19 January 2023

on the day BRIEFING NHS Providers

Joint Committee on the Draft Mental Health Bill 2022 report

The Joint Committee on the Draft Mental Health Bill was appointed by the House of Lords and the House of Commons in July 2022 to consider the government's draft Bill to reform the Mental Health Act 1983 (the Act). The briefing below summarises the committee's report and sets out NHS Providers view. If you have any comments or questions, please contact Ella Fuller, senior policy advisor (ella.fuller@nhsproviders.org).

Our response to the committee's call for evidence can be read here and our briefing setting out the contents of the draft Bill in more detail can be read here. The draft Bill follows the 2021 white paper, Reforming the Mental Health Act, and Sir Simon Wessely's 2018 independent review of how to modernise the Act.

The committee recognises that the draft Bill sits within a much larger programme of cultural and policy change, some of which is set out in the 2021 white paper mentioned above, as well as the NHS Long Term Plan and the Building the Right Support Action Plan.

Key points

- The committee welcomes the draft Mental Health Bill concluding it makes important changes to introduce more choice, accountability, and oversight into the use of the Mental Health Act 1983 (MHA). The committee would like to see the Bill introduced in this session of Parliament.
- However, the committee believes the measures in the draft Bill should be strengthened in a number of ways, such as by:
  - including the four principles – choice and autonomy, least restriction, therapeutic benefit, and the person as an individual – on the face of the Bill
  - creating a Mental Health Commissioner to oversee the direction of travel for the reforms and their implementation, monitoring outcomes and supporting cultural change. The commissioner would also serve as an advocate for patients, their families and carers and speak up about the stigma still attached to severe mental illness

- requiring all health organisations be required to appoint a responsible person to collect and publish data on, and oversee policies to address, racial and ethnic inequalities
- abolishing community treatment orders for Part II patients (those not involved in the criminal justice system), and a statutory process and timeline be put in place for their review and potential abolition for Part III patients (those involved with the criminal justice system)
- providing clearer guidance and tighter drafting of the detention criteria to ensure it is not used to turn away those who need help. The committee also recommends making the changes in criteria consistent between Parts II and III of the Act
- stronger duties on health and care bodies to ensure proper implementation of community care improvements and stronger safeguards against inappropriate detention for individuals with a learning disability and autism.

- The committee stresses that proper resourcing and implementation of the reforms will be crucial, and the provision of high-quality community alternatives to inpatient care are especially crucial. Most witnesses were unconvinced that the government's resourcing plans were adequate. The committee also highlights that mental health services are under significant pressure and, in a difficult fiscal environment, transparency and accountability will be key. The government should therefore publish a detailed plan for resourcing and implementation on introduction of the Bill and be required to report annually on progress during the implementation period.

Overall approach

There was strong support for the draft Bill in the evidence received by the committee, with the draft Bill viewed as containing important reforms and a "positive direction of travel", though this was often caveated by a desire to go further or more closely reflect the independent review's recommendations. Only a small minority expressed opposition or concern about the draft Bill as a package. Concerns were expressed about funding and implementation, and about unintended consequences. When concern about the direction of travel was expressed, it was generally that measures to reduce the rate of detention could lead to people not getting the care they need.

Fundamental reform versus amending legislation

While some would prefer more fundamental reform, there was a clear sense from witnesses that key reforms in the draft Bill could not afford to wait for a more radical change. The committee therefore welcomes the draft Bill and would like to see it introduced in this session of parliament. However, it also recommends that there should be an ongoing process of mental health legislation reform, leading in the direction of more "fused" and rights-based legislation and learning from developments elsewhere in the UK and overseas. In advance of this work, the government should look for

opportunities to amend the Act's code of practice to improve the justification required for clinical decisions to use the MHA where a patient has decision making capacity and is refusing admission and treatment.

