

MHB032 – The Law Society

Senedd Cymru | Welsh Parliament

Bil arfaethedig – Datblygu'r Bil Safonau Gofal Iechyd Meddwl (Cymru) |
Proposed Development of the Mental Health Standards of Care (Wales) Bill

Ymateb gan: Joshua Hurst, Cyngorydd Polisi a Materion Cyhoeddus Cymru,
Cymdeithas y Cyfreithwyr | Evidence from: Joshua Hurst, Wales Public Affairs and
Policy Advisor, The Law Society

Consultation Questions

In summary:

Our key recommendations are:

- **We support** enshrining the principles on the face of the Mental Health Act in Wales, replacing the Nearest Relative provisions with a new role of Nominated Person, and enshrining a change in the criteria for detention.
 - **We support** the proposal to amend the Measure to extend the ability to request a re-assessment to people specified by the patient.
 - **We would like to add** a provision on providing and storing Advance Choice Documents to enable patients to have a greater role in decisions made about their care and treatment. This would enable patients to set out in advance the care and treatment they would prefer. Patients would also be able to make clear any treatments they wish to refuse in the event they are detained under the Mental Health Act and are unable to express their views at that time.
 - **We recommend** that the Bill makes clear which areas apply to children and young people and the role of those with parental responsibility in a child and young person's healthcare. Any guidance related to this legislation should emphasise that all children and young people should be involved in decisions about their treatment and care.
-

- **We do not support** introducing remote assessments relating to Second Opinion Appointed Doctors (SOADs) and Independent Mental Health Advocates (IMHAs).

Enshrining overarching principles in legislation

Question 1: Do you think there is a need for this legislation?

Can you provide reasons for your answer.

We support the need for this legislation. The Law Society welcomed many of the recommendations made by the [Independent Review of the Mental Health Act](#) in our response to the [Reforming the Mental Health Act White Paper](#). The Mental Health Act 1983 is outdated and does not provide mental health patients with enough agency or choice in their care and treatment.

Question 2: Do you agree or disagree with the overarching principles that the Bill seeks to enshrine?

We support the Bill enshrining the following principles on the face of the Mental Health Act 1983 in Wales:

Choice and Autonomy: We agree with the aim of giving patients greater influence over decisions about their care and treatment and for their voice to be heard and respected, with the opportunity to challenge when it is not. Our members have an important role to play in supporting patients throughout such processes.

Least Restriction: Detention must be necessary and proportionate, used as a measure of last resort, and care should be provided in the least restrictive setting.

Therapeutic Benefit: We agree that detention must provide a therapeutic benefit to the patient.

The Person as an Individual: We support ensuring patients are viewed and treated as individuals.

Specific changes to existing legislation

A. Nearest Relative and Nominated Person

Question 3: Do you agree or disagree with the proposal to replace the Nearest Relative (NR) provisions in the Mental Health Act 1983 with a new role of Nominated Person?

We welcome the replacement of the Nearest Relative (NR) provisions with the role of the Nominated Person (NP). However, it will be necessary to consider the interaction between these provisions and the law relating to parental responsibility for those under 18.

There should be a clear process for identification of the NP to help address the risk of Approved Mental Health Professionals (AMHPs) doubting the legal basis and process for making this decision.

The power to overrule or displace a NP should sit with the Mental Health Review Tribunal in Wales due to the specialist knowledge and experience of these tribunals, in contrast to the County Court. We believe that representation in such proceedings should be funded on a non-means tested basis, in line with other tribunal proceedings, to ensure access to justice.

B. Changing the criteria for detention, ensuring the prospect for therapeutic benefit

Question 4: Do you agree or disagree with the proposal to change in the criteria for detention to ensure that people can only be detained if they pose a risk of serious harm either to themselves or to others?

We support enshrining a change in the criteria for detention to ensure that people can only be detained if they pose a risk of serious harm either to themselves or to others. This could help address the risk of patients being detained for prolonged periods due to historical harm, such as assaults from several years ago which were potentially connected to a mental disorder.

