Royal College of Psychiatrists |

Briefing on Report of Joint Committee on Draft Mental Health Bill 2023: England and Wales

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Background

The Mental Health Act (MHA) is the main piece of legislation that covers the assessment, treatment, and rights of people with a mental health disorder in England and Wales. It provides a legal framework to authorise the detention and compulsory treatment of people who have a mental health disorder and are considered at risk of harm to themselves or others.

In 2017, the Government announced an Independent Review of the MHA, chaired by Professor Sir Simon Wessely. The Review published its final report, Modernising the Mental Health Act: Increasing Choice, Reducing Compulsion in December 2018. The Review contained 154 recommendations, covering both legislative reforms and reforms to policy and practice.

Following this, the Government published a White Paper, Reforming the Mental Health Act, on 13 January 2021 in which the Government accepted the majority of the Review's recommendations. The subsequent consultation on the White Paper reported in July 2021.

The Draft Mental Health Bill was published in 2022, taking forward the vast majority of the Independent Review's recommendations, though with some key changes.

The report of the Joint Committee provides scrutiny on this Draft Bill and is the latest of reports making recommendations on MHA reform This briefing focuses on these recommendations.

More information on past reports on MHA reform and RCPsych involvement can be found here.

Joint Committee Process

The Joint Committee on the Draft Mental Health Bill was established to provide pre-legislative scrutiny on the Draft Mental Health Bill. The committee was made up of a group of cross-party parliamentarians, many with a background in mental health. The process involved a call-for-evidence and a large series of evidence sessions, which the College contributed to.

The process was wide-reaching in which we saw first-hand the forensic scrutiny that the Bill has been placed under.

RCPsych submitted a response to the committee's call for evidence which can be found here.

RCPsych's response to the final committee report can be found here.

Key themes emerging from Joint Committee evidence sessions

During the oral evidence sessions, some key themes emerged from the participants:

- Overwhelming support for advance choice documents and strong calls for them to be strengthened
- Concerns about the potential negative impacts of the reforms on learning disability and autism
- Concerns that the bill, though positive in general, will have limited effect on many of its main aims, i.e. reducing racial disparities and detentions
- Concerns from the committee that the resource implications of the Bill are likely to be substantial and that adequate money may not be forthcoming from Government
- Substantial workforce implications and a lack of clarity on how this will be solved.

- Suggestions from the committee and many panelists that the Bill was a missed opportunity to make more radical changes
- Concerns that the bill may be unnecessarily complicated
- Specific concerns regarding a number of detailed policies such as nominated persons and under-16s.

MHA in Wales

It is important to note that the MHA applies to both England and Wales and that health is devolved in Wales. Changes by the UK Government to non-devolved elements of the Mental Health Act detention regime such as giving patients additional rights to challenge decisions and for a 28 day limit on prison transfers will have an impact on devolved functions such as the Mental Health review tribunals and the NHS in Wales.

Choosing to accept equivalent changes to devolved mental health services in Wales to those proposed in England would come at a financial cost but would maintain a more consistent system that would facilitate cross-border working. This needs to be factored into the financial modelling and distribution to make the reform effective.

The changes are being led by England, and will need to take account the ways in which the system in Wales has already diverged, such as through the Mental Health Measure (Wales) and the absence of Clinical Commissioning Groups in Wales.

Joint Committee recommendations

Overall Approach

Recommendations

- The Committee welcome the Bill and would like to see it introduced in this Session of Parliament
- Reform should continue – in the direction of fusion legislation
- A Mental Health Commissioner should be appointed to be the voice of those who are detained and track the implementation of the reforms
- The Government should place the following principles on the face of the bill with the code of practice to reflect the principles:
    - Choice and autonomy–ensuring service users' views and choices are respected;
    - Least restriction–ensuring the Act's powers are used in the least restrictive way;
    - Therapeutic Benefit–ensuring patients are supported to get better, so they can be discharged from the Act;
    - The Person as an Individual–ensuring patients are viewed and treated as rounded individuals.