A mental health commissioner

The committee recommends that the post of a statutory mental health commissioner should be created. The role should include:

- being a voice at the national level promoting the interests and raising awareness of the needs of those who are detained, or are likely to be, under the Act, and challenging stigma and stereotypes;
- working with the Care Quality Commission (CQC) and other bodies to make recommendations on reforming mental health law in the direction of more rights-led and "fused" legislation;
- tracking the implementation of the reforms, including the provision of data;
- providing advice and support to service users, their families and carers on their rights and how to navigate complaints processes;
- working with NHS bodies, the CQC and Parliamentary and Health Service Ombudsman (PHSO) to promote best practice in handling complaints.

The committee sees the role of the commissioner being primarily to act as a watchdog to oversee the direction of travel for the key reforms of the MHA. In addition, they would monitor outcomes and cultural changes which the committee hopes will result from these reforms. Further functions focused on inequalities and data recommended by the committee for this role are detailed below.

The committee also recommends that the government adopt the PHSO's recommendations on streamlining and signposting complaints processes.

Principles

The committee wants to see the independent review's four principles (choice and autonomy: least restriction; therapeutic benefit; the person as an individual) on the face of the Bill. In order to achieve this, the committee recommends that section 118 of the Act be replaced with a new section at the start of the Bill, requiring the secretary of state to draw up the code of practice having regard to and including the principles. The new section should also specify that the principles should inform decisions taken under the Act, mirroring the current wording in section 118.

Racial inequalities

Data shows that the racial and ethnic inequalities that the independent review was set up to tackle have not improved since the review was commissioned and, on some key metrics, are getting rapidly worse. The committee states this is a collective failure that is unacceptable and inexcusable, and the draft Bill must be stronger in how it tackles racial disparity. The committee recommends that the government amend the list, under section 118, of matters that the secretary of state must address in the code of practice to explicitly include the need to respect racial equality.

Data collection and publication

The committee states that improving data collection will be an important part of reducing inequalities, but it cannot be an excuse for a lack of urgent and comprehensive action. There should be a responsible person for each health organisation whose role will be to collect and monitor data on the number, cause, and duration of detentions under the MHA broken down by ethnicity and other demographic information. The committee recommends that the secretary of state is required to ensure these statistics are published at the end of each year.

Responsible person

The committee recommends that a responsible person should also oversee workforce training and policies designed to address bias and discrimination in decision making in the operation of the MHA on the basis of protected characteristics, including the implementation of the Patient and Carer Race Equality Framework (PCREF). The committee recommends that the proposed mental health commissioner should be a national figure overseeing, standardising, and promoting the work of the 'responsible people' proposed above and already in the Mental Health (Use of Force) Act. The commissioner should also work with NHS and independent services, the CQC, Equality and Human Rights Commission (EHRC), and the Office of the National Data Guardian, to produce proposals aimed at reducing inequalities in, and improving data on, the provision of services and use of powers under the Act.

Implementation of NHS non-legislative programmes

The committee recommends that the government work with NHS England to produce an implementation plan with clear milestones for the NHS's non-legislative programmes to address inequalities in mental health care. Examples of milestones might include: appointment of 'responsible people'; take up and implementation of the PCREF; increased awareness of the public sector equality duty; reductions in disproportionate detention rates; improved diversity in the workforce; and access to culturally appropriate advocacy.

Community treatment orders

The committee concludes that there is not enough evidence to demonstrate benefit for the use of Community Treatment Orders (CTOs) for Part II patients to justify their continued use, especially as they are used disproportionately for black and ethnic minority patients. It therefore recommends that CTOs are abolished for patients under Part II of the Act. The committee received some evidence that suggests unrestricted Part III patients may benefit from CTOs, however, the evidence is inconclusive. The committee therefore recommends the government amends the draft Bill to include a statutory review of CTOs for Part III patients, to report within three years of Royal Assent.

