



BIHR Explainer: The Mental Health Act White Paper and Consultation

In 2017 the UK government created an [independent review](#) of the Mental Health Act 1983 (MHA). The aim of this review was to look at how the MHA is used and to suggest ways to improve it. The review's final report said that the MHA does not always work as well as it should for patients, their families and their carers.

In January 2021, the UK government published a [White Paper](#) (a policy document made by the Government telling people their proposals for future law or changes to law) on their plans to change and update the Mental Health Act. The UK government is now asking what people who access services, carers, staff and other organisations think about their proposals. This is called a consultation.

What is the Mental Health Act?

The Mental Health Act 1983 (MHA), is a law in England and Wales which covers the assessment, treatment and rights of people who have mental health issues. The Mental Health Act says when you can be detained in hospital and treated against your wishes (also called sectioning). The MHA says that you can only be detained if professionals think your mental health puts you or others at risk, and you need to be in hospital.

People with a learning disability and/or autism can also be detained under the Mental Health Act, despite learning disability or autism not being a mental health condition. Currently the MHA [says](#) that a person with a learning disability can be [detained](#) without having a mental health issue if it is deemed they behave “abnormally aggressively or seriously irresponsibly”.

Why is the Mental Health Act being reviewed and changed?

Over the years, there have been growing concerns about the increasing number of people being detained under the Mental Health Act and people remaining in hospital for long periods of time.

There have also been issues around the MHA being used in unsuitable, and sometimes discriminatory, ways. For example, black people are [four times](#) more likely than white people to be detained.

The review that took place in 2018, made a number of recommendations for how the Mental Health Act should be changed. For example, it recommended that people are given more choice and control over their treatment and that the law should be changed to make sure that keeping people in hospital does not actually cause more harm. It said the law should be changed to make sure that its powers are used in the least restrictive way.

What is in the White Paper?

The White Paper includes information on what changes the UK government plan to make to the Mental Health Act. The White Paper says that the changes to the Mental Health Act will be based on four guiding principles. Although the White Paper does not explicitly say this, it is important to note that these four principles are based around our pre-existing human rights which are protected by our [Human Rights Act](#) (1998).

1. Choice and Autonomy

According to the White Paper, the changes to the Mental Health Act aims to make sure that people in hospital for their mental health are listened to and have their choices respected.

The White Paper [says](#) that:

“service users' views and choices will be represented in advance choice documents and through their involvement in care and treatment plans, and through enhanced opportunities to challenge treatment decisions,” Choice and autonomy over our care and treatment is protected by our right to private and family life (see below). Therefore, legally through our Human Rights Act, those providing and delivering mental health services already have a duty to protect and respect the right to autonomy. However, it is important that this is a guiding principle for any legal changes.

The White Paper also says that if someone is detained under the Mental Health Act, this should be reviewed frequently and importantly people should be able to challenge decisions, especially the decision to keep them in hospital.

2. Least Restriction

Making sure that those delivering mental health services adopt a least restrictive approach is a key element of the Human Rights Act. The White Paper [says](#):

“We will ensure the act's powers are used in the least restrictive way, by strengthening and clarifying the criteria that must be satisfied before a person is detained and treated. We will make discharge planning a key part of care planning so that people are detained for the shortest possible time according to their needs.”

Again, under our Human Right Act there is already a legal duty on those providing and delivering mental health services to ensure that any restriction of rights (for example, mental health detention which restricts the right to liberty and the right to private and family life) are the least restrictive.

3. Therapeutic Benefit

A big concern in recent years has been that many people, including people with learning disabilities and/ or autism, are being detained under the MHA for a long time and that this is actually causing them more harm.

The White Paper says:

“We want to ensure patients are supported to get better, so they can be discharged from the act, and that therapeutic benefit is a requirement of detention.” This means that in the future people should only be detained when it is of benefit to them. Currently this can often not be the case. Again, under the Human Rights Act, especially under rights such as the right to be free from inhuman and degrading treatment there is already a legal duty on those providing and delivering mental health services to ensure that no one is in a situation that is causing them serious harm.

4. The person as an individual

The last guiding principle is that every person receiving care or treatment under the MHA is treated as an individual. The White Paper says:

“We will ensure that patients are viewed and treated as rounded individuals in accordance with the NHS Constitution's statement that staff should "value each person as an individual, respect their aspirations and commitments in life and seek to understand their priorities, needs, abilities and limits".

According to the White Paper, this will be done by giving enhanced rights to Independent Mental Health Advocates, and through a commitment to a Patient and Carer Race Equality Framework (PCREF) which aims to improve access, experience and outcomes for people from BAME backgrounds.

