

# Mental Health Act Commission

## Practice Note 3

### SECTION 5(2) OF THE 1983 MENTAL HEALTH ACT AND TRANSFERS

*Issued March 1994*

#### **Introduction**

The Commission has previously expressed its concern about the widespread misinterpretation of the Section 5(2) holding power and in particular the practice of transferring patients detained under the power. There are differing views on the place of the Common Law in this situation, which are unlikely to be easily resolved and which will be modified by further legal judgements. In the meantime nurses and doctors have to deal with acute psychiatric emergencies affecting informal patients in a wide variety of hospital settings. This practice note aims to give some practical guidance to Commissioners and those responsible for the development of comprehensive psychiatric services where the question of such transfers arises in relation to Section 5(2) of the Act. This practice note is not a substitute for more extensive debate within medico-legal circles concerning the principles involved nor for improvements in good professional practice and in the resources available for the management of emergencies in psychiatric units.

#### **1. The Mental Health Act and Transfers**

Section 19 (which applies to "a patient who is for the time being liable to be detained in a hospital by virtue of an *application* under this Part of the Act") allows patients to be formally transferred to another health authority and to be informally transferred to a hospital managed by the same managers.

**Patients detained under Section 5(2) are *not* detained by virtue of an *application* therefore the provisions of Section 19 do *not* apply to them.**

#### **2. When can patients detained under Section 5(2) be lawfully transferred?**

In the opinion of the Commission such patients could be transferred in the following circumstances:-

##### **a Patient's Consent**

Such transfers can be effected with the patient's valid consent.

##### **b For Urgent Treatment**

In the absence of "consent" there may be circumstances of "pressing need" when such a transfer would be lawful under the common law.

For example, a self-inflicted injury might necessitate the transfer of the patient to another hospital probably via the Accident and Emergency Department, in order to give the *necessary* physical treatment in order to save life or to prevent serious and possibly permanent suffering. Such a transfer would be regarded as part of the treatment to be given in an emergency. Any transfer would have to be limited to what was literally necessary to achieve the objectives set out above and it would not be permissible to transfer for administrative or clinical convenience.

**c Mentally Incapable Patients Detained under Section 5(2)**

It is at least arguable that a patient detained under Section 5(2), who was incapable of consenting to a transfer, could be transferred under common law powers analogous to the principle set out in the House of Lords in *Re F (1989)* that it would be wrong to deprive a person of treatment merely on the basis that they were incapable of consenting to it (see Code of Practice 15.8 onwards).

**3. What is a hospital?**

Section 145 of the Act defines a hospital as:-

- a Any health service hospital within the meaning of the National Health Service Act 1977; and
- b Any accommodation provided by a local authority and used as a hospital by or on behalf of the Secretary of State under that Act.

In addition, Section 34 provides for the purpose of admissions under Part II and Part III of the Act, that any reference to a hospital also includes a mental nursing home registered for the purposes of the Registered Homes Act 1984 to receive patients liable to be detained under the Mental Health Act.

Some hospitals comprise two or more sites some distance apart and therefore the movement of a patient detained under Section 5(2) from one site to another would be equivalent as far as the law is concerned to transferring a patient from one ward to another within a single hospital.

Notwithstanding this interpretation the Commission's advice on good practice contained in paragraphs 4 and 5 of this circular applies with equal force to any such contemplated transfers.

**4. Good Practice**

In considering the legal powers to transfer Section 5(2) patients set out above, it is the Commission's view, that the physical transfer of acutely ill patients during a disturbed period is undesirable for the following reasons:-

- a it is potentially dangerous and frightening
- b it introduces discontinuity in management
- c it raises the danger of transfer being used as a threat.

Great care should be taken by health care professionals, Health

Authorities, NHS Trusts and Mental Nursing Homes to avoid such transfers.

#### **5. Commission Advice**

- a Section 5(2) does not of itself provide the lawful authority to transfer to other hospitals patients detained under its provisions.
- b The emergency and compulsory transfer of patients detained under Section 5(2) previously being managed informally is disruptive and should be avoided wherever possible.
- c Where circumstances indicate that an immediate transfer to more appropriate facilities is necessary for the proper care and safety of a patient detained under Section 5(2), the patient should be fully assessed without delay to determine whether detention under Sections 2 or 3 is appropriate.
- d Any transfers of patients detained under Section 5(2) which purport to rely on common law powers must be fully documented and monitored by the hospital managers.

#### **6. Points for Health Authorities, NHS Trusts and Mental Nursing Homes to consider:**

*Monitoring the number of patients detained under Section 5(2) who have to be transferred in emergencies because they cannot be cared for adequately in the unit to which they were admitted.*

*Where such transfers take place, what steps should be taken to ensure that units managing acute psychiatric emergencies have the staff and facilities to enable transfers to be avoided.*

#### **Conclusions and Summary**

- 1 Patients detained under Section 5(2) of the Act are not detained by virtue of an application, and therefore the transfer provisions of Section 19 do not apply.
- 2 In the opinion of the Commission, transfers of patients on Section 5(2) can be effected in the following circumstances:
  - a When the patient is consenting,
  - b Where there is a pressing need and transfer would be lawful under Common Law. In such circumstances, the transfer would be considered as part of the emergency treatment. All such cases should be fully documented, and monitored by the hospital managers.
  - c Where the patient is mentally incapable and unable to consent to a transfer, he or she can arguably be transferred under Common Law powers.
- 3 Where hospitals are comprised of two or more sites, this is the equivalent in law to transferring a patient from one ward to another, within a single hospital.

- 4 **The Commission considers that it is undesirable to transfer acutely disturbed patients. This practice can be dangerous, disruptive and frightening for the patient.**
- 5 **When transfer to more appropriate facilities is indicated, the patient should be fully assessed to determine whether detention under Section 2 or 3 is required.**