The committee also recommends that the Bill contains a provision that abolishes CTOs for Part III patients six months after the time for the statutory review recommended above expires (or earlier with the approval of both Houses of Parliament). This would give the government time to introduce legislation to stop the abolition of CTOs for Part III patients if the statutory review demonstrated convincingly that they had value and were now being used in a non-discriminatory way. If that were not the case, they would be abolished automatically.

Resourcing and implementation

The committee stresses that proper resourcing and implementation of the reforms will be crucial and the provision of high-quality community alternatives to inpatient care are especially crucial. The committee also noted concerns surrounding adequate resourcing for second opinion doctors and tribunals. While the government acknowledges in its impact assessment that the draft Bill proposals will require a sustained period of direct investment in services and an expansion in the workforce, most witnesses were unconvinced that the government's resourcing plans were adequate. The committee also highlights that mental health services are under significant pressure and, in a difficult fiscal environment, transparency and accountability will be key.

The committee recommends that the government publish a detailed plan for resourcing and implementation on introduction of the Bill, which links to other relevant government policies, and be required to report annually on progress during the implementation period. The committee also recommends that the introduction of the final Bill should be accompanied by a revised impact assessment to take account of changes in the workforce and the economy since the original assessment was published. The assessment should also be explicit about the extent of interdependencies with other government programmes and policies.

Detention criteria

The committee welcomes the aim of the changes to the grounds on which someone can be detained for assessment and treatment, but recommends clearer guidance and tighter drafting to ensure they are not used to turn away those who need help, especially those who seek it voluntarily or for whom an earlier and shorter intervention may be more beneficial. It also recommends that the government set out in the response to this report what it, the CQC and NHS trusts are doing and will do to prevent the concept of "capacity" being misused to deny treatment to very ill and potentially suicidal patients when they have voluntarily sought it.

The committee also recommends the changes in the detention criteria are made consistent between Parts II and III of the Act, given the risk of an increase in the number of people being detained under Part III as changes to the detention criteria currently stand. The committee also emphasises in this section that changes in detention criteria, as with the draft Bill as a whole, need to be supported with adequate and accessible community-based alternatives to detention if they are to be successful.

Learning disabilities and autism

The committee highlights its concern that too many autistic people and people with a learning disability are being detained in inappropriate mental health facilities, and for too long. The committee welcomes the government's proposals to address this, but suggests a number of further proposals to help ensure proper implementation of community care improvements and stronger safeguards against inappropriate detention.

The committee's proposals include:

- stronger duties on health and care bodies to proactively identify those in need of community care and to provide it;
- a staged approach to these reforms to ensure changes only comes into force once community care provision has significantly improved and the hypothesis that increasing community services will allow the system to deal with this group of individuals effectively, including in crisis situations, has been tested; and
- a tightly defined power under the MHA aimed at ensuring particularly complex cases where detention might be thought to be warranted are considered by a specialist tribunal from the outset.

The committee also recommends that the government conducts a review of the Building the Right Support Action plan in light of the proposals in the draft Bill, to identify which milestones in the plan

must be met to ensure that individuals who would have been eligible for detention under section 3 can be supported to live in the community. The milestones outlined in this review must be met before commencement of those parts of the Bill that remove learning disabilities and autism as a condition for which people can be detained under section 3. It is also recommended that the government monitor outcomes for people with learning disabilities and autistic people who are no longer eligible for detention under section 3 and commit to act if detention by these routes rises.

The government should also urgently review the operation of the Mental Capacity Act (MCA) with a view to amending the Deprivation of Liberty Safeguards (soon to be Liberty Protection Safeguards) so they cannot be used as an alternative route to the MHA to deprive people with learning disabilities or autistic people of their liberty in inpatient mental health units.

The committee also recommends that the government strengthen the wording of the duty for integrated care boards (ICBs) and local authorities to ensure that the outcome of each care (education) and treatment review is actioned effectively. The committee also recommends the maximum time period between reviews should be shortened from 12 to six months.

