

Use of the Mental Health Act 1983 in general hospitals without a psychiatric unit

This guidance relates to England only

Previously issued by the Mental Health Act Commission; revised April 2010

1 Introduction

1.1 1.1 Many general hospitals¹ use the powers of the Mental Health Act 1983 (MHA 1983) to detain a small but significant number of patients². This raises two connected areas of concern:

- The registration system for health and adult social care requires that any hospital using the MHA 1983 to detain patients must be specifically registered to do so. The detention of a patient under the MHA 1983 by a hospital that is not specifically registered to do so will be a breach of that hospital's compliance with their own registration requirements, and may call the legality of that detention into question.
- Where admissions under the Act are infrequent, Trusts may have difficulties in ensuring that the obligations, entitlements and safeguards set out in MHA 1983 are observed, regardless of their registration status.

It is crucial that the necessary arrangements are in place, and this Guidance Note outlines some of the key responsibilities and powers.

2 Defining the detaining authority

2.1 **Section 17 leave.** General hospitals may be asked to admit patients who are detained by a mental health services but also need treatment for their physical health that cannot be provided in a mental health hospital. In such cases, it will usually be appropriate for the mental health service to remain the detaining

¹ The Care Quality Commission is aware that many general hospitals have mental health units, either on the same premises or elsewhere within their Trust, or close links with a mental health trust. There are, however, a number of general hospitals that do not have such facilities, and it is to the staff of such hospitals that this Guidance Note is primarily addressed.

² In a survey of 20 Trusts in a single NHS Executive region conducted in 2000/01, the Mental Health Act Commission (the functions of which transferred to the Care Quality Commission on 1 April 2009) found that 17 Trusts reported uses of the Act. Fifteen Trusts were able to provide statistics and in a period of one year had used the Act on 66 occasions - 32 uses of Section 5(2); 24 uses of Section 2 and 10 uses of Section 3. More recent visits to general hospitals by CQC Mental Health Act Commissioners have also noted the Act being used to detain patients.

authority, and for the patient to be granted leave of absence from the mental health hospital (using powers under section 17 of the MHA 1983) to be admitted to the general hospital. The advantage of this arrangement is that mental health services retain the responsibility for the patient's detention and treatment under the MHA 1983, and should ensure that all legal requirements under the MHA 1983 are met in the patient's day-to-day treatment.

2.2 **Section 19 Transfer.** Occasionally a patient requiring physical health care is formally transferred from the mental health hospital to a general hospital, using powers under section 19 of the MHA 1983. In such cases the general hospital becomes the “detaining authority”; should have appropriate registration under the Health and Social Care Act to detain patients under the MHA 1983; and is responsible for compliance with all aspects of the MHA 1983 whilst the patient remains detained under its authority.

2.3 **Detaining general hospital inpatients.** From time to time, in-patients of general hospitals are thought to require detention under MHA 1983. Such detentions may be short-term holding powers or longer-term detention for assessment and/or treatment:

- In an emergency, the doctor in charge of the treatment (or any “approved clinician”, as defined at section 145 (1) of the MHA 1983³) can initiate a 72-hour ‘holding’ power over someone who is already an inpatient in hospital, preventing them from leaving hospital and allowing time for consideration to be given as to whether an application should be made for further detention, (see 3.2 below). This power – which is contained in MHA 1983, section 5(2) – is discussed further at paragraph 6.1 below.
- An application for longer-term detention will usually be made by an Approved Mental Health Practitioner (AMHP) and must be founded on two medical recommendations. Compulsory admission for assessment and/or treatment may last for up to 28 days (MHA 1983, section 2), and for treatment, for up to six months (MHA 1983, section 3). One of the medical recommendations must be provided by a doctor approved under MHA 1983, section 12(2) as having special experience in the diagnosis or treatment of mental disorder.

2.4 **Admission from the community.** There may be circumstances where a patient is admitted from the community under the detention powers of MHA 1983 section 2 or section 3. The procedure is as described at 2.3 above.

³ An approved clinician may be a doctor, social worker, mental health or learning disabilities nurse, occupational therapist or psychologist, but must be approved for the purposes of the Act by the Secretary of State. Approval is granted by a Strategic Health Authority (SHA), but SHAs may delegate the function to Primary Care Trusts (PCT). See *Reference Guide to the MHA 1983*, pages 264-5.

- 2.5 Patients detained in general hospitals should be transferred to a mental health unit as soon as their physical health permits, so that they might receive the mental health care and treatment for which they have been detained.

