

## **RCPsych Wales response to the call for evidence on the Legislative Consent Memorandum for the Mental Health Bill**

### **About RCPsych Wales**

The Royal College of Psychiatrists is the professional medical body responsible for supporting psychiatrists throughout their careers, from training through to retirement, and setting and raising standards of psychiatry. The College aims to improve the outcomes of people with mental illness and intellectual disabilities, and the mental health of individuals, their families and communities.

To achieve this, the College sets standards and promotes excellence in psychiatry; leads, represents and supports psychiatrists; improves the scientific understanding of mental illness; works with and advocates for patients, carers and their organisations.

Nationally and internationally, the College has a vital role in representing the expertise of the psychiatric profession to governments and other agencies. RCPsych Wales represents more than 600 consultant and trainee psychiatrists working in Wales.

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### **Overall Views**

#### **1. Your overall views on the policy objectives of the Bill to:**

**a. modernise mental health legislation to give patients greater choice, autonomy, enhanced rights and support; and ensure everyone is treated with dignity and respect throughout treatment; and**

RCPsych Wales welcomes the introduction of the Mental Health Bill into the UK Parliament. The Bill represents a historic opportunity to improve the Mental Health Act and the lives of those with mental illness in Wales and England. In particular,

the Bill will support the delivery of relational care, in which clinicians work in greater partnership with patients to ensure that compulsory inpatient admissions focus on therapeutic benefit and safety for all.

Following the UK Conservative Government's failure to include a Mental Health Bill in the 2023 King's Speech, RCPsych Wales sought to modernise mental health legislation in Wales by supporting the development of James Evans MS's Private Member's Mental Health Standards of Care (Wales) Bill. The Bill was rights-focused and aimed to bring forward identified changes to the Mental Health Act that fall within the Senedd's legislative competence. In light of the new UK Government's introduction of a Mental Health Bill, James Evans MS took the decision to withdraw his Bill, a decision we supported. However, James Evans MS's Bill has laid important groundwork for future reforms to the mental health landscape in Wales, part of which will now be taken forward by the UK Government's Bill.

RCPsych Wales welcomes Clause 2 which extends to Wales the requirement for the Code of Practice to include the language of the four principles initially proposed within the 2018 Independent Review of the Mental Health Act (Choice and Autonomy; Least Restriction; Therapeutic Benefit; and the person as an Individual). We have previously supported the enshrinement of these principles in Wales via James Evans MS's Private Member's Bill. However, we believe there is scope to go further and that the principles should be included on the face of the Bill itself, replicating the Mental Capacity Act 2005.

**b. introduce measures to improve the care and support of people with a learning disability and autistic people, reducing reliance on hospital-based care.**

RCPsych Wales commends the emphasis within the Bill on supporting people with learning disability and autism in the community, but these measures could have unintended consequences and may widen existing inequalities that the Wessely Review was commissioned to address.

There are times when community services cannot manage the level of risk that some patients with learning disability and autism present with. This is not just because of lack of services or staff, but because some risk levels require treatment in appropriate and safe hospital environments.

We are concerned that excluding people with learning disability and autism from admission for treatment (section 3) would result in the use of Deprivation of Liberty Safeguards/Liberty Protection Safeguards (Mental Capacity Act 2005) for the same

detention but with fewer safeguards. There is also a real danger that people with learning disability and autism presenting with such high-risk behaviours will be dealt with by the police and in the criminal justice system if they cannot be admitted to hospital under the Mental Health Act.

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## **2. What barriers do you think currently exist in accessing mental health services in Wales, and does the Bill address these adequately?**

A key barrier when it comes to accessing mental health services in Wales is the insufficient workforce, which the Bill does little to address. As stated below in response to question 17, RCPsych Wales believes that the time has come for the development of a dedicated workforce plan for psychiatry. Although we welcomed the publication of the Strategic Mental Health Workplace Plan in November 2022, it has not lived up to expectations to date and not enough progress is being made to address shortages in the psychiatry workforce, which is exacerbating waiting lists.

Other accessibility barriers were well-documented as part of the Health and Social Committee's 2022 inquiry into tackling mental health inequalities in Wales. These include: inadequate Welsh language and deaf-friendly services; institutional racism; rurality and poor transport links; a lack of out-of-hours appointments; the increasing use of digital delivery; excessive bureaucracy; and inaccessible language.

