Mind's response to the Mental Health Act Review's report and recommendations

Mind welcomed the independent Review of the Mental Health Act as both necessary and timely. Being sectioned is one of the most serious things that can happen to somebody experiencing a mental health problem.

We welcome the Review's recommendations, set out in its final report *Modernising the Mental Health Act: Increasing choice, reducing compulsion*.[1] In the longer term, we want to see larger, more fundamental shifts in the law, but these recommendations could make significant improvements to people's rights and experience of mental health care.

This response is based on our submission to the Review and how the concerns we raised were addressed.

Overview

We wanted the Review to make recommendations that would:

- make a serious, meaningful response to racism and the disproportionate detention of African and Caribbean people in particular
- reduce the need for involuntary interventions and compulsion through vastly improved service provision and increased rights to access support
- reduce the ability to detain and impose treatment by tightening criteria, removing Community Treatment Orders (CTOs), and placing a greater responsibility on services to engage with people about their treatment needs and preferences
- greatly improve people's autonomy and experience when detained, maximising people's dignity, safety and meaningful involvement in their care, and their ability to challenge care when it falls short of reasonable expectations.

The Review's recommendations have the potential to meet these objectives:

Race equality

The Organisational Competence Framework (OCF) and Patient and Carer Experience Tool are proposed as a methodology to make services more attractive and responsive to people from BME backgrounds, and to support organisations to meet their duties under the Equality Act, while culturally appropriate advocacy should help secure BME people's rights.

[1] Modernising the Mental Health Act: Increasing choice, reducing compulsion. Final report of the Independent Review of the Mental Health Act 1983. December 2018. https://www.gov.uk/government/publications/modernising-the-mental-health-act-final-report-from-the-independent-review

Reducing the need for compulsion
The Review calls for more accessible and responsive mental health crisis services and community-based mental health services that respond to people's needs and keep them well. This lies within the remit of the NHS Long Term plan which includes significant improvements to emergency mental health support and community mental health services for people with severe mental health problems.[2]

Reducing the ability to detain
The Review recommends tightening detention criteria by requiring 'a substantial likelihood of significant harm' and its recommendations would introduce greater transparency and scrutiny through a statutory care and treatment plan and expanded tribunal powers. The recommendation to include welfare along with health and safety as justifications for detention (for example to prevent destitution) would widen the scope, but within the context of a higher threshold as regards the seriousness and likelihood of harm. On CTOs, the Review recommends measures to restrict their use with further research and a review in five years' time.

Maximising dignity, safety, involvement and ability to challenge
Much of what the Review recommends aims to give greater legal weight to people's wishes and preferences, for example through inclusion of people's wishes in the care and treatment plan, advance choice documents to capture patients' wishes and make it harder for them to be overruled, the ability for patients to appeal treatment decisions and more frequent access to the tribunal. All inpatients would be entitled to advocacy without having to ask, and this would help people to be involved in their care and to exercise their rights. There are proposals for improving the social and physical environments of wards, ending certain coercive practices and unjustified restrictions in hospital, and improving how complaints are dealt with.

Conclusion and next steps
While we had wanted to see more fundamental consideration of the basis of mental health legislation and how it relates to discrimination and capacity, this will take longer and the reforms recommended by the Review are needed and can be implemented now. However, more fundamental reform should not be delayed and we would like to see a commitment from government to take forward work on fusion law and the five tests which the Review said needed to be met.

Our immediate priority is that the Review's recommendations - which are necessary and achievable, not aspirational - are implemented. This applies to changes in both the law and the health care system, such as expanding provision to include culturally appropriate services and a wider range of therapies and support that are responsive to people's wishes and circumstances. Delivery of commitments made in the NHS Long term plan will be critical to this, as will a focus on people who are marginalised, especially as the Review has not recommended additional rights to access treatment and care.

In particular the recommendations relating to race equality will need concrete development, and concerted commitment and action, if they are to make a real difference. Throughout the next stage of drafting legislation and planning implementation there needs to be attention to accountability and making the reforms stick.

[2] The NHS Long Term Plan. January 2019. https://www.longtermplan.nhs.uk/

Recommendations in more detail

1. Principles and rights included in the Act

Issue
Currently there are principles in the Code of Practice but not on the face of the Act, where they would carry more force.

