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**Section 5(2) Doctors' Holding Power Procedure**
**Mental Health Act, 1983**

## Introduction and Aim

This document supports the Section 5(2) Doctors' Holding Power Policy, Mental Health Act, 1983.

To ensure staff are aware of their individual and collective responsibilities when considering use of the doctors' holding power under section 5(2).

To Provide clear direction and guidance to staff in relation to their legal responsibilities under the Mental Health Act 1983 as amended by the MHA 2007.

To Ensure that statutory requirements under the Mental Health Act 1983 are met.

## Objectives

This Procedure describes the following with regard to a doctors' holding power:

- The purpose of a doctors' holding power
- The process for assessing the suitability for the use of a doctors' holding power
- The duties of the practitioners and agencies involved in the management of patients subject to a doctors' holding power

Practitioners must have due regard to the Mental Health Act Code of Practice generally and specifically to the Guiding Principles when they are considering the use of a doctors' holding power. This will ensure that considerations are given as to whether the objectives can be met in a less restrictive way.

## Scope

This procedure applies to all of our staff in any inpatient setting where a person is receiving inpatient treatment in hospital and is not already liable to be detained or who is subject to a community treatment order (CTO).

Patients who are in hospital by virtue of a deprivation of liberty authorisation under the Mental Capacity Act 2005 (MCA) may be detained under section 5(2). It does not matter whether the patient was originally admitted for treatment primarily for either a mental disorder or a physical condition.

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| **Equality and Health Impact Assessment** | There is potential for both positive and negative impact. The procedure is aimed at improving services and meeting diverse needs. Mitigation actions are already in place to offset any potential negative |

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| | outcome, e.g. through the monitoring of the procedure. There is nothing, at this time, to stop the procedure being implemented. |
| **Documents to read alongside this Procedure** | • The Mental Health Act 1983 (as amended by the Mental Health Act 2007)<br>• Mental Health (hospital, guardianship, community treatment and consent to treatment)(Wales) regulations 2008<br>• The Mental Capacity Act 2005 (including the Deprivation of Liberty Safeguards delegated to this Act under the Mental Health Act 2007)<br>• The respective Codes of Practice of the above Acts of Parliament<br>• The Human Rights Act 1998 (and the European Convention on Human Rights)<br>• Domestic Violence, Crime and Victims Act, 2004<br><br>All Cardiff and Vale policies on the Mental Health Act 1983 as appropriate including:<br><br>Section 5(2) Doctors' Holding Power Policy<br>Section 5(4) Nurses' Holding Power Policy<br>Section 5(4) Nurses' Holding Power Procedure<br>Hospital Managers' Scheme of Delegation Policy<br>Hospital Managers' Scheme of Delegation Procedure |
| **Approved by** | Mental Health and Capacity Legislation Committee |

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| **Accountable Executive or Clinical Board Director** | Chief Operating Officer |
| **Author(s)** | Mental Health Act Manager |

**Disclaimer**

**If the review date of this document has passed please ensure that the version you are using is the most up to date either by contacting the document author or the Governance Directorate.**

**Summary of reviews/amendments**

| Version Number | Date of Review Approved | Date Published | Summary of Amendments |
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| 1 | MHCLC | 02/07/2018 | New document |

