

# Independent review of the Mental Health Act

## A summary of the interim report

### Key points

- In October 2017, the government announced an independent review of the Mental Health Act would take place.
- The interim report from the review team was published in May 2018.
- It highlighted a range of issues relating to before and during detention, as well as issues relating to specific groups of people including BAME communities.
- A final report is expected to be published in late 2018.
- This briefing summarises key points from the interim report for Mental Health Network members.

### Introduction

In October 2017, the Prime Minister, The Rt Hon Theresa May MP, announced an independent review of the 1983 Mental Health Act (MHA). Chaired by Professor Sir Simon Wessely, the review has been tasked with making recommendations for making improvements “in relation to rising detention rates, racial disparities in detention, and concerns that the act is out of step with a modern mental health system”.<sup>1</sup> The review team have been asked to look at both legislation and practice.

On 1 May 2018 the review team published an interim report, which summarised their work to date and outlined emerging priority areas. These issues will be the subject of further focus over the next phase of the review, with a final report due to be published towards the end of 2018. This briefing sets out an overview of the interim report for Mental Health Network members.

## Background

In recent years, concerns relating to the MHA have risen up the agenda. As highlighted by a recent Care Quality Commission (CQC) report into the use of the MHA, the number of people detained in hospital has risen in recent years. In some parts of the country, mental health wards now admit few informal patients.<sup>2</sup> From 2005/06 to 2015/16, the reported number of uses of the MHA to detain people in hospital increased by 40 per cent. There was a 9 per cent increase from 2014/15 to 2015/16, when there were 63,622 reported uses of the MHA.<sup>3</sup>

The CQC has further highlighted concerns relating to over-representation of people from particular BAME communities and other issues, including service user involvement in the development of care plans and other aspects of care.<sup>4</sup>

The MHA has been amended since its creation in 1983, including in 2007 after a review led by Professor Geneva Richardson. Revisions in 2007 included widening access to independent mental health advocacy for people detained under the MHA, and the introduction of Community Treatment Orders.

## Review activity

As part of phase one, the review team received over 2,000 survey responses, held over 30 focus groups, attended over 70 meetings and events and received 150 submissions from organisations responding to their formal call for evidence. In February 2018, the review team hosted a roundtable at 10 Downing Street to discuss priorities for African and Caribbean communities. Topics of discussion included substance misuse, secure care, race equality and unconscious bias.

In February 2018, the Mental Health Network hosted a meeting for members with Professor Sir Simon Wessely and representatives of the review team. The Mental Health Network is also a member of the review's advisory panel.

The review team commissioned a number of literature reviews and one-off research projects. This has included engaging public bodies and two mental health trusts to conduct detailed data analysis to explore the issues of variation in detention rates,

re-detention, comparisons of informal and formal admission and success rate of tribunal appeals.

### The review's goals

- Service users and carers being treated with dignity and respect.
- Greater autonomy for people subject to mental health legislation.
- Greater access to services for those that need them.
- Making the least restrictive option appropriate to a person's circumstances the default option.
- Improved service user and carer wellbeing.
- Service users and carers supported to be fully involved in treatment as possible.
- Reduced disparities between groups with protected characteristics.
- Greater focus on rights-based approaches.
- Reduced harm and improved safety for all.
- Professionals better able to deliver their expertise.

## Key topics

The interim report highlighted a range of key topics which have emerged as part of the work of the review so far, which will be subject to further consideration. The below sets out a summary of those central themes.

### Before detention

#### Addressing rising numbers of detentions

The review found that while detention rates in England are about average for Europe, they note that they appear to be rising faster in England than elsewhere. Overall admission rates have not risen alongside compulsory admission rates, which has resulted in a growing proportion of people on inpatient wards who are under the provisions of the MHA. Analysis suggests that rising numbers of detentions reflect more individuals being detained

(rather than some people being detained more often). While the review team do not consider there to be a single cause for the rise in rates of detention, they refer to work carried out recently by the Care Quality Commission which concluded that legislative change alone may not have a major or immediate effect on this issue.<sup>5</sup>

The review team heard about people finding it difficult to access care in the community, which could prevent people reaching a crisis point. The review team also noted that some people have suggested that a reduction in the number of acute beds has made the use of the MHA “more important to get someone a bed when needed” although they conclude that “compelling evidence on this is unclear”. There was also concern about risk aversion amongst professionals working in services.

The team suggest that “joint crisis plans can reduce compulsory admissions and high fidelity home treatment and crisis resolution teams can reduce overall admissions”. They have also heard that street triage models may reduce use of section 136 of the MHA, and that “increased investment and resourcing of community mental health services and good inter-agency working” may also help reduce admissions under the MHA.