What we wanted the Review to recommend
We called for principles to be included in the face of the Act and to reference anti-discriminatory practice and the idea of 'hospitality'. This draws from the vision set out in our 2010-11 independent crisis care inquiry, for care 'built on humanity, embodying a culture of service and hospitality, where people are treated with kindness, respect and courtesy, have someone to talk to and feel safe'.

What the Review said and Mind's view
The Review recommends including the following four new principles in the Act, to govern actions taken under it and to set standards and expectations:

- Choice and autonomy
- The use of least restriction
- Therapeutic benefit
- The person as an individual.

Mind welcomes this recommendation; anti-discrimination is contained in the principle 'The person as an individual', which specifies the person's individual diversity. Although, hospitality is not explicitly mentioned, later recommendations on improving the social environment of wards provides opportunity to adopt this ethos.

2. Reducing detentions

Issue
A lot of the people we heard from talked about the difficulty of getting support when they needed it most and how better, early and more accessible support could prevent detentions.

What we wanted the Review to recommend
We called for investment in a wider range of services and support that are culturally relevant and new rights to assessment and treatment.

What the Review said and Mind's view
The Review recommends investment in services, calling for more accessible and responsive mental health crisis services and community-based mental health services that respond to people's needs and keep them well. In addition to this, an Organisational Competence Framework (OCF) and Patient and Carer Experience Tool would bring a focus on cultural relevance and competence in services.

The Review does not recommend new rights to assessment and treatment as we called for, but does recommend putting coordinated care planning on a statutory footing in a way that brings together existing rights under health and care legislation.

Mind welcomes these recommendations and we will assess to what extent they would, together with planned improvements under the Five Year Forward View for Mental Health

and NHS long term plan, prevent people from being turned away from services when trying to access mental health support.

3. Decisions to detain under the Act

Issue

The current criteria are very broad: the person must have a mental disorder and need to be detained in hospital for their own health or safety or for the protection of others. The person's capacity to make their own decisions is not a factor and their wishes have no legal force. In practice, decision-making may be affected by racism and bias.

What we wanted the Review to recommend

We wanted a concrete commitment to work on options for capacity-based legislation such as 'fusion law' which would bring together mental health and mental capacity law, as has been done (though not yet implemented) in Northern Ireland. Such law would give primacy to a person's capacity to make their own decisions. Meanwhile, we wanted the current legislation to have more focus on capacity and the wishes of the person.

We also wanted an explicit reference in the Act to ensure diagnoses considered cultural and social backgrounds and for the involvement of trusted family or friends and/or advocacy before key decisions are taken

What the Review said and Mind's view

The Review's recommendations tighten the criteria to say that there must be a substantial likelihood of significant harm and that risks would need to be evidenced. This should limit compulsory admission to the most serious of cases. The Review also recommends including welfare along with health and safety as justifications for detention. The purpose is positive, to prevent damage to a person's life such as becoming destitute. This would widen the scope of detention but within the context of a higher threshold as regards the seriousness and likelihood of harm.

The Act would only apply to people who objected to admission. Everyone who was admitted would be assessed as to their capacity to make these decisions. The Review is very clear that treatment should be beneficial as well as available, and many of its recommendations aim to give greater weight to people's wishes.

The Review does not specify consideration of cultural and social backgrounds in making diagnoses, but the statutory care and treatment plan would include known cultural needs while the principle of the person as an individual has the potential to drive improvements and should provide a basis for challenge.

The Review did not recommend a right to advocacy before detention on the grounds that it might be impracticable but does recommend piloting this approach. A combination of a right to advocacy for inpatients, a nominated person instead of nearest relative, use of advance choice documents, and a requirement to state how patients' wishes have informed the care and treatment plan, should all help decision-making to be based on an understanding of the person's own perspective.

We will consider what else could be done to strengthen the person's involvement prior to sectioning and to ensure that these key decisions are culturally informed and non-discriminatory.

The Review considered 'fusion' law and accepted some of the arguments in its favour such as reducing discrimination and advancing human rights. It did not recommend fusion in the short term but instead set out five 'confidence tests' that would need to be met.

We agree that this 'fusion' approach would be a fundamental shift and that more work is needed, particularly seeking the views of service users. These confidence tests will not be met by themselves and we would like to see a commitment from government to take this forwards.

4. Interface between the MHA and MCA

Issue

Currently, a person receiving treatment for their mental health in hospital who lacks the capacity to consent to their admission will be detained under the Mental Health Act if they object; if they do not object they may be detained under either the Mental Health Act or the Mental Capacity Act. Greater clarity is needed over where the dividing line is between the MHA and MCA.