Glossary of terms

| Term | Definition |
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| AC | Approved Clinician – A mental health professional approved by the Welsh Ministers to act as an approved clinician for the purposes of the Act. In practice, Health Boards take these decisions on behalf of the Welsh Ministers |
| Community Treatment Order (CTO) | The legal authority for the discharge of a patient from detention in hospital, subject to the possibility of recall to hospital for further medical treatment if necessary. Community patients are expected to comply with the conditions specified in the community treatment order. |
| Form HO12 | Statutory Welsh form to be completed by Doctor when implementing section 5(2) |
| RC | Responsible Clinician - The approved clinician with overall responsibility for the patient's case |
| IMHA | Independent Mental Health Advocate – An advocate independent of the team involved in patient care available to offer support to patients. |
| Mental Capacity Act (2005) | An Act of Parliament that governs decision-making on behalf of people who lack capacity, both where they lose capacity at some point in their lives and where the incapacitating condition has been present since birth |
| MHRTfW | Mental Health Review Tribunal for Wales – A judicial body that has the power to discharge patients from detention, community treatment orders, guardianship and conditional discharge |
| Part 4, Mental Health Act | The part of the Act which deals mainly with the medical treatment for mental disorder of detained patients (including conditionally discharged and community treatment order patients who have been recalled to hospital). In particular, it sets out when they can and cannot be treated for the mental disorder without their consent |
| Section 2 | Compulsory admission of a patient to hospital for assessment and for detention up to 28 days |
| Section 3 | Compulsory admission to hospital for treatment and detention for up to six months |
| Section 4 | An application for detention for assessment of mental disorder made with only one supporting medical recommendation in cases of urgent necessity. Also known as a section 4 application |
| Section 17 leave | Formal permission for a patient who is detained in hospital to be absent from the hospital for a period of time; patients remain under the powers of the Act when they are on leave and can be recalled to hospital if necessary in the interests of their health or safety or for the protection of others |
| Section 133 | The duty of hospital managers to information nearest relatives of a patients discharge |
| Keywords | Section 5(2), Doctors' Holding Power, Mental Health Act, 1983 |

**CONTENTS**

## 1. INTRODUCTION

Section 5(2) is the power under the Mental Health Act, 1983 (MHA) that allows a responsible doctor or approved clinician to detain an in-patient for a maximum period of up to 72 hours in order to make arrangements for their assessment for detention under section 2 or section 3 of the MHA. This power can only be used to detain patients who have already been informally admitted to a hospital. It can be used whether or not the patient has capacity to consent to their admission but cannot be used with out-patients, or with those attending the hospital in other capacities, e.g. as visitors.

Section 5(2) should only be used if; at the time it is not practicable or safe to take the steps necessary to make an application for detention without detaining the patient in the interim. It should not be used as an alternative to making an application, even if it is thought that the patient will only need to be detained for 72 hours or less.

## 2. PROCEDURE STATEMENT

This procedure has been developed to guide staff on the implementation and management of section 5(2) doctors' holding powers in accordance with the Mental Health Act 1983 as amended by MHA 2007. This guidance has been developed in line with the Mental Health Act 1983 Code of Practice for Wales 2016 (Code of Practice).

Holding powers when implemented authorises the detention of the patient in the hospital for a maximum of 72 hours so the patient can be assessed with a view to an application for detention under the Act being made.

## 3. SCOPE

The Health Board has in place appropriate governance arrangements to monitor and review the exercise of functions under the Act on its behalf. The Mental Health and Capacity Legislation Committee is specifically for this purpose.

This procedure is applicable to all qualified doctors' within all Mental Health inpatient settings and general hospital settings.

## 4. DUTIES AND RESPONSIBILITIES OF DOCTORS' AND APPROVED CLINICIANS

Section 5(2) authorises the detention of the patient in the hospital for a maximum of 72 hours so the patient can be assessed with a view to an application for detention under the Act being made. It should only be used if, at the time, it is not practicable or safe to initiate an application for detention without also detaining the patient in the interim. That is, the patient must be unwilling to remain in hospital in order for the assessment for detention to be made and it must be necessary for the person

to remain in hospital until the assessment can be undertaken.

Section 5(2) should not be used as an alternative to making an application, even if it is thought the patient will only need to be detained for 72 hours or less.

The identity of the person in charge of a patient's medical treatment at any time will depend on the particular circumstances. However, a professional who is treating the patient under the direction of another professional should not be considered to be in charge.

There may be more than one person who could reasonably be said to be in charge of a patient's treatment e.g. where a patient is receiving treatment for both a physical and a mental disorder. In such a case, the psychiatrist or approved clinician in charge of the patient's treatment for the mental disorder is the preferred person to use the power in section 5(2).

The Doctor 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, this will include sensory and cognitive abilities and physical impairment. Where necessary, an interpreter should be obtained.

They must complete a written record of the assessment (Statutory Form HO12). As well as the completion of the statutory documentation, doctors' must make a record of the assessment including the start time of the section in the patients' clinical notes.

## 5. NOMINATION OF DEPUTIES

Section 5(3) allows the doctor or approved clinician in charge of an inpatient's treatment to nominate a deputy to independently exercise section 5(2) powers in their absence.

