

## Briefing on reform of Part III of the Mental Health Act (the criminal justice sections)

### Introduction

The government's proposals to reform the outdated Mental Health Act 1983 (MHA) are a welcome response to "concerns around the growing number of people being detained, inequalities among the detained population, and the length of time people spend detained under the Act."<sup>1</sup>

However, the government's proposals for reform are more limited in relation to Part III of the MHA (the criminal justice sections). The outcome will be a more pronounced difference in the legal regime for the detention and treatment of people diverted from the criminal justice system (forensic patients) compared with non-offenders (civil patients). This has led the Centre for Mental Health to warn of the "need to guard against creating a two-tier system."<sup>2</sup> A recent BMJ article by Brooker and Coid also concludes that "the proposed changes to the Mental Health Act designed to control rising compulsory mental health admissions will result in more vulnerable people being criminalised for public protection, increasing pressure on the criminal justice system."<sup>3</sup>

Forensic patients make up nearly a third of those currently detained under the MHA<sup>4</sup> and more than 2 in every 5 of the over 2000 people with a learning disability or autistic people in mental health in-patient services are detained on a forensic section.<sup>5</sup> If the reforms of the MHA are to tackle inappropriate detention, and particularly inequalities among the detained population, the proposals relating to Part III of the MHA would benefit from further public debate including pre-legislative scrutiny by parliament.

This briefing focuses on the government's proposals in two areas:

- the MHA detention criteria and differential approach to forensic and civil patients
- the powers of the Mental Health Tribunal in relation to 'restricted' patients

### Background

Due to the "burning injustice" of mental illness and the disproportionate number of people from ethnic minorities, in particular Black people, being detained under the MHA, former Prime Minister Theresa May commissioned an independent review of the MHA in 2017.<sup>6</sup> The independent review reported in 2018 and a government white paper and public consultation followed in early 2021 to take "forward the government's commitment to legislate to give people greater control over their treatment, and ensure they are treated with dignity and respect."<sup>7</sup> A Bill to reform the MHA is expected in the Queen's Speech in 2022.

<sup>1</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612222/Reforming_the_Mental_Health_Act_-_GOV.UK.pdf) p.23

<sup>2</sup> [centre for mental health summaryresponse mhawhitepaper\\_21042021.pdf \(centreformentalhealth.org.uk\)](https://www.centreformentalhealth.org.uk/wp-content/uploads/2021/02/centre_for_mental_health_summaryresponse_mhawhitepaper_21042021.pdf) p.2

<sup>3</sup> [Mental health services are failing the criminal justice system | The BMJ](https://www.bmj.com/content/363/n8182/mh-services)

<sup>4</sup> [Mental Health Act Statistics, Annual Figures - 2020-21 - NHS Digital](https://www.nhs.uk/press-releases/2021/01/20/mental-health-act-statistics-annual-figures-2020-21) p.22 of Summary

<sup>5</sup> [LD AT DataTables Dec2021.xlsx \(live.com\)](https://www.live.com/ld/AT_DataTables_Dec2021.xlsx)

<sup>6</sup> [Prime Minister announces review to tackle detention of those with mental ill health - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612222/Reforming_the_Mental_Health_Act_-_GOV.UK.pdf)

<sup>7</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612222/Reforming_the_Mental_Health_Act_-_GOV.UK.pdf) p.9

## The MHA detention criteria

The MHA detention criteria are at the heart of decision-making on whether to admit or discharge someone from hospital including when people exercise their legal rights to challenge detention. To help reduce inappropriate detentions under the MHA, the government is proposing to amend the detention criteria for civil patients in two significant ways:

- to introduce a higher legal threshold for detention of “substantial likelihood of significant harm” to self or others<sup>8</sup>
- that detention must have a demonstrable “therapeutic benefit” so that “the purpose of detention is always about helping patients to recover”<sup>9</sup>

However, the government is proposing to leave the detention criteria for forensic patients unchanged. The outcome under a reformed MHA would be the application of a substantially different legal threshold for detention to forensic patients compared with civil patients.

In relation to detention criteria and civil patients, the government’s white paper states that: “We agree with the Review that the current wording within the Act, that detention is lawful for the interests of the patient’s ‘own health or safety or with a view to the protection of other persons’ is too ambiguous and may have contributed to growing risk aversion amongst some professionals, particularly with regard to patients with a learning disability and autistic people. We want to revise the Act to ensure it is more explicit about how serious harm must be, or how likely it is that the harm will occur, to justify detention and/or treatment.”<sup>10</sup>

As there is acknowledgement by government that the current detention criteria are somewhat ambiguous, contributing to growing risk-aversion by professionals and potentially leading to discriminatory outcomes, we are concerned that the issue of detention criteria for forensic patients has not received more detailed exploration. For example, the Care Quality Commission has warned in its response to the MHA public consultation that the government’s proposals “could have an exclusionary impact in pushing Black males away from civil detention towards the criminal justice disposals, where lower clinical thresholds of admission will apply.”<sup>11</sup>

The government stated in its white paper that it was “satisfied the current criteria for detention under Part III of the Act enables professionals to make the right decisions”<sup>12</sup> but did not present an evidential basis to support this assertion or seek the views of stakeholders on this question during the public consultation. There are potential justifications for different detention criteria, such as maintaining the current pathway from the criminal justice system to mental health in-patient services. However, this fundamentally important issue of detention criteria would benefit from further scrutiny.

