

## Written evidence from Mind (COV0227)

### About Mind

We're Mind, the mental health charity for England and Wales. We believe no one should have to face a mental health problem alone. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

### Introduction

1. We recognise that many of the measures included in the Coronavirus Act 2020 were necessary to enable the UK Government to respond to the unprecedented emergency created by Covid-19. However, we have consistently highlighted concerns about how some could affect the rights of people with mental health problems.
2. As we move past the peak of the pandemic and focus on recovery and longer-term impact, **we urge the UK Government to remove from the Coronavirus Act any powers that are no longer necessary.** Many of these powers have significant implications for the rights of people with mental health problems and even if not in use, their existence erodes hard won protections and creates significant fear and anxiety.
3. We also note with concern that the UK Government has introduced other measures since the Coronavirus Act. For example, changes to children's social care regulation were made via statutory instrument, and the sectioning process via legal guidance. It is of vital importance that changes to rights and protections made since or outside of the Coronavirus Act also receive adequate attention and scrutiny.
4. We note the six-month review clause in the Coronavirus Act, which allows Parliament to vote on a motion to either approve or reject collectively all the measures in the Act. This means Parliament cannot call for individual measures which are no longer necessary to be removed from the legislation. **We urge the UK Government to review this approach and allow Parliament to meaningfully scrutinise the legislation and vote to remove any powers which are no longer necessary.** Given the reach of the powers and the impact on rights, it is vital that Parliament has the power to scrutinise their ongoing necessity.
5. Below we highlight specific concerns regarding the emergency measures and the Mental Health Act; Mental Health (Review) Tribunals; Care Act; rights of children and young people with mental health problems. In response we recommend that the UK Government
  - a. removes the temporary powers to change the Mental Health Act from the Coronavirus Act;
  - b. provides a full response to the Independent Review of the Mental Health Act and proposals for how they will take forward reform, with timescales for implementation;
  - c. plans to 'switch off' social care easement, and identify how they will support local authorities to deliver the Care Act duties in full;
  - d. publish their long-awaited plan for social care and set out a long-term sustainable solution for the funding and provision of care, including for those of us with mental health problems;

- e. ensure people with mental health problems can be safely discharged from hospital and that anyone who is discharged has access to the health and social care support they need in the community;
  - f. reinstate the Special Educational Needs duties and ensure that local authorities are equipped to meet the needs of disabled children during this pandemic, including children and young people with mental health problems; and
  - g. reinstates the children's social care duties in full by suspending the regulations immediately.
6. Furthermore, we recommend that the UK and Welsh Governments resolve the issues with the Mental Health (Review) Tribunal so that no one is stuck in hospital or on a Community Treatment Order unable to exercise their rights of appeal.

## The Mental Health Act

### Impact on human rights & ensuring compliance

7. The Coronavirus Act makes changes to the Mental Health Act (MHA), which could have an impact on the rights of those of us with a mental health problem in England. More than half of those being treated in hospital for mental health problems are sectioned. The MHA concerns both deprivation of liberty and treatment without consent (including by force).<sup>1</sup>
- "I hadn't hurt anyone, I hadn't broken the law... so why had I being imprisoned?" - Dan on being sectioned*
8. The emergency measures are designed to enable people to be admitted to hospital and treated under the MHA should there be extreme staffing shortages, particularly doctors. For example, requiring a single medical recommendation for sectioning, instead of two. These measures have not yet been 'switched on' by the Secretary of State for Health and Social Care, but it remains an option.
9. The changes to the MHA represent a significant reduction in protection for people's rights. **We urge the UK Government to remove the temporary powers to change the MHA from the Coronavirus Act.** Considering these powers have not yet been deployed, we urge that they are removed, regardless of the possibility for a second wave of coronavirus. If it was ever necessary to use these powers, they should be deployed provision by provision, area by area, and for the shortest time possible. In addition, the Government must ensure that the impact of the measures is monitored, including which provisions are used when, where and on whom, and evaluation of the reasons given.
10. We are particularly concerned about three of the emergency provisions:
- a. Requiring only a single medical recommendation for sectioning – instead of the usual two medical opinions<sup>2</sup>
  - b. Extension of doctors' holding powers from 72 hours to five days – under which a person is deprived of their liberty without vital safeguards<sup>3</sup>

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<sup>1</sup> At a minimum, being subject to the Mental Health Act engages a person's right to liberty (Article 5 of the Human Rights Act) and the right to respect for private and family life (Article 8).

