

**MENTAL HEALTH ACT SECTION 5(2) and 5(4)**  
**HOLDING POWER POLICY**

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Applies to:	All doctors , Approved Clinicians and nurses (RNMH and RNLD)

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## DOCUMENT CONTROL

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## 1. INTRODUCTION

- 1.1 The holding power of section 5 can only be used to detain patients who are in-patients. It can be used whether or not the patient has capacity to consent to their admission to hospital, but cannot be used with out-patients, with those attending the hospital in other capacities, e.g. as visitors, or with patients who are already liable to be detained under the Mental Health Act 1983 or subject of a Community Treatment Order.
- 1.2 A doctor or approved clinician's power to detain under section 5(2) lasts a maximum of 72 hours. A nurse's power to detain under section 5(4) lasts a maximum of 6 hours. Neither power is renewable or extendable, but either can be considered again once the patient has reverted to informal status. They can only be used when it is believed that the patient meets the criteria for detention under Part II of the Act. Whether or not to use this power is frequently a difficult decision, but good practice will always depend on the professionals involved in implementing the holding power correctly understanding the power and its purpose.

## 2. PURPOSE AND RATIONALE

- 2.1 To inform hospital staff what action to take when an in-patient is trying to leave the ward and it is believed the patient is suffering from mental disorder to such a degree that it is necessary for the patient to be immediately prevented from leaving the hospital either for the patient's health or safety or for the protection of other people.
- 2.2 The patient may be held for up to 72 hours under section 5(2) or up to 6 hours under section 5(4).

## 3. DUTIES AND RESPONSIBILITIES

- 3.1 The **Trust Board** has a duty to care for patients looked after by the Trust,
- 3.2 The **Director of Governance and Corporate Development** is responsible for this policy covering the appropriate use of section 5 within the Trust, but will delegate authority for the operational implementation and ongoing management of this policy to the Mental Health Act Coordination Lead.
- 3.3 The **Mental Health Act Coordination Lead** is the author of this policy, who will review this policy at least every two years.
- 3.4 Each **registered healthcare professional** is accountable for his/her own practice and will be aware of their legal and professional responsibilities relating to their competence and work within the Code of practice of their professional body.

3.5 **All doctors** caring for patients on the wards, approved clinicians and nurses (RNMH and RNLD) should be familiar with the procedures detailed in the document and other related policies.

3.6 **Ward managers are responsible for ensuring all nursing staff are conversant with this policy and related policies.**

#### **4 DEFINITIONS**

4.1 **MHA** – Mental Health Act 1983 as amended by the Mental Health Act 2007.

4.2 **AC** – Approved Clinician. This could be a suitably qualified doctor, psychologist, nurse, social worker or occupational therapist.

4.3 **NURSE**- in order to invoke section 5(4) a nurse must be ‘of the prescribed class’. Regulation 2(1) of the Mental Health (Nurses) (England) Order 2008 (SI 2008/1207) states that for the purposes of this provision a “nurse of the prescribed class is a nurse registered in either Sub-Part 1 or 2 of the register maintained under article 5 of the Nursing and Midwifery Order 2001, whose registration includes an entry specified in paragraph (2).

“(2) An entry in the register referred to in paragraph (1) is an entry indicating that the nurses field of practice is either—

- (a) mental health nursing, or
- (b) learning disabilities nursing.”

4.4 **INPATIENT**- any person who is receiving in-patient treatment in a hospital. It does not apply to a patient who is already liable to be detained under section 2, 3 or 4 of the Act, subject to a community treatment order, or a person who is being kept in a hospital as a place of safety under section 135 or 136. It includes patients who are in hospital by virtue of a deprivation of liberty authorisation under the Mental Capacity Act 2005 (MCA). It does not matter whether or not the patient was originally admitted for treatment primarily for a mental disorder. The patient could be receiving in-patient treatment in a general (or community) hospital for a physical condition.