In the next phase of the review, the team will consider:

- What interventions could reduce use of the MHA and compulsory admissions.
- Opportunities to take a ‘whole system’ view of this issue. The review team will seek examples of where local areas have sought to reduce compulsory admissions in order to learn from what has worked and what has not.
- Both legislative and non-legislative ways of encouraging, or mandating, closer inter-agency working between services.
- Opportunities to improve risk and safety assessment.

### **Decisions to detain and renewals**

Relating to decisions to detain and renewals, the team will also consider the following:

- Whether current risk thresholds under the MHA are the right ones, and if not, what they should be.
- How the MHA can support positive risk taking and standardised/operationalised risk assessment when making decisions for detention and renewal.
- Whether the appropriate treatment requirement is adequate to ensure a person is receiving clinically effective help while being detained.
- Whether sections 2 and 3 of the MHA should be combined or reconfigured, with an initial shorter period for assessment and treatment.

### **Mental Capacity Act**

The interim report includes some discussion of the interface between the MHA and Mental Capacity Act (MCA) and some of the challenges therein. The interim report states that it is unlikely the review will recommend “fusion” between the MHA and MCA in the short term, but will be considering it as a longer-term option. It also sets out a series of related issues for further consideration.

### **Role of police**

The review considers the role of the police. The interim report clearly states that “the police recognise that helping people with mental health issues is a part of their core business” and the important role that they play, but also of the challenge for the NHS to “ensure that services are available and ready to take over responsibility at the most appropriate time”.

The next phase of the review will consider:

- How recent legislative changes to sections 135 and 136 are changing service approaches and whether it is right to bring an end to having a police cell designated as a place of safety. If so, what safeguards and resources are needed to do this safely?
- Why people who are arrested under the criminal law are staying in police cells for too long after an approved mental health professional has decided that the person needs to be admitted to hospital, and what can be done to address this.
- Why police vehicles rather than ambulances are still transporting the majority of people under these sections, and what can be done to address this.

- The practicalities and benefits of NHS England taking over the commissioning of health services in police custody, as has been recommended in both the Angiolini and Bradley reports.
- Equality issues, particularly police interactions with people from BAME communities under the MHA.

## During detention

### Dignity, respect, autonomy and advance planning

While the review has heard examples of excellent care, the team have also heard from service users who have not felt they have been treated with the dignity and respect we would all wish to be shown. From service user and carers the review heard examples of distressing experiences, including “physical violence, verbal abuse and threats, bullying and harassment, sexual predation, pain-based restraint, coercive reward and punishment systems for access to open air, leave or family contact”.

The review team will further consider:

- Learning from successful initiatives to improve care for service users.
- Opportunities to improve systems for identifying and addressing poor or abusive care as well as changing regulatory systems and safeguards.
- Opportunities to improve redress for service users and carers.
- The possibility and impact of introducing guiding principles onto the MHA itself, in particular considering the principles currently in the Code of Practice.

Relating to issues of autonomy and advance planning, the review team will consider further:

- Whether service users have enough say in MHA decisions, and if not, how this could be increased or other safeguards provided.
- Whether a person’s mental capacity and decision-making ability should play a role in detention and/or treatment under the MHA, and at what points.
- The potential for unintended consequences from different approaches to reform.

- How the existing legal framework under Part 4 of the MHA and MHA Code of Practice can be better implemented to strengthen advance planning.
- Whether additional legislative reforms are needed.

### Treatment safeguards

Several issues have been identified during the first phase of the review around safeguards relating to treatment. In the next phase of the review the team will consider:

- The appropriate route to securing safeguards for patients in the initial period of detention, whether that be under sections 2 and 3 of the MHA as they stand, or under a reconfigured version of these sections.
- The appropriate route to securing safeguards for patients thereafter and revising the current urgent or emergency treatment exemptions.
- Whether service users should be able to appeal to the tribunal against compulsory treatment decisions. If so, in what circumstances and with what conditions.

### Tribunals and hospital managers’ hearing, advocacy

Relating to these topic areas, in the next phase of the review the team will consider:

- How to ensure that the tribunal provides an effective and proportionate safeguard for patients subject to the MHA.
- The role that hospital manager hearings should play in the future.
- How tribunals sit amongst other safeguards inside and outside the MHA, including other parts of the judicial system.
- Whether the tribunal should provide the sole channel to challenge being subject to the provisions of the MHA and if so, whether a service user should be allowed to apply more than once in the statutory period if there is a change in circumstance.
- How services can ensure advocacy is available and suitable for all, especially in terms of being culturally appropriate.

- Whether the right to advocacy should be extended to more people.
- The legal basis for advocacy and whether the requirements need to be better set out in law or guidance (including how different advocacy services could be streamlined).
- The current state of Independent Mental Health Advocates training and how to increase its quality.
- How national standards, reporting requirements, monitoring and oversight, or other mechanisms might be used to facilitate better implementation and delivery of advocacy services.

