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A deep dive into the Mental Health Bill 2024

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Chair: Associate Anselm Eldergill

Speakers: Sophy Miles, Oliver Lewis and Elizabeth Cleaver

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The Mental Health Bill- Shifting the dial? Detention and the Nominated Person

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Sophy Miles

THE JOURNEY BEGINS

"On my first day in Downing Street last July, I described shortfalls in mental health services as one of the burning injustices in our country," May said. "It is abundantly clear to me that the discriminatory use of a law passed more than three decades ago is a key part of the reason for this. …….today I am pledging to rip up the 1983 act and introduce in its place a new law which finally confronts the discrimination and unnecessary detention that takes place too often…"

- Therea May, 7 May 2017

MODERNISING THE MENTAL HEALTH ACT- INCREASING CHOICE, REDUCING COMPULSION

"I was tasked to see If the Act is up to date in how it deals with human rights (it isn't)."

"What I would like to see is a wider realisation that sometimes to reduce risk you need to take risks.

" …we have to accept the painful reality of the impact of that combination of unconscious bias, structural and institutional racism, which is visible across society, also applies in mental health care."

"**I am confident that our recommendations will "shift the dial", in favour of greater respect for wishes, choices and preferences"**

- Sir Simon Wessely, December 2018

EIGHT YEARS AND FIVE PRIME MINISTERS LATER……

Mental Health Bill has had 2nd reading in HL

Currently at Committee State-sitting on 22 and 27 January 2025

Report stage and final reading in HL, then to HC

Joint Committee on Human Rights has call for evidence closing on 24 January 2025

For resources see Alex Ruck Keene's excellent webpage: https://www.mentalcapacitylawandpolicy.org.uk/mental-health-bill-resources/

Easyread version: https://assets.publishing.service.gov.uk/media/672cc215eee595f5288bdbec/mental-health-bill-easy-read-accessible-november-2024.pdf

DETENTION CRITERIA-DEFINITIONS-1

MENTAL DISORDERS

Bill defines

“learning disability”; state of arrested or incomplete development of the mind which includes significant impairment of intelligence

“autism” - lifelong developmental disorder of the mind that affects how people perceive, communicate and interact with others

and residual “psychiatric disorder”- mental disorder other than LD/autism

“Serious behavioural consequences” to LD if associated with abnormally aggressive/seriously irresponsible conduct

DETENTION CRITERIA –DEFINITIONS -2

"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.";

DETENTION CRITERIA -CIVIL

Section 2:
Presence of MD/nature or degree warranting detention- unchanged (so includes those with LD/autism)
Risk criteria:
serious harm may be caused to the health or safety of the patient or of another person unless the patient is so detained; and
given the nature, degree and likelihood of the harm, and how soon it would occur, the patient ought to be so detained

DETENTION CRITERIA-CIVIL

Section 3 (3 months, 6 months, 1 year)

(a) Patient must be suffering from psychiatric disorder or nature or degree etc; and

(b) serious harm may be caused to the health or safety of the patient or of another person unless the patient receives medical treatment,

(c) it is necessary, given the nature, degree and likelihood of the harm, and how soon it would occur, for the patient to receive medical treatment,

(d) the necessary treatment cannot be provided unless the patient is detained under this Act, and

(e) appropriate medical treatment is available for the patient

DETENTION CRITERIA-GUARDIANSHIP

Can include those with
Psychiatric disorder
Autism
LD which has serious behavioural consequences
Burden of proof no longer on patient at Tribunals.

ADMISSIONS VIA CJS

Part 3 sections (remands to hospital, hospital orders, transfers from prison)

New concept of a “relevant mental disorder”:

Psychiatric disorder

Autism

LD which has serious behavioural consequences

CTOS

- Psychiatric disorder .
- Serious harm test,
- Necessity for medical treatment,
- Appropriate medical treatment
- Requirement for consent from community clinician-
- 6 months revewable

- NEW requirement to consult nominated person

DOES THIS SHIFT THE DIAL?

- Underlying recommendation to reduce the rate of detention
- “there should be more accessible and responsive mental health crisis services and community based mental health services that respond to people’s needs and keep them well” (Modernising the MHA):
- Treat inpatients with consent where possible
- Must be objecting
- Treatment is available which would benefit the patient
- Substantial likelihood of significant harm to patient or others
- “CTOs are in the Last Chance Saloon”

THE SERIOUS HARM TEST

- Current test – necessary in the interests of patient's health, safety or with a view to protection of others
- Section 41- restriction order where "necessary for the protection of the public from **serious harm**"
- R v Salmon [2022] EWCA Crim 116- where the harm is physical or psychological injury test is risk of "death or serious injury"
- Can include indirect harm (downloading material); or importing dangerous drugs or harm to patient failing to take treatment

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THE NOMINATED PERSON –WHO?

