next day BRIEFING NHS Providers

Reforming the Mental Health Act White Paper: Government response to consultation

The government published its response to the *Reforming the Mental Health Act White Paper* consultation on 15 July 2021. The document summarises stakeholder views on the proposals, following a 14-week public consultation and 1710 responses, and the government's next steps.

This briefing summarises key points from the government's response, and sets out NHS Providers' view. If you have any comments or questions, please contact Ella Fuller, policy advisor (ella.fuller@nhsproviders.org).

Key points

- The government's response to the *Reforming the Mental Health Act White Paper* consultation sets out which proposals will be taken forwards and next steps in the process of introducing a new Bill and reforming policy and practice to support the implementation of a new Mental Health Act more broadly.
- The government has confirmed it is taking forward a significant number of the proposals from the white paper including: the introduction of four new guiding principles, increasing the frequency of automatic referrals to the Tribunal, and the creation of the nominated person statutory role. The government will also seek to give appropriate powers to health professionals so that people in need of urgent mental health care can stay on an accident and emergency site pending clinical assessment.
- There are a number of areas the government has said it will consider further given responses to the consultation, such as: improving the interface between the Mental Health Act and the Mental Capacity Act; removing the associate hospital managers' panels; and the proposal that health and local authorities should deliver on directions made by the Tribunal within five weeks. The government has also committed to explore its proposals regarding Advanced Choice Documents, advanced consent to admission, and Care and Treatment plans further.
- The response states work will continue on developing a Bill to reform the Act and it will be brought forward when Parliamentary time allows. At the moment, we understand the government is aiming to undertake pre-legislative scrutiny at the end of this year and introduce the Bill at the start of the 2022 spring parliamentary session.

- The response re-emphasises that a new Act on its own will not be enough to improve how and where good quality mental health services are accessed. It is recognised that successful implementation of a new Act, and changes to policy and practice more broadly, requires an expansion of the mental health workforce and additional funding.
- Proposals that require additional funding continue to be subject to future funding decisions, including at the Spending Review 2021.

Background

The government published its *Reforming the Mental Health Act w*hite paper in January 2021. The paper set out proposed changes to the Mental Health Act 1983, as well as proposals and ongoing work to reform policy and practice to support the implementation of a new Act. The majority of the proposals were informed by recommendations made by the 2018 Independent Review of the Mental Health Act 1983.

NHS Providers' briefing summarising the contents of the white paper on the day it was published is available on our website here. Our response to the consultation can be read here. Since January we have also briefed parliamentarians on key areas to consider, and supported engagement between trust leaders and the Department for Health and Social Care (DHSC) to discuss the technical details of the proposals.

Summary of responses and the government's next steps

Guiding principles

The government proposed introducing four new guiding principles (choice and autonomy; least restriction; therapeutic benefit; the person as an individual) and the response confirms that they will take these forward.

It is however noted that the feedback from the consultation will be considered in the everyday practice and application of the Act. Stakeholder feedback suggested that the guiding principles should be clearly communicated to providers, service users and their carers. Areas identified to improve the visibility of the guiding principles include: practitioner training and guidance documents; service commissioning; service reviews (including through the CQC); Mental Health Act documentation and paperwork; and through posters and leaflets in mental health settings.

Responses to the consultation also suggested that applying the guiding principles to the wider health and care system, and beyond health into policing and justice, would also be beneficial. Responses emphasised how A&E, GP surgeries, social care, police, prison staff and the justice system more widely should be made aware of and trained in the new principles.

Detention criteria

The government acknowledged that introducing tests of 'therapeutic benefit' and 'a substantial likelihood of significant harm' would be useful and has been well received. Overall, 82% of respondents agreed with changing the detention criteria so that detention must involve the provision of a therapeutic benefit to the individual. However, many stakeholders were clear that the term "therapeutic benefit" needs to be defined clearly and with care. Some felt that a broad definition would prompt a more holistic approach to patient care, whilst others argued this may risk the therapeutic benefit 'test' being too easily satisfied and lead to unnecessary detentions. The white paper proposed that the individual should only be detained if there is substantial likelihood of significant harm, and 74% of respondents were in agreement. However, some stakeholders called for clarification and said both 'substantial' and 'significant' should be clearly defined to avoid ambiguity.