What we wanted the Review to recommend

While two separate frameworks exist, we wanted it to be made clear when each Act should be applied, and for safeguards to be harmonised and strengthened. We wanted maximum regard for people's wishes which includes the starting assumption that a person has capacity to be involved in and make decisions about their care.

What the Review said and Mind's view

The Review provides clarity about which Act to use but the continuing existence of two different frameworks makes the dividing line problematic. Safeguards in the MHA are strengthened but safeguards for people treated under the MCA depend on reforms to that legislation, and at present these look very poor.

Mind welcomes the Review's recommendation to strengthen a number of safeguards in the MHA. At the same time the government is progressing amendments to the MCA which reduce safeguards. For example, automatic reviews are set to change from every three years to annually under the MHA, while moving from annually to every three years under the MCA.

It is not acceptable for fundamental safeguards to be better or worse depending on whether you fall under the MHA or MCA. The government needs to look at this holistically and ensure that any improvements will be felt by everyone detained in hospital for mental health treatment.

5. Role of the police

Issue

Initial police involvement is sometimes unavoidable during crises, but is often an indication of shortcomings in mental health services. Having the police involved makes people feel as though they are criminals and it is intimidating. For Black people there is the added dimension of racism and fears associated with policing especially when force is used.

What we wanted the Review to recommend
We asked for the Review to support work in this area such as the Crisis Care Concordat and Mental Health Units (Use of Force) Act. We also called for police training on cultural competence and further commitment to end the use of police cells as places of safety under the Act, and to end the use of police vehicles to take people to places of safety (except in the most exceptional of cases).

What the Review said and Mind's view
Mind welcomes the Review's recommendations to invest in more health-based places of safety and for people detained under police powers to be conveyed to places of safety by ambulance. This is the initial step needed to reduce the criminalisation of mental illness, however more work still needs to be done to strengthen mental health training and cultural competence in the police.

6. Dignity and respect

Issue
There are many ways in which people's dignity and safety are compromised while detained under the Mental Health Act, or indeed as informal inpatients. These can range from a poor physical environment through unnecessary restrictions to allegations of provocation, intimidation and racism on the part of staff. Closed environments, blanket restrictions, poor communication and misunderstanding can culminate in physical restraint, seclusion or forced medication which continue to be in common use.

What we wanted the Review to recommend
We called for a number of steps to improve people's experience in hospital. These included an antidiscrimination principle and a principle promoting a culture of hospitality on the face of the Act, and concerted action across all NHS arm's length bodies to require and support quality improvement that would put hospitality into practice, create positive cultures on wards and improve environments.

What the Review said and Mind's view
The Review calls on commissioners and providers to improve the social environments of wards and recommends that the Care Quality Commission develop new criteria for monitoring these environments and use the criteria in registration and inspection of wards and enforcement action. It also recommends improving the physical environment including through co-producing with service users a review of physical design requirements and through capital investment. Dormitory accommodation should be replaced with single rooms and accommodation should be genuinely single sex.

The review recommends ending behavioural systems used for patient compliance, ending unjustified 'blanket' restrictions, and improving the way that complaints are dealt with.

We welcome these and related recommendations such as the principle of therapeutic benefit. What happens to people in hospital is as much a concern as the basis on which people are admitted. We are conscious that these recommendations are much more than the Act itself can deliver and will require concerted action and a commitment to implementation.

7. Patient autonomy and making decisions about care and treatment

Issue
As it currently stands, the Mental Health Act pays no regard to patients' wishes and this is fundamentally out of step with how we now understand people's rights. Many people that we engaged with told us they felt ignored and misunderstood by staff while in hospital, with little opportunity to have a say about their care. There is no right to be involved in care planning, and not even any external scrutiny of prescribing for the first three months of detention. There is no right of appeal against treatment decisions except by Judicial Review.

What we wanted the Review to recommend
Mind is strongly in favour of increasing the regard paid to patients' wishes, both in advance and at the time, and we called for a statutory requirement for meaningful involvement and shared decision-making in care and treatment planning. We said this needed to provide for cultural competence and advocacy that is culturally relevant.

We called for earlier second opinions on treatment and a right for patients to challenge treatment.

What the Review said and Mind's view
The Review makes recommendations to give people more of a say about their care and treatment and makes it harder to override people's choices by introducing:

- Advance Choice Documents so that people can set out their wishes about future care and treatment, which would have more weight than they do in the current system.
- A statutory care and treatment plan that would be developed within days of the person's detention and be integral to it. It would include the aims of care and treatment and the known needs and wishes of the patient, and would be scrutinised by the tribunal at appeals for discharge.

