



Horizon scanning

The legislative landscape in mental health

Key points

- The number of people detained under the Mental Health Act has increased 9 per cent since 2010.¹
- Black and minority ethnic people continue to be over represented in the detained population.²
- Law reform proposals seek to ban use of police cells for children and young people, and ensure that adults can only be held under Section 136 for a maximum 24 hours rather than 72.³
- New deprivation of liberty safeguards proposals will increase Mental Health Act detentions.⁴
- Provisional proposals include extending the scope of deprivation of liberty safeguards beyond hospitals and care homes, into supported living, shared lives accommodation and domestic settings.
- Services need to be designed, developed and resourced to ensure people receive care in the least restrictive setting.
- Changes in law can only be translated into practice with resource.
- The increased use of Mental Health Act legislation needs to be researched to be fully understood.

Introduction

Mental health care and services are delivered within a complex legislative framework. There have been changes to this framework in the last 12 months with more revisions proposed.

This briefing aims to provide members with an overview of the current legislative landscape, highlight how the current legislation is working in practice and explore the potential impact of proposed changes.

Background

Mental health organisations are required to deliver care in the context of human rights law and the legal framework balancing personal and public protection. Providers must also deliver care in the least restrictive setting and play their part in empowering people to exercise more choice, more control and have more information about their care and the services available.

The two specific pieces of legislation that impact on mental health care are the Mental Health Act 1983 (updated by the 2007 Act) and the Mental Capacity Act 2005 including the Deprivation of Liberty Safeguards (DoLS).

The Mental Health Act 1983 is the main Act of Parliament covering the care and treatment of people with mental health problems. It sets out how and when a person can be admitted, detained and treated in hospital without consent. In order to apply it, certain professionals must agree that this must be done because the health or safety of the individual, or that of other people, is at risk.⁵

While the application of the Mental Health Act means that an individual loses certain rights (such as freedom and refusal of treatment), it also sets out patient rights, such as that an individual has a right of appeal and help from an advocate, and free aftercare in certain circumstances.

The Mental Capacity Act allows the restriction of freedom of individuals who do not have capacity to agree to decisions such as regarding their freedom, finances, and choices about health assessments, treatment and visitors. The 2007 Mental Health Act made changes to The Mental Capacity Act 2005 including the introduction of DoLS from 2009. DoLS are used to restrict liberty of individuals who are not detained in hospital under the Mental Health Act but who may need to be deprived of their liberty in a hospital or care home.⁶

Also of relevance is the Care Act 2014, which reforms the way in which adult social care and support is provided and financed. The Care Act is designed to bring the current laws related to adult social care together in one act.

Mental Health Act 1983 (amended 2007)

The Mental Health Act was amended by the Mental Health Act 2007 and was slightly amended again by the Health and Social Care Act 2012.

Between 1 April 2013 and 31 March 2014, the Act was used 53,176 times in England to detain patients in NHS or independent hospitals for longer than 72 hours.^{7,8} This figure is 5 per cent higher than the previous year (2012/13). There was a 6 per cent increase in the number of people subject to the Act from 2012/13 and a 32 per cent increase since 2008/09, the year community treatment orders (CTOs) were introduced.⁹

Between 1 April 2013 and 31 March 2014, there were 4,434 new CTOs made in England under the Act, 5 per cent fewer than in the previous year (2012/13). At 31 March 2014, there were 5,365 people being treated in the community on CTOs. (This is because CTOs made in earlier years are still in place.)¹⁰

Mental Health Act Code of Practice

The Mental Health Act Code of Practice was revised and updated and came into force on 1 April 2015. The new iteration reflects changes in the law and developments in professional practice that have happened since the last update in 2008.

The revised Code aims to provide stronger protection for patients and clarify roles, rights and responsibilities. This includes:

- involving the patient and, where appropriate, their families and carers in discussions about the patient's care at every stage
- providing personalised care
- minimising the use of inappropriate blanket restrictions, restrictive interventions and the use of police cells as places of safety.

