



From Joanna Cherry KC MP, Chair

## The Baroness Buscombe

Chair of the Joint Committee on the draft Mental Health Bill

13 October 2022

Dear Baroness Buscombe,

We welcome the establishment of the Joint Committee on the draft Mental Health Bill to consider the [Government's draft Bill](#), which aims to reform the Mental Health Act 1983 (MHA). As you will be aware, this Committee has had a long-standing concern regarding the human rights of people receiving care and treatment. Most recently, we published a report on [Protecting human rights in care settings in July 2022](#). We have also published reports focusing on youth detention and the detention of young people with learning disabilities and/or autistic people.<sup>1</sup>

The evidence we have received shows there are considerable human rights concerns arising from the application of the MHA. Reform is needed, but any reform must satisfactorily address the human rights issues faced by those who receive care and treatment under the Act.

### Detention and segregation

The misuse of detention and segregation under the MHA, particularly of young people and people with learning disabilities and/or autistic people, is a longstanding problem. In written evidence to us late last year, in the context of our inquiry into protecting human rights in care settings, the Care Quality Commission (CQC) said that they found “too many examples of undignified and inhumane care, in hospital and care settings, where people were seen not as individuals but as a condition or a collection of negative behaviours (...) the response to this has often be to restrain, seclude or segregate them”.<sup>2</sup>

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<sup>1</sup> See Joint Committee on Human Rights, Nineteenth Report of Session 2017–2019, [Youth detention: solitary confinement and restraint](#), HC 994/HL Paper 343; Joint Committee on Human Rights, Second Report of Session 2019, [The detention of young people with learning disabilities and/or autism](#), HC 121/HL Paper 10; Joint Committee on Human Rights, Second Report of Session 2019, Fifth Report of Session 2019–21, [Human Rights and the Government's response to covid-19: the detention of young people who are autistic and/or have learning disabilities](#), HC 395/HL Paper 72.

<sup>2</sup> Care Quality Commission ([HCS0045](#)), received for the inquiry into Protecting human rights in care settings.



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During the same inquiry, Mencap told us that restrictive practices, which includes segregation and restraints, are often used because people are detained in unsuitable accommodation in the first place:

“In many cases, the environment there is totally unsuited for them and puts people in a position where they are trapped, where behaviours escalate and they cannot get the support they need.”<sup>3</sup>

Improper detention within the MHA framework has exposed individuals to inadequate care and treatment in violation of their human rights, particularly the right to life (Article 2 of the European Convention on Human Rights (ECHR)), the protection against torture and inhuman or degrading treatment (Article 3 ECHR), the right to liberty and security (Article 5 ECHR), and the right to private and family life (Article 8 ECHR).

In our 2019 report on [The detention of young people with learning disabilities and/or autism](#), we endorsed the recommendation of the Independent Review to narrow the criteria for detention under the MHA.<sup>4</sup> We are pleased to see that the draft Bill narrows the detention criteria as suggested by the Independent Review.

The Bill would change the definition of mental disorder, to exclude autism and learning disabilities. As highlighted in the Explanatory Notes, under the proposals of the draft Bill, “people with a learning disability and/or autistic people cannot be detained for compulsory treatment under section 3 of the MHA unless they have a psychiatric disorder, which by the definition, excludes learning disability and autism”.<sup>5</sup> This is welcome, as the intention is to reduce the use of detention for people with learning disabilities and/or autistic people who do not have treatable medical conditions. This was a concern we raised on our report on [The detention of young people with learning disabilities and/or autism](#).<sup>6</sup> However, it is important that the change does not result in other mechanisms and frameworks, such as the Mental Capacity Act 2005 (MCA), being used to improperly detain and segregate individuals.

### **Conditional and supervised discharge**

The draft Bill provides for the imposition of conditions on discharge that amount to a deprivation of liberty in high-risk cases in which the patient no longer benefits from hospital detention. Although this measure might reduce the incidence of improper detention, deprivation of liberty measures might potentially violate the protection

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<sup>3</sup> [Q19](#) [Dan Scorer], Oral evidence: Protecting human rights in care settings, 23 February 2022.

