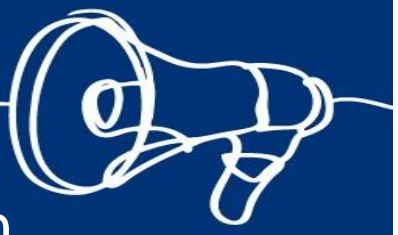
Briefing from Mind



White Paper on Mental Health Act Reform

About Mind

We're Mind, the mental health charity for England and Wales. We believe no one should have to face a mental health problem alone. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

1. Overview

We're pleased the Mental Health Act White Paper[1] is finally out and that the UK Government has accepted the majority of the independent Review's recommendations[2]. We've waited two years for the UK Government's response to the Review while thousands of people are still subjected to poor, sometimes appalling, treatment.

We are concerned that the UK Government hasn't fully accepted some of the Review's recommendations, and on some areas that do not require legislation to be taken forward we are disappointed by the lack of progress.

Over the consultation period we will be examining the content of the White Paper in more detail, as well as seeking the views of people with lived experience of mental health problems. We will provide a formal response to the White Paper and will be encouraging others to do the same.

In this short briefing, we set out some of the reasons why we think reform of the Act is so important, and our initial thoughts on some of our areas of concern with the White Paper.

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[1] Reforming the Mental Health Act - GOV.UK (www.gov.uk) The White Paper represents the position of the UK Government. Most of it concerns health policy, which is devolved to Wales, and the Welsh Government is considering its next steps. Some aspects, relating to criminal justice, are reserved to the UK Government and the two governments are working together on these.

[2] Modernising the Mental Health Act – final report from the independent review - GOV.UK (www.gov.uk)

2. Key content

The 1983 Act is outdated – it was based on earlier legislation and the grounds for detaining people have not changed for many years, even though health care and attitudes towards mental health have changed radically.

The White Paper is an important step forward and contains changes that should strengthen people's rights, including:

2.1 Greater say in treatment and care

Currently people have very little say at all in their care and treatment under the Act. The reforms give greater legal weight to people's wishes through:

- advance choice documents in which people can set out their wishes about future care and treatment
- a statutory care and treatment plan which is informed by the person's wishes
- scrutiny of the plan by the tribunal
- rules for treatment decision-making that make it harder to overrule the person's wishes
- a way to challenge treatment decisions.

2.2 Advocacy and support

Currently there is much more that independent mental health advocates (IMHA) could do to support people to understand and exercise their rights, both people who are detained under the Mental Health Act and informal patients who are not eligible for an IMHA. The 'nearest relative' role, that gives a family member particular rights to be involved in the person's detention is assigned according to a fixed hierarchy of relationships. The reforms:

- expand the role of advocates so they can offer a wider range of support to help people express their thoughts and wishes, and challenge treatment that may not be in the person's best interests
- provide for culturally appropriate advocacy, so that people from a range of different ethnic and cultural backgrounds are equally involved and protected
- replace the nearest relative with a nominated person – a family member or friend chosen by the person to carry out this role.

2.3 Stronger criteria, greater transparency and oversight

Currently the criteria for detention are too broad and there is little scrutiny of the purpose and content of people's care and treatment during detention.

The reforms:

- tighten the criteria for civil patients' detention by including an explicit reference to the therapeutic benefit of treatment and by raising the threshold of the risk of harm that justifies detention[3]

- include a statutory care and treatment plan with timescales for its completion and scrutiny by the tribunal when they consider discharge

- provide more opportunities for tribunals to discharge people, scrutinise and make certain changes to their care.

3. Concerns

3.1 Resourcing

A number of important reforms are referred to as being subject to future funding decisions including in the 2021 spending review. These include the expansion of advocacy, entitlement to culturally sensitive advocacy, increased access to tribunals, and review of the physical requirements for wards. It is unthinkable that resources not be made available; these reforms concern people's liberty and treatment under detention. The changes to advocacy and tribunals are key to making many of the other reforms, such as involvement in treatment decisions, real and effective. Therefore we need assurance that the planned reforms will be fully funded.

