

Mind Cymru's response to the UK Government Mental Health Act White Paper

April 2021

Introduction

Being sectioned is one of the most serious things that can happen to somebody experiencing a mental health problem. Whatever the therapeutic intent or clinical need, it can be completely disempowering. To lose control over where you live, who you live with, what you do in your day, what medical treatment you take and other aspects of your life, inevitably has a profound impact on a person's sense of self and, unsurprisingly, can slow down a person's eventual recovery even while the treatment received may contribute to recovery in other ways. And this loss of liberty can be additionally traumatising, when, for example, the police are involved in the initial sectioning or people's wishes and legitimate preferences are unheard and overruled when detained. This should not have to be the way that people access mental health care.

Mind has submitted a response to the White Paper proposals via the UK Government consultation, which provides a detailed view on each of the proposals outlined alongside wider considerations and areas we think proposals could be stronger. This response sets out the areas we believe the Welsh Government should give particular consideration in responding to the White Paper.

1. A Welsh response to the White Paper

The independent Review of the Mental Health Act made recommendations to the UK Government on health policy and legislation in England. Whilst the UK Government's White Paper on reforming the Mental Health Act (the White Paper) sets out some legislative changes in reserved areas, it primarily focusses on health policy and legislation in England. However, many of the issues identified by the Independent Review of the Mental Health Act are relevant to Wales and improving people's rights and the quality of treatment they receive whilst detained under the Mental Health Act must be a priority for policy-makers in Wales. Similarly, it is widely recognised that there are significant benefits to ensuring alignment between the operation of the Mental Health Act both in England and Wales, not least given the number of Welsh patients who receive treatment in England and vice versa.

Some of the proposals set out in the White Paper are currently delivered in Wales via the Mental Health Measure (the Measure), for example, advocacy services for people receiving voluntary inpatient treatment. In responding to the White Paper, the Welsh Government must consider the unique legislative landscape in Wales and what is required to improve the rights and treatment of people subject to (or potentially subject to) detention under the Mental Health Act. Additionally, the Welsh Government must seek to avoid duplication or

further complicating the legislative, guidance and delivery framework for mental health services in Wales.

Our view is that, given our unique legislative framework and delivery landscape, and noting that the White Paper does not propose all of the recommendations put forward by the Independent Review of the Mental Health Act, the Welsh Government should consider its response to the White Paper as part of a wider consideration of existing mental health legislation and practice.

Together for Mental Health 2019-22¹ sets out the Welsh Government's commitment to reviewing the recommendations of the Duty to Review Final Report of the Measure, which recommended several regulatory amendments, in 2021. This work will need to be undertaken alongside responding to the White Paper and, together, provides a timely opportunity for a wider consideration of the framework and delivery of mental health support in Wales. Additionally, as we approach the ten-year anniversary of the introduction of the Measure it is timely to review its impact against the ambitious goals it aimed to achieve. A wider consideration of current legislation and potential reforms of the Mental Health Act provides an opportunity for the Welsh Government to demonstrate further leadership in enacting progressive mental health legislation, ensuring everyone experiencing a mental health problem gets the help and support they need.

Mental health act data

The disproportionate number of people from racialised communities detained under the Mental Health Act was one of the key areas for consideration of the Independent Review of the Mental Health Act. We know that in England, Black people are four times more likely to be detained under the Mental Health Act and are put on Community Treatment Orders eight times more frequently than white people. However, due to inadequate data collection, the exact figures for Wales are unknown. Several reports in recent years have highlighted the impact of and need for effective data collection and publication in this area:

“Inconsistent monitoring of protected characteristics and at risk groups makes it difficult to assess their access to mental health services and determine their health and well-being outcomes.”² - **Emmanuel Ogbonna, June 2020.**

“To put the spotlight on persistent race inequality in Wales, there must be improved data collection to enable a systematic and robust method for examining equality outcomes and the impact of actions taken to address

¹ https://gov.wales/sites/default/files/publications/2020-10/review-of-the-together-for-mental-health-delivery-plan-20192022-in-response-to-covid-19_0.pdf

² <https://gov.wales/sites/default/files/publications/2020-06/first-ministers-bame-covid-19-advisory-group-report-of-the-socioeconomic-subgroup.pdf>

inequalities in Wales, disaggregated for race except where there is a valid reason for not doing so.”³ – **Equality and Human Rights Commission, 2018.**

We believe it is vital that the Welsh Government collect and regularly publish equalities data information on use of the Mental Health Act at the earliest opportunity. The lack of this information to-date means it is not possible to understand disproportionate uses of the Mental Health Act between demographic groups, nor measure any action taken to address these disparities.

