



Challenging Behaviour - National Strategy Group (CB-NSG)

Thursday 24th November 2022 via Zoom

Workshop 6:

Legal Issues

Workshop Facilitator: Kirsty Stuart & Viv Cooper

Time: 11.00am-12.45pm

The aim of the workshop is to:

- To identify current legal issues relating to people with learning disabilities whose behaviour challenges and ways to use the law to make a positive difference to their lives

The objectives are:

- To discuss and understand the legal barriers faced by people with learning disabilities and their families, and to identify how these barriers can be overcome
- To identify best practice and existing examples of using the law to support people with learning disabilities whose behaviour challenges
- To identify actions to include in a co-produced Transforming Care action plan for people with learning disabilities

Background

There are a large number of laws which relate to people with learning disabilities whose behaviour challenges. These include:

- the Mental Health Act*
- the Mental Capacity Act
- the Mental Health Units (Use of Force) Act
- the Human Rights Act**
- the Equality Act
- the Care Act

- the Children and Families Act

*currently undergoing reform

**currently at risk of being replaced by the 'Bill of Rights'/'Rights Removal Bill'

Legal avenues are often used to ensure that people with learning disabilities whose behaviour challenges have their rights respected and their needs met. For example, highlighting rights and obligations under the Human Rights Act has helped people to be discharged from mental health units, to get the medical treatment they need, and to have adjustments made to support them.

Barriers

Legal issues can be very complicated for people who are not familiar with the law and legal terms, which can be an additional barrier for families who are advocating on behalf of their relatives.

Families are not always aware of the rules around and availability of [legal aid](#), or about the legal support that they or their relatives are entitled to.

Opportunities

The ongoing reform to the Mental Health Act provides a number of ways to make things better for people with learning disabilities whose behaviour challenges. For example, there is a proposal to change the criteria for detention under section 3 of the Mental Health Act so that people with a learning disability and autistic people can only be detained if they have a co-occurring mental health condition which itself requires therapeutic treatment.

Please see Appendix A for a summary of commitments related to legal issues in the 'Building the Right Support' Action Plan.

Workshop agenda (Timings TBC)

- 1. Welcome and introductions**
- 2. Presentation to give the background and context for this work**
- 3. Group discussion**
- 4. Actions**

Actions: (To be completed during workshop)

Action: What is needed	How it will be done	Who will do it	When it will be done
1.			
2.			
3.			
4.			
5.			

Appendix A

Statutory/Legal Commitments in BTRS Action Plan

Key Points

- Much of the BTRS Action Plan is non-statutory
- There are references to changes to the Mental Health Act – these are currently proposals only, as the draft Mental Health Bill has not passed into law
- The Action Plan does not discuss the ‘Bill of Rights’/‘Rights Removal Bill’ which is due to return to Parliament in the near future for its second reading

Commitment	Applies to	Enacted?	Comments/concerns
<p>1c - Proposal to make it a statutory requirement for Responsible Clinicians to have regard to the findings and recommendations from Care (Education) and Treatment Reviews (C(E)TRs) and include them in the patient’s care and treatment plan, unless there are good reasons not to</p> <ul style="list-style-type: none"> • <i>Part of proposed reforms to Mental Health Act</i> • Proposal includes placing a duty on relevant ICBs to have regard to recommendations that relate to services that are to be available on discharge 	<p>Responsible Clinicians</p> <hr/> <p>ICBs</p>	<p>No – proposed guidance</p>	<p>What counts as a “good reason not to” include findings/recommendations in care and treatment plan?</p> <p>“have regard to” - not a strong legal obligation</p>
<p>Mental Health Units (Use of Force) Act 2018 (also known as Seni’s Law)</p> <ul style="list-style-type: none"> • Increases oversight and management of the use of force in mental health units • Statutory guidance has been published 	<p>Staff who work in mental health units</p> <p>Police officers who attend mental health units</p> <p>CQC and commissioners</p>	<p>Yes - “partially commenced”</p> <p>Statutory guidance has been published</p>	<p>“must have regard to” guidance – not a strong legal obligation</p>

