

Explanatory Memorandum: Mental Health Standards of Care (Wales) Bill

The proposed title of the Bill (SO26.91A(i))

1. The proposed title of the Bill is the Mental Health Standards of Care (Wales) Bill (“the Bill”).

The proposed policy objective(s) of the Bill (SO26.91A(ii))

2. The purpose of the Bill is to replace outdated mental health legislation; improve the delivery of mental health plans for Child and Adolescent Mental Health Services and adult services in Wales; improve the accountability of Welsh public sector organisations; help to establish parity between the treatment of physical and mental health; and help to reduce the stigma of mental health in Wales.

3. As required by Standing Order 26.91B, I consider this policy objective to be consistent with that stated in my pre-ballot information. The additional information contained in this Explanatory Memorandum, (compared to that included in the pre-ballot information), has been provided so that Members have a greater level of clarity on my thinking as to how the policy objective may be achieved.

4. The reforms proposed in the Bill will ensure that patients are more empowered, have more choice and influence over their treatment and receive the dignity and respect they deserve. The measures proposed within the Bill will also strengthen the patient voice.

5. In attaining these policy objectives, the Bill will bring forward appropriate changes to the Mental Health Act 1983 (“the Act”) in Wales, and amend elements of the existing Mental Health (Wales) Measure 2010 (“the Measure”). Further detail on how these changes will be taken forward is set out within this Explanatory Memorandum.

Content of the Bill

6. The Bill will enshrine the following principles in Wales:

- a. Choice & Autonomy,
- b. Least Restriction,
- c. Therapeutic Benefit, and
- d. the Person as an Individual.

7. The principles should be seen as overarching throughout mental health services, and seek to satisfy the policy objectives identified in Paragraph 2.

8. Under these principles, the Bill will:
 - a. replace the Nearest Relative (NR) provisions in the Act with a new role of Nominated Person.
 - b. enshrine a change in the criteria for detention to ensure that people can only be detained if they pose a risk of serious harm either to themselves or to others, and that there must be a reasonable prospect of therapeutic benefit to the patient.
 - c. introduce remote (virtual) assessment under 'specific provisions' relating to Second Opinion Appointed Doctors (SOADs), and Independent Mental Health Advocates (IMHA).
9. The Bill will amend the Measure to ensure that there is no age limit upon those who can request a re-assessment of their mental health and to extend the ability to request a re-assessment to people specified by the patient.
10. These changes will complement the existing Measure, Codes of Practice, and further relevant national policy.

Further detail on proposals

Principles

11. In the Bill, in exercising any powers under the Act, a person will have regard to the following principles:
 - a. **Choice and Autonomy:** all practicable steps must be taken to:
 - i. support a person subject to the Act to express their will and preferences;
 - ii. have particular regard to the person's will and preferences, even where an intervention in the absence of consent is expressly authorised by the Act;
 - iii. promote the person's dignity, and accord them due respect, including respecting their social and caring relationships; and
 - iv. take steps to ensure that the person understands their rights and entitlements whilst they are subject to the Act.
 - b. **Least Restriction:** The exercise of any power under the Act must be done in the least restrictive and least invasive manner consistent with the purpose and principles of the Act.
 - c. **Therapeutic Benefit:** care and treatment must be designed to meet the person's needs in a timely manner within a supportive, healing environment with a view to ending the need to be subject to coercive powers under the Act.

d. **The person as an Individual:** care and treatment must be provided and commissioned in a manner that:

- i. respects and acknowledges the person's qualities, strengths, abilities, knowledge and past experience; and
- ii. in particular, respects and acknowledges the person's individual diversity including any protected characteristics under the Equality Act (2010)

12. These principles were initially proposed within the Independent Review of the Mental Health Act 1983 (2018).¹

Nearest Relative & Nominated Person

13. The Bill will look to replace the Nearest Relative (NR) provisions in the Act with a new role of Nominated Person.

14. The Act provides for the role of the NR. It sets out a hierarchical list of 'relatives' and includes a number of rules for identifying the NR from this list. The Independent Review of the Mental Health Act 1983 (2018) highlighted that service users and stakeholders consistently found the current model of family and carer involvement outdated and insufficient.