Again, this principle is based in pre-existing human rights such as choice and autonomy (under the right to private and family life) and the right to be free from discrimination. Enhancement of advocacy support is important as advocates often play a key role in ensuring that the human rights of the people that they support are protected and respected.

What is missing from the White Paper?

People and organisations are now trying to understand the full impact of the proposals in the White Paper – it is a very large document. So far some of the concerns that have been raised about what is missing from the White paper include:

- A number of the important planned reforms such as the expansion of advocacy, increased access to tribunals and increased community supports are dependent on future funding decisions.
- There are many wider issues around the provision and funding of mental health services in the UK.
- In the consultation, the government is asking for views on the use of advance consent to admission as an informal patient. This would mean that a person who lost capacity to agree to being in hospital could be admitted on the basis of their prior consent without being detained under legal frameworks such as the Mental Health Act or made subject to Deprivation of Liberty Safeguards (soon to be Liberty Protection Safeguards).

At BIHR we plan to hold some sessions in March to hear from people about their views on what is missing from these proposals.

Which Human Rights Are Involved?

The Human Rights Act means that the Mental Health Act has to be used in a way which upholds our human rights. As described above, the guiding principles of the reforms align with many of our existing rights. It is good that there are steps being taken through the reform process to bring the Mental Health Act into line with our fundamental human rights.

It is important however, that this alignment doesn't simply happen on paper but also in practice. How the Mental Health Act is used in real life, has to respect, protect and fulfil human rights. This is the case now and will also be the case after changes are made.

Some of our legally protected rights which we should be aware of and use in discussions about the Mental Health Act are detailed below. These rights are not up for debate or discussion when reform decisions are made.

The right to be free from inhuman and degrading treatment (Article 3 HRA)

The right to be free from inhuman and degrading treatment is an absolute right. This means that a situation where a person is being treated in an inhuman and degrading way is unlawful, whether intentional or not.

What is inhuman and degrading treatment is on a case-by-case basis and depending on how the treatment impacts the person. However, when a person is detained, they are being placed in a vulnerable situation, therefore may be more at risk of inhuman and degrading treatment. For example, people who are detained under the Mental Health Act, particularly autistic people and people with learning disabilities, may have stayed in hospitals, away from their family and communities, for long periods of time with minimal positive impact on their health and wellbeing. This may reach the level of inhuman and degrading treatment.

The White Paper suggests that detention in hospital must clearly benefit the person and contribute towards their recovery. This will be important in ensuring that people are not being treated in an inhuman and degrading way.

Right to Liberty (Article 5 HRA)

The right to liberty protects your right to not have extreme restrictions placed on your movement. This means that you have a right to freedom of movement and a right to not be detained or restricted unreasonably. It is not a right to do whatever you want.

The right to liberty can be restricted when necessary under very specific circumstances, for example detention under the Mental Health Act. Any restriction on people's right to liberty must be lawful, legitimate and proportionate. A proportionate decision is the least restrictive decision.

The White Paper guiding principle of least restriction will aim to make clear that the powers of the MHA are only used when it is the least restriction option. This means for someone to

be detained, care and treatment cannot be delivered without detention. This is already the law under the Human Rights.

Right to Family and Private Life (Article 8 HRA)

The Human Rights Act protects your right to respect for private and family life, home and correspondence. If someone is detained under the MHA this will impact their right to private and family life as they are likely to be removed from their family.

Again, any restriction on this right family and private life must be lawful, legitimate and proportionate. A proportionate decision is the least restrictive decision.

The right to private life also protects wellbeing (physical and mental health) as well as autonomy (having a say in decisions around our rights, life and care).

The Right to be Free from Discrimination (Article 14 HRA)

The Human Rights Act protects our right not to be discriminated against in relation to any of the other human rights in the Act. This right means that we should all be able to enjoy our human rights in the same way, without discrimination.

As mentioned previously, concerns have been raised around the MHA being used in unsuitable, and sometimes discriminatory, ways. For example, black people four times more likely than white people to be detained. People with mental health and mental capacity issues can often face discrimination when accessing other services such as physical health care.

What happens now?

There is a long way to go before any of these suggestions become the law. The government is now asking what service users, carers, professionals and other organisations think about their proposals.

You can tell them what you think here. You have until 21 April 2021 to share your views.

Where can I find more information?

- We have many resources on human rights in mental health services. For people accessing services, advocates and staff. You can download them for free here.
- Our online advocacy tool Know Your Human Rights supports people to know when their human rights may be at risk in mental health and mental capacity services, and how to use the law to resolve these issues in everyday discussions with staff. You can access the tool here.
- Mind's information on the MHA Review, including briefings on the consultation, is available here.
- You can read a blog from an expert by experience about human rights in mental health services here.