Challenging detention

Automatic referrals to the Tribunal

The government intends to take forward the proposals to increase the frequency of automatic referrals to the Mental Health Tribunal to ensure that detentions under the Act are more regularly scrutinised (rather than relying on the patient or their representative to request a review). It believes the proposals and proposed timings – which vary according to the powers under which people are detained – are appropriate and will work with Her Majesty's Courts & Tribunals Service (HMCTS) to ensure access is maintained. Responses were mostly concerned with the timings to automatic referral for each group of patients and suggested that these should be more frequent. There were also concerns with the increased administrative workload for both clinicians and judicial capacity.

Removing automatic referrals following a revocation of a community treatment order (CTO)

The government acknowledges concerns raised by stakeholders around the removal of a safeguard for those whose CTO has been revoked, but believe that its proposals to increase the frequency of automatic referrals to the Tribunal system, including those on CTOs, provides more regular access to the Tribunal to scrutinise detention. It agrees with the views of stakeholders that revocation decisions should still be subject to scrutiny, and commits to working with stakeholders to discuss how best to

achieve this. It believes a phased approach is the best route to implementing this policy and commits to fully assessing resource constraints and ensuring sufficient capacity in the system before removing other safeguards.

Tribunal powers to make directions

Recognising that there are a number of issues raised, the government will review its position on the proposal that health and local authorities should deliver on directions made by the Tribunal within five weeks. Respondents argued that the five-week timetable does not take into account service users who may require more complex care. Respondents also made the case that the timeframe to deliver on directions should be flexible, or depend on co-creating plans with service users, families and carers alongside health and local authorities. There was also confusion over accountability, namely who is accountable for service user welfare and failed directions. Several respondents thought the feasibility of this proposal relied on both sufficient community service availability and adequate funding and training to enable compliance. Stakeholders also highlighted that the Tribunal needs to be aware of the local service picture when setting directions as some services required may not be available locally.

Associate hospital managers' panel hearings

The proposal to remove associate hospital managers' panels received a mixed response, and the government has said it will consider this matter further. The Equality and Human Rights Commission warns that the DHSC should assess the capacity of the tribunal system before removing the power of the hospital managers' panel. Those who agreed felt that associate hospital managers were reluctant to exercise powers of discharge and pointed to the low number of discharges as evidence. Respondents who disagreed suggested that panels provided an important and accessible safeguard for service users. Generally, respondents felt that there were improvements to be made, including greater consistency in the way the panels are run across trusts.

Choosing and refusing treatment

Advanced choice documents

The government sees that standardising the documents remains valuable, but also recognises that this should not limit what can be included. A fine balance needs to be struck between the document being led by service users and ensuring that they are aware of the legal effect of the document, including understanding the potential implications of what is included. The government has said it will continue to work with stakeholders to consider how it can align advance choice decision making

under the MHA with the Mental Capacity Act (the MCA). Following engagement with stakeholders, concerns about how the advance choice document can be applied to children under 16 years came to the fore, as there are different legal considerations relating to capacity and competence.

Care and treatment plans

The government has said it is a priority to work with stakeholders to ensure that any statutory requirements placed on staff will facilitate a culture of high quality, co-produced care for all patients under the Act. The concern NHS Providers raised about the proposed internal scrutiny of plans by medical or clinical directors is noted and the response says it will seek to ensure the new plans consider the existing care planning requirements and multidisciplinary working should be encouraged.

Refusal of treatment for those with capacity

Over half of respondents agreed that patients with capacity who refuse treatment should have their wishes respected. However, 25% disagreed or strongly disagreed with this. Those in disagreement felt the proposal risked undermining the therapeutic benefit principle and expressed concern about the negative impact of mental illness on mental capacity or judgement, and highlighted the fluctuating nature of capacity. The government will carry out further work with stakeholders to ensure that any negative unintended consequences of this proposal are mitigated – for example, by establishing a universally understood definition of capacity to be applied in a mental health setting.

Challenging treatment decisions

Stakeholders raised concerns that a single sitting judge acting alone may not fully understand a given clinical decision, and so called for practical requirements in the interest of patient safety such as clinical training for the judge or having access to independent clinical advice.

Advance consent to admission

Stakeholders asked for further clarity on how the proposal to give advance consent to informal admission to a mental health hospital would work in practice, and what safeguards are in place to protect patients. The government will explore how advance consent could be implemented in the patient and service user journey, including the ways in which patients who are informally admitted on this basis are adequately supported.