Key changes

The main changes to the code include:

- **Five new guiding principles** should be considered when making all decisions in relation to care, support or treatment provided under the Act:
 1. Least restrictive option and maximising independence
 2. Empowerment and involvement
 3. Respect and dignity
 4. Purpose and effectiveness
 5. Efficiency and equity
- **New chapters** on care planning, human rights, equality and health inequalities, consideration of when to use the Mental Health Act and when to use the Mental Capacity Act 2005 and DoLS and information to be provided to victims of part 3 patients.
- **New sections** on physical healthcare, blanket restrictions, duties under section 140, to support patients with dementia or who are immigration detainees, and what to do if the care or the protections of the Act are not being appropriately applied.
- **Significantly updated chapters** on the appropriate use of restrictive interventions, including particularly seclusion and long-term segregation, police powers and places of safety and in relation to decisions about whether to discharge or not.
- **Further guidance** on how to support children and young people, those with a learning disability or autism, and in relation to part 3 patients.

Police powers – places of safety

Section 135 and Section 136 of the Mental Health Act give the police powers to temporarily remove people who appear to be suffering from a mental illness and who need urgent care to a “place of safety”, so that a mental health assessment can be carried out and appropriate arrangements made for their care. A place of safety in the majority of cases is a hospital, but sometimes police stations are used.

In 2014/15, as many as 21,995 people in England and Wales were held on a Section 136 of the Mental Health Act, of which at least a fifth were detained in a police cell.

In December 2014, the government published the results of a review of the use of Sections 135 and 136 following concerns about the continued use of police cells as places of safety, particularly for young people and children.

The review recommends the government change the law so that police cells are no longer used for children and that adults can only be held under Section 136 for a maximum 24 hours rather than 72. Allowing other places, other than health settings or police cells, to be designated as places of safety to support vulnerable people is also recommended.

The review seeks to build on the progress being made as a result of the Crisis Care Concordat, and reflects the findings of the Care Quality Commission report, *A safer place to be* – a survey of health-based places of safety in England.¹¹

Theresa May, Home Secretary, announced £15 million new funding to deliver health-based places of safety at the Police Federation conference on 20 May this year.¹²

Laws to reform the use of Sections 135 and 136 of the Mental Health Act will be included in the Policing and Criminal Justice Bill, and were outlined in the Queen’s Speech on 27 May.

Details of when the Bill will be introduced into parliament are yet to be confirmed.

The Care Quality Commission

Compliance with all the requirements of the Act and relevant safeguards, including access to formal appeal processes, is carefully monitored by the Care Quality Commission (CQC).

The CQC report in February this year marked the 30th anniversary of the Mental Health Act and five years since the CQC started to keep the Mental Health Act under review.

During 2013/14, the CQC carried out 1,227 Mental Health Act monitoring visits – meeting more than 4,500 patients – and the Mental Health Act reviewers carried out 174 inspections with the mental health inspection teams. During this period, the CQC started to align the Mental Health Act monitoring responsibilities with their new approach to inspection.¹³

The inspections highlighted a variation of care provided to detained patients. The report states that, in too many cases, services are not routinely involving patients in their treatment. In addition, they raise concerns about the issue of bed availability and the increasing number of patients being detained far away from home.

Key findings

- There was a 6 per cent increase in the number of people subject to the Act from 2012/13.
- Black and minority ethnic people continue to be over represented in the detained population.
- The availability of NHS mental health inpatient beds had decreased by 8 per cent between the first quarter of 2010/11 and the last quarter of 2013/14.

Since 2010, the number of people in hospital subject to the Mental Health Act has increased by 9 per cent (1,544). In that time, the population in England has increased by 3 per cent (1.67 million), so the number of people being detained cannot be linked to an increase in the number of people in the general population.

The number of people detained in care from non-NHS providers is increasing. This year, independent hospital providers have reported an increase of 21 per cent in detained patients. This is 10 per cent of all longer-term detentions and more than double the proportion of ten years ago.

The Mental Health Alliance

The Mental Health Alliance¹⁴ is a coalition of 75 organisations who came together to secure effective mental health legislation. The Alliance campaigned heavily to influence the amendments to the legislation eight years ago, and believe the time is now right for a comprehensive review of the Act. They propose that the Act should be rights-based and reflect the developments raised through the Code of Practice revision and the UK's ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

The Mental Health Alliance will be widely consulting with members, professionals and service users alike as to what a rights-based Mental Health Act might look like. The findings and analysis of this work will be used to influence the Department of Health's thinking on changes to the Act.