The extent to which the Bill can adequately address these barriers, in and of itself, is questionable. The Mental Health Code of Practice for Wales has a key role to play in bridging the gap between legislation, policy and the day-to-day experience of patients. RCPsych Wales stands ready to work in partnership with the Welsh Government to develop an updated Code of Practice which better meets the needs of mental health patients and removes barriers to access and treatment.

The Welsh Government's consultation on the new Mental Health and Wellbeing Strategy also referenced the need to address long-term challenges, including inequalities in access to services, which is to be welcomed. We look forward to scrutinising the initial delivery plan and its detailed actions to ensure progress can be made at the fastest rate possible.

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## **Impact on Areas of Devolved Competence**

### **3. Do you support the principle of Westminster legislating in areas that are devolved to the Welsh Government?**

RCPsych Wales believes that, wherever possible, legislation about Wales, which falls within the devolved competence of the Senedd, should be made in Wales. However, mental health law is a complex area which exemplifies the jagged edge of the Welsh devolution settlement and the intricate intersection of devolved (health) and non-devolved (justice) responsibilities.

Although the Mental Health Bill impacts on areas of devolved competence, it also introduces important changes in reserved areas which otherwise couldn't be taken forward by the Senedd. We therefore agree with the position of the Welsh Government that making provision for these reforms through a UK Bill offers the most coherent approach to legislating and safeguarding against the risk of divergence between the services available in Wales and England.

Beyond legislating for reforms, implementation is crucially important. In this regard, it will be necessary for the Welsh Government to update the Code of Practice to take account of the changes and their application within the distinct policy and legislative landscape of Wales. This should be done in consultation and collaboration with key stakeholders, such as RCPsych Wales.

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#### **Alignment with policy priorities**

### **4. Do you think the provisions of the Mental Health Bill align with the Welsh Government's *Mental Health strategy* and broader policy priorities?**

Yes. The Welsh Government has previously committed to develop and implement a programme of work to support the outcomes intended from the Wessely Review. The Bill establishes a legal framework giving effect to this end. The four vision statements set out in the draft Mental Health and Wellbeing Strategy and its ten underpinning principles are also complementary to the Bill's provisions and rights-based approach. Collectively, these will help to improve the experience and care of people suffering with poor mental health in Wales.

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## **5. Are there specific Welsh priorities or policies that should be better reflected in the Bill?**

We do not believe so. RCPsych Wales would like to see amendments made to the Mental Health (Wales) Measure 2010, as put forward in James Evans MS's recent Private Member's Bill. This includes removing the age limit upon those who can request a re-assessment of their mental health, extending the ability to request a re-assessment to people specified by the patient, and introducing remote (virtual) assessment under 'specific provisions' relating to Second Opinion Appointed Doctors (SOADs), and Independent Mental Health Advocates (IMHA). These should be taken forward by the Welsh Government, and we are pleased that the Minister for Mental health and Wellbeing has given a commitment in that regard.

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### **Cross-border Considerations**

## **6. How will the Bill address the movement of patients across the Wales-England border, ensuring smooth collaboration between services?**

The Bill will support the movement of patients across the Wales-England border by aligning the broad legislative framework between both countries (notwithstanding the additional application of the Mental Health (Wales) Measure 2010 in Wales). That said, implementation of the Bill's provisions is likely to differ between both countries. It is therefore important that the updated Codes of Practice for Wales and England also speak to cross-border considerations and the importance of collaboration.

It is also worth noting that the Bill makes provision for statutory care and treatment plans for patients detained under the Act in England. This would bring England in line with current practice in Wales where such a provision already exists under the Measure.

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### **Application of the Mental Health Act 1983: Autism and Learning Disability**

## **7. How will the Bill's provisions integrate with Welsh Government's efforts to reduce mental health-related hospital admissions? Specifically, your views on proposals to amend the Mental Health Act 1983 so that people with a learning**

**disability and/or autism cannot be detained for compulsory treatment unless they have a “psychiatric disorder”.**

The Bill prohibits the detention of people with learning disabilities or autism unless they have a co-occurring psychiatric disorder that warrants hospital treatment. We welcome this emphasis on supporting people with learning disability and autism in the community, but, as stated previously in response to question 1(b), there are times when community services cannot manage the level of risk that some patients with learning disability and autism present with. There is a real danger that people with learning disability and autism presenting with such high-risk behaviours will be dealt with by the police and in the criminal justice system if they cannot be admitted to hospital under the Mental Health Act. These measures could have unintended consequences and may widen existing inequalities that the Wessely Review was commissioned to address.

