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# Mental Health Bill 2025- detention & treatment

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# The Mental Health Bill- Shifting the dial? Consent to Treatment

Elizabeth Cleaver

# UPDATE ON THE BILL

The Bill was introduced in the Lords on 6 November 2024. Committee stage has just completed and awaiting date for reports stage: https://bills.parliament.uk/bills/3884/stages

Committee stage held over two days on 27 January & 24 February.

Report stage and 3rd reading before the bill will go to the commons

Royal assent expected in the summer

List of amendments taken forward for discussion at committee stage (as of 20 February 2025): https://bills.parliament.uk/bills/3884/publications

i) Proposal for an Independent Mental Health Commissioner to oversee implementation of functions discharged by relevant bodies under the MCA 2005 and MHA 1983

ii) Proposal to address racial disparities by nominating individual within each mental health unit to monitor and address this issue and through training

iii) Duty on ICBs “to secure sufficient resources for services in the community”

iv) Statutory competency test for under 16s

v) Secretary of State to report on alternative places of safety (including in the community)

vi) Clearer definition of serious harm: *““serious harm” means death or serious personal injury, whether physical or psychological.””*

*vii)* Provisions seeking to prevent detention of children on adult wards

viii) Recording use of force and LTS and mandatory Care and Treatment Reviews for those in LTS;

ix) Services in the community to manage withdrawal symptoms for patients coming of psychiatric medication

*x)* Costed plan for the provision of community services for individuals with LD/autism

xi) Banning use of profit-making companies to deliver treatment under the MHA

xii) MHTs to be able to determine challenges to treatment decisions

xiii) Local authorities to have a general duty to “promote mental health and wellbeing”

xiv) Secretary of State to report on how to ensure greater continuity of care for those discharged from secondary services to the care of their GP

Clause 42 inserts new sections 130M and 130N which create new duties for ICBs, NHS England and Local Health Boards (Wales) to facilitate people to make Advance Choice Documents. Guidance notes:

*"An Advance Choice Document can be used by individuals to set out what they want and don't want, while they are well and have capacity or competence to do so, so that the Document can be used by mental health professionals in the event that they are assessed and potentially admitted for care and treatment either informally or formally, and they lack capacity or competence to share these things at the time"*

Intended for individuals who are well now but may require admission in the future.

*"a written statement made by an individual while they have capacity or competence to make the statement, setting out their decisions, wishes and/or feelings about matters that may be relevant to their assessment for admission, and care and treatment as a formal or informal patient, in the event that they lack capacity or competence to make the decision in question. The Document can also include advance decisions under the Mental Capacity Act 2005"*

# ADVANCE DECISION V ADVANCE CHOICE DOCUMENT

- s24-26 Mental Capacity Act 2005 provide for advance decisions to refuse treatment- these are binding if valid and applicable to the relevant treatment (only valid re life sustaining treatment if specified in the advance decision)
- AD valid if it is in writing and witnessed
- AD can be overridden by detention/treatment under the MHA

- Advance Choice Document- amendment does not specify whether it is binding (assuming not)- only provision in the Act relates to ICBs/LAs enabling patients to prepare these.

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Sophy Miles

# CONSENT TO TREATMENT

What did the Independent Review say?

**"We believe that improving patients' and service users' ability to make decisions about their own care and treatment is essential to upholding dignity**. This theme runs throughout the report from start to finish."

**"We propose far earlier access to a SOAD, as soon as the care and treatment plan is finalised, and that the patient be allowed to make a Tribunal challenge to a treatment decision, if both the RC and SOAD believe a treatment to be necessary…**we do think that human rights compliance should enable a patient to assert their right to object to a specific treatment provided, of course, that there is another treatment available, even if it may be sub- optimal "

# APPROPRIATE MEDICAL TREATMENT

“Appropriate Medical Treatment”: medical treatment which

taking into account the nature and degree of the disorder and all other circumstances—

(i) has a **reasonable prospect of alleviating, or preventing the worsening of, the disorder or one or more of its symptoms or manifestations**, and

(ii) is appropriate in the person’s case;

“Medical Treatment: references to medical treatment, in relation to mental disorder, are references to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations.”;

# MAKING CLINICAL DECISIONS

New Section 56A

- Duty on approved clinician (AC) to consider matters in a clinical checklist when deciding whether to give treatment under Part 4.
- Includes
  - Patient's past and present wishes and feelings including those in an ACD
  - Reasonable steps to enable patient to participate
  - Consulting those close to the patient
  - If patient lacks capacity must consider wishes or feelings patient might have had