### Family and carer involvement

The review heard from service users and carers of how important it is to be able to choose who is involved in discussions about their care. Provisions relating to 'nearest relative', most notably the statutory order of preference, were reported to be particularly problematic.

The review will further consider:

- Reforming the nearest relative provision to allow individuals to nominate a person of their choice to fulfil this role. They will also consider how this could apply for children and young people.
- Granting the nominated person a statutory role in treatment decisions and whether this could mirror the principles of the Power of Attorney and Deputyship provisions in the MCA.
- Appropriate safeguards in relation to the appointment and discharge of nominated persons, including where the relevant person lacks capacity.
- Other mechanisms through which the carers, families, and friends of people who are detained can be supported to be involved in care of the person they support.

The review will also further consider issues relating to confidentiality and the sharing of information with families and carers.

### Restraint and seclusion

The review will consider further options for how the principle of least restrictive practice can be strengthened in the delivery of services.

### Leaving hospital

#### Community treatment orders

Introduced in 2007, about 5,000 people are currently estimated to be the subject of a Community Treatment Order (CTO). The review notes that 'Black or Black British' people are nine times more likely to be given a CTO than white people. The interim report states that the review team are "not persuaded" that CTOs "should remain in their current form". The review will further consider:

- How CTOs are experienced by individuals and their families.
- Why people from BAME communities, in particular black African and Caribbean men, are much more likely to be given CTOs and with what outcomes.
- The disparity of views about the effectiveness of CTOs.
- Whether some groups of people do derive benefits from CTOs, and in what circumstances.
- The implications of either reforming or replacing CTO.

#### Discharge and aftercare

The review team received many submissions about aftercare support, and will consider further a number of issues related to this, including:

- The need to clarify what aftercare means within the modern health and social care system, so that it supports independence and recovery.
- The case for reforming eligibility for aftercare to improve equity of access.
- Resolving some of the complex arrangements across health and social care, especially regarding funding and ordinary residence.

- The need to modernise section 117 aftercare in relation to the provisions of the Care Act.

### Care planning

The interim report notes that while reform of the Care Programme Approach is being considered by other review processes, that it will be important for the review to consider whether or not legislation might support better care planning for people detained under the MHA. Along with issues relating to advance planning, they will consider further:

- The opportunity to bring the requirements of the CPA, the Care Act, the Children Act, NHS Continuing Health Care (as well as other legal provisions) and section 117 care planning together in a coordinated way.
- Opportunities to drive greater collaboration between bodies involved in preparing and delivering care plans, which may include new statutory duties.

### Issues for particular groups

#### Black, Asian and minority ethnicities

People from black Caribbean, black African and mixed black ethnicity have a higher risk of being detained under the MHA than people from other groups. The interim report also highlights that black Caribbean people are more likely to come into contact with mental health services through the police, and acknowledges important concerns about the typically poorer outcomes for people from some BAME communities.

The report states that focus groups held for the review, which included participants from BAME communities, highlighted concerns of “a lack of cultural awareness in staff and a need for culturally appropriate care”. The focus groups also heard about concerns relating to “racism, stigma, stereotyping and overmedication”.

The review has several groups examining issues relevant to BAME communities, including an African and Caribbean Group, which includes experts from academic, professional and lived experience backgrounds.

The review will consider further:

- The experiences of BAME people of being detained and treated under the MHA, with a particular focus on people of black African and Caribbean descent and including interactions with primary care, social care and criminal justice systems.
- Why some BAME groups have worse outcomes, including but not limited to being more likely to relapse when they left hospital.
- Whether specific changes to the MHA or the Code of Practice including the ways they are implemented could help to improve disparities in detention rates and experiences of compulsion.
- Possible extension of the approaches used by NHS Workforce Race Equality Standard to service users and carers not just staff.
- The impact of any other broader changes recommended by the review on BAME communities.

#### Children and young people

The review team hosted dedicated focus groups for children, young people and parents as part of the first phase of the review. Specific legal issues arise in relation to the assessment and treatment of children and young people for mental ill health, in particular because they may well be subject to different legal frameworks operating in parallel.

Issues highlighted included information sharing, decision making and the legal complexities and ambiguities surrounding admission and consent to treatment (including the role of parental responsibility). The review team have also noted issues relating to education and transition into adult services.

The review will further consider:

- Which barriers to the delivery of care and treatment stem from poor understanding and/or implementation of the existing legal frameworks and associated guidance.
- How to identify and secure the appropriate place for family members in decisions about admission and treatment.

- The impact of any other broader changes recommended by the review on children and young people.

### **Learning disabilities and autism**

One of the key issues raised in the review's engagement activity to date was whether learning disabilities and / or autism should be entirely removed from the scope of the MHA. The review has heard concern about the availability of appropriate community support. The team "have been struck by the significant level of disagreement about the inclusion of learning disability and autism in the MHA and the subsequent role of the interaction with the MHA to provide the most appropriate care for their needs".

