Reforming the Mental Health Act White Paper: feeding into the RCN response

The RCN and wider nursing profession are key stakeholders for the Reforming Mental Health Act consultation. With the nursing workforce being the largest cohort of healthcare staff, it is vital that your voice is heard throughout and beyond this consultation. To enable the RCN to provide a comprehensive response, we are keen to receive as much input from our members and the wider nursing workforce as possible.

The consultation questions (*Appendix 1*) cover a wide scope of the proposed reforms set out in the department of Health & Social Care's (DHSC) the Reforming Mental Health Act white paper. Feedback suggested that the RCN should provide a more concise summary of key areas most pertinent to the nursing workforce. The RCN has reviewed the 36 consultation questions, consolidating and organising key questions into eight themes.

Although we have consolidated the consultation questions into themes that we believe are most relevant to nursing practice, we understand that some questions, not included in these themes, may be of interest to you and your practice. Responses to any of the other consultation questions are welcome.

If you would prefer to respond to the consultation independently from the RCN, you can do so here.

RCN Consultation Themes - consolidated questions

The proposed changes to the MHA white paper can be viewed online at Reforming Mental Health Act. Please refer to this white paper when answering the questions below. Clicking on the numbered *consultation question* next to each of our themes will take you to the questions as set out by the DHSC. The content of the proposed reforms are outlined in the white paper and correspond to the DHSC's *consultation question* numbers. Please answer any or all of our questions – your contributions will be well received.

1. Guiding principles *(Consultation Question: 1)*

The proposed reform outlines four new guiding principles:

1. Choice and autonomy – *ensuring service users' views and choices are respected*
2. Least restriction – *ensuring the act's powers are used in the least restrictive way*
3. Therapeutic benefit – *ensuring patients are supported to get better, so they can be discharged as quickly as possible*
4. The person as an individual – *ensuring patients are viewed and treated as individuals*

Other than in the MHA and the MHA code of practice, where else would you like to see the principles applied to ensure that they have an impact and are embedded in everyday practice?

2. Care planning and choice *(Consultation Questions: 8, 9, 10, 11)*

Advanced choice, care planning and consent to treatment are key proposed reforms for the MHA. As nurses often facilitate the formation of care plans with the people in their care, it is important to have your insight.

i) ***What do you feel should be included in the person's advanced choice document and care plan?***

ii) ***Should people with capacity who are refusing treatment have the right to have their wishes respected even if the treatment is considered immediately necessary to alleviate serious suffering?***

3. Advocacy *(Consultation Questions: 4, 15)*

The MHA reform aims to reduce the timescales for which people are automatically referred to tribunal, while providing more powers to Independent mental health advocates.

How could these proposed reforms affect nursing practice?

4. Capacity *(Consultation Questions: 17, 19)*

The proposed reform is aiming to better define the dividing line between the Mental Health Act and the Mental Capacity Act.

i) ***How best could this be done so that people are subject to the powers which most appropriately meet their circumstances?***

ii) ***Should section 5 of the Mental Health Act be extended to apply in A&E or is section 4B of the Mental Capacity Act adequate?***

5. Therapeutic benefit and least restriction *(Consultation Questions: 2, 23, 24, 25)*

Therapeutic benefit is a guiding principle underpinning the proposed reform – *'ensuring patients are supported to get better, so they can be discharged as quickly as possible'*.

i) ***How would a change in the detention criteria, so that detention must provide a therapeutic benefit to the individual, affect your practice?***

ii) ***What do you see as the consequences (negative or positive) of discharging restricted persons under conditions that amount to deprivation of liberty who are no longer therapeutically benefiting from detention in hospital, but whose risk could only be managed safely in the community with continuous supervision?***

6. The impact on nurses and the role of CQC *(Consultation Question: 35, 36)*

In their impact assessment the DHSC have estimated likely costs and benefits of implementing the proposed changes to the act. Changes will, in some way, affect the way in which nurses' practice on a day-to-day basis, how they learn and how they lead.

a) ***How do you think the current proposals may affect the current workloads of nurses?***

b) ***How could the Care Quality Commission support the quality (including safety) of care by extending its monitoring powers?***

7. Learning Disabilities & Autistic People *(Consultation Questions: 26, 27, 28, 29, 31)*

There are several proposed reforms to the MHA that will affect the care of people with a learning disability and autistic people, aiming to increase safeguards and reduce hospital admissions (please refer to Consultation Questions for further information).