15. The intention would be that in place of the NR, a patient would be able to personally select a Nominated Person (NP) to represent them and exercise the relevant statutory functions which the Bill extends. This supports the policy objective of improving support for detained patients and is linked to the wider policy intention to ensure that the views, experiences and expertise of patients are taken into account more fully and more seriously in their care and treatment, by allowing an individual to express their wishes through someone they know and trust. In doing so, these measures support the principle of choice and autonomy.

16. Currently, the NR can exercise powers under a range of sections in the Act, including:

- a. The right to require an assessment to be made with a view to admitting the patient to hospital (section 13(4)).
- b. The right to apply for compulsory admission or guardianship (sections 2, 3, 4 and 7).
- c. The right to be consulted or informed before an AMHP makes an application for detention under section 3 or guardianship (section 11(3)-(4)).
- d. The right to object to section 3 admission or guardianship (section 11(4)).
- e. The right to order discharge of the patient (sections 23 and 25).
- f. The right to information given to the detained patient or patient subject to supervised community treatment (section 132(4)).
- g. The right to apply to the Mental Health Review Tribunal for Wales (MHRTW) (sections 66 and 68(1)).

¹ [Modernising the Mental Health Act – final report from the independent review](#)

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

17. The Bill will enshrine a change in the criteria for detention to ensure that people can only be detained if they pose a risk of serious harm either to themselves or to others, and that there must be reasonable prospect of therapeutic benefit to the patient.

18. Since the Mental Health Act Code of Practice for Wales already sets out that services should be provided in line with the presumption of capacity, be the least restrictive option, serve a person's best interests and maximise independence, this is likely to be symbolic rather than make a substantive difference in practice, but nonetheless an important one.

19. Paragraph 19. And 20. identify additional areas that would improve support for patients, and the principles of choice and autonomy. They do not stem from the Independent Review of the Mental Health Act 1983 (2018) or the Draft Mental Health Bill (2022), they would be uniquely Welsh developments, and would require primary legislation.

Amendments to the Mental Health (Wales) Measure 2010

20. The Bill will look to amend the Measure to ensure that there is no age limit upon those who can request a re-assessment of their mental health and to extend the ability to request a re-assessment to people specified by the patient. Currently the opportunity to request a re-assessment is only available to adults, and this change will also seek both a parity within services, and look to address the stigma that's often felt in receiving mental health support.

Remote (Virtual) assessment

21. The Bill will look to introduce remote (virtual) assessment under 'specific provisions' relating to Second Opinion Appointed Doctors (SOADs), and Independent Mental Health Advocates (IMHA).

Further areas that were given consideration but not included in the Bill

22. For clarity, I have identified several additional areas of potential reform that were considered in the development of the explanatory memorandum of the Bill. This has included:

- a. Placing a duty on clinicians to have regard to advance choices – the clinical checklist provisions. This is largely a codification of what should already be happening, and as a matter of good clinical practice could be progressed without legislation.
- b. Shortening the period that a patient may be kept in detention for treatment so that a patient's initial detention period will expire sooner and if the patient's detention is to continue it must be reviewed and renewed more frequently. There are some resource implications to this in terms of clinician and others time to carry out the reviews more frequently.

- c. Amending the frequency that a person may seek reviews through Mental Health Review Tribunals (MHRTW). This would result in a different regime compared to England and would have significant resource implications as the MHRTW would need greater capacity to deliver this.
- d. Amending section 132 of the Act to place a statutory duty on hospital managers in respect of detained patients to supply complaints information to both the patient and the NP. Supply of information could be achieved without legislation. From April 2023 there is a legal duty of candour requiring NHS organisations in Wales to be open and transparent with service users, which includes talking to service users about incidents that have caused harm and apologising and supporting them through the process of investigating the incident.
- e. Amending s.117 aftercare provisions to ensure the deeming provisions are consistent with other legislation. This relates to who is responsible for providing aftercare when a patient moves between different local authority areas. This has been a more significant issue in England than in Wales. Since we cannot legislate to change the system in England, Wales-only legislation would only serve to complicate matters around cross-border issues, and risks potentially creating cracks in the system.
- f. Autism and learning disabilities. Changing in how the Act applies to patients with a learning disability and/or autistic people under Part 2 of the Act to end the practice of patients in this group being detained under the Act in unsuitable long-stay wards, in line with the principle of least restriction. Welsh Government are currently reviewing the Code of Practice for Autism Services. How neurodivergent people including autistic people receive support / treatment when diagnosed with co-occurring mental health concerns will be integral to this review.