Nominated person

The government had decided to take forward the proposal to replace the nearest relative with a new statutory role known as the nominated person, so that service users can choose who represents them and exercise certain rights on their behalf. DHSC will continue to explore the rights for those under Part 3 of the Act alongside the Ministry of Justice and other partners in the justice system. Additional support and guidance will be provided for those involved in a patient's care, including clarity on how these new powers interact with existing legal rights.

Advocacy

The government confirms it will take forward legislative changes to extend eligibility of Independent Mental Health Advocates (IMHA) services to all mental health inpatients whilst considering what is needed for an opt out service. Respondents broadly agreed that the quality of IMHAs could be improved by introducing regulation, and having enhanced standards and accreditation, and the government will explore ways to achieve this. Additionally, the government will prioritise developing culturally appropriate advocacy and ensure that patients from ethnic minority backgrounds are represented, with the launch of a pilot programme facilitating this.

Interface with the Mental Capacity Act

The government does not intend to take forward the proposals to reform the interface between the Mental Health Act and the MCA at this time. In order to better understand the application of the interface, the government is looking at building an evidence base on this issue and will continue to engage with stakeholders. The government will also shortly publish its consultation on a draft, updated, Code of Practice for the MCA, including the LPS, and the draft LPS regulations.

Respondents were not in favour of the proposal to subject patients without the relevant capacity, who do not object, to the Liberty Protection Safeguards (LPS). Respondents felt that this proposal moves away from the patient centred approach, as the current interface means clinicians can adjust their approach based on what is most suitable at that time. However, the government acknowledges that the current interface can be incorrectly applied, and it will review the interface once the new LPS arrangements are embedded properly.

A&E holding powers

The government will seek to give appropriate powers to health professionals in the legislation, so that people in need of urgent mental health care can stay on an accident and emergency site pending clinical assessment. They will take into consideration the best ways to implement and embed the practice, and provide further clarification on how the power can be used.

Caring for patients in the criminal justice system

Respondents expressed concern that the proposed 28-day limit on transfers from prison or immigration removal centres to a secure hospital depends on the number of patient beds available as well as means of transport and the location of a secure hospital. The government acknowledges these concerns, and although it will introduce this legislative change, it will only commenced once NHS England and NHS Improvement guidance on transfer and remissions has been fully embedded.

People with a learning disability and autistic people

Limiting the scope of the Act

Respondents were concerned that community services may not have the capacity to provide appropriate care for those with learning disabilities or autistic people in crisis, and indicated that the proposals did not provide an adequate alternative to inpatient care. Others were concerned about the 28-day period for assessment, given that this may not be long enough to complete assessments. Further risks highlighted by stakeholders included potential weakened safeguards for people, as there is a risk of either imprisonment or being detained under the MCA if they are deemed to lack capacity. The government states it will bring forward the reforms whilst considering the potential risks and practical implications, and the implications for the LPS.

Duties on local commissioners and pooled budgets

The government will consider the options for pooled budgets, whilst taking into account the challenges, including further clarification on joint funding tools and what is considered a health or a social care need. It will also review how to report on spend whilst ensuring transparency. The response states that the development of integrated care systems (ICSs) provides an opportunity to improve pooled budgets and improve partnership working.

Based on support in this consultation, the government will proceed with duties for local commissioners to ensure the adequate supply of community services for people with a learning disability and autistic people. The need for adequate resourcing to ensure adequate supply was a recurring theme, and some respondents felt that the workforce needed the right skills to support people with learning disabilities and autistic people, and substantial investment to support provision of community services.

The role of the Care Quality Commission

The government plans to consider the proposal to strengthen the role of the Care Quality Commission (CQC) in monitoring the use of the Act in light of the wider changes to CQC's role changing as part of the Health and Care Bill. This includes the CQC's role in monitoring ICSs. Several respondents agreed that the CQC has an important role to play in drawing attention to local concerns including how well partner organisations across the health and social care system can provide support to individuals. However, respondents were clear that the CQC should promote a culture where providers feel they can raise concerns. Many also sought to relay the importance of patient engagement, and noted that better quality and frequency would help the CQC make better informed recommendations related to gaps in provision.

Community treatment orders

Respondents were divided on the use of CTOs but agreed on the need for change, and the government has set out its commitment to reforming CTOs, including limiting the number of CTOs and ensuring they are only used where there is strong justification and where they provide therapeutic benefit. The governance acknowledged that while there was broad support for reform of CTOs, many respondents raised potentially negative, unintended consequences, as well as practical considerations associated with implementing the proposals. It believes that some of these concerns may be resolved through clearer guidance in the Code of Practice and strengthening governance structures around the use of CTOs.