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<sup>8</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](#) p.25

<sup>9</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](#) p.11

<sup>10</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](#) p.25

<sup>11</sup> [20210421\\_mha-consultation-response\\_questions.odt \(live.com\)](#) p.3

<sup>12</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](#) p.27

## **Detention criteria for people with a learning disability and autistic people**

There is widespread public concern about the experiences of people with a learning disability and autistic people in mental health in-patient services. In its report published in July 2021, the House of Commons Health and Social Care Select Committee found that “autistic people and those with learning disabilities can find themselves experiencing intolerable treatment in inpatient facilities which has included being subject to abusive restrictive practices; being detained for long periods of time in facilities that do not meet their needs; and being kept long distances away from their family and friends.”<sup>13</sup>

The government is proposing to largely remove autism or a learning disability as a basis for detention under the MHA, unless there is a co-occurring mental health condition, but sought views in the public consultation on whether this change should also apply to forensic sections. The response was mixed. Some agreed with the practical rationale of maintaining the current criteria and pathway for diversion from the criminal justice system whilst others viewed this as discriminatory and contradicting the wider direction of travel under the MHA.

The government stated in its formal response to the public consultation that “we recognise the importance of ensuring that reforms to the Act for people with learning disabilities and autistic people strike an appropriate balance in terms of application to the criminal justice system. We will therefore commit to exploring this issue further, including through an expert group.”<sup>14</sup> As there is an over-representation of people with a learning disability and autistic people on forensic sections, this is an important issue for further scrutiny and debate.

## **Restricted patients**

Restricted patients are those on forensic sections who are subject to special controls by the Secretary of State for Justice that limit the powers of medical professionals, and in some cases the Mental Health Tribunal (an independent judicial body that hears appeals against detention), to make decisions about the patient.<sup>15</sup>

## **Mental Health Tribunal powers**

The independent review of the MHA recommended that the powers of the Mental Health Tribunal should be expanded so that they are able, when deciding not to grant an application for discharge, to direct leave from hospital or transfer to another hospital (as part of the pathway towards discharge). The government accepted this recommendation in relation to unrestricted patients (civil patients and forensic patients without restrictions) but not for restricted patients. In relation to restricted patients, they propose the Tribunal could make recommendations for the Justice Secretary to consider.<sup>16</sup>

Expert stakeholders involved in the independent review also recommended that the Tribunal should have powers to remove restrictions if satisfied they are no longer necessary to protect the public. In their view, the Tribunal should have the same

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<sup>13</sup> [Treatment of autistic people and individuals with learning disabilities \(parliament.uk\)](https://www.parliament.uk/publications/2021-07/13) p.3

<sup>14</sup> [Reforming the Mental Health Act: government response \(web accessible\) \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/94444/reforming-the-mental-health-act-government-response) p.90

<sup>15</sup> [Mentally disordered offenders: The Restricted Patient System 2017 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614444/mentally-disordered-offenders-the-restricted-patient-system-2017)

<sup>16</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614444/reforming-the-mental-health-act) p.171

powers as the Secretary of State and civil servants as these matters fall “squarely within the tribunal’s area of expertise.”<sup>17</sup> It would be worth reconsidering the recommendations of the independent review, and its associated expert topic group on the criminal justice system, in relation to Tribunal powers and restricted patients.

Furthermore, the government should consider whether the proposed new Tribunal powers to direct services in the community could also apply to restricted patients. At present, people can remain in hospital for many months or even years after they have been assessed as ready for discharge due to the lack of appropriate housing and/or support in the community.

### **Proposed new power of ‘supervised discharge’**

Building on a recommendation from the independent review, the government’s white paper proposes a new power of ‘supervised discharge’ in relation to restricted patients. The aim of this new power would be to facilitate discharge from hospital for those restricted patients that would be better off in the community but might continue to pose some level of risk. The white paper states that it would be applicable only where such a patient:

- is no longer therapeutically benefitting from hospital detention under the Act; but
- continues to pose a level of risk which would require a degree of supervision and control amounting to a deprivation of their liberty; and so, could not be managed via a conditional discharge. Therefore;
- this would be the only least restrictive alternative to hospital.<sup>18</sup>

Whilst the proposal should help facilitate discharge from hospital for some people, it will also extend the powers of the Mental Health Act into the community. Following the experience of Community Treatment Orders, which were introduced in the 2007 reforms and have been used more often than originally intended and disproportionately with Black people, there are concerns that risk-averse professionals may be tempted to overuse ‘supervised discharge’ and this proposal therefore warrants further scrutiny and debate.

## **Next steps**

The upcoming reform of the Mental Health Act is a once in a generation opportunity to ensure the legislative framework governing involuntary treatment for a mental illness is fit for purpose and includes appropriate safeguards from inappropriate detention. The issues highlighted in this briefing that would benefit from further debate, including through pre-legislative scrutiny if parliamentary time allows, are:

- the detention criteria for forensic patients;
- the powers of the Mental Health Tribunal in relation to restricted patients; and
- the proposed new power of ‘supervised discharge’ and how it will work in practice.

There are other issues not highlighted in this briefing where we look forward to further details when a Bill is published. These include a statutory limit on the length of time for transferring someone from prison or an immigration removal centre to mental health inpatient services and establishing a new designated role to manage the transfer.

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<sup>17</sup> [Independent Review of the Mental Health Act 1983: supporting documents \(publishing.service.gov.uk\)](#) p.214

<sup>18</sup> [Reforming the Mental Health Act - GOV.UK \(www.gov.uk\)](#) p.77

## About VoiceAbility

VoiceAbility<sup>19</sup> is a registered charity in England and Wales (1076630) and Scotland (SC050036) and one of the UK's largest providers of advocacy and involvement services.

VoiceAbility's Independent Mental Health Advocates (IMHAs) work in over twenty local authority areas in England and supported over 5,000 people in 2020/21 under the provisions of the Mental Health Act.

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<sup>19</sup> For more information about VoiceAbility, visit [www.voiceability.org](http://www.voiceability.org)