3.2 Race equality

The reforms address race equality, primarily through a Patient and Carer Race Equality Framework (PCREF)[4] and culturally sensitive advocacy. There is a hope and expectation in both the independent review and the white paper that many of the other reforms, that are intended to benefit everyone affected by the legislation, will improve the experience and outcomes of people from BAME backgrounds. We hope so too but we cannot assume that the legislation will operate as intended and that disparities will reduce. We shall review the reforms to see if there are more ways to embed antiracist practice in the Act and its use.

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[3] The criteria also add 'welfare' to the existing criteria of health and safety, which effectively broadens the criteria. This is something we will consider during the consultation period.

[4] This is a systematic approach to improving how mental health services respond to their local population's ethnic and cultural background, which forms part of NHS England's Advancing Equalities programme and is currently being developed.

3.3 Community treatment orders

Community treatment orders (CTOs) have not reduced hospital readmissions and are often experienced as intrusive and coercive. Their use shows the most staggering racial disparity, with black and black British people over ten times more likely than white people to be placed on a CTO.

We were disappointed when the Review did not recommend getting rid of CTOs, though their recommendations would be an improvement on the current position. But while the UK Government has accepted most of the Review's recommendations for CTOs, they are not proposing to legislate for a CTO to have a maximum duration of two years or to allow tribunals to change the conditions imposed on an individual by the order. We are concerned by this and would want to see the recommendations accepted in full, though we would prefer the Government to go further and repeal CTOs altogether. This issue is particularly important because CTOs are one of the areas which particularly affects Black people.

3.4 Reliance on existing law and the Code of Practice

In a number of cases the Government's response to the Review's recommendations is that rights and duties already exist, or that issues can be addressed in the Code of Practice, or by existing bodies. One area is their response to a recommendation for a joint working duty, to improve commissioning and provision of services, another the response to a proposed new hospital visitor role.

We are concerned that this misses the point. The Review identified problems where existing provisions have proved inadequate and where more effective mechanisms are needed to change practice.

3.5 Wider and non-legislative reform

Much of what the Review recommended, and that the White Paper agrees to, does not require legislative change; it is about expanding and improving services, developing the workforce, and better data collection across the organisations involved with the Act. There are also recommendations in the Review concerning other legislation.

We are concerned about delays and lack of ambition in some areas, especially as non-legislative reform could have progressed more in the past two years. For example, some capital funding for hospital building has been allocated, which is very welcome, but a review of guidelines for ward requirements – determining what wards should actually be like - is only being explored, subject to funding. The Government's response to the Review's recommendation for a statutory care plan for everyone using mental health services is at an exploratory stage. There needs to be urgency and ambition in how the whole package of reform is delivered.

3.6 Prior consent to admission

The Government is consulting on the use of advance consent to admission as an informal patient. This would mean that a person who lost capacity to agree to

admission to hospital could be admitted on the basis of their prior consent without being detained under the Mental Health Act or made subject to DoLS/LPS[5]. We are concerned about the implications of this for people's rights and will be looking at it in more depth during the consultation period.

3.7 Rights to services

One of the strongest messages to come out of our engagement work around the Review was people's inability to access timely support, making it more likely that their mental health would deteriorate and the Act would be used. We welcome the commitments to expand and transform mental health services through the NHS Long Term Plan, but believe that people should have individual rights to assessment and services, beginning with crisis care. This was not a Review recommendation or included in the White Paper, but we will continue to make this case.

3.8 Further fundamental reform

The reforms that are being planned and proposed involve amending the Mental Health Act, when there are strong arguments for more fundamental reform. One approach could be to have a capacity-based system whereby (always or in most circumstances) people with capacity to make their own decisions about mental health care and treatment could not be detained and/or treated against their will.

The Review considered fusion of mental health and mental capacity legislation but did not advocate it, or at least not at this stage. They said that there were five confidence tests that should be met before it was introduced, including having the support of service users. We agree that more work is needed to test out people's views on this and are disappointed that this is not addressed in the white paper as a step towards longer term reform.

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[5] Deprivation of Liberty Safeguards are a provision of the Mental Capacity Act and they are being replaced by Liberty Protection Safeguards through amendments that have been made to the MCA.

If you'd like to talk to us about this briefing, please contact:

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mind for better mental health