Racial Inequalities

Recommendations

- Racial inequalities in MHA have not improved since the Independent Review and, in some key metrics, are getting worse.
- The Secretary of State should be required to monitor racial inequality
- There should be a responsible person appointed in each health organisation for monitoring MHA statistics, particularly relating to inequalities and this same person should oversee workforce training to reduce biases
- The Mental Health Commissioner should have oversight of these responsible people.
- CTOs should be abolished in Part II of the MHA

- CTOs should remain in some Part III cases, though there should be a statutory review of their use
- Further legislation would be required to maintain CTOs if this statutory review found they were useful.

Resourcing and Implementation

Recommendations

- There are major concerns about whether existing implementation plans reflect reality relating to resourcing
- There should be a revised impact assessment that takes changes to workforce and the economy into account
- There should be a comprehensive implementation and workforce plan alongside the Bill

Detention Criteria

Recommendations

- There needs to be adequate community-based alternatives to detention for the changes to the detention criteria to be successful.
- The committee is concerned by evidence that the concept of "capacity" has been misused to deny treatment to very ill patients. Government to set out how they will prevent this.
- Clarity is needed on the definition of "serious" harm and give guidance on how the "likelihood" of harm should be assessed.
- The consideration of "how soon" harm might occur should not be included in the draft Bill itself.
- Clarity is needed on how "appropriate treatment" should be interpreted in cases with a relatively low chance of improvement
- The changes in detention criteria should be consistent for individuals under either Part II or Part III of the MHA.

Learning disabilities and Autism

Recommendations

- The committee Welcomes the direction in travel on learning disability and autism, though it will require a staged approach
- The committee notes that the proposed changes could lead to more LD&A patients detained under MCA, steps must be taken to mitigate this risk
- The Government should review the Building the Right Support Action plan, showing how people currently under section 3 will be able to be cared for in the community
- The Government must monitor outcomes of LD&A patients no longer detainable under section 3, focusing on criminal justice system use and MCA. Government should act if use increases
- Provision should be able to continue after 28 days in tightly defined exceptional circumstances. These circumstances will be defined in the code of practice and only available if pre-authorised by a tribunal
- Review of DoLs/LPS so they cannot be used as an alternative route to MHA to deprive people with LD&A of their liberty
- Depending on whether government agrees with recommendation to make changes to detention criteria in part II and III the same, it will be essential to either provide enhanced diagnosis, care and treatment in prisons or develop safeguards to prevent further inappropriate use of Part III for this group.

- Duty on responsible commissioner and ICB to have regard for CETR recommendations should be strengthened, either by requiring the recommendations are followed, or that they have good reason for not following.
- The maximum time period between CETRs should be shortened from twelve to six months.
- There needs to be a strong enough requirement on the relevant bodies to collaborate in the provision of community care.
- As this group will lose s117 care, there must be equivalent duties on commissioning services to provide care for this group were introduced in its place.
- Risk register' to be renamed 'Dynamic Support Register'
- The Government should strengthen the duties on ICBs and LAs to ensure the adequate supply of community services for people with LD&A, using information gathered from the Dynamic Support Register
- The duty on ICBs to establish and maintain a register should be strengthened.
- Government to commission research on cost of aftercare and should extend where appropriate

Children and Young People

Recommendations

- A statutory test to assess child capacity is necessary to clarify this process for children, families, and clinicians.
- The Government should consult on the introduction of a statutory test for competency, or "child capacity", for children under 16.
- It is imperative that there are enough specialist services to ensure that children are given the care that they need.
- Government must strengthen the protections in the Mental Health Act against children and young people being placed in inappropriate settings, such as adult wards or placements out of area.