The Review recommends earlier access to a second opinion and a right to appeal against treatments.

We welcome these recommendations and are pleased that the UK Government has agreed to introduce Advance Choice Documents. A statutory care and treatment plan could bring transparency to decision-making and means that clinicians can be held to account on the quality and delivery of the plan, how it is to benefit the patient and how far it meets their needs and wishes. Notwithstanding, care plans in themselves will not ensure more involvement of co-planning. This will require solid implementation and a culture shift.

8. Race equality

Issue
The Review had a significant focus on people from ethnic minority communities, in particular people of Black African and Caribbean heritage who are most disproportionately affected by the Act and have poorer outcomes.

What we wanted the Review to recommend
We called for earlier access to culturally competent and relevant community services, and a commitment to wider reforms to promote social justice, equality and inclusion. Other measures to reduce the need for detention included rights-based advocacy, action to counter bias in assessment and clinical decision-making, better quality data and more

transparent monitoring, co-produced care planning and more support for the BME voluntary and community sector.

In the Act itself we called for an antidiscrimination principle referencing racism and greater cultural competence in services, advocacy and tribunal membership.

What the Review said and Mind's view
The Review's main recommendation is for a new systematic approach to improving how mental health services respond to their local population's ethnic and cultural backgrounds. This Organisational Competence Framework (OCF) and Patient and Carer Experience Tool would be developed and implemented first by the NHS, but ultimately rolled out to other public services. It would be a practical way of making improvements to race equality and help organisations meet their duties under the Equality Act.

Other recommendations include culturally appropriate advocacy, enabling people to follow religious and spiritual practices while in hospital, greater representation of people of African and Caribbean heritage in mental health professions including at senior levels, and piloting behavioural 'nudges' to counter bias in decision-making. Anti-discrimination is contained in the principle 'The person as an individual', which specifies the person's individual diversity.

We support these recommendations while being very conscious that they will require concrete development and a continuous commitment to tackling racial discrimination and increasing diversity and inclusion in wider mental health services to bring about significant and sustained change.

In the context of the Act itself, there is more work to be done on diversity and cultural competence in tribunal membership, given the tribunal's critical role in hearing appeals and evaluating care and treatment planning.

9. Advocacy

Issue
Currently, a person only becomes eligible for Independent Mental Health Advocacy (IMHA) under the Act once they have been detained and to get access to an advocate you have to ask for one. Not everyone is informed of their right to an advocate or has the capacity or motivation to ask.

Also, if you are an informal patient (ie not detained) there is no-one making sure you know what your rights are. Several people told us they wanted advocacy to be available during the sectioning process to help them express their views.

What we wanted the Review to recommend
We asked for the eligibility for advocacy to be extended to all inpatients and for patients to be automatically referred. We also wanted culturally relevant advocacy and for advocacy to be regulated by national standards.

What the Review said and Mind's view
The Review recommends giving all inpatients on mental health wards a statutory right to advocacy, whether they are detained or not, without having to ask for one. Advocates' role would include supporting people to take part in their care planning and in setting out advance choices. They would also be empowered to challenge treatment decisions where

the patient lacks capacity to do so and challenge treatment they consider is not in the patient's best interests. Commissioning would be strengthened to promote quality and meeting the needs of BME groups. It does not recommend national regulation, but full consultation to address training, accreditation and standards.

We strongly support all these recommendations which would strengthen people's voice, protect their rights and support people to express their views and wishes so these can be reflected in treatment plans and care from the beginning.

10. Tribunals

Issue

Currently, people have a right to appeal to a tribunal to be discharged from detention or a community treatment order (CTO). However, there are many other aspects of care and treatment that a person may want looked at that Tribunals do not have the power to intervene in. People who lack capacity to make an appeal may be detained for as long as three years before any external scrutiny as to whether their detention is still justified.

What we wanted the Review to recommend

We asked for a broadening of the range of issues that Tribunals can consider to include treatment choices, plans and the quality of care. We wanted diagnosis changes to trigger reviews, automatic reviews (when no-one makes and application) to be annual, and for Tribunal membership to be more culturally diverse.