a) ***To what extent do you think the proposals to reform the Mental Health Act:***
   - ***i) apply to people with a learning disability and autistic people?***
   - ***ii) provide adequate safeguards when they do not have a co-occurring mental health condition?***
   - ***iii) would have unintended consequences (negative or positive)?***

b) ***To what extent do you agree that the proposal to change the way the Mental Health Act applies to people with a learning disability and autistic people, should only affect civil patients and not those in the criminal justice system?***

c) ***What do you think would be the impact of placing a new duty on local commissioners (NHS and local government) to ensure adequacy of supply of community services for people with a learning disability and autistic people?***

8. BAME communities *(No Consultation Question)*

The Final report of the Independent Review of the Mental Health Act 1983 highlighted how BAME groups are at a greater risk of compulsory detention than White majority groups (*pp. 271*). Although the consultation has not asked specific questions around the impact of the proposed reforms on people from BAME communities, the RCN is keen to ensure this is included in our response.

To what extent do you think the proposed reforms would affect (negative or positive) people from black and minority ethnic communities?

Appendix 1:

Reforming the Mental Health Act White Paper
Copy of consultation questions

This document can be used as an aide for discussions on the consultation questions linked to the Government's proposals in its White Paper: Reforming the Mental Health Act

Consultation questions:

Part 1

1. New guiding principles

There are 4 new guiding principles that people working to provide care will need to consider while carrying out their duties. These principles are central to our plans to modernise and improve the Mental Health Act. They are:

- choice and autonomy – making sure people's views and choices are respected
- least restriction – making sure the act's powers are used in the least restrictive way
- therapeutic benefit – making sure patients are supported to get better, so they can be discharged from the act as quickly as possible
- the person as an individual – making sure patients are viewed and treated as rounded individuals

Consultation question 1:

We propose embedding the principles in the MHA and the MHA code of practice. Where else would you like to see the principles applied to ensure that they have an impact and are embedded in everyday practice?
Your answer can be up to 500 words.

2. Clearer, stronger detention criteria

Consultation question 2:

We want to change the detention criteria so that detention must provide a therapeutic benefit to the individual. Do you agree or disagree with this proposal?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 2a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 3:

We also want to change the detention criteria so that an individual is only detained if there is a substantial likelihood of significant harm to the health, safety or welfare of the person, or the safety of any other person. Do you agree or disagree with this change?

- *strongly agree*
- *agree*

- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 3a:

Please give reasons for your answer (*up to 500 words).*

3. Giving patients more rights to challenge detention

Consultation question 4:

Do you agree or disagree with the proposed timetable for automatic referrals to the Mental Health Tribunal (see table 1 for details)?

1) Patients on a section 3

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

2) Patients on a community treatment order (CTO)

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

3) Patients subject to part 3

- strongly agree
- agree
- disagree
- strongly disagree
- not sure

4) Patients on a conditional discharge

- strongly agree
- agree
- disagree
- strongly disagree
- not sure

Consultation question 4a:

Please give reasons for your answer *(up to 500 words).*

Changes to the tribunal's responsibilities

Consultation question 5:

We want to remove the automatic referral to a tribunal received by service users when their community treatment order is revoked. Do you agree or disagree with this proposal?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 5a:

Please give reasons for your answer (*up to 500 words).*

Giving the Tribunal more power to grant leave, transfers and community services

Consultation question 6:

We want to give the Mental Health Tribunal more power to grant leave, transfers and **community services.**

We propose that health and local authorities should be given 5 weeks to deliver on directions made by the Mental Health Tribunal. Do you agree or disagree that this is an appropriate amount of time?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 6a:

Please give reasons for your answer *(up to 500 words).*

Hospital managers' hearings

Consultation question 7:

Do you agree or disagree with the proposal to remove the role of the managers' panel in reviewing a patient's case for discharge from detention or a community treatment order?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 7a:

Please give reasons for your answer (*up to 500 words).*

4. Strengthening the patient's right to choose and refuse treatment

Advance choice documents will follow a standard format and approach, and should include the following information about an individual's preferences, including on treatment and non-medical therapeutic approaches, as well as any other information deemed relevant by the individual:

- any treatments the person does not wish to consent to as well as their preferred clinically appropriate treatments
- preferences and refusals on how treatments are administered (for example refusal of suppositories, and preference for care staff of a particular gender, to avoid retraumatising them, given the relationship between gender-based violence and trauma)
- name of their chosen nominated person
- names of anyone who should be informed of their detention, care and treatment (including specific instructions on which individual should get what information)
- communication preferences
- behaviours to be aware of which may indicate early signs of relapse
- circumstances which may indicate that the person has lost the relevant capacity to make relevant decisions
- religious or cultural requirements
- crisis planning arrangements, including information about care of children/other dependents, pets, employment, housing etc
- other health needs and/or reasonable adjustments that might be required for individuals with a disability or learning disability and for autistic people

Consultation question 8:

Do you have any other suggestions for what should be included in a person's advance choice document?

Your answer can be up to 500 words.

Consultation question 9:

Do you agree or disagree that the validity of an advance choice document should depend on whether the statements made in the document were made with capacity and apply to the treatment in question, as is the case under the Mental Capacity Act?

- strongly agree
- agree
- disagree
- strongly disagree
- not sure

Consultation question 9a:

Please give reasons for your answer *(up to 500 words).*

Making care and treatment plans statutory

We think that a care and treatment plan should include the following information:

- the full range of treatment and support available to the patient (which may be provided by a range of health and care organisations)
- for patients who have the relevant capacity and are able to consent, any care which could be delivered without compulsory treatment
- why the compulsory elements of treatment are needed
- what is the least restrictive way in which the care could be delivered
- any areas of unmet need (medical and social) for example where the patient's preferred treatment is unavailable at the hospital
- planning for discharge and estimated discharge dates (with a link to s117 aftercare)
- how advance choice documents and the current and past wishes of the patient (and family and/or carers, where appropriate) have informed the plan, including any reasons why these should not be followed
- for people with a learning disability, or autistic people, how Care (Education) and Treatment Reviews, where available, have informed the plan, including any reasons why these should not be followed
- an acknowledgement of any protected characteristics, for example any known cultural needs, and how the plan will take account of these
- a plan for readmittance after discharge for example informal admission, use of civil sections, or recall by the Justice Secretary

Consultation question 10:

Do you have any other suggestions for what should be included in a person's care and treatment plans?

Your answer can be up to 500 words.

A new framework for patient consent and refusal of medical treatment

Consultation question 11:

Do you agree or disagree that patients with capacity who are refusing treatment should have the right to have their wishes respected even if the treatment is considered immediately necessary to alleviate serious suffering?

- strongly agree
- agree
- disagree
- strongly disagree
- not sure

Consultation question 11a:

Please give reasons for your answer (*up to 500 words).*

Consultation question 12:

Do you agree or disagree that in addition to the power to require the responsible clinician to reconsider treatment decisions, the Mental Health Tribunal judge (sitting alone) should also be able to order that a specific treatment is not given?

- strongly agree
- agree
- disagree
- strongly disagree
- not sure

Consultation question 12a:

Please give reasons for your answer (*up to 500 words).*

5. Improving support for people who are detained

Nominated person

The new nominated person will have the same rights and powers to act in the best interests of the patient as nearest relatives have now. These include rights to:

- object to the patient being made subject to the act
- apply for the patient's discharge
- appeal to the tribunal if this application for discharge is denied
- apply for the patient to be detained under the act
- receive information from the hospital about the patient's care, detention or community treatment order (CTO), unless the patient objects to this

In addition to the powers currently held by the nearest relative, we propose that the nominated person should also:

- have the right to be consulted on statutory care and treatment plans, to ensure they can provide information on the patient's wishes and preferences
- be consulted, rather than just notified, as is the case now, when it comes to transfers between hospitals, and renewals and extensions to the patient's detention or CTO
- be able to appeal clinical treatment decisions at the tribunal, if the patient lacks the relevant capacity to do so themselves and the appeal criteria are met
- have the power to object to the use of a CTO if it is in the best interests of the patient

To support nominated persons to access and exercise these enhanced powers we will provide clear, detailed guidance on the powers of the nominated person role

Consultation question 13:

Do you agree or disagree with the proposed additional powers of the nominated person?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 13a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 14:

Do you agree or disagree that someone under the age of 16 should be able to choose a nominated person (including someone who does not have parental responsibility for them), where they have the ability to understand the decision (known as 'Gillick competence')?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 14a:

Please give reasons for your answer *(up to 500 words).*

Advocacy

Independent mental health advocates (IMHAs) are trained specifically to work within the framework of the act and to enable patients to participate in decision-making. They are currently responsible for supporting patients to understand:

- their legal rights under the act and those of the people who are able to act on their behalf
- the particular parts of the act which apply to them
- any conditions or restrictions to which they are subject
- any proposed or received medical treatment, and the reasons for that treatment
- the legal authority for providing that treatment
- the safeguards and other requirements of the act which would apply to that treatment

To ensure patients are able to benefit from the reforms to the act proposed in earlier chapters, we propose to expand the role of IMHAs to include the following additional safeguards:

- supporting patients to taking part in care planning
- supporting individuals in preparing advance choice documents
- power to challenge a particular treatment where they have reason to believe that it is not in the patient's best interests
- power to appeal to the tribunal on the patient's behalf

Consultation question 15:

Do you agree with the proposed additional powers of independent mental health advocates?

- *strongly agree*
- *agree*
- *disagree*

- *strongly disagree*
- *not sure*

Consultation question 15a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 16:

Do you agree or disagree that advocacy services could be improved by:

1. **enhanced standards**
   - *strongly agree*
   - *agree*
   - *disagree*
   - *strongly disagree*
   - *not sure*

2. **regulation**
   - *strongly agree*
   - *agree*
   - *disagree*
   - *strongly disagree*
   - *not sure*

3. **enhanced accreditation**
   - *strongly agree*
   - *agree*
   - *disagree*
   - *strongly disagree*
   - *not sure*

4. **none of the above, but by other means**
   - *strongly agree*
   - *agree*
   - *disagree*
   - *strongly disagree*
   - *not sure*

Consultation question 16a:

Please give reasons for your answer *(up to 500 words).*

7.The interface between the Mental Health Act and the Mental Capacity Act

Consultation question 17:

How should the legal framework define the dividing line between the Mental Health Act and the Mental Capacity Act so that patients may be made subject to the powers which most appropriately meet their circumstances?
Your answer can be up to 500 words.

Consultation question 18:

Do you agree or disagree that the right to give advance consent to informal admission to a mental health hospital should be set out in the Mental Health Act (MHA) and the MHA code of practice to make clear the availability of this right to individuals?

- strongly agree
- agree

- disagree
- strongly disagree
- not sure

Consultation question 18a:

Please provide reasons for your answer *(up to 500 words).*

Consultation question 18b:

If agree, are there any safeguards that should be put in place to ensure that an individual's advance consent to admission is appropriately followed?
Your answer can be up to 500 words.

Consultation question 19:

We want to ensure that health professionals are able to temporarily hold individuals in A&E when they are in crisis and need a mental health assessment, but are trying to leave A&E.
Do you think that the amendments to section 4B of the Mental Capacity Act achieve this objective, or should we also extend section 5 of the Mental Health Act (MHA)?

- rely on section 4B of the Mental Capacity Act only
- extend section 5 of the MHA so that it also applies A&E, accepting that section 4B is still available and can be used where appropriate

Consultation question 19a:

Please give reasons for your answer *(up to 500 words).*

8.Caring for patients in the Criminal Justice System

Consultation question 20:

To speed up the transfer from prison or immigration removal centres (IRCs) to mental health inpatient settings, we want to introduce a 28-day time limit.
Do any further safeguards need to be in place before we can implement a statutory time limit for secure transfers?

- *Yes*
- *No*
- *Not sure*

Consultation question 20a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 21:

We want to establish a new designated role for a person to manage the process of transferring people from prison or an immigration removal centre (IRC) to hospital when they require inpatient treatment for their mental health.
Which of the following options do you think is the most effective approach to achieving this?

- *expanding the existing approved mental health professional (AMHP) role in the community so that they are also responsible for managing prison or IRC transfers*
- *creating a new role within NHS England and Improvement (NHSEI) or across NHSEI and Her Majesty's Prison and Probation Service to manage the prison or IRC transfer process*
- *an alternative approach (please specify)*

Consultation question 21a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 22:

Conditionally discharged patients are generally supervised in the community by a psychiatrist and a social supervisor. How do you think that the role of social supervisor could be strengthened?

Your answer can be up to 500 words.