We have further concerns that differentiating the definitions of mental disorder in part 2 (civil) and part 3 (criminal) of the Mental Health Act would be discriminatory and disadvantage the care that people with learning disability and autism would receive. There is also a potential that the reforms may lead to a situation where people do not receive appropriate health and social care because they will not be entitled to section 117 aftercare (because they haven't been detained under the Mental Health Act).

The College retains a strong objection to the creation of a division between part 2 and part 3 (although we appreciate that the UK Government may view part 2 and part 3 as serving different public policy purposes). Any division will result in many of the principles that should apply to all people with mental disorders being watered down for those under part 3, who may be denied their rights to equivalent care and safeguards. We hope that the UK Government will reconsider changes to the Mental Health Act that will create such gaps.

In light of the concerns regarding learning disability and autism, as well as the distinctions between part 2 and 3, in 2023, the Joint Committee on the Draft Mental Health Bill made the following recommendation:

*‘We recommend there should be provision by which detention can be continued after the 28-days allowed under Section 2 of the Mental Health Act for people with learning disabilities or autistic people in tightly defined exceptional circumstances. This should only be available if pre-authorized by a specialist Tribunal comprising individuals with an understanding of*

*learning disabilities or autism. The time-period should be determined in the Tribunal and subject to regular review by the same Tribunal. The conditions which constitute “exceptional circumstances” should be defined in the Code of Practice; we envisage they might include particularly complex presentations where further assessment beyond 28 days is needed.’*

In the spirit of this recommendation, Baroness Elaine Murphy proposed the following amendment to the Bill at the House of Lords Committee Stage, which the College supports:

*Add Section 3A*

*Admission for treatment - autism and learning disability*

*(1) An application for admission for treatment [note, this is defined in section 3(1)] may only be made in respect of a patient with autism or learning disability with the approval of the appropriate tribunal.*

*(2) An application for approval may only be granted by the appropriate tribunal in exceptional circumstances.*

*(3) The appropriate tribunal may when granting an application for approval set a duration of authority to detain shorter than that provided for in section 20(1)(a).*

*(4) Section 78 applies to the making of procedural rules by the Mental Health Review Tribunal for applications for approval under subsection (1).*

*Add Section 20 (2AA)*

*(a) A patient with autism or learning disability admitted to hospital in pursuance of an application for admission for treatment may not be detained further absent a further application for approval from the appropriate tribunal.*

*(b) An application for approval may only be granted by the appropriate tribunal in exceptional circumstances.*

*(c) The appropriate tribunal may when granting an application for approval set a duration of authority to detain shorter than that provided for in section 23(1)(a).*

*(d) Section 78 applies to the making of procedural rules by the Mental Health Review Tribunal for applications for approval under subsection 2AA(1).*

*Add new Section 118 (g)*

*“for the guidance of the appropriate tribunal as to the meaning of ‘exceptional circumstances’ for purposes of section 3A and section 20(2AA)”*

*\*All those subject to this section will be granted s117 aftercare.*

The purpose of this amendment is to address concerns about the needs of some people with learning disabilities who pose a considerable risk in the community and require supervision and treatment but will not be managed safely in the community, and yet have no formal ancillary diagnosis. There will need to be further discussion on how this amendment would work in practice, though some aspects could be defined by the Code of Practice.

At the time of writing, this amendment has neither been formally withdrawn or moved.

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### **Consultation with the Community Clinician**

#### **8. Your views on proposals to introduce a new requirement for hospital clinicians to collaborate with a second professional from a community service when making decisions regarding the use and operation of community treatment orders (“CTO”).**

Following their introduction in 2007, the use of CTOs was significantly higher than predicted and they remain associated with marked racial/ethnic disparities. The changes proposed in the Bill around CTOs are limited and offer little prospect of their use being restricted (as recommended by the Wessely Review). We believe that the UK Government should consider new options for more pointed and restricted use of CTOs and that, where appropriate, Advance Choice Documents should be used as an alternative to CTOs in patients where this is likely to be effective.

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### **Nominated Person**

#### **9. Your views on:**

**a. the proposed introduction of a “nominated person” role to replace the nearest relative in decision-making;**

RCPsych Wales supports the proposed introduction of a “nominated person” role to replace the current outdated and insufficient model of family and carer involvement in decision-making. We believe this will improve support for detained patients and will ensure that the views, experiences and expertise of patients are taken into account more fully and more seriously in their care and treatment.