#### **5. USING Section 5(2) IN THE TRUST**

5.1 The power should only be used after the doctor or approved clinician (AC) (or their nominated deputy- see section below) in charge of the treatment of a hospital in-patient, personally examines the patient and concludes that the patient is suffering from mental disorder to such a degree that it is necessary for the patient to be immediately prevented from leaving the hospital either for the patient’s health or safety or for the protection of other people. And that it is unsafe to wait for a full assessment to admit under Part II of the Act.

- 5.2 If the patient is already detained under s.5(4) the request from a nurse to assess for detention under s.5(2) should be treated as an emergency and be responded to quickly.
- 5.3 The doctor or AC invoking the power must complete Form H1. The 72 hours of detention start when the form 'is furnished' to the hospital managers. This is the sooner of either- putting it in the mail (or faxing) to the MHA Administration team, or handing it to the nurse in charge of the shift (see point 10 of the Trust's 'scheme of delegation of hospital managers' functions).
- 5.4 Patients who try to leave while Form H1 is being completed can be prevented from doing so under common law.
- 5.5 Once Form H1 has been completed and committed to the internal or external mail system or faxed to the MHA administrators or handed to the authorised member of staff, the patient can be detained even though he or she might have left the ward area.
- 5.6 However, if the patient has left the hospital before the completion of Form H1, they cannot subsequently be detained and returned to hospital on the authority of that form. This is because by leaving hospital the patient relinquishes their in-patient status which is an essential pre-condition to the use of section 5. As a patient who is not "liable to be detained", they could not be returned to hospital under the auspices of s.18.
- 5.7 Although there is a distinction between 'the hospital' and 'the hospital grounds'. Section 5 makes no mention of 'the hospital grounds' so the holding power may be applied to an inpatient who has already left the building (or outside areas with no exit such as garden areas), but is still within 'the grounds'. For example, section 5 may be applied to an inpatient who is in the car park/driveway area of a hospital whilst trying to leave. The Trust acknowledges that this approach remains open to legal challenge, but believes that staff should be able to take actions in order to safeguard patients, and that the use of section 5 in this scenario is better than trying to rely on common law
- 5.8 There is no power to return absconding patients subject to s.5(2) once the 72 hour period has elapsed. Please see the Detained Patients Absent Without Leave (AWOL) Policy for details of how to respond if a patient subject to S5 absconds from custody.
- 5.9 The doctor or AC must be fully aware of the diverse needs of the patient when considering detention and must take them in to account at all times. They must make attempts to ensure the patient fully understands what is happening to them in a language and format which they are able to understand.

## 6 NOMINATION OF DEPUTIES

- 6.1 Section 5(3) allows the doctor or approved clinician in charge of an in-patient's treatment to nominate a deputy to exercise section 5(2) powers in their absence. The deputy will then act on their own responsibility.
- 6.2 Only a doctor or approved clinician on the staff of the same hospital may be a nominated deputy (although the deputy does not have to be a member of the same profession as the person nominating them). Only one deputy may be authorised at any time for any patient, and it is unlawful for a nominated deputy to nominate another. A nomination "to Dr A or, in Dr A's absence, to Dr B" would also be unlawful.
- 6.3 Doctors should not be nominated as a deputy unless they are competent to perform the role. If nominated deputies are not approved clinicians (or doctors approved under section 12 of the Act), they should wherever possible seek advice from the person for whom they are deputising, or from someone else who is an approved clinician or section 12 approved doctor, before using section 5(2).
- 6.4 Nominated deputies should report the use of section 5(2) to the person for whom they are deputising as soon as practicable.
- 6.5 It is permissible for deputies to be nominated by title, rather than by name – eg the junior doctor on call for particular wards (although note 6.6 below) – provided that there is only one nominated deputy for any patient at any time and it can be determined with certainty who that nominated deputy is.
- 6.6 When the doctor or approved clinician in charge of the patient's treatment is not available, and has left no specific instructions to nominate a deputy, the 'default' nominated deputy will be the on-call doctor. Note that F1 doctors are not able to invoke section 5(2), because they are not a fully registered person within the meaning of the Medical Act 1983 (Interpretation Act 1978, Sch1)
- 6.7 Ward staff must know who the nominated deputy for a particular patient is at any given time.
- 6.8 Doctors and approved clinicians may leave instructions with ward staff to contact them (or their nominated deputy) if a particular patient wants or tries to leave. But they may not leave instructions for their nominated deputy (or for nurses) to use section 5, nor may they complete a section 5 report in advance to be used in their absence. Notes should not be left along the lines of "For consideration of section 5 if tries to leave". This consideration should be made every time any informal or voluntary patient wishes to leave the ward, so singling out a particular inpatient for this consideration could be