Consultation question 23:

For restricted patients who are no longer therapeutically benefiting from detention in hospital, but whose risk could only be managed safely in the community with continuous supervision, we think it should be possible to discharge these patients into the community with conditions that amount to a deprivation of liberty.
Do you agree or disagree that this is the best way of enabling these patients to move from hospital into the community?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 23a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 24:

We propose that a 'supervised discharge' order for this group of patients would be subject to annual tribunal review. Do you agree or disagree with the proposed safeguard?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 25:

Beyond this, what further safeguards do you think are required?

Your answer can be up to 500 words.

9. People with a learning disability and autistic people

We propose to revise the Mental Health Act to be clearer that for the purposes of the act we do not consider autism or a learning disability to be mental disorders warranting compulsory treatment under section 3. The proposed revisions would allow for the detention of people with learning disability and autistic people for assessment, under section 2, of the Mental Health Act, when their behaviour is so distressed that there is a substantial risk significant harm to self or others (as for all detentions) and a probable mental health cause to that behaviour that warrants assessment in hospital. We think this should apply to civil patients only and not to patients coming from the criminal justice system.

Consultation question 26:

Do you agree or disagree with the proposed reforms to the way the Mental Health Act applies to people with a learning disability and autistic people?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 26a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 27:

Do you agree or disagree that the proposed reforms provide adequate safeguards for people with a learning disability and autistic people when they do not have a co-occurring mental health condition?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 27a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 28:

Do you expect that there would be unintended consequences (negative or positive) of the proposals to reform the way the Mental Health Act applies to people with a learning disability and autistic people?

- *Yes*
- *No*
- *Not sure*

Consultation question 28a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 29:

We think that the proposal to change the way that the Mental Health Act applies to people with a learning disability and autistic people should only affect civil patients and not those in the criminal justice system. Do you agree or disagree?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 29a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 30:

Do you expect that there would be unintended consequences (negative or positive) on the criminal justice system as a result of our proposals to reform the way the Mental Health Act applies to people with a learning disability and to autistic people?
Your answer can be up to 500 words.

Consultation question 31:

Do you agree or disagree that the proposal that recommendations of a care and treatment review (CTR) for a detained adult or of a care, education and treatment review (CETR) for a detained child should be formally incorporated into a care and treatment plan and responsible clinicians required to explain if recommendations aren't taken forward, will achieve the intended increase compliance with recommendations of a CETR?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 31a:

Please give reasons for your answer *(up to 200 words).*

Consultation question 32:

We propose to create a new duty on local commissioners (NHS and local government) to ensure adequacy of supply of community services for people with a learning disability and autistic people. Do you agree or disagree with this?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 32a:

Please give reasons for your answer *(up to 500 words).*

Consultation question 33:

We propose to supplement this with a further duty on commissioners that every local area should understand and monitor the risk of crisis at an individual-level for people with a learning disability and autistic people in the local population through the creation of a local 'at risk' or 'support' register. Do you agree or disagree with this?

- *strongly agree*
- *agree*
- *disagree*
- *strongly disagree*
- *not sure*

Consultation question 33a:

Please give reasons for your answer (*up to 500 words).*

Consultation question 34:

What can be done to overcome any challenges around the use of pooled budgets and reporting on spend on services for people with a learning disability and autistic people?

Your answer can be up to 500 words.

Part 2

The role of the Care Quality Commission (CQC)

Consultation question 35:

How could the Care Quality Commission support the quality (including safety) of care by extending its monitoring powers?
Your answer can be up to 500 words.

Impact assessment

Alongside the White Paper we have produced an impact assessment in which we have estimated likely costs and benefits of implementing the proposed changes to the act.

Consultation question 36:

In the impact assessment we have estimated likely costs and benefits of implementing the proposed changes to the act. We would be grateful for any further data or evidence that you think would assist the departments in improving the methods used and the resulting estimates.
We are interested in receiving numerical data, national and local analysis, case studies or qualitative accounts, etc that might inform what effect the proposals would have on the following:

- different professional groups, in particular:
  - how the proposals may affect the current workloads for clinical and non-clinical staff, independent mental health advocates, approved mental health professionals, Mental Health Tribunals, SOADs etc
  - whether the proposals are likely to have any other effects on specific interested groups that have not currently been considered
- service users, their families and friends, in particular:
  - how the proposal may affect health outcomes
  - ability to return to work or effects on any other daily activity
  - whether the proposals are likely to have any other effects on specific interested groups that have not currently been considered
  - any other impacts on the health and social care system and the justice system more broadly

Please provide information (up to 500 words).