<p>1i - Requirement for registered providers to ensure their staff receive specific training on learning disability and autism, which is appropriate to their role</p> <p>As of 2023, this training expected to be the Oliver McGowan Mandatory Training programme</p> <ul style="list-style-type: none"> • <i>Part of Health and Care Act 2022</i> 	Registered providers	Yes – full OMMT to be available early 2023	
<p>2c – Introducing a new power of Supervised Discharge to enable the discharge of restricted patients into conditions in the community which amount to a deprivation of liberty</p> <ul style="list-style-type: none"> • <i>Response to judgement which deemed that this is not possible under the current MHA legislation</i> <p><u>White Paper says that this:</u></p> <ul style="list-style-type: none"> - Would be subject to annual review by the Tribunal in line with the Court of Protection decisions on similar cases - Would only be applicable to restricted patients - Would be available irrespective of decision-making capacity - Would be applicable only where a patient is a) not benefiting therapeutically from being in hospital, and b) could not be managed via a conditional discharge, making this c) the least restrictive alternative to hospital 		No – proposed	

<p>3k - Proposal to introduce new duties on commissioners to ensure that there are adequate community-based services in their local area to support people with learning disability and autistic people</p> <p><u>Proposed duty:</u> “ensure adequacy of supply of community services for people with a learning disability and autistic people”</p>	<p>Commissioners</p>	<p>No – proposed</p> <p>The government intend to move forward with these, but are continuing to explore how they will work in practice (see here)</p>	
<p>3l - Proposal to introduce a new duty for commissioners to hold a dynamic support register, including an ‘at risk of admission’ component, that would ensure that commissioners understand and monitor the risk of crisis at an individual level for children, young people and adults with a learning disability or autistic children, young people, and adults in their local population</p>			
<p>4i - DfE are updating the National Minimum Standards (NMS) for Residential Special Schools and are engaging with Ofsted and other stakeholders on this update</p> <p>See NMS</p>	<p>Residential special schools (state or independent)</p>	<p>Yes – implemented from September 2022</p>	<p>These NMS link to DfE’s Behaviour in Schools guidance, which includes that “reasonable force” can be used “to maintain good order and discipline” - in practice this leads to harmful restrictive interventions</p>
<p>5a - Proposal to limit the scope to detain people with a learning disability or autistic people under the Mental Health Act, as part of work to reform the Mental Health Act</p> <ul style="list-style-type: none"> • Would only be detained under section 3 if there is a co-occurring mental health condition that would benefit from hospital treatment 		<p>No - proposed</p>	<p>What safeguarding measures will there be to prevent misdiagnoses?</p> <p>What specific measures will be taken to support those who are currently detained that do not have a co-occurring mental health condition to be released?</p> <p>Funding is required to ensure that there is appropriate community support</p>

<p>5c - Reviewing section 75 of the NHS Act 2006 (which allows partners such as NHS bodies and councils to pool and align budgets) to simplify and update the underlying regulations</p>	<p>NHS bodies, councils, etc</p>	<p>No – review currently being conducted, guidance due to be published Spring 2023</p>	
<p>Proposal to extend right to an Independent Mental Health Advocate (IMHA) to all people who are mental health inpatients, including voluntary patients who are not detained under the Mental Health Act</p> <p>- <i>Part of proposed reforms to the Mental Health Act</i></p>		<p>No – proposed</p>	
<p>Public consultation on the proposed changes to the Mental Capacity Act 2005 (MCA) Code of Practice, including guidance on the new Liberty Protection Safeguards (LPS) system</p> <p>- LPS to replace Deprivation of Liberty Safeguards (DoLS)</p> <p>- LPS system will introduce “an explicit duty to consult with the person and those interested in their welfare to establish their wishes and feelings about proposed arrangements”</p>		<p>No - proposed</p>	
<p>Health and Care Act 2022 includes a provision for a new duty for the Care Quality Commission to assess local authorities’ delivery of their adult social care duties under the Care Act 2014</p>	<p>Local authorities, CQC</p>	<p>Yes - ongoing</p>	