Mental Capacity Act 2005 (including DoLS)

The Mental Capacity Act allows somebody to make a decision on behalf of a person aged 16 and over in their best interests, if the person lacks the capacity to make the decision for themselves. These decisions can relate to life-changing events, the restriction or deprivation of a person's liberty, or everyday matters. People may lack capacity for different reasons – because they have dementia, a brain injury or a learning disability, for example.

Deprivation of Liberty Safeguards (DoLS)

A House of Lords Select Committee was set up to investigate whether the Mental Capacity Act is working effectively.

The Committee's report was published in March 2014 and found that many health and social care professionals are not using the Act as they should in their everyday work – capacity assessments are often not carried out, for example – and recommended that an independent organisation be set up to promote and oversee the implementation of the Act.

The Committee was also critical of DoLS, saying they are complicated, poorly understood and not fit for purpose, and called for a better system to protect vulnerable people held in care homes or hospitals.

Health and Social Care Information Centre (HSCIC) statistics paint a clear picture of the very significant increase in DoLS applications since the 19 March 2014 Supreme Court judgment. Over 55,000 applications in the six months following the judgment points to a more than eight fold-plus increase on 2013/14 figures.¹⁵

In June 2014, the government published *Valuing every voice, respecting every right: making the case for the Mental Capacity Act 2005*¹⁶, and tasked the Law Commission to consider improvements that could be made to the DoLS system.

This review has been accelerated and the Law Commission opened a consultation¹⁷ on the Mental Capacity Act and DoLS on July 7 to run until 2 November.

The consultation paper concludes that the DoLS are “deeply flawed” and that the DoLS should be replaced by a new system called “protective care”. It also

proposes that there should be a new code of practice, and that the UK and Welsh governments should also review the existing Mental Capacity Act Code of Practice.

Extending the scope of DoLS beyond hospitals and care homes is central to the new proposals. The paper suggests applying different sets of safeguards for different settings, including supported living and shared lives accommodation, temporary settings such as hospitals and palliative care as well as family homes or other domestic environments.

Provisional proposals also include extending the Mental Health Act to enable all necessary deprivations of liberty for mental health patients who require mental health treatment. A new mechanism would enable the admission to hospital of compliant incapacitated patients in circumstances that amount to deprivation of liberty, while those who are objecting could be detained under the existing provisions of the Mental Health Act.

Other proposals include:

- simplifying the system and reducing bureaucracy
- introducing an independent professional to be known as an approved mental capacity professional
- suggest anyone subject to the Protective Care scheme should be provided with an advocate to represent their views and wishes
- challenge any restrictive treatment and care decisions in a specialist tribunal, rather than in a court.

A draft bill is anticipated by spring 2017. Legislative changes are anticipated by April 2018.

“This review has been accelerated and the Law Commission opened a consultation on the Mental Capacity Act and DoLS on July 7 to run until 2 November.”

The Care Act 2014

The Care Act is designed to bring the current laws related to adult social care together in one act. Two of the key aspects of the Act which affect mental health providers are:

- **Candour:** It was the Care Act which introduced the Statutory Duty of Candour. Readers will be aware that this came into force on 27 November 2014 for NHS bodies and on 1 April 2015 for other registered persons.
- **Safeguarding:** The safeguarding aspects of the Act replace “No secrets” guidance. Local authorities have a statutory duty to make safeguarding enquiries and there is a statutory duty in respect of cooperation and information sharing. Safeguarding adult reviews replace serious case reviews. There are also new criminal offences of ill treatment and wilful neglect.

“The Care Act is designed to bring the current laws related to adult social care together in one act.”