In addition to the above, the way in which data on the operation of the Mental Health Act is published requires improvement. With the exception of Section 135/6 data, which is published quarterly, the most recent figures on the use of the Mental Health Act in Wales published by the Welsh Government covers the year 2018/19.⁴⁵ These statistical releases are published annually and cover previous financial years, as such, it is difficult to draw insights from, or scrutinise, the use of the Mental Health Act in a timely way. Our view is that this data should be published quarterly.

2. Mind’s vision for reform of the Mental Health Act

Mind has long called for reform of the Mental Health Act. A lot has changed in the way we view mental health and we have a higher expectations of the treatment people should receive than when the Act was written. We want legislation and services which are fit for purpose, and which support people when they are in crisis.

We have welcomed both the Independent Review’s recommendations and the UK Government’s White Paper because we see both as important steps on the journey to achieving our vision for a legislative framework that supports people to get the help and support they need, when they need it. There are important areas where we disagree with both documents and while we want to see the White Paper progress to legislation, we will continue to fight for further improvements to the proposals so that both legislation and practice better reflects the needs of people with mental health problems.

Our vision for reform encompasses understanding and respect for a person’s will and preference. Our vision is for rights of access to care and treatment that meets people’s needs and that people are willing to engage with. Our vision is one in which people are treated with respect and dignity, and where treatment enhances not jeopardises people’s life chances and quality of life.

New Guiding Principles

³ <https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-is-wales-fairer.pdf>

⁴ <https://stats.wales.gov.wales/Catalogue/Health-and-Social-Care/Mental-Health/Admissions-to-Mental-Health-Facilities/admissionstomentalhealthfacilitiesbylhb>

⁵ <https://gov.wales/admission-patients-mental-health-facilities-april-2018-march-2019>

The UK Government proposes embedding the principles in the Mental Health Act (MHA) and the MHA Code of Practice. The new principles are:

- 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 as quickly as possible
- the person as an individual – ensuring patients are viewed and treated as individuals

We welcome the guiding principles and strongly support their inclusion in the Act as well as the Code. We agree with the focus of the principles: following them should enable people's human rights to be better supported, particularly rights to liberty, private and family life, and not to be discriminated against. They will provide a basis for challenging any decisions and practice that fall short of people's reasonable expectations and for raising expectations of what should be provided.

Clearer, stronger detention criteria

The UK Government proposes to change the detention criteria so that detention must meet two core principles:

- Therapeutic benefit - greater consideration must be given to whether, and if so how, detention and interventions provided under the Act are or would be beneficial to a person's health and recovery
- Least restriction - ensuring a person is only detained where it is absolutely necessary, where not detaining poses a substantial risk of significant harm being caused to themselves or others

Mind agrees with the need to require stronger justification for detention. This must mean substantive justification with a clear, evidenced rationale for what is therapeutic, what constitutes risk, and for the level of harm it is believed would ensue if the person were not detained.

Giving patients more rights to challenge detention

The White Paper sets out a number of proposals to give patients more rights to challenge detention as the UK Government recognises that too often patients are detained for longer than is needed, and beyond the point of therapeutic benefit to the individual. They propose more checks and more frequent reviews of detentions and increased access to Tribunal.

Therapeutic benefit should always be central to the purpose and the outcome of detention in hospital for a mental health problem. Given the seriousness of any decision to take away someone's liberty, the focus of services must be on restoring that liberty.