The review will consider further:

- How services can support people with a learning disability or autism in ways that avoid the need for detention, including responses to challenging behaviour.
- The arguments for and against continued inclusion of learning disability and autism in the scope of the MHA.
- Opportunities to improve awareness among professionals of the needs of people with a learning disability or autism in the context of the MHA.
- The impact of broader changes recommended by the review on people with a learning disability or autism.

### **Criminal justice system and part 3**

Every year, around 1,000 prisoners and immigration detainees with a mental illness are transferred to hospital in England and Wales. Concerns have been raised relating to delays experienced by people requiring admission, and therefore spending too long in settings such as prisons before treatment can commence.

The review will further consider:

- How to streamline and speed up the process of transfer to and from hospital for prisoners and immigration detainees.
- How to streamline and speed up decisions on

release for transferred prisoners serving life or other indeterminate sentences.

The review will also further consider specific issues relating to restricted patients and where decision making powers relating to such patients should sit.

### **Court powers and processes**

The MHA gives courts sentencing options (for example, by allowing people to be sent to hospital for treatment rather than to prison). It also allows the court to detain an individual who is accused for assessment or interim mental health treatment during the court process.

Through the call for evidence, the review found concern relating to the inappropriate use of custody for people with an acute mental illness and the impact of wider legislation on this. Problems relating to the use of section 35 powers in terms of ensuring timely access to medical expertise and hospital beds were also highlighted.

The review team will further consider:

- The potential to reduce inappropriate use of custody for people with acute mental illness.
- How to make it easier for courts to use section 35 when appropriate.
- Sentencing options for courts and the circumstances in which they are used.

### **Compatibility with human rights obligation**

The MHA must be compliant with the European Convention on Human Rights (ECHR) and evolving case-law. The review team will look at whether the current system of procedural safeguards for detention and treatment in the first three months of any detention is compliant with the ECHR.

The team will also consider the implications of the UN Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the UK government in 2009, and the UN Convention on the Rights of the Child for those under 18.

The review team will further consider:

- Relevant international instruments and statements of international bodies.
- Relevant recent law reforms in other jurisdictions, including but not limited to Scotland, Northern Ireland and India.
- The legal, ethical and political issues arising out of the statements of the Committee on the Rights of Persons with Disabilities.

### The MHA in Wales

Finally, the interim report makes note of the scope of the review as it relates to Wales. The MHA applies to both England and Wales. The recommendations made by the review will be to the UK government, and as such will extend to England in relation to matters that are devolved in Wales (including health), and England and Wales in relation to non-devolved matters (including justice).

The Mental Health (Wales) Measure 2010 ensures that an assessment of mental health needs is available within primary care in the Welsh system, and increases the entitlement to an independent mental health advocate to informal inpatients. The review team will engage closely with stakeholders in England and Wales in the second phase of the review.

## Involvement in the review

The interim report states that over the coming months the review team will continue to engage with stakeholders. There will be “a rolling programme of engagement throughout the review” which will include targeted focus groups, and the testing of emerging thinking, especially with service-users and carers. If you would like to get involved directly, please email [MHActreview@dh.gsi.gov.uk](mailto:MHActreview@dh.gsi.gov.uk)

## Mental Health Network viewpoint

The MHA plays an important role in ensuring the necessary care for those who have reached the point of crisis can be provided. At the Mental Health Network, we have previously shared our concerns relating to rising numbers of people being detained and of the over-representation of people from particular BAME communities within those numbers. We therefore very much welcomed the announcement of this review into the MHA in October 2017.

During the first phase of the review, the Mental Health Network has had the opportunity to meet with Professor Sir Simon Wessely and members of the review team regularly. As we move into the second phase of the review, we will continue to engage with the review closely and seek opportunities for the voices of mental health providers to be heard as part of the process.

## References

1. HM Government (May 2018), *The independent review of the Mental Health Act: Interim report*, [online pdf].
2. Care Quality Commission (March 2018), *Monitoring the Mental Health Act in 2016/17*, [online pdf].
3. Care Quality Commission (Jan 2018), *Mental Health Act: The rise in the use of the MHA to detain people in England*, [online pdf].
4. Care Quality Commission (March 2018), Op. cit.
5. Care Quality Commission (Jan 2018), Op. cit.

The Mental Health Network is the voice of mental health and learning disability service providers for the NHS in England. We represent providers from the not-for-profit, commercial and statutory sectors – including more than 90 per cent of NHS trusts and foundation trusts providing secondary mental health services. 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.

For more about our work, visit [www.nhsconfed.org/mhn](http://www.nhsconfed.org/mhn) or email [mentalhealthnetwork@nhsconfed.org](mailto:mentalhealthnetwork@nhsconfed.org)

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