Patient Choice

Recommendations

- Statutory Care and Treatment Plans can be strengthened by also including statutory advance choice documents.
- There should be a statutory right for patients who have been detained under the Mental Health Act to request an advance choice document be drawn up.
- To facilitate patient involvement in drawing up ACDs, this should be done with the support of a trained person who is independent of the service users' treatment team
- In recommending the inclusion of this measure, this must be done in a manner that allows for mitigation against any further increase in workload in as far as this is possible.
- Agree with the decision to remove the Review's recommendation that treatment decisions may be referred to a tribunal .
- Agree with the Independent Review that a slimmed down Mental Health Tribunal should be able to consider whether a patient is entitled to challenge their treatment plans, if requested, following a Second Opinion Authorised Doctor review of their care and treatment plan or a major change in treatment. This should be done through pilots in the first instance.

Nominated Persons

Recommendations

- Choice of nominated person to be included in Advance Choice Document.

- Government should consult on how Nominated Person provisions will apply to under 18s in regard to potential conflicts with other legislation affecting children, such as the Children Act 1989

Advocacy

Recommendations

- The Committee welcomes the "opt-out" advocacy scheme for detained patients, this should be extended to voluntary/informal patients.
- For advocacy to be effective, people with LD&A and children require specialist services
- The Government should examine the case for a Central Advocacy Service, to meet the needs of specific groups who may otherwise go unsupported in some areas
- Culturally appropriate advocacy is important to ensure that black and ethnic minority patients can have a greater say in their care
- The Bill should include a statutory right to request Culturally Appropriate Advocacy, as defined in the existing pilots

Patients concerned in criminal proceedings or under sentence

Recommendations

- Concerned about disproportionate use of supervised discharge
- There should be a statutory duty to collect and publish data on the use of supervised discharges, including duration, cause and demographic profile.
- The Tribunal must be involved in the decision to place someone on a supervised discharge
- Government to consult with CQC on how those under supervised discharge can be safeguarded
- Unclear how the government will support services to achieve the statutory 28-day deadline for transfer from prison. Independent oversight is needed.
- For the 28-day transfer deadline to be meaningful the committee recommend that "seek to" be removed, so that the duty is to ensure that the deadline is met.
- The Government should set out an action plan alongside the Bill that has a clear timeline and process for how all services will achieve this deadline.
- The Government should include the newly developed statutory independent role to monitor and manage prison transfers in the Bill when it is presented to Parliament, as stated by the Minister.
- Support both the changes to the Bail Act set out in the draft Bill and the removal of prisons and police cells as a place of safety. This will require the provision of high-quality community care and underline the need for the implementation plan.

Crisis Management

Recommendations

- There is a gap in the current law which may result in patients being detained unlawfully or not being treated in crisis situations. The committee sees no clear reason why that gap should not be closed, although it will need to be done carefully to avoid unintended consequences.
- The Government should consult further on a short-term emergency detention power, and whether this would provide greater legal clarity to clinicians and accountability for what is happening in A&E services.
- The Government should look to resolve the three gaps or ambiguities in the law regarding the interface of the Mental Health Act and the Mental Capacity Act identified in this subsection, through amendment of the Mental Capacity Act if necessary.

- The complexity and unintended consequences of the interface between the Mental Health Act and Mental Capacity Act needs to be addressed. The committee recommends that the Government review the interaction between the two pieces of legislation as part of the process of ongoing reform recommended earlier in this report.
- The government should increase the provision of appropriate health-based places of safety, and include plans for this within the implementation plan.
- All people known to a mental health service with a known learning disability and/or autism should have the reasonable adjustment flag attached to their record, with an option for individualised adjustments of preferred communication and the name of their advocate.

Analysis of Joint Committee Report

Here we look at some of the key themes and policy changes recommended in the report and how they relate to the College's perspective on MHA reform.

Resourcing and implementation

RCPsych has been closely involved in the process of MHA reform since the announcement of the Independent Review, Chaired by Professor Sir Simon Wessely. We have welcomed the emphasis on reducing racial disparities in the Act as well as focus on increasing patient choice and autonomy. However, throughout the process, the College has stressed the need for a proper understanding of the workforce and resource implications of reform and for the need for this to be properly addressed. Therefore, we are very glad to see the committee's acceptance that a more realistic appraisal of the workforce and resource implications of this Bill are made before implemented.