We strongly agree with the UK Government proposals to strengthen detention criteria so that an individual is only detained where there is a substantial likelihood of significant harm to the health, safety or welfare of the person. This would mean that stronger justification would be required in order to remove a person's liberty and to impose treatment.

Strengthening the patient's right to choose and refuse treatment

The right to choose and refuse treatment is central to the reforms. The reforms do not provide this right but they significantly increase the say that the patient has and should reduce the likelihood of forced treatment. We strongly support them. Clearly, for the right to choose or refuse treatment to be meaningful, people need to be given a real choice in their treatment options.

People should also expect that the full range of NICE-approved therapies will be available to them whether detained or not, as an inpatient or in the community, and culture change within services will also be a key part of this. Shared decision-making needs to become the norm across mental health services and approaches like Open Dialogue which fully involve patients in decision-making about their treatment need to be adopted everywhere. When people wish to try reducing medication, there should be support available for them to do so as safely as possible. Otherwise, people may be tied into a treatment that they disagree with, even after discharge from the MHA, because they don't want to adjust their treatment unsupported, without advice.

3. The Mental Health Measure and the White Paper

As noted above, some of the proposals within the White Paper overlap significantly with duties already adopted into Welsh legislation via the Measure. Careful consideration of these proposals is required to avoid duplication and further complicating requirements and duties in Wales under existing mental health legislation, whilst delivering much-needed reforms to the Mental Health Act.

Care and treatment planning

The White Paper proposes to introduce a requirement that anyone subject to detention must have a statutory care and treatment plan. Whilst there is significant overlap between this proposal and the requirements already in place in Wales via the Measure and its associated guidance, both the form and purpose are fundamentally different.

The White Paper proposes that detention should require a statutory care and treatment plan be in place within 7 days, which sets out:

- the full range of treatment and support available to the patient from health and care organisations
- any care which could be delivered without compulsory treatment
- why the compulsory elements are needed
- what is the least restrictive way in which the care could be delivered
- any areas of unmet need (medical and social)
- planning for discharge (including a link to the statutory care plan recommended in the Care Planning and Aftercare chapter)
- how specifically the current and past wishes of the patient (and family carers, where appropriate) have informed the plan
- any known cultural needs

Whilst some of the above requirements are covered within Care and Treatment Plans and associated guidance, there are fundamental differences in form and purpose under the Measure.

The White Paper proposes greater focus on patient choice. It sets out why compulsory treatments are needed and focuses on reducing restrictive practices – more so than is currently delivered via the Measure. We strongly support White Paper proposals to increase the say that detained patients have in the care and treatment they receive, which should reduce the likelihood of forced treatment and restriction.

Care and treatment planning under the Measure focuses on the holistic nature of mental health. It is recovery-focussed and looks to set and measure progress towards goals in eight areas of life, including accommodation, education & training, personal care and so forth. We also support this holistic approach, which better recognises the wider social determinants of mental health and provides opportunities for support beyond health-based services.

However, almost a decade on from the passage of the Measure, there is clear evidence that care and treatment planning is falling short of the standards expected. NHS Wales Delivery Unit National Assurance Review, the Quality of Care and Treatment Planning, published in July 2018, is the most comprehensive review of care and treatment planning conducted to date; having looked at more than 1400 CTPs across every Local Health Board in Wales. The Review expresses a range of concerns and found that the quality of CTPs is ‘generally poor’, ‘lacking detail’, were completed in order to meet statutory compliance and were not at the centre of the delivery or review of care and treatment.

The most recent Health Inspectorate Wales ‘Mental Health, Learning Disability Hospitals and Mental Health Act Monitoring Annual Report’, for 2018-19, highlighted multiple concerns with care and treatment planning stating:

“Our inspections continue to find numerous issues with individual patients’ care and treatment planning and many of these issues were prevalent in previous years. Care planning is an essential component in delivering an effective treatment programme for patients that they feel part of. The range of issues identified within our inspection regime included:

- lack of timely updating to reflect changes
- plans not developed in accordance with the Measure
- unmet needs not documented
- lack of detailed clinical entries
- a lack of individual restraint reduction plans
- information not fully completed
- lack of documented patient and family involvement
- a lack of documentation in relation to medication and other treatment.