The committee has also recommended the government commission research into the likely costs and benefits of extending aftercare to patients who are detained in mental health settings under provisions other than section 3 of the MHA and consider extending section 117 aftercare, or an equivalent provision, where appropriate given the findings.

Children and young people

The committee states that the legislation will be a crucial opportunity for the government to strengthen the rights and protections for children and young people under the MHA. For example, introducing stronger requirements to avoid the placement of children in adult or out of area wards. The committee adds that it is imperative such reforms coincide with developments in the provision of specialist services for children and young people to address the core driver of this problem. The committee also recommends the government consult on a statutory test for 'child capacity' to ensure that children and young people have equal access to the safeguards in the draft Bill that rely on a patient's ability to make their own choices.

Patient choice

The committee found that the ability of patients to make choices about their care and treatment was identified as one of the single most effective measures to reduce detentions and improve inequalities.

The committee welcomes the draft Bill's provision for statutory care and treatment plans and recommends that all patients who have been detained under the MHA should also have the statutory right to make advance choice documents, covering care and treatment, and have support of a trained person who is independent of the service users' treatment team in doing so.

Similarly, the committee welcomes the draft Bill's proposal to give patients choice over who should make certain decisions, but argue more work needs to be done to ensure the process is manageable and does not conflict with existing legislation when applied to under 18s.

The committee recommends that the government amend the draft Bill to allow for pilots of a slimmed down mental health tribunal that considers whether a patient is entitled to challenge their treatment plans to ensure that the additional workload is manageable and the tribunal's and clinicians' roles are not compromised.

Nominated persons

The committee welcomes the nominated persons provisions for adults. It and recommends that the government work with Approved Mental Health Professionals to revise the proposals to address the practical concerns that have been raised and ensure the benefits of these reforms materialise. The committee also recommends that the choice of a nominated person is included in advance choice documents.

The committee recommends that the government consult, and come forward with new proposals, on how nominated person provisions will apply to under 18s in regard to potential conflicts with other legislation affecting children, such as the Children Act 1989, at an early stage in the Bill's progress.

Advocacy

The committee recommends that "opt-out" advocacy, whereby patients will be proactively offered the support of an advocate, should be extended to voluntary patients when sufficient capacity has been developed in the workforce to allow it. The government should also examine the case for a central advocacy service to meet the needs of specific groups, such as people with a learning disability or autistic people, who may otherwise go unsupported in some areas.

The committee also recommends that the Bill include a statutory right to request culturally appropriate advocacy, as defined in existing pilots being carried out, and the government should

consider the workforce requirements needed for this change and ensure adequate timing to develop services. The second round of pilots should be evaluated before commencing this right so that lessons can be learnt in its implementation.

Patients concerned in criminal proceedings or under sentence

The committee states that the draft Bill contains positive proposals in relation to Part III patients, such as the removal of prison and police stations as "places of safety". The committee emphasises that this change will require the provision of high-quality community care and underlines the need for the recommended implementation plan.

With regards to the statutory time limit of 28-days to transfer patients from prison to hospital, the committee recommends the duty is strengthened to ensure that the deadline is met while stressing the importance of services being supported to meet it. To this end, the committee recommends the government set out an action plan alongside the Bill that has a clear timeline and process for how all services will achieve this deadline. The government should also include the newly developed statutory independent role to monitor and manage prison transfers in the Bill when it is presented to parliament.

The committee is concerned that the proposal for a conditional discharge that amounts to deprivation of liberty may be overused, especially for ethnic minorities, and therefore recommends that the use of this provision should be closely monitored, with a statutory review after three years. The committee also recommends that the tribunal must be involved in the decision to place someone on a supervised discharge to ensure that therapeutic benefit is being considered in this process. The government should also consult with the CQC and set out in their response to the committee´s report how the places where individuals may be residing under supervised discharge can be appropriately regulated and inspected, relative to hospitals.