<sup>2</sup> Paragraph 3 of Schedule 8 of the Coronavirus Act

<sup>3</sup> Section 4 of Schedule 8 of the Coronavirus Act, which amends section 5 of the Mental Health Act

- c. Removal of the requirement for an independent medical opinion on treatment with medicines in some circumstances – further weakening the already inadequate safeguard for treatment without consent<sup>4</sup>
11. We question whether it would ever be necessary or human rights compliant to enact these three provisions, which would weaken vital safeguards and protections for people subject to the MHA. All three of these provisions must be removed by the UK Government without delay.
12. For example, in the case of independent medical opinions on treatment with medicines, removing the requirement for a second opinion in some circumstances would mean that patients could be made to have treatment without a say, which may have serious adverse effects, with no external scrutiny. This could compromise rights and patient safety, especially in high-risk prescribing. Previously, we were deeply concerned that the existing process was not an adequate safeguard - and the Independent Review made extensive recommendations for reform.
13. Overall, all the measures were introduced when we have waited over 18 months for the UK Government to respond to an Independent Review, which expressed significant concerns about people’s rights under the MHA. **As a matter of urgency, the UK Government must provide a full response to the Independent Review and proposals for how they will take forward reform of the MHA, with timescales for implementation.**

#### **Disproportionate impact on BAME communities**

14. Whilst it is now known that Black, Asian and Minority Ethnic (BAME) communities are among those hardest hit by coronavirus, there is also pre-existing disproportionality in the use of the MHA for some BAME groups. People of Black African and Caribbean heritage are four times more likely to be sectioned and over eight times more likely to be placed on a Community Treatment Order.
15. There are a number of ways in which BAME people may be more affected by the emergency measures. Firstly, a reduction in access to services makes it less likely that people will get early support and avoid crisis - one factor known to contribute to why some people from BAME communities are more likely to be sectioned.
16. Secondly, a reduction in the number of people involved in key MHA decisions may make it less likely that the individual is heard and understood as well as they might be. This also increases the risk for unconscious bias.

*“...the psychiatrist who might be racially inclined to think, oh because they studied this in mental health and this is what black people are supposed to be like...and the next minute you’re schizophrenic” - Mind’s submission to the Mental Health Act Review*

#### **The Mental Health (Review) Tribunals<sup>5</sup>**

##### **Impact on human rights & ensuring compliance**

17. In response to coronavirus, a number of changes have been made to the Mental Health Tribunals (MHT) in England and Mental Health Review Tribunals (MHRT) in Wales. These

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<sup>4</sup> Section 9 of Schedule 8 of the Coronavirus Act, which amends section 58 of the Mental Health Act

tribunals are one of the mechanisms by which people can challenge their detention (or Community Treatment Order) under the Mental Health Act, often with the aim of being discharged. The changes – introduced by the Coronavirus Act, statutory instrument and changes to guidance – raise significant concerns about the right to liberty and a fair trial.

18. We are particularly concerned about the following changes:

- a. Hearings of the MHRT to be conducted by panels of one or two members (rather than three); no pre hearing examinations with medical member; presumption of remote hearing;<sup>6</sup>
- b. MHTs and MHRTs permitted to make a decision without a hearing in some situations, ie automatic referrals;<sup>7</sup> and
- c. Managers hearings in England can be temporarily suspended if impossible to hold a hearing in person or remotely<sup>8</sup>, whilst in Wales, hospitals are advised to take legal advice before suspending managers hearings.<sup>9</sup>

19. In addition to the specific measures above, we note that there are wider barriers to accessing the tribunals and justice due to coronavirus in England and Wales, including:

- a. Communication and technology: We recommend that video technology be used by Tribunals as appropriate, but the MHT in England now conducts hearings by telephone. For fair hearings, the judge/panel should be able to see the patient and pick up non-verbal communication, and the patient needs to be supported to participate, which involves having private and unrushed conversation with their lawyer.
- b. Access to lawyers: We've heard that some hospitals are not allowing solicitors to visit their clients, whilst others did not introduce processes quickly enough to facilitate electronic disclosure of notes or even telephone contact with lawyers. This severely undermines a solicitors' ability to make a strong case for their client, risking their human rights.
- c. Access to Independent Mental Health Advocates (IMHAS): We've heard that many IMHAs have experienced a drop off in referrals, and difficulties in accessing wards and maintaining contact with patients. IMHAs are an important statutory safeguard; help ensure that people's voices are heard; and provide independent scrutiny.
- d. Contact with friends and families: In addition to the risk to the right to family life, losing contact with friends and families has implications for informal advocacy and scrutiny of inpatient services – especially when the Care Quality Commission suspended visits. Some hospitals are providing phones and tablets for people to maintain contact, but in others people are relying on busy and public payphones.

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<sup>5</sup> Mental Health Review Tribunal in Wales, and Mental Health Tribunal in England

<sup>6</sup> Emergency measure under the Coronavirus Act

<sup>7</sup> New rules introduced by The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 in England and Mental Health Review Tribunal For Wales - Practice Direction - Coronavirus Covid-19 in Wales

<sup>8</sup> Amendment to the Code of Practice in England

<sup>9</sup> Welsh Government guidance: Coronavirus: guidance for Local Health Boards and Independent Hospitals in Wales exercising Hospital Managers' discharge powers under the Mental Health Act 1983

20. **We urge the UK and Welsh Governments to act to resolve these issues so that no one is stuck in hospital or on a Community Treatment Order unable to exercise their rights of appeal.** This should ensure everyone detained is able to enjoy their right to a fair trial.
21. Furthermore, provision of phones or tablets to patients, good video technology for meetings and consultations, and clean rooms for essential visits are all ways to promote and protect people's rights.

#### **Disproportionate impact on BAME communities**

22. Considering that people of Black African and Caribbean heritage are more likely to be sectioned, we are deeply concerned about the impact of these changes to the Tribunals on these communities.
23. Plus less access to family, friends and advocates/lawyers reduces people's voice in their own care and treatment, and the ability of others to speak for them. This is likely to impact negatively on BAME people who are already disadvantaged and have worse experiences of inpatient care (as recognised by the independent review of the Mental Health Act).

#### **The Care Act & access to social care**

##### **The impact on human rights & ensuring compliance**

24. The Coronavirus Act included provisions that effectively suspended adult care. Known as social care easement, these provisions were 'switched on' by the Secretary of State for Health and Social Care almost immediately and remain active. Under social care easement, local authorities are now only required to meet social care needs to prevent a breach of human rights in England.
25. Our social care system is already overstretched and underfunded. Lower standards and less care cannot become the new normal for people with mental health problems, who already find it difficult to get the support they need. We're seeking greater assurance, transparency and accountability to make sure that this does not happen.
26. The suspension of adult social care was unprecedented, and we are concerned there are likely to be issues in implementation and practice, including assessments of needs; processes to determine a potential breach of Convention rights; complaint processes or accountability.  
**The UK Government must monitor the implementation of social care easement to assess the impact and prevent discrimination.**
27. On 16 July 2020, there were no local authorities using the easements according to the Care Quality Commission, down from a maximum of eight at any time. We note with concern the risk that some local authorities may in practice be operating under easement, without following the official process. **We urge the UK Government to plan to 'switch off' social care easement, and identify how they will support local authorities to deliver the Care Act duties in full - not suspend duties indefinitely.**
28. Noting with concern the frailty of the social care sector – laid bare by the coronavirus outbreak – **we call on the UK Government to publish their long-awaited plan for social care and set out a long-term sustainable solution for the funding and provision of care, including for those of us with mental health problems.**