Only a doctor or approved clinician on the staff of the same hospital may be a nominated deputy. 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.

Doctors' and approved clinicians should only be nominated as a deputy if they are competent to perform the role. Nominated deputies should report the use of section 5(2) to the person for whom they are deputising as soon as practicable.

It is permissible for deputies to be nominated by title, rather than by name e.g. the junior doctor on call for particular wards, provided there is only one nominated deputy for any patient at any time and it can be determined with certainty who that nominated deputy is.

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. However, they may not leave instructions for their nominated deputy to use section 5(2), nor may they complete a section 5(2) report in advance to be used in their absence. The deputy must exercise their own professional judgment. Patients should not be admitted informally with the sole intention of then using the holding power.

## 6. DUTIES AND RESPONSIBILITIES OF QUALIFIED NURSES

The qualified nurse should check that the doctor has completed form HO12 correctly. The form must then be faxed or emailed and the original sent immediately to the Mental Health Act administration team either by hand, internal mail for first class post delivery.

The nurse should ensure that the patient is made aware of their rights under the Act and this is documented in the patients' notes. Information and leaflets are available on the Mental Health Act page, Cardiff and Vale intranet.

## 7. PROCEDURE

Holding powers can only be used on a patient who has been admitted to hospital. Admission should be defined as completion of the admission process performed by nursing staff or medical staff.

Patients who are in hospital by virtue of a deprivation of liberty authorisation under the Mental Capacity Act 2005 (MCA) may be detained under section 5(2). It does not matter whether the patient was originally admitted for treatment primarily for either a mental disorder or a physical condition.

If the doctor invoking the section 5(2) power is not a psychiatrist, approved clinician or nominated deputy they should make immediate contact with a psychiatrist or an approved clinician to obtain confirmation of their opinion that the patient needs to be detained so that an application can be made.

If a patient is already detained under section 5(4) the request from a nurse to assess for detention under section 5(2) should be treated as an emergency and be responded to accordingly i.e. within 6 hours of the section 5(4) commencing.

Although section 5(2) can last up to a maximum of 72 hours, the assessment process must be put in place once the HO12 is completed.

The Approved Mental Health Practitioner (AMHP) should be contacted at this stage in order to co-ordinate a Mental Health Act assessment and for those attending to consider the need for section 2 or section 3 of the Mental Health Act.

Patients subject to section 5(2) are not subject to consent to treatment provisions contained in Part 4 of the MHA.

If the patient is mentally capable of making a decision about treatment, the common law enables him to refuse to be treated for either a physical or mental disorder. However, if the patient is assessed as being mentally incapable of making a decision about treatment, the treatment can be provided under the Mental Capacity Act 2005 if it is deemed to be in his best interests.

A record of the assessment must be made in the patient's clinical notes.

## 8. USE OF SECTION 5(2) IN A GENERAL HOSPITAL

Any doctor in charge of a patient's care may detain an informal patient under section 5(2), using form HO12. This includes a doctor in a non psychiatric hospital.

The non-psychiatric doctor should, wherever possible, consult with a senior psychiatrist prior to the use of section 5(2). If this is not practicable then the senior psychiatrist should see the patient as soon as possible to determine whether the patient should be detained further.

The full Mental Health Act assessment should be requested as soon as possible after the use of section 5(2).

Section 5(2) cannot be used in an Accident and Emergency Department.

## 9. SECTION 17 LEAVE

A patient detained on Section 5 (2) cannot receive section 17 leave. They are not detained by virtue of either an application under Section 2 or Section 3 and therefore do not have a Responsible Clinician to grant such leave.

## 10. COMMUNITY TREATMENT ORDER PATIENTS

Section 5(2) is not applicable to a patient subject to a Community Treatment Order (CTO). Patients can be recalled even during periods when they are in-patients. Therefore where it is considered necessary, the recall procedure must be used to detain the patient and within the 72 hours allowed a decision must be made whether to revoke the CTO.

Section 5(2) cannot be used to keep a patient in hospital after the end of the 72 hour recall period if the CTO has not been revoked.

## 11. SECTION 18 ABSENT WITHOUT LEAVE (AWOL)

A patient detained under section 5(2) who leaves the hospital is AWOL and can be retaken but only within the 72 hour period.