NB- SOAD (second opinion-appointed doctor) checks this has been done

"Bumped up" from Code of Practice Ch 24

# CHANGES TO SECTION 58

Section 58 currently permits treatment by medication of a capacitous patient without consent

**NEW SECTION 57A**

Patient with capacity who refuses treatment OR patient lacking capacity but with valid and applicable advance decision OR deputy/holder of LPA refuses:

CANNOT be given ANY medical treatment UNLESS

- There is a “compelling reason” AND a second opinion appointed doctor (SOAD) has certified that the treatment should be given

# THE ROLE OF THE SOAD

Currently – test for SOAD is whether the treatment is appropriate (must consult with 2 people)

**NEW TEST**

- Must apply the new definition of “appropriate medical treatment”
- Must certify that the clinician in change has complied with the checklist requirement
- Whether patient has consented/no AD/no refusal in relation to an available alternative treatment
- SOAD still has to consult 2 people

- **Treatment cannot start till after the SOAD has certified**

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# THE THREE MONTH RULE

At present the safeguards in s58 only apply after 3 months

New provisions- shortened to 2 months

So there will still be 2 months when the patient can be treated without consent (but still require the ‘clinical checklist”)

Many admissions relatively short – how many people will benefit?

# ECT -SECTION 58A

**NO NON-URGENT ECT** for a patient lacking capacity with a valid AD/objecting deputy or holder of valid LPA

Current position – could be given with SOAD agreement

# CHANGES TO URGENT ECT

New section 62ZA

Currently AC can over-ride capacitous refusal of ECT OR valid AD/refusal of deputy or attorney

**New proposal**

- SOAD must issue a certificate
- Before doing so must consult with a nurse AND the patient’s nominated person
- Can do so by video-link
- NB- Secretary of State can amend these provisions so that AC can certify

# CHANGES TO URGENT TREATMENT PROVISIONS

AC will not be able to administer urgent treatment to capacitous refusing patient on the basis that it is necessary to alleviate "serious suffering"

**Explanatory notes:**

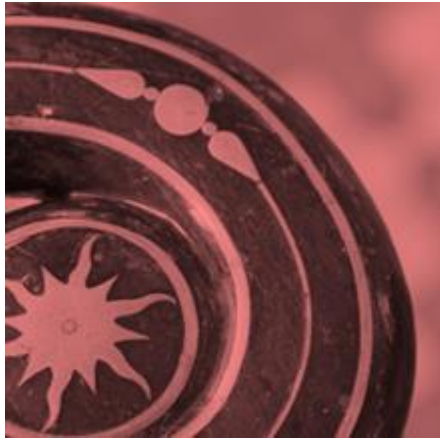
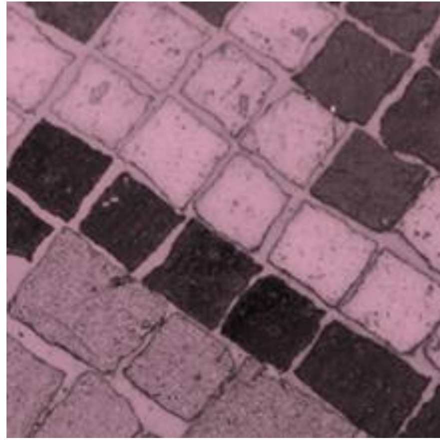
*this change allows patients who have capacity or competence at the time to decide on the degree of suffering they are willing to accept, strengthening the patient's right to self-determination and thereby further embedding the principle of choice and autonomy. This change does not apply to patients who lack the relevant capacity, including those who made an advance decision.*

# STATUTORY TREATMENT PLAN

- All detained patients (apart from those under s5(2) or 5(4), s135 or s136) will have a Care and Treatment plan
- Also applies to those on CTOs or Guardianship
- Contains plan to meet needs in terms of care, treatment, leave and other issues relating to life after discharge
- Requirements to review if:
  - Patient’s case will be considered by MHT
  - Following a care and treatment review
  - ”Reasonable” request by patient or NP

# DOES THIS SHIFT THE DIAL?

- Will more patients be assessed as lacking capacity?
- Should more treatments be brought into section 58A? **North Tees and Hartlepool NHS Foundation Trust(1) Tees Esk and Wear Valleys NHS Trust v KAG and Mr G [2024] EWCOP 38** confirms that PEG-feeding as well as NG feeding can be delivered under s63. Should this continue?
- How many will be affected by the changes to s58?
- How will patients know about the safeguards so they can consider LPAs or ADs?
- A view from an Expert by Experience

# WATCH THIS SPACE

A deep dive into

- Proposals for treatment of those with learning disability/autism
- The role of the Tribunal