interpreted as an instruction to apply section 5. The deputy must exercise their own professional judgment.

## **7. USING SECTION 5(4)- THE NURSES' HOLDING POWER**

- 7.1 S.5(4) can only be used by a qualified mental health or learning disability nurse, who cannot be instructed to use the power but must make a personal decision (see 6.8 above). It can only be used when the patient is still within the hospital or its grounds (see 5.8 above).
- 7.2 The nurse using the power must be satisfied that the patient is suffering from a mental disorder to a degree that it is necessary for their health or safety, or the protection of others, that they not be allowed to leave the hospital.
- 7.3 Where the nurse becomes aware of a patient's sudden determination to leave they should be alert to the potentially serious consequences of them doing so and the power may be used without a full assessment.
- 7.4 It should only be used when there is likely to be a delay in getting a doctor to attend and the patient cannot be persuaded to wait to see the doctor in charge of their treatment.
- 7.5 It is permissible to detain the patient under common law pending the immediate (meaning a few minutes) assessment by a doctor.
- 7.6 The nurse must be fully aware of the diverse needs of the patient when considering detention and must take them in to account at all times. They must ensure the patient fully understands what is happening to them in a language and format which they are able to understand. Where necessary, an interpreter should be obtained.

## **8. OBTAINING AN ASSESSMENT AFTER SECTION 5(4) HAS BEEN INVOKED**

- 8.1 The nurse invoking the power does so by completing Form H2 and delivering it to the hospital managers, via the Mental Health Act Administrators. It can be faxed.
- 8.2 The nurse should immediately contact the doctor or approved clinician (AC) in charge of the patient's treatment, or their nominated deputy, to inform them of the use of s.5(4).
- 8.3 Reasons for using the power should be recorded in the patient's electronic patient record.



- 8.4 While waiting for the doctor or AC to attend it is permissible, using the minimum force necessary, to prevent the patient from leaving the ward.
- 8.5 The nurse in charge must ensure that at the time of a shift change staff coming on duty are made aware of patients who remain subject to s.5(4).
- 8.6 If the doctor or AC has not arrived within four hours, the nurse in charge must contact the duty consultant who should attend.
- 8.7 The power to detain lapses once the doctor or AC arrives to assess the patient.
- 8.8 The nurse should inform the hospital managers, via the Mental Health Act Administrators, when the power to detain has lapsed. This can be done by e-mail or fax. A note must also be made on the patient's electronic patient record.
- 8.9 If no doctor or AC has attended after the six hours have elapsed the nurse in charge must immediately inform (orally) the service manager or their deputy and complete a DATIX by the end of the next working day.