“The issues above were equally prevalent across both the NHS and independent hospitals”.⁶

- **Health Inspectorate Wales**

We believe that greater accountability and enforcement is required to ensure that the Measure, as primary legislation, is being delivered in accordance with legislation and guidance.

In responding to the White Paper, the Welsh Government should consider how care and treatment planning as delivered by the Measure could be improved and what additional guidance or legislative amendments might be needed in response to the White Paper and Independent Review of the Mental Health Act to improve people’s rights, choice and outcomes. In doing so, the Welsh Government should also consider what action is needed to improve and ensure effective implementation and enforcement of Welsh mental health legislation.

Advocacy services

The White Paper proposes specific reforms to expand the role of advocacy services, including:

- supporting patients to take part in care planning
- supporting individuals in preparing advance choice documents
- power to challenge a particular treatment where they have reason to believe that it is not in the patient's best interests
- power to appeal to the tribunal on the patient's behalf

⁶ <https://hiw.org.uk/sites/default/files/2020-01/Mental%20Health%20Act%20Annual%20Report%2018-19%20English%20WEB%20FINAL.pdf>

These proposals are in addition to expanding advocacy services to people receiving voluntary inpatient treatment, as already delivered via Part 4 of the Measure. Whilst some of the above areas are currently delivered in Wales via the Measure, careful consideration is needed to ensure effective alignment across jurisdictions and to reflect any amendments made to Welsh legislation in response to the White Paper, for example, the introduction of advance choice documents. Additionally, the Welsh Government should assess the impact of Part 4 of the Measure and ensure equitability and quality of advocacy services across Wales.

4. The Mental Health Measure – Wider Considerations

Duty to Review Final Report

As noted above, in addition to considering the overlap between existing mental health legislation in Wales and the proposals of the White Paper, the Welsh Government is also due to consider its response to the Duty to Review Report recommendations on the Measure.⁷ The Welsh Government is committed to considering these recommendations in 2021. We believe this provides a timely opportunity to consider the wider legislative and delivery landscape for mental health in Wales, and an opportunity to consolidate existing mental health legislation and guidance whilst taking forward essential reforms to the Mental Health Act. Consolidating devolved legislation would act to reduce legislative complexity and provide clearer guidance on the intersection between duties under the Measure, the Mental Health Act and the Mental Capacity Act. Additionally, this would ensure the Measure is effectively understood as primary legislation within services and better reflect the Senedd's primary legislative powers.

The Duty to Review Final Report recommended amending regulations to:

- expand the list of health professionals registered with a regulated professional body able to undertake a local primary mental health support service (LPMHSS) assessment
- expand the list of health professionals registered with a regulated professional body able to undertake the care coordination role

In addition to amending Part 3 of the Measure to:

- ensure that there is no age limit upon those who can request a reassessment of their mental health
- extend the ability to request a re- assessment to people specified by the patient

⁷ <https://gov.wales/sites/default/files/publications/2019-03/the-duty-to-review-final-report.pdf>

The Duty to Review Report was published in 2017, following which other reports and research have identified further areas for improvement, including, for example, the NHS Delivery Unit National Assurance Review of Care and Treatment Planning and the NHS Delivery Unit Review of Local Primary Mental Health Support Services for Children and Young People. As such, there is a clear need for a wider consideration of the Measure, including both the Duty to Review Report and other areas for improvement.

Part 1 Schemes – Local Primary Mental Health Support Services

Section 1 of the Measure establishes “local mental health partners,” these are partnerships between Local Authorities and the Health Boards. The Measure obliges the local mental health partners jointly to take all reasonable steps to agree a scheme: -

- which identifies what treatment is to be made available in the area,
- for securing the provision of local primary mental health support services, and
- which sets out the extent to which each of the partners is to be responsible for providing those services.

How the local primary mental health partners frame these schemes is significant as under section 3 of the Measure “*the local mental health partners for a local authority area must provide local primary mental health support services in accordance*” with their scheme. Therefore, the formation of these schemes will determine the services section 3 legally obliges mental health partners to deliver via Local Primary Mental Health Support Services.