## 12. INAPPROPRIATE USE OF SECTION 5(2)

Section 5(2) cannot be used in the following circumstances:

- For an outpatient attending an accident and emergency department or any other out-patient facility.

- For a patient who is already liable to be detained in hospital or who is subject to a CTO.
- Is not to be used as a holding power simply for the purpose of persuading the patient to stay.

Patients should not be informally admitted with the sole intention of then using the holding power.

## 13. ENDING OF SECTION 5(2)

Section 5(2) holding powers last for a maximum of 72 hours and cannot be renewed.

Detention under section 5(2) will end if:-

- The result of the assessment is a decision not to make an application under section 2 or section 3.
- The power has been invoked by a nominee under section 5(3) and the doctor or approved clinician in charge decides that no assessment for possible detention needs to be carried out.
- An application under section 2 or section 3 is made.
- The patient is discharged for clinical reasons before an assessment can be undertaken.

The maximum period a patient may be held under section 5(2) is 72 hours, which will include anytime the patient is held on section 5(4) of the Act.

The patient should be informed once they are no longer held under section 5(2) and advised of the reasons why. If this is because section 2 or section 3 was not applied, the patient should be informed they are free to leave hospital.

## 14. MEDICALTREATMENT OF PATIENTS

The rules in Part 4 of the Act do not apply to patients detained under section 5(2) and as such there is no power under the Act to treat them without their consent. In other words, they are in exactly the same position in respect of consent to treatment as patients who are not detained under the Act.

## 15. TRANSFER TO OTHER HOSPITALS

Patients detained under section 5(2) cannot be transferred to another hospital under section 19, because they are not detained by virtue of an application made under Part 2 of the Act. This includes transfer between hospitals managed by the same hospital managers.

A patient who is subject to section 5(2) of the Act but needs to go to another hospital urgently for treatment, security or other exceptional reasons, can only be taken there if they consent to the transfer. If the patient lacks capacity to consent to the transfer, any transfer must be carried out in accordance with the MCA.

If, following transfer, the patient tries to leave the receiving hospital, a new situation will have arisen. In this circumstance, the receiving hospital may need to use section 5(2) to provide authority to detain the patient in that hospital.

In all cases, if the conditions are met, an emergency application for detention under section 4 of the Act could be made by the sending hospital. The patient could then be transferred to the receiving hospital under section 19. Alternatively, an emergency application under section 4 could be submitted to the managers of the receiving hospital.

## 16. APPEALS

A patient detained under section 5(2) cannot make an application to the Mental Health Review Tribunal for Wales or appeal to the hospital managers.

## 17. MONITORING

Hospital managers should monitor the use of section 5(2), including:

- How quickly patients are assessed for detention and discharged from the holding power.
- The proportion of cases in which applications for detention are, in fact, made following use of section 5(2).

## 18. TRAINING

The health board will provide ongoing training for staff who have a delegated duty under the scheme of delegation. Details of training courses available can be found by contacting the mental health act administration team.

## 19. IMPLEMENTATION

This document will be widely disseminated to staff in Cardiff and Vale University Health Board. It will be published on the organisations intranet sites and referred to during training relevant to the Act.

## 20. RESPONSIBILITIES

### 20.1 Chief Executive

The Chief Executive Officer has overarching responsibility for ensuring that Cardiff and Vale University Health Board is compliant with the law in relation to the Mental Health Act.

### 20.2 Chief Operating officer

The Chief Operating Officer is the Executive Lead for Mental Health. He has overarching responsibility for ensuring compliance with the contents of this procedure.

### 20.3 Designated Individuals

This procedure applies to all doctors' who have defined responsibilities under the provisions of the Act.

## 21. REFERENCES

All staff will work within the Mental Health Act 1983 and in accordance with the Code of Practice for Wales 2007, Mental Capacity Act 2005, and Human Rights Act 1998.

Mental Health Act 1983 - www.legislation.gov.uk/ukpga/1983/20/contents
Mental Capacity Act 2005 - www.legislation.gov.uk/ukpga/2005/9/schedule/7
Mental Health Review Tribunal for Wales - www.justice.gov.uk/tribunals/mental-health
Human Rights Act 1998 - www.legislation.gov.uk/ukpga/1998/42/contents