## **9. USING THE POWER IN A GENERAL OR COMMUNITY HOSPITAL**

- 9.1 Section 5(4) may be invoked only by a nurse 'of the prescribed class' (see 'Explanation of terms used above'), so it is unlikely that it will be used in a general or community hospital. If it is used, the procedures above (in sections 5 and 6) should be followed.
- 9.2 Whilst the Mental Health Act allows for detention in any hospital, The Health and Social Care Act 2014 demands that any hospital detaining or treating a person under The Mental Health Act must be registered to do so. At the date of publication of this policy no community hospital within Somerset is so registered. The two general hospitals (Yeovil District and Musgrove Park) are so registered. This means that any use of section 5 in a community hospital would be a breach of The Trust's registration with CQC. The guidance below complies only with The Mental Health Act.
- 9.3 Any doctor in charge of a patient's care may detain a patient under s.5(2), using Form H1. This includes a doctor in a non-psychiatric hospital.
- 9.4 The non-psychiatric doctor should try to discuss the use of the power, prior to using it, with a senior psychiatrist. If this is not practicable then a senior psychiatrist should be contacted as soon as the power is used. The senior psychiatrist should see the patient as soon as possible to determine whether the patient should be further detained.

- 9.5 If the patient is already receiving treatment for a mental disorder, as well as their physical disorder, then the consultant psychiatrist is the doctor in charge of treatment.
- 9.6 The full Mental Health Act assessment should be initiated as below.
- 9.7 A s.5(2) cannot be used in an A & E department.
- 9.8 The doctor or AC must be fully aware of the diverse needs of the patient when considering detention and must take them in to account at all times. They must ensure the patient fully understands what is happening to them in a language and format which they are able to understand.

## **10. ENDING A SECTION 5(2)**

There is no procedure for discharging the patient from the holding power. The power will automatically lapse if:

- (i) the result of the assessment is a decision not to make an application under s.2 or 3; or
- (ii) the power is invoked by a doctor or an AC who has been nominated under subs.(3) and the clinician in charge of the patient's treatment subsequently decides that no assessment for possible detention needs to be carried out, or
- (iii) an application under s.2 or 3 is made; or
- (iv) the patient is discharged from the hospital before an assessment can be undertaken, e.g. the patient's violent conduct results in an arrest and removal to police custody.

## **11. OBTAINING A MENTAL HEALTH ACT ASSESSMENT AFTER SECTION 5(2) HAS BEEN INVOKED**

- 11.1 Once s.5(2) has been invoked the doctor or AC completing Form H1 should initiate a Mental Health Act assessment of the patient by ensuring an Approved Mental Health Professional (AMHP) is informed. The AMHP service must be contacted as soon as possible after a S5(2) has been invoked. It is not appropriate (and may be unlawful) to consider a section 5 as a short-term assessment period.
- 11.2 A hospital doctor providing a medical recommendation to detain under either s.2 or s.3 should be available to discuss the patient with the doctor providing the second medical recommendation and the AMHP (or nearest relative if the nearest relative is the applicant).
- 11.3 The patient should be told both orally and in writing of their detained status and rights, including their right to refuse treatment. The oral

and written information given to the patient must be in a format and language they can understand.

- 11.4 Where the power has been invoked by the nominated deputy, no further assessment would be necessary should the doctor or AC in charge of the patient's treatment review the situation and decide that no MHA assessment is, after all, required. This situation may arise, for example, if a 5(2) is imposed 'out of hours' by the nominated deputy, and is then reviewed by the doctor or AC in charge of the patient's treatment on their return to work in the morning.
- 11.5 In this situation if an AMHP has been informed of the need for a Mental Health Act assessment, the doctor or AC should ensure he/she is immediately told of the patient's reversion to informal status as it is the responsibility of the AMHP co-ordinate the assessment process.
- 11.6 The authority to detain the patient under s.5(2) ends once the assessment has been completed and a decision made not to detain the patient under s.2 or s.3. A note should be made by the doctor or AC on the patient's EPR of the time the s.5(2) ended.
- 11.7 The patient should be informed that he or she is no longer detained under s.5(2).
- 11.8 The s.5(2) will not run for the full 72 hours if a decision has been made not to proceed with a full Mental Health Act assessment. Patients must not be led to believe that they remain detained when they are not.
- 11.9 The Mental Health Act administrators should be informed as soon as the patient reverts to informal status.