However, in reviewing Part 1 Schemes, Mind Cymru has found that many of the schemes are unclear, vague and do not adequately identify treatments available. Additionally, many of Part 1 schemes have not been updated since their introduction in 2012. This is concerning not least because the purpose of a primary mental health assessment under the Measure is to identify “*the local primary mental health treatment (if any) which might improve or prevent a deterioration in the individual’s mental health*”. It is difficult to see how assessors can effectively undertake this role if they are not clear what is available due to vague or outdated Part 1 Schemes.

Similarly, a lack of clear and accessible information on what support and/or treatments are available via Local Primary Mental Health Support Services can have a negative impact on patient choice. The need for improved information for people accessing mental health services is well recognised and was recommended by Health Committee’s post-legislative scrutiny of Mental Health Measure, which stated:

“The Committee recommends that the Minister for Health and Social Services requires health boards to ensure that sufficient information is available in appropriate formats for all mental health service users, including children and young people, and harder to reach groups.”⁸

Improving information provided to people on the role of Local Primary Mental Health Support Services was also highlighted by the Duty to Review Final Report, which recommended that all Health Boards report annually on how information, and if relevant, training is provided to patients and GP’s explaining the role and purpose of the LPMHSS.⁹

More recently, Health Inspectorate Wales and Care Inspectorate Wales, in their Joint Thematic Review of Community Mental Health Teams made a similar recommendation aimed at improving the information available to primary care practitioners on the range of support available:

“Health boards should ensure there is clarity over the criteria for accessing CMHTs and the various community support teams that exist. In particular GPs and primary care practitioners need to have the information and support to enable them to provide the best possible advice for service users.”¹⁰

Part 3

Part 3 of the Measure introduced the requirement that secondary mental health services have in place arrangements to ensure the provision of timely access to assessment for previous service users. We strongly support this right to re-referral. However, in reviewing mental health legislation in Wales the Welsh Government should assess the impact of Part 3 against its intended ambitions.

In addition to recommending regulatory amendments, one of the key findings of the Duty to Review Final Report was that accessibility to Part 3 reassessment remains variable. However, data in relation to the number of people requesting a referral under Part 3 across Health Boards is not currently published and so it is not possible to scrutinise whether improvements in this regard have been taken forward. The Report recommended that Health Boards report annually on how patients discharged from secondary mental health services, and relevant other

⁸ [https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20\(wales\)%20m/cr-ld10069-e.pdf](https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20(wales)%20m/cr-ld10069-e.pdf)

⁹ <https://gov.wales/sites/default/files/publications/2019-03/the-duty-to-review-final-report.pdf>

¹⁰ <https://hiw.org.uk/sites/default/files/2019-06/190207joint-thematic-review-community-mental-health-en.pdf>

people, know about how, and understand their right, to request a reassessment. This issue was also highlighted by the Health Committee’s post-legislative scrutiny of the Measure, which recommended:

“That the Minister for Health and Social Services works with health boards and the third sector as a matter of priority to improve the information and the way that is provided to patients and primary mental health service providers about people’s rights to self-refer for reassessment under Part 3 of the Measure.”¹¹

5. Conclusion

A lot has changed in the way we view mental health and we have a higher expectations of the treatment people should receive than when the Act was written. We want legislation and services which are fit for purpose, and which support people when they are in crisis.

We strongly support the UK Government reforms that aim to provide clearer detention criteria, give patients more rights to challenge their detention and strengthen rights to choose and refuse treatment.

The White Paper provides a timely opportunity to review mental health legislation and practice in Wales, to consolidate and provide greater clarity to existing legislation whilst taking forward much-needed reforms. In doing so, the Welsh Government should consider the Measure, the proposals of the White Paper and the Independent Review and consult directly with people to understand better people’s experiences of mental health support in Wales.

¹¹ [https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20\(wales\)%20m/cr-ld10069-e.pdf](https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20(wales)%20m/cr-ld10069-e.pdf)