3 Registration requirements

- 3.1 The Health and Social Care Act regulations provide that a hospital must be specifically registered to provide assessment or treatment of mental disorder (excepting any surgical procedures), where the patient concerned is detained in *that* hospital under any power of the MHA 1983 other than the holding powers under sections 135 or 136 (which are discussed at 7.3.1. below)⁴.
- 3.2 Such registration is therefore required if the general hospital itself detains patients, whether under MHA 1983 section 5 holding powers or the more substantial detention powers of MHA 1983 sections 2 or 3, and provides assessment or treatment of their mental disorder. In the interpretation of these regulatory requirements, ‘treatment for mental disorder’ is defined very broadly to include “nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care”⁵.
- 3.3 Such registration is not required to provide assessment or treatment of mental disorder to patients who are detained by another authority, but admitted to the treating hospital under the powers to grant leave of absence from the place of detention under MHA 1983, section 17. This will be the case even if the detaining authority authorises that the patient remains in the custody of the treating hospital⁶.
- 3.4 If a hospital does not have the correct registration, but nevertheless assesses or treats the mental disorder of someone who it has detained under the MHA 1983, it will be in breach of its registration requirements. CQC takes a proportionate approach, accepting that unforeseen emergencies will arise and the absence of registration should not deprive people of access to appropriate services; however, that approach does not extend to foreseeable or planned services outside of a provider’s registration. Such a breach is an offence and

⁴ *Health and Social Care Act 2008 (Regulated Activities) Regulations 2009*, Regulation 6

⁵ *Ibid*, n.5 above, at regulation 6(2): which defines medical treatment to have the same meaning as in MHA 1983 s.145

⁶ Under MHA 1983, section 17(3), the Responsible Clinician (RC) at the mental health unit may direct that the patient remain in the custody of any officer on the staff of the general hospital. The staff at the general hospital will need to have copies of the RC’s leave authorisation (i.e. a MHA 1983, section 17 leave form). Nursing and medical staff in the general hospital, as well as the patient, should be aware of any conditions attached to that leave and of the procedure that must be followed if the patient goes absent.

the hospital will therefore potentially be liable for penalties⁷. It is also arguable that the patient concerned would be able to bring an action challenging the lawfulness of his or her detention and/or treatment⁸.

- 3.5 It is therefore important that managers of general hospitals consider whether there is any possibility of patients being detained, and subsequently assessed or treated for mental disorder, in those hospitals, and to ensure that their registration is appropriate.

4 The Mental Health Act 1983 – basic facts

- 4.1 The Mental Health Act 1983 ('MHA 1983') provides a framework for the compulsory admission to hospital and subsequent treatment of patients with a mental disorder. The MHA 1983 *Code of Practice* identifies standards that mental health service providers should meet when they perform their responsibilities under the Act.⁹ An explanatory Memorandum is also available.¹⁰ Although the *Code of Practice* is not legally enforceable, failure to follow it might be referred to in evidence in legal proceedings. The House of Lords' has ruled that those to whom the *Code of Practice* is addressed should only depart from where they have cogent reason to do so.¹¹
- 4.2 The managers of any general hospital that might have to admit patients under MHA 1983 should ensure that members of staff who are likely to have responsibilities under the Act have ready access to the *Code of Practice* and the *Reference Guide to the Mental Health Act 1983*.¹² In addition, they may find it helpful to have access to reference texts such as the *Mental Health Act Manual*¹³ and Care Quality Commission Guidance Notes¹⁴. General hospitals should also have copies of the necessary statutory forms and patients' leaflets, information about which can be had from the Department of Health website.
- 4.3 In every general hospital in which MHA 1983 may be used, named members of staff should be available who are familiar with the operation and requirements of the Act and whom other staff may consult. These members

⁷ See *Health and Social Care Act 2008 (Regulated Activities) Regulations 2009*, Regulation 27

⁸ Although the MHA 1983 requires only that a detaining authority is a 'hospital', there could be an argument that any detention which itself involves unlawful conduct (i.e. amounts to an offence under the Health and Social Care Act) would fail the tests under Article 5 of the European Convention on Human Rights that the detention of persons of unsound mind should be 'lawful'.

⁹ Department of Health (2008) *Mental Health Act 1983 Code of Practice*.

¹⁰ Department of Health (2008) *Reference Guide to the Mental Health Act 1983*

¹¹ *R v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte Munjaz* [2005] UKHL 58.

¹² Both available from The Stationery Office, tel: 0870 600 5533.

¹³ Richard Jones (2009) *Mental Health Act Manual*, 12th edition, London: Sweet & Maxwell.