## Disproportionate impact on people being discharged from hospital

29. Social care is the vital care and support that helps people with a mental health problem to live with independence, dignity and opportunity. Social care also has a particular role in ensuring successful discharge from hospital. Analysis of NHS Digital's Mental Health Services Monthly Statistics shows an increase of 26% in the number of discharges from hospital in the month of March 2020 compared to the previous month.<sup>10</sup> There is a risk that increased barriers to accessing a Care Act assessment as a result of social care easements could lead to people being discharged from hospital without assessment of social care needs and adequate provision of support.
30. This comes at a time when reduced capacity in NHS Community Mental Health Teams could mean that people do not have access to the support in the community. In response to the pandemic and NHS England guidance, mental health trusts will have discharged people from hospital where they considered it was safe to do so. However, community support is limited. From our research, one in four people who tried to access mental health support during lockdown were not able to.<sup>11</sup>
31. **We call on the UK Government to ensure people with mental health problems can be safely discharged from hospital and that anyone who is discharged has access to the health and social care support they need in the community.**

## Rights of children and young people with mental health problems

### Rights of disabled children

32. In response to Covid-19, the UK Government introduced powers to 'relax' local authority duties to secure Special Educational Needs provision in Education, Health and Care plans via the Coronavirus Act. These emergency measures were 'switched on' until 31 May, and extended in June and July with only a few days' notice. The 'relaxation' of these duties will have a significant impact on the support available, including for children with social, emotional and mental health needs.
33. A recent survey by the Disabled Children's Partnership found that three quarters of disabled children had all their support withdrawn during lockdown.<sup>12</sup> It is also important to recognise the context for these changes. The SEND system is stretched and under-funded, with the Education Select Committee expressing grave concern that the ambition of the 2014 reforms had not been realised.<sup>13</sup>
34. As the focus is on getting children back into classrooms, it is concerning that the UK Government has suspended the absolute duty on local authorities to provide the support that a child has been identified as needing for their education. For disabled children, this puts their right to an education at risk.

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<sup>10</sup> NHS Digital (2020) [Mental Health Services Data Set](#)

<sup>11</sup> Finding from Mind survey of adults aged 25+ (14,421 respondents), and children and young people aged 13-24 (1,917 respondents) - Mind (2020) [The mental health emergency: how has the coronavirus pandemic impacted our mental health?](#)

<sup>12</sup> Disabled Children's Partnership (2020) [Left in Lockdown](#)

<sup>13</sup> Education Select Committee (2019) [Inquiry: Special educational needs and disabilities](#)

35. **We urge the UK Government to reinstate the Special Educational Needs duties and ensure that local authorities are equipped to meet the needs of disabled children during this pandemic, including children and young people with mental health problems.** We also call on the UK Government to monitor the impact of these emergency measures on disabled children and their families.

#### **Children's social care duties**

36. In response to coronavirus, the UK Government made a number of changes to the framework which protects the wellbeing of looked after children via the Adoption and Children (Coronavirus) Amendment Regulations (2020). These changes mean:

- a. Health plans no longer have guaranteed independent oversight every six months
- b. No guaranteed opportunity for a looked after child to explain their concerns to their social worker every six weeks
- c. Senior social workers no longer have to consider the appropriateness of an out of area placement before approval
- d. No deadline to prepare placement plans, meaning a child could arrive in placement without the plan
- e. No longer an absolute duty to arrange for regular monthly visits to a children's home by an independent visitor

37. These changes and more were introduced overnight via statutory instrument, posing a real risk to the rights of children in care and a threat to their wellbeing. Prior to the pandemic, looked after children already had disproportionately high rates of mental health problems, with half of children in care having a diagnosable mental health problem.<sup>14</sup>

38. **We recommend that the UK Government reinstates the children's social care duties in full by suspending the regulations immediately.**

*22/07/2020*

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<sup>14</sup> Statutory Guidance (2015) Promoting the health and well-being of looked-after children