Question 5: Do you agree or disagree with the proposal to change in the criteria that there must be reasonable prospect of therapeutic benefit to the patient?

Can you provide reasons for your answer.

We also agree with changing the detention criteria so that detention must provide a therapeutic benefit to the patient. This would help ensure that

detention is necessary and proportionate. It is important that the change to the detention criteria, as well as the presumption that a person has capacity to decide on their own medical treatment, is not used to deny care and treatment to those seeking it. We believe the Code of Practice should make this clear.

C. Remote (Virtual) assessment

Question 6: Do you agree or disagree with the proposal to introduce remote (virtual) assessment under 'specific provisions' relating to Second Opinion Appointed Doctors (SOADs), and Independent Mental Health Advocates (IMHA)?

Can you provide reasons for your answer.

We do not support the proposal to introduce remote (virtual) assessment relating to Second Opinion Appointed Doctors (SOADs) and Independent Mental Health Advocates (IMHAs). There is a risk that these changes could lead to the routine use of remote assessments, regardless of whether this is in the best interests of the patient. The reference to 'specific provisions' is unclear and requires further explanation. It is important to safeguard the rights of patients detained under the Mental Health Act who either refuse their treatment or are deemed incapable of consenting. IMHAs play a particularly important role in supporting patients detained under the Act to understand their rights and make their views and wishes heard in decisions about their care or treatment. An assessment of a patient's physical and mental state can be difficult when not held face-to-face. Connection disruptions, distractions, the inability to assess body language, and the stress of an unfamiliar and impersonal process all present challenges to ensuring a fair and accurate assessment is conducted.

D. Amendments to the Mental Health (Wales) Measure 2010

Question 7: Do you agree or disagree with the proposal to amend the Measure to ensure that there is no age limit upon those who can request a re-assessment of their mental health?

Can you provide reasons for your answer.

We agree with amending the Measure to ensure that there is no age limit on people requesting a re-assessment of their mental health. However, for this to improve patient access to mental health services there needs to be greater awareness of the right to re-assessment. A 2019 review of Community Mental Health Teams (CMHTs) found that less than half (43%) of previous patients knew they could re-refer themselves to a CMHT if they were relapsing. It will also be

necessary to consider the interaction between these provisions and the law relating to parental responsibility for those under 18.

Question 8: Do you agree or disagree with the proposal to amend the Measure to extend the ability to request a re-assessment to people specified by the patient?

Can you provide reasons for your answer.

We agree with the proposal to amend the Measure to extend the ability to request a re-assessment to people specified by the patient.

General Views

Question 9: Do you have any views about how the impact the proposals would have across different population groups?

The Independent Review found that research consistently shows higher levels of detention in Black African and Caribbean people. Many of the proposals in this consultation document will help ensure the Mental Health Act is used in the least restrictive way possible and that all people who are detained against their will have their views and choices respected.

Question 10: Do you have any views about the impact the proposals would have on children's rights?

As stated in our response to question 3, it will be necessary to consider the interaction between NP provisions and the law relating to parental responsibility for those under 18.

We recommend that the Bill makes clear which areas apply to children and young people and the role of those with parental responsibility in a child and young person's healthcare. This will help provide clarity for health professionals.

Any guidance related to this legislation should emphasise that all children and young people should be involved in decisions about their treatment and care. This is to the extent that it is appropriate to the individual dependant on their age, stage of development, experience and understanding of their care. A child or young person's capacity to make decisions about their care and treatment can depend on the specific decision, time of day and circumstances. For example, they may have capacity to make a decision when the matter is discussed with them in a familiar environment with someone they trust, but not in a stressful environment with someone they do not know. Another example is

that a child or young person may only have capacity to make a decision at certain times of day, depending on the timing and impact of medication.

Children and young people will benefit from the Bill making statutory provision for facilitating the creation and storage of Advance Choice Documents (see 'key recommendations' above). This will ensure that a child with capacity to make decisions about their treatment can have their views respected.

Question 11: Do you have any general views on the proposal, not covered by any of the previous questions contained in the consultation?

-