Crisis management

The committee concludes that many of the pressures in A&E are ultimately best tackled by clear, efficient, and adequately resourced routes to appropriate care for those in mental health crises. However, even with these routes in place, there would still be individuals who present at A&E with symptoms of mental illness and so the gap in the current law, which may result in patients being detained unlawfully or not being treated in crisis situations, should be closed. The committee recognises this will need to be done carefully to avoid unintended consequences, and therefore

recommends that the government consult further on a short-term emergency detention power, and whether this would provide greater legal clarity for clinicians as well as accountability.

The committee recommends that the government increases the provision of appropriate health-based places of safety, and include plans for this within the recommended implementation plan. The committee also recommends that all people known to a mental health service with a known learning disability and/or autism should have the reasonable adjustment flag attached to their record, with an option for individualised adjustments of preferred communication and the name of their advocate.

Interface with the Mental Capacity Act

Evidence to the committee highlighted the complexity and unintended consequences of the interface between the MHA and MCA and the committee concludes this issue needs to be addressed. It recommends the government review the interaction between the two pieces of legislation, in particular the use of the MCA to authorise admission and treatment in mental health units, as part of the process of ongoing reform recommended earlier in the report. The committee also recommends the government look to resolve gaps and ambiguities in the law regarding the interface, through amendment of the MCA if necessary.

NHS Providers view

The committee makes a number of welcome recommendations to improve the draft Bill and we are also pleased to see that many of the key points we made in our evidence have been reflected in the report. This includes the government developing a robust and achievable plan for implementation, and providing greater clarity around changes to the detention criteria, including making these changes consistent between Parts II and III of the Act.

The committee is right that the draft Bill will bring vital, long overdue reforms to mental health legislation, and it must be introduced as quickly as possible.

We also welcome the report highlighting the considerable pressure that mental health services are under and the need for proper resourcing of the proposed reforms given that mental health services are already overstretched. Long-term, sustainable investment and support for the sector are needed to improve how and where people access high quality mental health care. In particular, focus is needed on delivering high quality alternatives in the community to inpatient care and developing enough workforce capacity across the sector.

We agree with the committee that, in a difficult fiscal environment, transparency and accountability will be key and welcome requirements for the government to report annually on progress during the new Act´s implementation phase.

Trust leaders will share the committee's concerns about the lack of improvement, and worsening by some measures, in racial equalities. They will welcome the committee suggesting where more action could be taken to help address this, including improving collection and publication of data. It is important that proposals align with what is already taking place or planned in the near future – the committee´s recommendation that a detailed implementation plan for NHS non-legislative programmes to address inequalities in mental health care be produced should help with this. Ensuring that adequate support at national and local levels accompanies this implementation plan will be crucial to its success.

We also support the committee's proposals to help ensure community improvements for, and stronger safeguards against inappropriate detention of, people with a learning disability and autistic people. The unintended consequences of proposals for this group of individuals has been a key area of concern for trust leaders. National and local action to deliver on the swift improvement in community care that enables the system to better meet the needs of these individuals in the community is vital to stopping people being detained if they don't have a mental illness and must be urgently prioritised.

Trust leaders have also been very concerned about the mental health care deficit for children and young people and are clear that meeting their needs must be a national priority, so we welcome the focus of the committee here. We would argue that duties need to be placed on hospital managers and other system partners, as opposed to just hospital managers alone, to ensure that there are sufficient services for children and young people. The committee is right to stress it is imperative any reforms coincide with developments in the provision of specialist services for children and young people to address the core driver of the problem of individuals being placed out of area or in inappropriate settings such as adult wards.

Beyond legislative changes, action is needed to improve people's access to and outcomes from mental health services, including greater capital funding and more money for wider public services. These services help meet the needs of their local communities and play a crucial role in providing people with wider care and support and helping many avoid reaching a crisis point and the need to detain under the Act in the first place.