What the Review said and Mind's view

The Review is recommending new powers for the tribunal when a patient is applying for discharge: to grant leave from hospital, to direct transfer to a different hospital, and a limited power to direct the provision of services in the community. Where the tribunal refuses to discharge a person from a CTO, it could order the conditions of the CTO to be changed. The tribunal would also scrutinise the care and treatment plan during every application for discharge.

Where people do not have capacity to appeal to the tribunal, their Independent Mental Health Advocate or Nominated Person would have the power to apply on their behalf. Automatic reviews would be more frequent - four months after detention, at twelve months, and then annually.

We welcome these recommendations which strengthen patients' human rights. We are keen to see concrete proposals on the proposed limited power to direct the provision of services in the community, which could reduce instances where patients are discharged without any support, or spend too long in hospital waiting for support to be put in place.

However we are also aware that people can find hearings extremely stressful and there needs to be attention to improving people's experience.

Further work should also aim to achieve greater diversity of tribunal membership and consideration of diagnosis.

11. Family and Carer Involvement

Issue
At the moment, people are allocated their 'nearest relative' from a strict hierarchy of family relationships set out in the Act. The role has significant powers and duties which enables someone to be informed about various aspects of their relative's treatment. The nearest relative system means this role could be filled by someone who does not have your best interests at heart, may be abusive or barely know you.

What we wanted the Review to recommend
We wanted people to be able to choose who carried out the 'nearest relative' role.

What the Review said and Mind's view
The Review recommends giving people the choice of which friend or family member has a role in decisions under the Act by making the current 'nearest relative' role a 'nominated person' that you can choose yourself. We are pleased that this recommendation has been accepted by the UK Government. The recommendations also provide for the patient to stipulate what information can be shared with which other friends and family, making it less likely that people will be shut out of their relative's care.

12. Community Treatment Orders

Issue
People who are in hospital on certain sections of the Mental Health Act can be discharged from hospital onto a Community Treatment Order (CTO). This means being subject to recall to hospital and abiding by conditions in the community. Research has consistently shown that CTOs do not achieve their aim of reducing the risk of readmission and they are perceived as coercive, discriminatory and intrusive to those subject to them. Black or Black British people are over eight times more likely than white people to be made the subject of CTOs.

What we wanted the Review to recommend
Given people's experience of CTOs, the strong sense of racial discrimination and the research evidence that they are ineffective, we called for CTOs to be repealed. Enabling people to be discharged from hospital and supporting their ongoing recovery would be better achieved by mandating the provision of community support through statutory, co-produced aftercare and crisis plans, with sufficient resources to be effective, and using other powers where additional oversight or community testing is necessary. Section 17 can be used for short term testing in the community, subject to regular reviews, while the Mental Capacity Act exists to authorise longer term arrangements for those who lack capacity to make decisions about their care and treatment.

What the Review said and Mind's view
The Review recommends further research into the effectiveness of CTOs and a review after five years. The Review also recommends restricting the use of CTOs for example by requiring more than one professional to be involved in all decisions and a higher evidence threshold for their use, which they expect to halve the use of CTOs and improve their effectiveness. Tightening the rules for imposing them is a small step in the right direction but we are disappointed that the Review has not called to scrap them given the consistent evidence of their ineffective and discriminatory use. We are not confident that the Review's

recommendations will achieve its objective of halving the numbers of CTOs and would like a commitment for a further review.

13. Immigration detention

Issue

There are many concerns about people in immigration detention and their mental health; many will have pre-existing mental health problems or histories of trauma, and being in detention is damaging to mental health. One concern highlighted by the Review is that even where a person wants to go into hospital, they are transferred and treated under the Mental Health Act (sections that apply to remand prisoners) and are held in unnecessary levels of security.

What we wanted the Review to recommend

We wanted immigration detainees to be a separate category from prisoners in the Act, and called for explicit timescales for transfer to hospital, culturally competent services and support, access to advocacy and access to community services on discharge from detention.

What the Review said and Mind's view

The Review recommends a new statutory, independent role to manage transfers from both prisons and immigration removal centres (IRCs). This role should consider the least restrictive option for immigration detainees, including treatment in the community, informal admission and civil sections of the MHA. There would also be a new statutory time limit of 28 days for transfers from prison and immigration detention and people awaiting transfer from a prison or IRC would be entitled to an IMHA.

We welcome these recommendations, while we still want to see improvements on broader issues relating to people with mental health problems being in immigration detention at all, identification and assessment of mental health problems in IRCs and the quality of mental health support in IRCs.

January 2019