<sup>4</sup> [The detention of young people with learning disabilities and/or autism](#), HC 121/HL Paper 10; Joint Committee on Human Rights, Second Report of Session 2019, para 88.

<sup>5</sup> Draft Mental Health Bill, [Explanatory Notes](#).

<sup>6</sup> [The detention of young people with learning disabilities and/or autism](#), HC 121/HL Paper 10; Joint Committee on Human Rights, Second Report of Session 2019, para 68.



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against torture and inhuman or degrading treatment (Article 3 ECHR), the right to liberty and security (Article 5 ECHR), and the right to private and family life (Article 8 ECHR) if implemented in a way which is unnecessary or disproportionate.

### **Participation in decisions about treatment and care**

We welcome the increased focus of the draft Bill on patient autonomy and on the participation of individuals and their loved ones in decisions about treatment and care, as an area protected by the right to private and family life (Article 8 ECHR).

### **Complaints mechanisms**

It is of vital importance that, when things go wrong, an adequate avenue is available to handle complaints from patients subject to the MHA. We expressed our concern over current mechanisms in our July 2022 report. Earlier this year, Margaret Flynn, a safeguarding expert and Chair of the National Mental Capacity Forum, told us during the care settings inquiry:

“I know that some complaints have gone unresolved for many, many years, and families are left feeling extraordinarily frustrated and with a sense of strong grievance”<sup>7</sup>

In 2020/2021, the CQC received “2,280 complaints and concerns about the MHA”,<sup>8</sup> mostly from people who use services and from carers, and the majority by telephone. They only opened seven of these to be investigated as complaints.

During our inquiry we asked both the CQC and the DHSC to provide us with data to explain why so few MHA investigations have taken place. The CQC were unable to do so.<sup>9</sup> Without information to show what has happened to the majority of complaints and concerns received, our report concluded that we could not be assured that the CQC is adequately investigating such complaints. We therefore recommended that section 120(4) MHA should be amended to transfer the duty to investigate complaints related to the MHA in England, along with the CQC’s enforcement powers for such investigations and decisions, to the Local Government and Social Care Ombudsman (LGSO) or the Parliamentary and Health Service Ombudsman (PHSO). We noted that this change could help minimise some of the confusion as to which body one should

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<sup>7</sup> [Q9](#) [Margaret Flynn], Oral evidence: Protecting human rights in care settings, 12 January 2022.

<sup>8</sup> Care Quality Commission (CQC) ([HCS0065](#)), received for the inquiry into Protecting human rights in care settings.

<sup>9</sup> *Ibid.*



# Joint Committee on Human Rights

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direct complaints, and could better enable the CQC to focus on its monitoring and regulatory role.<sup>10</sup>

Since the publication of the report, we have received correspondence from the PHSO and the LGSCO about our recommendations. The PHSO does not agree with the recommendation to change the MHA but accepts that “MHA complaints are not being resolved in a simple, streamlined or consistent way”, and that it is “extremely difficult for complainants to navigate the system and seek resolution”. The LGSCO has concerns about how a transfer of powers might require the LGSCO to step into the role of regulator, but has agreed in principle that all complaints relating to care settings should be dealt with by the relevant Ombudsman service, and noted that, with regards to the MHA, “the LGSCO would be happy to take on complaints regarding social care that fall within” their current framework.

Although the draft Mental Health Bill contains proposals to improve information on available complaints mechanisms for people subject to the Mental Health Act 1983, it does not contain proposals to make substantive improvements to complaints-handling mechanisms. Improvements are necessary to ensure the effective protection of and respect for rights.

We wish you and your Committee well as you carry out your scrutiny of this important proposed legislation, and look forward to your report in due course.

Yours sincerely,

**Joanna Cherry KC MP**

Chair of the Joint Committee on Human Rights

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<sup>10</sup> [Protecting human rights in care settings](#), HC 216/HL Paper 51; Joint Committee on Human Rights, Fourth Report of Session 2022-23, para 105.