No voice unheard, no right ignored: A consultation for people with learning disabilities, autism and mental health conditions

This Department of Health consultation sought views on a set of measures with a clear emphasis on personal independence, choice and community provision. The consultation made a number of significant proposals to change the Mental Health Act to:

- require services and clinicians to consider and record whether assessment and treatment could be provided in the community
- require local authorities and commissioners to seek explicit documented approval or consent from an individual to have them admitted to inpatients
- introduce more opportunities for people to challenge decisions about them taken under the Mental Health Act
- reduce police cells as a place of safety for mental health crises
- enable people to choose their own “nearest relative”
- change the definition of mental disorder so that the Mental Health Act more appropriately covers people with a learning disability or autism
- introduce one set of criteria for detention for both assessment and treatment under the Mental Health Act (amending sections 2 and 3)
- clarify that the Mental Health Act Code of Practice also applies to CCGs and NHS England commissioning
- allow restricted (“Part 3”) patients to be discharged from hospital onto a new type of order which could contain conditions imposed by the Secretary of State for Justice (SSJ) or the Tribunal which would authorise deprivation of liberty in the community.

The Department of Health is expected to publish a response to the consultation in the autumn.

Context of delivery

Providers of NHS mental health services are facing considerable pressure. The demand for mental health services is growing, yet funding for mental health services has fallen by 8.25 per cent in real terms over the last five years.¹⁸

In line with therapeutic trends, bed availability has reduced to deliver more community-based care. However, there are concerns that the pressures on NHS and social care budgets are impacting on the community 'infrastructure' that keeps people well and out of hospital.¹⁹

Key challenges in the mental health and wider system

- Demand for mental health services is growing.²⁰
- Mental Health Act detentions are rising and hit a record high in 2013/14.²¹
- Bed availability has dropped, with 2,100 mental health beds closed since 2011.²²
- Mental health funding has fallen by 8.25 per cent in real terms in the last five years.²³
- Local authority spending on working-age adults with mental health needs fell by 13.2 per cent in real terms between 2010/11 and 2013/14.²⁴
- There is a lack of suitable housing options for people with mental health needs, including alternatives to hospital admission.²⁵

The interim report by the Independent Commission into acute adult psychiatric care²⁶ challenges media reports about a mental health "bed crisis"²⁷, and instead highlights the problem of delayed discharges or lack of alternatives to admission and calls for a change in services and management of the whole system. A lack of suitable housing (ranging from local authority to supported accommodation) was a factor in preventing discharge in 49 per cent of people who were clinically well enough to be discharged. The report suggests that "alternatives to hospital admission" need to be more available, including crisis houses, rehabilitation services and services for people with personality disorders.

“There are concerns that the pressures on NHS and social care budgets are impacting on the community ‘infrastructure’ that keeps people well and out of hospital.”

Mental Health Network viewpoint

Delivering care in the context of human rights law and a legal framework that provides personal and public protection is integral to mental health services. The legal architecture needs to be robust and offer professionals clear guidance for implementation and provide safeguards to patients, families and carers. There also needs to be appropriate provision.

The Mental Health Act Code of Practice has largely been welcomed. However, a 'one year on' review of how the Code is working in practice may be helpful to identify implementation issues. For example, meeting the four-hour A&E mental health assessment target with limited availability of approved mental health professionals has been a challenge for some providers. Similarly a shortage of doctors in some localities means that the specific requirement for a 'doctor' to review seclusion patients at four hourly intervals is proving impractical across a 24-hour period.

MHN support the proposal to reduce the use of police cells in principle. However, our members have raised safety concerns about reducing length of detention without access to appropriate alternative facilities. There needs to be sufficient age-appropriate settings to care for teenagers in crisis and provision of adult health-based places of safety to meet local need. The additional £15 million to support implementation of these services is welcome, but it is not clear how the funding will be distributed and whether it is enough. These changes in law can only be translated into practice with sufficient resources, otherwise we are at risk of seeing more people travelling across the country to receive appropriate care.

There is a role for commissioners to do more to develop the mental health crisis care system and ensure people receive care in the least restrictive setting. This includes more early intervention and prevention services, crisis houses, rehabilitation services and jointly commissioned health and justice street triage services. There needs to be clarity about how system pressures are reported across health and justice, we need to be clear that reductions in S136 do not increase A&E attendance in the longer term.

The rise in Mental Health Act detentions is poorly understood. There is some speculation that the mental health system is increasingly coercive, while others suggest more appropriate use of mental health legislation. Research needs to be commissioned to inform this debate.