Use of remote technology

The white paper originally considered how the use of digital and online methods, including video technology, could be sufficient in making medical assessments for the purposes of the Act. The government has decided not to allow the use of remote assessments following a High Court judgement that the terms "personally seen" and "personally examined" cannot be sufficiently satisfied using remote technology and the government has said the presence of professionals in the room is in the best interest of the patients.

Section 117

A High Court judgement this year highlighted that greater clarity is needed on the concept of ordinary residence and its interpretation in practical terms. The government will continue to develop proposals on Section 117 aftercare to establish a how these responsibilities should be split between health and social services.

Impact assessment

An updated impact assessment has been published alongside the government's response, which draws on further evidence submitted by stakeholders during the consultation to help the government accurately assess the impact of the proposals. A further iteration of the impact assessment will be published alongside the draft Bill.

Next steps

The government commits to working closely with stakeholders to build on what it has learnt at consultation, and to test and develop its policy proposals further. Proposals that require additional funding continue to be subject to future funding decisions, including at the Spending Review 2021.

Work will continue on developing a Bill to reform the Mental Health Act and it will be brought forward when Parliamentary time allows. At the moment, we understand the government is aiming to undertake pre-legislative scrutiny at the end of this year and introduce the Bill at the start of the 2022 spring parliamentary session.

We will continue our engagement with DHSC and other stakeholders within the sector on reform of the Act on behalf of members in the months ahead, and would welcome you sharing your views with Ella Fuller to inform our work here.

NHS Providers view

We welcome the government's response to the white paper and that making progress on this area of much needed, and long called for, reform is being prioritised.

We support the government taking forward proposals that simplify the 1983 Act and make changes that maintain appropriate safeguards, but enable greater individual rights and liberties, as well as service users having a more active role in their care planning with a focus on recovery.

It is good to see a number of concerns we raised in our response have been heard, such as the potential for unintended consequences of the proposal regarding the interface between the Mental Capacity Act and the Mental Health Act, and the need for further clarity on, and consideration of the practical implementation of, certain proposals. Elsewhere, we understand that there are a number of areas where the government has decided it needs to build on what it has learnt at consultation and

revise key policy proposals further, and look forward to continuing engagement as well as a maintained focus on taking forward these reforms.

The government is right to re-emphasise that a new Act on its own will not be enough to improve how and where good quality mental health services are accessed. Successful implementation of a new Act, and changes to policy and practice more broadly, requires a significant expansion of the mental health workforce and additional funding for NHS services and their partners well above current commitments. The Spending Review later this year offers the government a key opportunity to square this circle.

All changes to the Act and associated regulations and guidance that will result in increased costs to providers need to be fully and promptly funded, on a sustainable basis, to ensure that they can be meaningfully taken forward.

Sufficient funding and investment in mental health services, as well as public health and social care more broadly, are crucial to addressing the underlying issues driving the pressures on services and the rising severity and complexity of people's needs. Both serve to increase the likelihood that a person may reach crisis point necessitating the use of the Act to admit. Services focused, and supported to deliver, on better meeting the needs of different parts of the local population, and specifically those from Black, Asian and minority ethnic communities, also has an important role to play in reducing usage of the Act.

NHS Providers press statement

Responding to the government's consultation response to the *White paper: Reforming the Mental Health Act*, the deputy chief executive of NHS Providers, Saffron Cordery said:

"It is good to see the Government's response and that much needed and long overdue reform of the Mental Health Act is being prioritised.

"We look forward to legislation that is fit for purpose and reflects what the Government heard during the consultation period being introduced to Parliament as soon as possible.

"The government is right to reinforce that a new Act alone will not be enough to improve how and where good quality mental health services are accessed.

"As we said in our consultation response, implementing the Act successfully will require additional funding and workforce expansion. Only with this investment in mental health services and in public health and social, will we be able to address the underlying issues driving the pressures on services and the rising severity and complexity of people's needs. Both serve to increase the likelihood that a person may reach crisis point necessitating the use of the Act.

"Critically, services focused on better meeting the needs of different parts of the local population, and specifically those from Black, Asian and minority ethnic communities will have an important role to play in reducing the use of the Act."