**b. the extent to which this proposed reform is consistent with the Welsh Government's vision for a rights-based approach to mental health care?**

By allowing an individual to express their wishes through someone they know and trust, the proposed introduction of a “nominated person” role supports the principle of choice and autonomy. We therefore consider that the proposed reform is consistent with the Welsh Government’s vision for a rights-based approach to mental health care.

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**Deprivation of Liberty**

**10. How does the Bill address the use of compulsion and deprivation of liberty in mental health care (e.g. to shorten the period etc), and does it respect Wales’s legislative competence in these areas?**

RCPsych Wales believes that the Bill should amend the Mental Capacity Act 2005 to prevent the Deprivation of Liberty Safeguards/Liberty Protection Safeguards schemes being used to replace detention under section 3 of the Mental Health Act for people with learning difficulties or autism who do not have a mental health condition. An amendment to this effect was proposed by Baroness Angela Browning, but it has not been moved.

Further clarity is also needed as regards the interface between the Bill and the Mental Capacity Act 2005. In particular, the UK Government needs to provide an update on the implementation of Liberty Protection Safeguards following the indefinite postponement announced by the previous Conservative UK Government in April 2023.

**11. Are the safeguards for patients sufficient, particularly for children, young people, and those with learning disabilities or neurodiverse conditions?**

In terms of children and young people, the Wessely Review and the Joint Committee on the Draft Mental Health Bill also recommended the inclusion of additional safeguards, which aren't contained within the 2024 Bill. This includes protections for children and young people placed inappropriately in adult wards or out of area and a statutory test for competency, or 'child capacity', for children under 16 years old.

As stated in response to the previous question, we believe it is also important that Deprivation of Liberty Safeguards/Liberty Protection Safeguards are prevented from being inappropriately used for patients with learning disability or autism who will no longer be able to be detained under section 3 of the Mental Health Act.

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### **Transfers from Prison to Hospital: Time Limits**

#### **12. Your views on proposals to introduce a statutory 28-day time limit within which individuals with a severe mental health need must be transferred from prison to hospital for treatment under the 1983 Act.**

RCPsych Wales welcomes the concept of a target, but not its enshrinement in legislation. Our concerns are mainly about unforeseen consequences. We believe there is a substantial risk of avoidance of recommendations for transfer, even in appropriate cases, if there is a perceived penalty against clinicians, health boards or both in the event of a target not being met. Where patients remain in prison beyond such a period this almost always results from a lack of hospital beds and not from failure of clinicians to respond to assessment requests.

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### **Help and Information for Patients**

#### **13. Your views on proposals to place a duty on Local Health Boards in Wales to make arrangements they consider appropriate for making information available about advance choice documents ("ACD") and helping those people they consider appropriate to create ACDs.**

RCPsych Wales welcomes the inclusion of ACDs in the Bill as a means of enhancing patient choice and autonomy. This is a positive step in comparison to the 2022 draft Bill where they were lacking. However, we believe that a statutory right to an

ACD, as opposed to a duty on health boards to make information available about them, would be better for ensuring that all patients who could benefit from an ACD can get one, thereby reducing detentions and improving therapeutic relationships.

The Joint Committee on the Draft Mental Health Bill 2022 recommended that all patients who have been detained under the Mental Health Act should have the statutory right to make ACDs, covering care and treatment, and have support in doing so. This recognised the importance of having a system in place in order to make ACDs an effective reality for people. Placing ACDs on a statutory footing would also help to reduce racial disparities in the level of detentions.

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### **Early Intervention and Community-based Support**

#### **14. Are the provisions for crisis intervention and preventive care adequate and in line with the Welsh Government's focus on early intervention and community-based support?**

Neither the Bill nor the Explanatory Notes make explicit reference to crisis intervention or preventative care, which represents a shortcoming. We therefore believe that the Mental Health Code of Practice for Wales has a key role to play in bridging the gap between legislation, policy and the day-to-day experience of patients and setting out clear expectations in terms of crisis intervention and preventative care. RCPsych Wales stands ready to work in partnership with the Welsh Government to develop an updated Code of Practice which better meets the needs of mental health patients and supports preventative measures and early intervention in the community.

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### **Removal of Police Stations and Prisons as Places of Safety**

#### **15. Your views on proposals to remove police stations and prisons as a place of safety for adults experiencing a mental health crisis.**

We welcome proposals to remove police stations and prisons as a place of safety for adults experiencing a mental health crisis. This will help to ensure that, in future, all people in a mental health crisis are taken to a clinical environment,

where they can receive the vital care and support that they urgently need. Additional capital funding should be made available to develop new health-based places of safety in areas of identifiable need. We acknowledge that much work has already been undertaken in this area in Wales.

