, cf. Section 22 of the Health Personnel Act (6). If the observee is a former patient in the health enterprise concerned, health information will be available in the electronic patient records and may thus be accessible to the observation team. Despite the fact that the observation team will not actively access the former patient records, health-related information will be available since the records are activated when the observee is committed, as well as each time the observation team members enter documentation in the electronic patient records. The observee's legitimate decision to deny access to former health information to the court-appointed experts and the observation team is therefore violated by documenting observation findings in the patient records. Information on previous health observed in this manner may influence the observation team. This is a further reason to maintain the distinction between documentation for purposes of health care and documentation for purposes of hospital-based forensic psychiatric observation.

Interpretation of symptoms, behaviour and functioning is an important element of a psychiatric assessment. This process involves quantitative as well as qualitative aspects. It is not invariably easy to describe these without also interpreting them. Since the interpretation of findings from hospital-based forensic psychiatric observation is fundamentally a matter for the court-appointed experts, the observation team should limit their interpretations of the observation findings in the documentation. This may cause observational findings documented in the patient records to be erroneously interpreted by subsequent therapists. This problem is exacerbated by the fact that large parts of a hospital-based forensic psychiatric observation are undertaken by personnel without formal diagnostic skills (nurses and assistant nurses).

During hospital-based forensic psychiatric observations, health personnel have a duty of confidentiality with regard to third parties, but a duty of disclosure to their commissioning agency, i.e. the court-appointed experts and the court. At the start of the hospital-based forensic psychiatric observation, the

participating health workers must clearly explain their role to the observee, cf. Section 27 of the Health Personnel Act (6). It is recommended to provide this information orally as well as in writing to the observee.

Another topic concerns what will happen to the observation documents when the hospital-based forensic psychiatric observation is completed, as well as the rights pertaining to these documents that possibly should be accorded to the observee or others at a later time. This problem is further exacerbated by the fact that when forensic psychiatry reports are prepared, it is customary to destroy all working papers (such as intelligence tests, notes taken during interviews and psychometric forms) once the casework in the court system is finished, leaving the forensic psychiatry report as the only remaining document.

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## Other key topics

As a rule, the health personnel who undertake the hospital-based forensic psychiatric observation will not be appointed as experts, but act as assistants to the court-appointed experts. This is no problem if they have a good collaborative relationship with the court-appointed experts and the observation findings are carefully discussed with them. However, problems may still occur if disagreement arises with regard to the interpretation of the observation findings, especially if this disagreement is of crucial importance to determine the issue of sanity. This possibility of disagreement may indicate that the psychiatrist or specialist in psychology who is responsible for the hospital-based forensic psychiatric observation should also be appointed as an expert by the court, so that all aspects of the case can be properly elucidated, which will help ensure due process for the observee.

The psychiatric hospitals that receive observees for hospital-based forensic psychiatric observation must undertake a prior assessment as to whether they should accept the assignment, in light of possible previous contact with the observee as a patient in mental health care. It is also obvious that health personnel who have, or have had, previous contact with the observee in a personal or family capacity should not participate in the hospital-based forensic psychiatric observation.

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## Recommendations

We recommend that a review of this issue is undertaken, hopefully leading to more transparent legislation or interpretations of the Criminal Procedure Act as regards hospital-based forensic psychiatric observations. Until this can happen, we will recommend some solutions here.

Observees are not regarded as patients until their possible need for health care during an ongoing hospital-based forensic psychiatric observation. It is recommended that such health care is provided by health personnel other than those who are included in the observation team.

It is recommended that the observation findings are documented in another documentation system than the patient records, to make it practically possible to keep the observation findings separate from the patient records. However, the patient records should note that the observee is subject to hospital-based forensic psychiatric observation, and that this is the reason why he or she has been hospitalised. This is especially important in case the observee should develop a health problem outside of normal working hours. After the discharge from the observation, the diagnosis «Z04.6 General psychiatric examination, requested by authority» should be added to the case history, with an account of the hospital-based forensic psychiatric observation and the period of time it has lasted, as well as any health care provided during the observation period.

It is recommended that the psychiatric hospital files the observation findings in a separate filing system, in case appeals or requests for inspection should be brought forward at a later time.

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*The authors are members of the Committee for Forensic Psychiatry, Norwegian Psychiatric Association.*

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## **Tabell**

<b>Main message</b>
<ul style="list-style-type: none"><li>• Hospital-based forensic psychiatric observation in a psychiatric hospital should be considered when a perpetrator has complex symptoms or behaviour which is difficult to interpret.</li><li>• Such observation may be especially useful when an observee refuses to cooperate in a forensic psychiatric examination.</li><li>• Observation may help improve the quality of forensic psychiatric examinations.</li></ul>

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