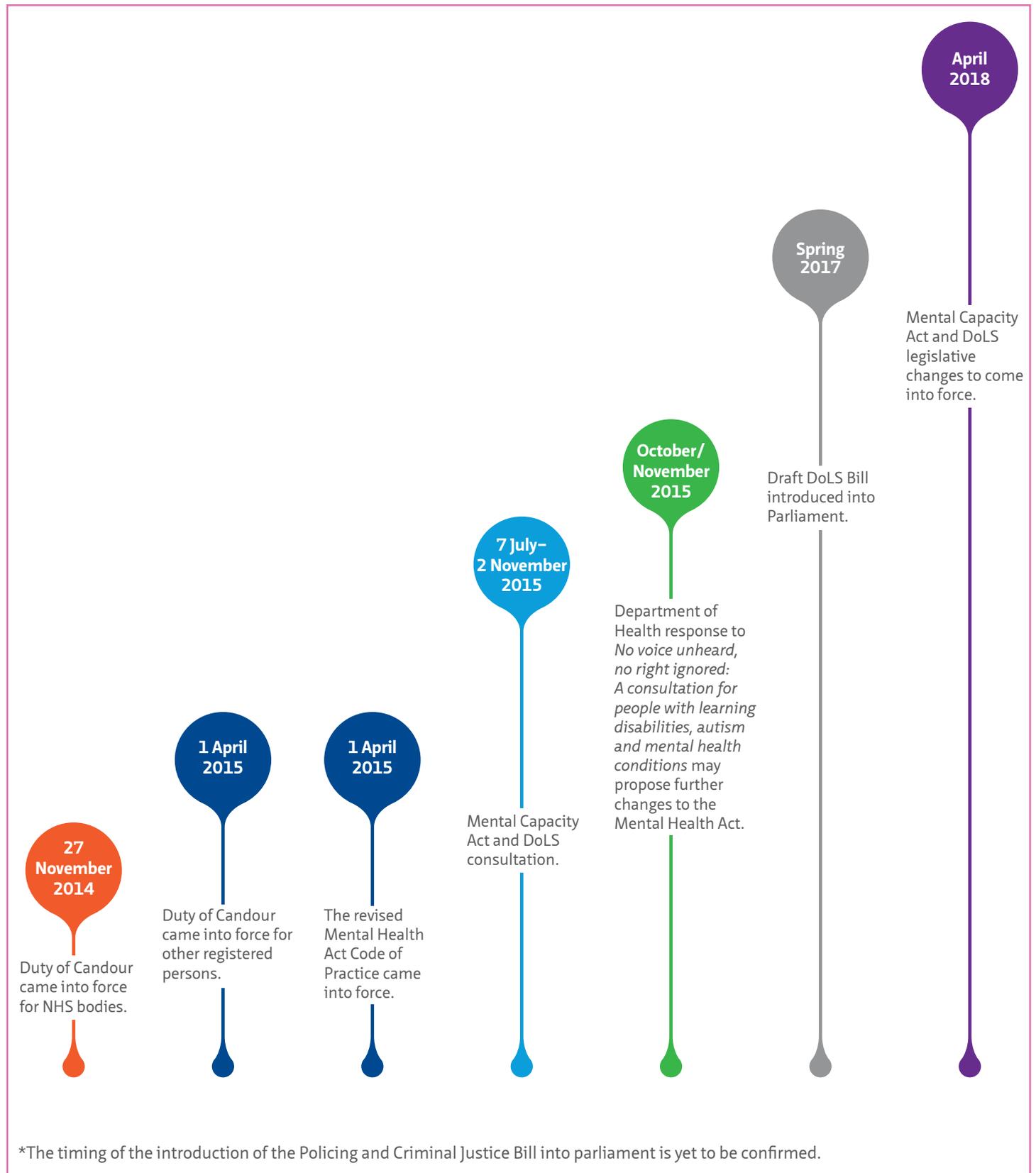
Many improvements to services could use and build upon existing frameworks, agreements, and legislation and partnership arrangements. Legislation alone is not the answer. We need to be clear how proposed changes in law will be implemented and that they will bring improved outcomes for people using and working in mental health services.