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## **Children and Young People**

### **16. Does the Bill adequately consider the needs of children and young people in Wales, particularly given the higher rates of mental health concerns reported post-pandemic?**

RCPsych Wales welcomes the fact that the proposed introduction of a “nominated person” role to replace the nearest relative in decision-making will extend to children and young people (subject to Gillick’s competence). This will be of particular benefit to those in the care of local authorities, whose family members may not be actively involved in their day-to-day healthcare decisions. Moreover, the requirement that the Nominated Person for under 16s must be an adult (18 years or over) introduces a necessary safeguard into the new arrangements. Likewise, we welcome the extension of Advance Choice Documents to children and young people (again, subject to Gillick’s competence)

However, there is scope to go further in Wales to ensure the needs of children and young people in Wales are fully considered. This includes introducing amendments to the Mental Health (Wales) Measure 2010, which are within the Senedd’s devolved competence.

RCPsych Wales has supported previous legislative attempts via James Evans MS’s Mental Health Standards of Care (Wales) Bill to remove the age limit upon those who can request a re-assessment of their mental health. Currently, the opportunity to request such a re-assessment is only available to adults, resulting in children and young people being put at a disadvantage. Introducing this change would establish important party in law and bring the Measure in line with the UNCRC, to which Welsh Ministers have a duty to pay due regard. Under the Convention, children have the right to the highest attainable standard of health (Article 24) and the right to express their views and have them taken seriously (Article 12).

Children and young people’s rights would be further enhanced by the introduction of remote (virtual) assessment under ‘specific provisions’ relating to Second

Opinion Appointed Doctors (SOADs), and Independent Mental Health Advocates (IMHA). Again, this proposal was put forward in James Evans MS's Private Member's Bill, with RCPsych Wales support. Such remote assessments aren't intended to supplant in-person appointments but rather provide patients with greater choice and autonomy and offer a means of alleviating issues associated with access to services, such as rurality and transport.

We are encouraged that, on 27 November 2024, the Minister for Mental Health and Wellbeing gave a commitment in Plenary to taking forward these changes to the Measure as actions in the new Mental Health and Wellbeing Strategy for Wales. RCPsych Wales looks forward to working with the Welsh Government to ensure the successful implementation of these bespoke changes to the mental health landscape in Wales.

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## **Workforce**

### **17. What impact will the Bill have on mental health practitioners and services in Wales, particularly in the context of staffing pressures and workforce development?**

Successful implementation of reforms to the Mental Health Act is contingent on investment to ensure an expanded and fully trained workforce is in place to deliver them. Without the required investment, proposed changes to improve patient rights and safeguards, as well as improve the services they receive, will not be realised.

To understand the views of RCPsych members on the proposed changes to the Mental Health Act, a survey of members in Wales and England was conducted in March 2021. Whilst this survey was undertaken in response to the UK Department of Health and Social Care's 2021 White Paper on Reforming the Mental Health Act, some of its findings are translational to the 2024 Bill, thereby giving an indication of the anticipated impact of the 2024 Bill on the psychiatry workforce. One area in which there was clear agreement was the need for substantial investment to implement the proposed changes.

For example, the survey revealed that 71.05% of respondents believed that substantial investment would be required to ensure a sufficient workforce is in place in order to successfully implement more regular Tribunal reviews. This

compares with 25.85% of respondents who said moderate investment would be required and 3.1% who said no investment would be required.

The proposed changes to the way learning disability and autism are treated in the Mental Health Act will also require changes in services. When asked “which of the following statements is most accurate in your area?”, 66.4% of all participants said substantial investment in community services and an expansion of the workforce is required in advance of the changes coming into place. This compares to 90% of learning disability specialist respondents.

RCPsych Wales has recently called for the development of a dedicated workforce plan for psychiatry by HEIW. This should be done in full consultation and collaboration with us to ensure that the voice of the profession is fully heard. Although we welcomed the publication of the Strategic Mental Health Workplace Plan in November 2022, it has not lived up to expectations to date and not enough progress is being made to address shortages in the psychiatry workforce, which has been forecasted to fall by 7.2% between 2020-26. We believe that a clearer and more ambitious plan is needed to meet the rising and increasingly complex demand for mental health services and the changing nature of the psychiatric profession. This is particularly pertinent in light of reforms to the Mental Health Act, as well as emerging treatments, therapies and technologies and the need to promote better co-ordination between mental health and other specialist support services.