¹⁴ Available on the Care Quality Commission website: www.cqc.org.uk

of staff should also be responsible for ensuring that the hospital's MHA 1983 obligations are properly discharged. (However, see paragraph 6 below for suggested arrangements with mental health units.)

4.4 Training is an important consideration in this context and might well be provided in conjunction with a local mental health unit.

4.4.1 We also commend to managers and commissioners of services read the Academy of Royal College's guide "Managing Urgent Mental Health Needs in the Acute Trust"¹⁵. In particular, this describes models of psychiatric support to emergency departments and acute hospitals that should be considered to ensure staff and patients have access to appropriate medical and clerical expertise.

5 Responsibilities and powers under the act – Hospital Managers

5.1 Definition of Hospital Managers

5.1.1 MHA 1983 gives certain powers and responsibilities to "the managers". In the case of a patient detained in a NHS hospital, "the managers" is the board of the detaining Trust, rather than the officers who have operational responsibility for running the hospital. Some of the duties imposed upon a NHS Trust board may be delegated to an officer of the hospital staff (see paragraph 5.3 below). However, the power to discharge patients from detention under MHA 1983 (which is contained in section 23) is not one of these, and it may only be exercised by the Trust board, or, more usually, by a duly authorised committee or sub-committee of the board.

5.2 The NHS Trust responsible for a hospital in which patients are detained will normally be expected to appoint a number of additional (or 'associate') members to the committee or sub-committee that may use the section 23 discharge power. It may be preferred to contract the function from a local mental health trust. Advice on the setting up and running of such committees may be obtainable from local mental health trusts.

5.3 Key functions

5.3.1 Under MHA 1983, "the managers" of a hospital in which a patient is detained have the following functions:

- To ensure that the grounds for admitting the patient are valid and that all relevant documents are in order.

- To ensure that those formally delegated to receive documents, and those who are required to scrutinise them, have a thorough knowledge of the Act.
- To review each patient's detention.
- To give certain information to each patient and to his/her 'nearest relative' (see paragraph 5.4, below).
- To ensure that any patient who wishes to apply to a Mental Health Tribunal (Tribunal) is given the necessary assistance.
- To authorise the transfer of certain patients to the care of another hospital or set of "managers".
- To consent to the rectification of certain kinds of error in the statutory documents.

5.4 *Information about patients' rights*

5.4.1 Under MHA 1983, section 132, "the managers" must take all practicable steps to ensure that patients understand which provision(s) of the Act they are detained under and what rights they have to apply to the Tribunal. A record should be kept of how, when, where, and by whom this information was given (for details and guidance on these requirements see MHA 1983 *Code of Practice*, chapter 2). The Department of Health produces leaflets containing the minimum of information that must be given to a patient. In addition, "the managers" must notify the 'Nearest Relative' (who is to be ascertained according to MHA 1983, section 26) of a patient's admission under the Act and, unless the patient requests otherwise, of his/her impending discharge from detention.

5.5 *Record keeping*

5.5.1 General hospitals that admit a patient under MHA 1983 should retain the associated documentation. The statutory forms should be kept in a dedicated file in the medical records department, and copies should be kept in the patient's medical notes. It is also recommended that the hospital maintain a record of the use of the Act in a computerised format, so that an accurate annual return may be made to the Department of Health. The Commission may also scrutinise the documentation associated with a patient's detention under MHA 1983.

6 Responsibilities and powers under the act – Responsible Clinicians (RCs)

¹⁵ Available from www.aomrc.org.uk

6.1 *Definition Of Responsible Clinician*

6.1.1 According to MHA 1983, section 34(1) (a), the Responsible Clinician ('RC') is "the approved clinician with overall responsibility for the patient's case". Therefore, the identity of the RC is purely a matter of fact. In the case of a patient who is receiving treatment for a physical disorder in a general hospital, the doctor in charge of this (physical) treatment could only be the RC if he or she is an "approved clinician" (see footnote 3 above). As this is not likely to be common, the Commission considers it good practice for general hospitals to have formal arrangements in place that allow care and treatment for mental disorder to be given under the direction of a consultant psychiatrist (or other approved clinician) from a mental health unit. In such circumstances, it is the consultant psychiatrist with responsibility for the treatment of a patient's mental disorder that would be considered his/her RC.