Details of any consultation / support for the Bill (SO26.91A(iii))

23. Following the initial ballot result, to allow the process to progress to the stage of seeking the Senedd's consent to develop and introduce a Bill, initial consultation was sought, and support received from:

- Mind Cymru
- Adferiad
- Royal College of Psychiatrists
- Royal College Mental Health Expert Advisory Group

24. Learning from the views expressed at face to face engagement of public workshops and focus groups from the Independent Review of the Mental Health Act 1983 (2018), as well as the review of Together for Mental Health & Talk to Me 2 Strategies (2023) has informed initial development of the Bill.

25. A more detailed consultation exercise will be undertaken to inform further development of the Bill, should the Senedd give its consent to the proposal progressing to the next stage, which will include a wide range of stakeholders, not limited to those who have already indicated a desire for further consultation.

An initial assessment of any costs and/or savings arising from the Bill (SO26.91A(iv))

26. Under Standing Order 26.91A (iv) there is a requirement for an initial assessment of any costs and/or savings arising from the Bill. I have set out the main options that I will consider in terms of how this Bill will be developed, but my intention would be to minimise the cost impacts of the Bill while ensuring that it achieves its stated intentions.

27. It will be important as part of developing this Bill to work with stakeholders to shape the development of this Bill and maximise the benefits while minimising resource impact. Therefore, I will work on researching the impacts in more detail to inform the impact assessment for introduction with this Bill if the leave to proceed vote is successful.

28. The main potential areas where costs and benefits will fall on the introduction of such a Bill are around:

- Replace nearest relative with nominated person.
- Changing the criteria for detention.
- Remote (virtual) assessment
- Amend Mental Health (Wales) Measure to remove age limit

29. The costs relating to replacing the role of the nearest relative to a new role of nominated person will not have a significant additional cost.

30. Additional costs are likely to mainly impact on Approved Mental Health Professionals (AMHPs), Independent Mental Health Advocates (IMHAs) and administrative staff.

31. The main administrative costs would relate to changing nearest relative to nominated person on patient records. Providing information to the nominated persons and cases to tribunal referral rights. Costs would be linked to nurse Band 4/5 for administration and potential additional support regarding changes to tribunal referral rights.

32. The Mental Health Act Draft Bill included estimated costs in relation to a similar provision for England. Costs were rounded to the nearest million pounds and on that basis were estimated at £1 million a year. As a ballpark figure, scaling costs down to Welsh population costs would be between £30,000 and £90,000 annually.

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

33. Since the Mental Health Act Code of Practice for Wales already sets out that services should be provided in line with the presumption of capacity, be the least restrictive option, serve a person's best interests and maximise independence, this is likely to be symbolic rather than make a substantive difference in practice, but nonetheless an important one.

34. If given leave to proceed, research will be undertaken to consider services provided in line with this Act and how the principles of choice and autonomy may impact on costs and benefits.

Remote (virtual) assessment

35. As the Bill is looking to introduce remote (virtual) assessments there are not expected to be significant additional net costs due to this provision.

36. It is unlikely that any additional costs relating to guidance, additional training or unforeseen costs would exceed savings of holding meetings virtually.

Amendments to the Mental Health (Wales) Measure 2010 removing age limit

37. The impact assessment for the Mental Health (Wales) Measure 2010² set out costs in relation to this Measure. I am mindful that these costings were made back in 2010, however, the cost estimates in that impact assessment linked to mental health assessments are modest. Therefore, setting out a proposal to remove the age limit, in conjunction with stakeholders, will only include limited additional costs, dependent on the approach decided upon.

² [Mental Health \(Wales\) Measure 2010: Impact Assessment](#)