## **12. TRANSFERRING PATIENTS BETWEEN HOSPITALS**

- 12.1 Patients subject to s.5(2) or 5(4) on a hospital site in the Trust may not be removed to another hospital site in the Trust. For example, a s.5(2) or 5(4) detained patient on Rydon or Pyrland wards could be transferred to Holford ward, but a patient detained on s.5(2) or 5(4) on Rowan ward could not be transferred to Holford ward as it is on a different hospital site.
- 12.2 There is no ability to grant leave under S17 to a patient subject to S5(2) or 5(4), because such patients have (and can have) no responsible clinician, and it is only a responsible clinician who can grant leave.
- 12.3 Patients subject to s.5(2) or 5(4) in a general hospital cannot be transferred, under a provision of the Mental Health Act 1983, to a psychiatric hospital. They should be assessed in situ.

12.4 Patients detained on s.5(2) or 5(4) and lacking capacity can be transferred to another hospital site, but the s.5(2) or 5(4) lapses once they leave the hospital site to which the s.5(2) or 5(4) applies. On reaching the new hospital site, consideration should be given to imposing a fresh s.5(2) or 5(4) should they try to leave the hospital.

### **13. TREATMENT**

13.1 Patients detained under s.5(2) or 5(4) are in the same position in regard to treatment as voluntary patients. No treatment, except when given in an emergency or in the absence of capacity, can be administered without consent. To obtain the patient's consent, the use of professional interpreter may be required.

13.2 Treatment can only be given either within the principles of common law or the Mental Capacity Act. Under common law treatment may be provided if it is immediately necessary to save life, prevent a serious deterioration in the patient's health, alleviate serious suffering or prevent the patient from behaving violently and being a danger to themselves or others. Under The Mental Capacity Act, treatment must be provided in the patient's best interests once their lack of capacity to consent has been established. In accordance with the Trust's 'Consent and Capacity to Consent to Treatment' policy, a capacity assessment, including the Best Interest checklist, should be completed where any treatment is given when a patient lacks the capacity to consent. Treatment in either case should be the least restrictive and the minimum necessary.

### **14. TRAINING REQUIREMENTS**

14.1 The Trust will work towards all staff being appropriately trained in line with the organisation's Staff Training Matrix (training needs analysis). All training documents referred to in this policy are accessible to staff within the Learning and Development Section of the Trust Intranet.

### **15. MONITORING COMPLIANCE AND EFFECTIVENESS**

15.1 Overall monitoring will be by the Trust Board. The Mental Health Legislation Committee is accountable to the Trust Board.

15.2 The Mental Health Legislation Committee Will review assurance of the effectiveness of the policy by monitoring any issues arising from:

- internal audits
- clinical audits
- complaints

15.3 The Mental Health Act Coordination Lead will provide annual reports on the general use of S5(2) and S5(4) in the Trust to the Mental Health Legislation Committee.

15.4 Any incidents of serious incidents relating to the use of Section 5(2) and 5(4) Holding Powers will be monitored by the Clinical Governance Committee.

## **16. REFERENCES, ACKNOWLEDGEMENTS AND ASSOCIATED DOCUMENTS**

### **16.1 References**

Jones R. 'Mental Health Act Manual – 16<sup>th</sup> Edition - Sweet & Maxwell 2013

MHA '83 Code of Practice – Chapter 18 – The Stationery Office 2015

### **16.2 Cross reference to other procedural documents**

Consent and Capacity to Consent to Treatment Policy

Detained Patients AWOL Policy

Learning Development and Mandatory Training Policy

Record Keeping and Records Management Policy

Risk Management Policy and Procedure

Section 17 Leave Policy

Scheme of Delegation of Hospital Managers' functions

Staff Training Matrix (Training Needs Analysis)

Untoward Event Reporting Policy and procedure

16.3 All current policies and procedures are accessible in the policy section of the public website (on the home page, click on 'Policies and Procedures'). Trust Guidance is accessible to staff on the Trust Intranet.