6.2 *Consent to treatment*

6.2.1 If the function of RC is fulfilled by an approved clinician who is not a doctor, the responsibility for operating those parts of the Act concerned with medical treatment for mental disorder may fall upon another approved clinician who (most likely being a psychiatrist) is in fact "the approved clinician in charge of the treatment in question". It is quite possible under the Act for such a practitioner to have responsibility for medical treatment without taking overall responsibility for the patient (and therefore not becoming the RC). All relevant staff should be aware of the implications of Part 4 of MHA 1983, which deals with consent to treatment. Guidance on this subject may be found in MHA 1983 *Code of Practice*, chapters 23 and 24.

6.2.2 All staff should be aware that use of MHA 1983 enables patients to be both confined in hospital and treated against their will, but only for their *mental disorder*. The Act does not sanction treatment for physical disorders that are unconnected to the mental disorder, even where the patient is unable or unwilling to give consent. In such cases, practitioners who wished to treat a patient would have to seek an authority to do so possibly using the Mental Capacity Act, in the common law, or a declaration by the High Court, and the Trust would normally be expected to take legal advice.

6.2.3 The mere fact that a patient suffers from mental disorder does not necessarily make him/her incapable of giving or withholding consent to medical treatment.

6.3 *Leave of absence from hospital.*

6.3.1 A patient detained under MHA 1983, section 2 or section 3 may only leave the hospital in which s/he is detained if the RC (and only the RC) has given him/her formal leave of absence under section 17. Further guidance on formal leave of absence may be found in chapter 20 of MHA 1983 *Code of Practice*, and in the Commission's Guidance Note *Leave of absence and transfer under the Mental Health Act 1983*.

7 Miscellaneous issues

7.1 Use of section 5(2) – the doctor's holding power

7.1.1 The doctor responsible for an informal patient's treatment in a general hospital may authorise his/her detention for up to 72 hours so that an assessment can be performed of the patient's mental health needs. In order to initiate this 'holding power', the doctor should 'furnish' a report to "the managers" of the hospital. Any such report should be in Form H1.¹⁶

7.1.2 If it is likely that the doctor in charge of a patient's treatment will be unavailable, s/he may nominate one other doctor or approved clinician as his/her deputy for the purposes of the MHA 1983, section 5(2) 'holding power' (see MHA 1983, section 5(3)). It is important that staff know who, if anyone, has been nominated in this way, so that there is neither uncertainty nor error in the event of an emergency. It is permissible to nominate a deputy by title rather than name (i.e. by nominating 'the junior doctor on call' for a particular ward, etc), provided that there is only one nominated deputy at any one time (*Code of Practice*, 12.15).

7.1.3 If the doctor normally in charge of a patient's treatment, or that doctor's nominated deputy, has little experience of operating the Act (or indeed treating mental disorder), he or she should wherever possible seek advice from someone who is an approved clinician or 'section 12' approved doctor (*Code of Practice*, 12.13).

7.2 Discharge from hospital

7.2.1 A patient detained under MHA 1983, section 3 should not be discharged home or to another establishment, except in compliance with discharge arrangements required by section 117 of the Act.

7.3 Accident & Emergency departments

7.3.1 An accident and emergency department may be designated as a place of safety under MHA 1983, sections 135 and 136. Section 136 concerns

anyone in a public place who appears to be mentally disordered, and it empowers a police constable to remove him/her to a 'place of safety' for psychiatric assessment and the making of any necessary arrangements for his/her treatment or care. Section 135 provides similar powers of removal to a place of safety, having accessed private property upon the issue of a warrant by a magistrate. The MHA 1983 *Code of Practice* (chapter 10) gives advice on the facilities that are suitable for use as a place of safety. CQC recommends that services also familiarise themselves with the Royal College of Psychiatrists' Consensus Statement on *Standards of Places of Safety*¹⁷. It is helpful if there is an accessible policy and procedure that can be followed when a patient is brought to an Accident and Emergency department under MHA 1983, sections 135 or 136. Nursing and medical staff should be trained in and familiar with any such procedure.

7.3.2 There are no specific registration requirements relating to use of the MHA 1983 in relation to 'places of safety', where these will be used to hold patients detained under MHA 1983 sections 135 or 136 (see 3.1 above) .

Any questions or concerns about this guidance should be sent to:

**CQC Mental Health Act
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4PA
Tel: 03000 616161**

Email: MHAenquiries@cqc.org.uk

¹⁶ See *Mental Health (Hospital, Guardianship and Treatment) Regulations 2008*.

¹⁷ Royal College of Psychiatrists (2008): *Standards of Places of Safety under Section 136 of the Mental Health Act 1983. Report of a multi-agency group led by the Royal College of Psychiatrists*. Royal College of Psychiatrists: London.