Modernising the Mental Health Act: getting the balance right

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The Mental Health Act 1983 in England and Wales is the principal piece of legislation by which people with a mental disorder can be detained and have their disorder assessed or treated against their wishes. The Independent Review of the Mental Health Act, chaired by Simon Wessely, with Vice Chairs Steve Gilbert, Mark Hedley, and Julia Neuberger, was commissioned in response to concerns about the increasing numbers of detentions, disproportionately affecting people from black and minority ethnic backgrounds. On Dec 6, 2018, *Modernising the Mental Health Act. Increasing Choice, Reducing Compulsion. Final Report of the Independent Review of the Mental Health Act 1983*[1] was published. Its key recommendation is that the four principles of choice and autonomy, least restriction, therapeutic benefit, and the person as an individual should be included in the Act and govern all decisions taken under the Act. People's choices, wishes, and preferences should carry far more legal weight. Shared decision making should be used as far as is possible. Criteria for detention should be strengthened and justification must be transparent. Statutory Advance Choice Documents (ACDs) should be created. An improved response for those patients who come into contact with the police is necessary. Action is needed to promote equality for people from ethnic minority backgrounds. There should be community-based support for people with a learning disability, autism, or both to avoid, if possible, hospital admission and support timely discharge. Investment in services is necessary as laws are modernised.

In his foreword, the Chair of the independent review describes the fundamental legislative and ethical tensions between the individual's right to autonomy and the desire of a civilised society to protect its most vulnerable. This tension is a key consideration and challenge for any legislation in this area.[2] The review rightly confronts this issue head on and is explicit in its intention to shift the balance towards greater respect for patient autonomy, acknowledging that, at present, it is weighed too much in favour of non-consensual intervention. The review's Chair and Vice Chairs are clear that change is necessary as the current legislation is not up to date with regard to the rights of those with mental illness.

This review describes the complex relationships between societal and cultural issues, a risk-averse climate, legal decisions, clinical practice, and resource provision that all have the potential to affect patient care and detention rates. Legislation alone is not the solution for reducing rates of detention. However, this review, with its strong principles—emphasising choice and autonomy, least restriction, beneficial purpose, and viewing patients and service users as individuals—is welcome in promoting autonomy.

Importantly, the review sets out measures to promote greater respect for patients' wishes, choices, and preferences. It makes recommendations that will increase the attention paid to a person's autonomy when making decisions under the Mental Health Act. These include the introduction of ACDs, extra safeguards when patients with capacity are given treatment against their will, a strong emphasis on the person's best interests, and a Statutory Care Plan that is coproduced. Thus, care planning will become a statutory responsibility across agencies and will follow service users through the system, including if they are detained, as well as discharge planning and after-care provision. The review also emphasises the importance of supporting people to make decisions, and of voluntary patients being "truly" voluntary—ie, fully informed and able to exercise their rights.

There is also a welcome and timely recognition that, for various reasons, mental health services have become increasingly risk averse, leading to sometimes overly restrictive care that does not respect autonomy and can harm rather than help patients. The review recommends that the criteria for detention in relation to risk are tightened so that a person can only be detained when there is a substantial risk of significant harm to the health, safety, and welfare of the person, or the safety of any other person without treatment. If this translates into practice, it will be a welcome step towards a more positive approach to risk, but clear definition and further guidance will be needed for this to have a useful impact in reducing the number of detentions.

The review gives a welcome emphasis to the role of decision-making capacity in consent to admission and treatment of mental disorders. It recommends that, when making decisions about admission, the person's capacity must always be assessed and recorded. However, a person who has capacity to refuse admission may still be detained and treated against their wishes if he or she has a

Panel: **Five confidence tests that would need to be met before fusion legislation is started in England and Wales**

1. Whether fusion has sufficient support from service users
2. An assessment of the impact of the Northern Ireland legislation when it is implemented
3. Whether the assessment of capacity is reliable enough to provide the sole basis for care and treatment
4. That associated processes, such as supported decision making and enabling legal capacity, are resilient enough to support the change
5. Whether fusion law can take proper account of what is in the public interest

mental disorder and presents a substantial and significant risk. This is in contrast to people with physical illnesses, whose capacitous choices must be respected. As the report acknowledges, this could be seen as discriminatory towards those with mental illnesses, a concern that has been articulated previously.[3]

Northern Ireland, where we work, has chosen the more radical path of introducing so-called fusion legislation that combines mental health and mental capacity legislation into one statute in which impairment of decision-making capacity is the gateway to all compulsory interventions, whether pertaining to mental, physical, or welfare decisions.[4,5] This has the strong ethical appeal of removing discrimination in the involuntary treatment of those with mental illnesses. The Mental Capacity Act (Northern Ireland) 2016 was passed by the Northern Ireland Assembly and received Royal Assent in May, 2016. The target date for implementation is 2020.

In addition to the question of discrimination, fusion legislation has the added advantage of avoiding a complex interface between parallel mental health and mental capacity legislation. Although the review recommends that the Mental Health Act should only be used for people who are obviously objecting to treatment as a way of clarifying this interface, a degree of complexity and potential for confusion will inevitably remain, particularly in older people or when the patient is in a general hospital but treatment for a mental disorder is being considered.

There are arguments for and against fusion legislation.[6] In clinical practice, the use of fusion legislation gives rise to two opposite concerns: either patients will be denied beneficial and potentially life-saving interventions because they are assessed as having capacity; or clinicians, working under the principle of beneficence (or possibly risk aversion), will interpret unwise decisions as meaning that capacity is impaired. There is also concern that fusion law might conflict with the public interest, particularly in terms of risk to others. In Northern Ireland, clinicians are engaged with officials from the departments of health and justice in the development of a detailed Code of Practice and clinical scenario examples that we think are essential to mitigate these concerns and ensure that the new legislation achieves its aims. The draft Code of Practice was due to go out to consultation earlier this year, but unfortunately this has been delayed by the collapse of the Executive and the lack of a functioning Assembly in Northern Ireland. Nevertheless, a group of clinicians continue to meet regularly with officials to discuss how the Mental Capacity Act (Northern Ireland) 2016 would apply to everyday clinical scenarios.

Although the Independent Review of the Mental Health Act is sympathetic to the idea of fusing mental health and mental capacity legislation, it does not recommend this step at this time, citing time and complexity as the reasons. It is undeniable that it is a complex and time-consuming process to develop a single piece of legislation that covers all treatment, care, and welfare decisions in which capacity is an issue. Nonetheless, if fusion is seen as the right thing to do, then it should be the aim of any future legislative changes.

The review sets out five confidence tests that would need to be met before fusion is started (panel). The review states "if these tests are met in the future, we think that the Law Commission should be asked to draft entirely new legislation with input from disabled people". The introduction of the five tests that would need to be met before countenancing such a change indicates to us that the review was not convinced about the overall merits of moving to fusion legislation at this time.

The review rightly views the proposed changes as being necessary but not sufficient if we are to move towards a more inclusive and responsive mental health service that places human rights at its core. Sustained and increased investment and reinvigoration of community services, with a focus on those with more severe mental illness, will provide alternatives to detention and do as much to promote a rights-based approach as will any new legislation.

The recommendations proposed in this review should lead to a welcome change in favour of patient

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autonomy. Within the UK, there will be three different legal approaches—in Northern Ireland, in England and Wales, and in Scotland—to managing the fundamental ethical tensions between autonomy and beneficence described so well in the Chair's introduction. There is clearly an opportunity for these different approaches to be evaluated: it is vital that this opportunity is not lost.

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