To share your views and concerns about mental health legislation and issues raised in this paper, please contact claire.mallett@nhsconfed.org

Recommendations and conclusions

- Department of Health to review the Mental Health Act Code of Practice to identify implementation issues.
- The impact of changing DoLS needs to be fully understood and resourced appropriately.
- Much greater consideration and consultation needs to be made of many of the new proposals put forward in the *No Voice Unheard, No Right Ignored* consultation.
- The increase in Mental Health Act detentions needs to be researched to be fully understood.
- There needs to be clarity about how Section 136 system pressures are reported.
- Legislation alone is not the answer – we need to be clear what outcomes will be achieved.
- Changes in law need must be resourced to be translated into practice.

Key changes to legislation – current and proposed



Resources

Mental Health Act Code of Practice
www.gov.uk/government/publications/code-of-practice-mental-health-act-1983

Reference guide Mental Health Act 1983
www.gov.uk/government/uploads/system/uploads/attachment_data/file/417412/Reference_Guide.pdf

Review of the operations of section 135 and section 136 of the Mental Health Act outcome
www.gov.uk/government/consultations/review-of-the-operation-of-sections-135-and-136-of-the-mental-health-act

No voice unheard, no right ignored: A consultation for people with learning disabilities, autism and mental health conditions
www.gov.uk/government/uploads/system/uploads/attachment_data/file/409816/Document.pdf

Mental capacity and deprivation of liberty: a consultation paper
www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty

Independent Commission on Acute Adult Psychiatric Care
www.caapc.info

Care Quality Commission
www.cqc.org.uk/content/mental-health-and-mental-capacity-act

Health & Social Care Information Centre: Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment: Annual report, England, 2013/14
www.hscic.gov.uk/catalogue/PUB15812/inp-det-m-h-a-1983-sup-com-eng-13-14-rep.pdf

Mental Health Network: Mental health and policing
www.nhsconfed.org/mentalhealthpolicing

Mental Health Network: Positive and proactive care: Reducing the need for restrictive intervention
www.nhsconfed.org/positivecare

NHS England Choice Guidance
www.england.nhs.uk/wp-content/uploads/2014/12/choice-mhc-14.pdf

References

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2. *ibid*
3. Home Office and Department of Health (2014) *Review of the operation of Sections 135 and 136 of the Mental Health Act*
4. Law Commission (2015) *Mental capacity and deprivation of liberty: a consultation paper*
5. Health & Social Care Information Centre (2014) *Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment: Annual report, England, 2013/14*
6. HSCIC report (2013/14)
7. *ibid*
8. This is not the number of people who were detained under the Act, as some people are detained more than once within a year.
9. HSCIC report, Op. cit
10. *ibid*
11. Care Quality Commission (2014) *A safer place to be*
12. Home Secretary's Police Federation 2015 speech
13. Care Quality Commission (2015) Op. cit
14. Mental Health Alliance
15. HSCIC (2015) *Deprivation of Liberty Safeguards (DoLS) – Monthly Summary Statistics Quarter 3 2014/15 (Oct–Dec)*
16. HM Government (2014) *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act – The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005*
17. Law Commission, Op. cit
18. McNicoll, A (2015) 'Mental health trust funding down 8 per cent from 2010 despite coalition's drive for parity of esteem', *Community care*
19. *ibid*
20. McNicoll, A (2015) Op. cit
21. HSCIC report, Op. cit
22. McNicoll, A (2014) 'Deaths linked to mental health beds crisis as cuts leave little slack in system', *Community care*
23. McNicoll, A (2015) Op. cit
24. McNicoll, A (2015) Op. cit
25. Royal College of Psychiatrists (2015) *Independent Commission on Acute Adult Psychiatric Care interim report*
26. *ibid*
27. McNicoll, A (2013) 'Patients at risk as 'unsafe' mental health services reach crisis point', *Community care*

Acknowledgement

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Mental Health Network

The Mental Health Network is the voice of mental health and learning disability service providers for the NHS in England. We represent providers from across the statutory, independent and voluntary sectors.

We work with government, NHS bodies, parliamentarians, opinion formers and the media to promote the views and interests of our members and to influence policy on their behalf.

The Network has 68 member organisations, which includes 93 per cent of statutory providers (NHS foundation trusts and trusts) and a number of independent, third sector and not-for-profit organisations. Our membership also includes housing associations to reflect the link between mental wellbeing and safe, affordable accommodation.

For more information about our work, visit www.nhsconfed.org/mhn or email mentalhealthnetwork@nhsconfed.org



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