Nearest relative provisions to be abolished

- Patient can choose their own NP
- Schedule A1 for eligibility and formalities- appointment in writing, witnessed by an IMHA or health/care professional who certifies capacity and lack of duress
- AMHP has power, but not duty, to appoint NP for patient lacking capacity to do so, IF patient is detained or under guardianship, or these are in process or being considered
- Pecking order – always appoint deputy or donee if authority extends to "taking decisions of a kind taken by a NP"
- Code of Practice will provide guidance which NP must have regard to

NEW POWERS

- Must be consulted unless impracticable/unreasonable delay before CTO (including for a patient under s37)
- Right to be consulted about part 3 non-restricted transfers or renewals (no power to block)
- Right to require “reasonably” review of patient’s care and treatment plan

BUT

- NP objection to detention/CTO/transfer can be over-ridden by certificate that patient would be likely to act in a manner dangerous to self or others

Does this differ from the “serious harm” test?

DISQUALIFICATION

- Application can be made to County Court by patient, AMHP or person "engaged in caring for the patient or interested in welfare"
- Court can terminate appointment AND disqualify from re-appointment for period set by court (patient can terminate but not disqualify)
- Grounds as in s29 but new grounds:
  - Has done anything which is clearly inconsistent with remaining NP- [?breach of new Code?]
  - Lacks capacity/competence to act
  - Is otherwise unsuitable

NOMINATED PERSON-QUESTIONS

- How many people will go through the requirements?
- Is the role becoming professionalized?
- Modernising the MHA recommended that AMHP *had* to appoint an interim NP when making an application for a patient lacking capacity who would otherwise be vulnerable- not taken forward
- Is it too easy to over-ride objections?

ANY QUESTIONS?

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Mental Health Bill 2025- proposed changes to MHTs

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Elizabeth Cleaver

ACCESS TO THE MENTAL HEALTH TRIBUNAL UNDER THE BILL (PART V)

Increased access to the tribunal

Section 66(2) (a)- Section 2 patients can apply in the first 21 days of detention (extended from 14 days;

Section 66(2)(b)- Section 3 patients can apply in first three months of detention;

S 66 (1) (h) (i-ii) Nominated Person can apply to MHT where admission/CTO/Guardianship went ahead despite objections.

REFERENCES TO MHT

S 68 (4A)- reference to the MHT by Hospital Managers after 3 months (reduced from 6) then every 12 months (reduced from 3 years)

S 71 (2)- detained restricted patients to be referred every 12 months by Secretary of State (down from 3 years) – no changes to patient's eligibility to apply to MHT for restricted patients (s70)

CHANGES TO TRIBUNAL POWERS

Section 72 amended to mirror admission criteria (no longer proof of negative)

i.e Section 72(1) (a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if it is not satisfied that the grounds under section 2 (2) are made out

[section 2(2) – a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and

b) Serious harm may be caused to the health or safety of the patient or of another person unless the patient is so detained; and;

c) Given the nature, degree and likelihood of the harm, the patient ought to be so detained.]

CHANGES TO TRIBUNAL POWERS

Section 72(1)(b) The tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 if it is not satisfied that

i) The conditions in section 20(4) are met

[Section 20(4) a) the patient is suffering from psychiatric disorder of a nature or degree which makes it appropriate for the patient to receive medical treatment in a hospital- and

b) Serious harm may be caused to the health or safety of the patient or of another person unless the patient receives medical treatment

c) It is necessary, given the nature, degree and likelihood of the harm, for the patient to receive medical treatment

CHANGES TO TRIBUNAL POWERS

d) The necessary treatment cannot be provided unless the patient continues to be liable to be so detained, and

e) Appropriate medical treatment is available to the patient.]

Same principle for CTOs (criteria under s17A (5))

Power to make statutory recommendations (with a view to facilitating discharge at a later date) remains (s72(3))- for leave, transfer to another hospital, guardianship or:

(3)(a)(iii) the responsible aftercare bodies make plans for the provision of after-care services for the patient.

b) Power to reconvene if recommendation not complied with.

FORENSIC/RESTRICTED PATIENTS

Section 37 patients- section 72 (1)ZA requires tribunal to consider "relevant disorder" instead of psychiatric disorder when considering criteria under section 20(4)

Restricted patients- section 73

Tribunal shall direct absolute discharge if:

- Section 20(4) criteria are not met;
- Power recall is not appropriate (no changes)

Same caveat that criteria should be read with reference to "relevant disorder" not psychiatric disorder. "relevant disorder"= psychiatric disorder, autism or LD which has serious behavioural consequences (s34A)

CONDITIONS AMOUNTING TO DOL

Restricted patients can be discharged subject to conditions amounting to deprivation of liberty

Section 71(4A) (applies to references to MHT- position on applications?)

a) Where conditions amounting to a deprivation of liberty for the patient are necessary for the protection of another person from serious harm (…)

b) That for the patient to remain discharged subject to those conditions would be no less beneficial to their mental health than for them to be recalled to hospital

Section 75 (2) (a) if restricted patient discharged subject to DOL- increased access to MHT- 6 months then every 12 months

DISCUSSION

Potential issues

- No statutory recommendations for restricted patients for example for leave of absence or transfer;
- No power to direct that aftercare be arranged (only statutory recommendation that this should be considered);
- No power to appeal treatment decisions;
- Different criteria for civil sections re “psychiatric disorder” v “relevant disorder” for restricted patients – confusion?
- Consequences for LD/autism patients?
- Significant additional resources needed within tribunal service + legal representation for patients – timescales?

Questions?

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