Advance Choice Documents

Also welcome is the committee's recommendation of the inclusion in the Bill of statutory advance choice documents as well as the recommendation that there should be a statutory right for patients who have been detained under the Mental Health Act to request an advance choice document be drawn up. Advance Choice Documents can be highly effective in improving outcomes such as reducing detention and increasing the efficacy of treatment by involving the patient more fully in their overall treatment, care and life decisions prior to them becoming unwell. Patients must be meaningfully involved in the creation of the advanced choice document.

Learning Disability and Autism

The committee's recommendations are aimed to limit any negative unforeseen consequences of the UK Government's proposed changes to the detention criteria of patients with learning disability/autism are welcome. These concerns were a key theme of the oral evidence sessions and included:

- That there is a danger that people with LD presenting with such high-risk behaviours will be dealt with by the police and in the Criminal Justice System;
- the potentially discriminatory effect of differentiating the definitions of mental disorder in Part II and Part III;
- and that excluding people with Autism/Learning Disability from admission for treatment (section 3) would result in use of the Liberty Protection Safeguards (MCA) for the same detention but with fewer safeguards

The committee appear to have taken into account the College's and others' concerns about the potential impacts on patients with learning disabilities and autism and have recommended a variety of safeguards to limit these risks. However, the fundamental principle of reforms remain unchanged and without adequate services and workforce, there remain substantial risks.

Community Treatment Orders

A major change that the committee recommend (from the Draft Bill and Independent Review) is to abolish Community Treatment Orders from part II of the Act, though they remain in Part III. In 2017, the College surveyed members in England and Wales to whether they thought CTOs should be abolished. The results were relatively mixed, with 41.4% in favour of abolition, 30.3% opposed and 28.3% not sure.

This is an intriguing recommendation from the committee as, in all other areas the committee have suggested aligning the detention criteria in part II and III, but suggest it is separated in this aspect. This is a policy area the College will continue to research and to consult College members on.

Tribunals as a means to appeal a treatment decision

Another area where the committee have recommended a change to the Bill is on whether a slimmed down Mental Health Tribunal should be able to consider whether a patient is entitled to challenge their treatment plans, if requested, following a Second Opinion Authorised Doctor review of their care and treatment plan or a major change in treatment. It is recommended that this is piloted first.

RCPsych has previously said that a tribunal judge is unlikely to have the clinical expertise to be able to weigh up the merits of one form of treatment over another, or to decide that no treatment at all should be given. Given this, and the increased stress likely to be placed on the tribunal system, we would welcome this being piloted and its success monitored closely.

Crisis management and Emergency Departments

The committee has recommended that the Government should consult further on a short-term emergency detention power, and whether this would provide greater legal clarity to clinicians and accountability for what is happening in A&E services. This is a policy that there has been substantial back and forth on from the Government as, though there is a clear legal gap, there are strong arguments on both sides of if and how to best fill it. We will continue to work with the Government, NHSE and other medical College's to ensure that any changes made work for patients.

Children and Young People

The committee recommend that Government should consult on the introduction of a statutory test for competency, or "child capacity", for children under 16. This has the potential to have some positive effects, but must be considered closely and we will work with the government on any potential consultation.

Next Steps

This report is only advisory and it is not binding on the Government to implement. An informal limit of two months for a response is in place, though not enforced, so the Government response could be forthcoming at any time. When the Bill is later introduced into one or other House, generally in a subsequent session, its passage through Parliament is not formally affected by its having undergone pre-legislative scrutiny, at which point the Mental Health Bill will be required to pass through the same stages as any other Bill. At this stage there is no indication as to when the Bill's First Reading will take place, though we will likely know more following the Government's response.

We particularly welcome the recommendations that there should be a revised impact assessment that takes changes to workforce and the economy into account and that the Bill should be accompanied by a comprehensive implementation and workforce plan alongside the Bill. We hope that the Government makes use of the Independent

Research Commissioned by the College on the Workforce implications of the MHA White Paper published in 2021.