Fixing the Mental Health Act

Young people's advisory team

Article 39

Draft Mental Health Bill EXPLAINER

To help you take part in Fixing the Mental Health Act: young people's advisory team, we have created this Explainer which summarises the main parts of the Draft Mental Health Bill.

Before you read:

- The words used in this Explainer are often different to the words used in the Draft Mental Health Bill. This is so it is easier to understand.
- Bills are split into numbered clauses and schedules – these are all the different rights and duties which will apply if the Bill becomes law. The Draft Mental Health Bill has 49 clauses and 3 schedules. When a Bill is passed by parliament, it becomes an Act, and then clauses become known as sections.
- When the term 'young people' or 'young person' is used, it means children and young people under the age of 18.
- This Explainer doesn't cover everything in the Draft Mental Health Bill, because we've focused on the parts which are particularly important for children and young people.
- We have included definitions throughout, you'll see them highlighted **like this**.
- The Draft Mental Health Bill aims to protect young people and adults. Our Explainer refers only to young people because that's our focus!

Draft Mental Health Bill: timeline

How have we got here?

- In 2017, Theresa May, the UK Prime Minister at the time, set up an **Independent Review** of the Mental Health Act 1983 (**MHA**). The purpose of the Independent Review was to answer some big questions about the mental health system:

Why are so many people being detained under the MHA?

Why are so many people from black, Asian and minority ethnic communities being detained under the MHA?

Does the current MHA, which was first made law in 1983, work well for people today?

- In December 2018, the Independent Review published its report which recommended over 150 changes to the MHA. The Independent Review and people who had personal experience of being detained under the MHA came up with 4 main goals for improving the MHA:

1. Choice Make sure that patients' feelings, views and choices are respected.	
2. Least restriction Make sure that patients receive care and treatment in the least controlling and restrictive ways possible.	
3. Therapeutic benefit Make sure patients are actually getting better, so they can leave hospital as soon as possible.	
4. Individuality Make sure patients are respected and treated as individuals.	

- In January 2021, the government responded to the Independent Review through its **White Paper** and said it was happy with most of the Review's recommendations.

- In July 2022, the government published the Draft Mental Health Bill which aims to put into practice the recommendations of the Independent Review, and the promises in the White Paper.

Independent Review
A report investigating a certain issue which is written by people outside of the government. This is so the report is fair.

MHA
Mental Health Act

White Paper
A government publication which sets out its plans for legislation on a particular subject. The Mental Health White Paper which led to this Draft Mental Health Bill was published in January 2021.

Why is this a Draft Mental Health Bill?

- Sometimes proposed changes to the law are published in a Draft Bill so people can give their views ahead of a final Bill being produced. This happens when proposed changes to the law are very complex, or lots of people have strong views about what must change. When a Draft Bill is published, a special committee is set up in parliament to carefully go through each of the changes. Committees usually invite experts to give their views – either by sending written comments or by meeting with the committee.

- This happened with the Draft Mental Health Bill. The Joint Committee on the Draft Mental Health Bill considered the proposed changes, and listened to and read the views of many organisations and individual experts, and published its final report in January 2023.

Where are we now?

- We are not sure yet when the next version of this Bill – which will be called the **Mental Health Bill** – will be ready for the whole of parliament to review and discuss. When it is introduced to parliament, it will go through different stages before it becomes law (an Act of Parliament). There are lots of opportunities during this process for people to give their views on the Bill.

UK Houses of Parliament

- **As a member of the young people's advisory team, you will be able to give your views on the Draft Mental Health Bill, which we hope will influence the final Bill that is introduced to parliament.**

Young people who have autism and/or learning disabilities

(Clauses 1 and 2)

- The Draft Mental Health Bill contains new definitions for autism and learning disabilities which aim to show that these are different to having a mental illness.
- In the Draft Mental Health Bill, young people who have autism and/or learning disabilities cannot be detained under section 3 of the MHA (assessment and treatment) **unless** they also have a mental illness.
- This would mean that the longest length of time that a young person with autism and/or learning disabilities could be detained for under the MHA is 28 days, under section 2 (assessment), unless they also have a mental illness.

Goal: least restriction
This clause is trying to stop young people who have autism and/or learning disabilities from being detained under the MHA for very long periods of time. Being locked up in hospital is often very harmful for young people.

(Clauses 2)

- In the Draft Mental Health Bill, **care, education and treatment reviews** for young people with autism and/or learning disabilities are put into law. This includes:
  - Care, education and treatment review meetings must make sure that all of the needs of the young person with autism and/or learning disabilities are looked at together.
  - Following the review meeting, a report must be written and sent to those who are involved with the young person's care so that everyone is aware of what was agreed in the review. This report should be sent within 14 days of the review meeting.
  - A young person's first care, education and treatment review meeting must happen within 14 days of them being detained under the MHA. After this, the next meeting must take place at least once every 12 months. But this is the maximum amount of time so it can happen sooner and more often.

Care, education and treatment review
A meeting about a young person who has autism and/or learning disabilities who is either at-risk of being admitted to hospital or is already detained in hospital, to make sure they are receiving the right care and treatment.

- **Integrated Care Boards** must create a 'risk register' which holds information about young people who have autism and/or learning disabilities and are at risk of entering hospital. The risk register will keep track of the care and treatment that young people with autism and/or learning disabilities are receiving in the community, in order to try to prevent them from going into hospital.

Goal: individuality
This clause is trying to make sure young people who have autism and/or learning disabilities are safe and that their individual needs are met, including when they go into hospital. Their care, education and treatment reviews should make sure this happens. At the moment, these reviews aren't always taken seriously or properly followed.

Integrated Care Boards
A NHS organisation which is responsible for developing a plan for meeting the health needs of people in a certain area. There are 42 Integrated Care Boards in England.

Being detained

(Clause 3)

- The Draft Mental Health Bill sets out new rules that must be followed before a young person can be detained under the MHA. Essentially, doctors have to ask two questions when deciding whether to detain a young person:

1. *Will serious harm be caused to the health or safety of the young person, or another person, if they are not detained?*
2. *What would this harm be, how bad would it be, how likely is it to happen, and how soon would it happen?*

(Clause 4)

- The rules in clause 3 also have to be followed when deciding whether to make a community treatment order (CTO).

(Clause 5)

- Mental Health Tribunals (MHTs) must also follow the rules in clause 3 when deciding whether a young person can be discharged from hospital, or not. So, if a young person does **not** meet the requirements for detention, they must be discharged from hospital.

CTO
Community treatment order

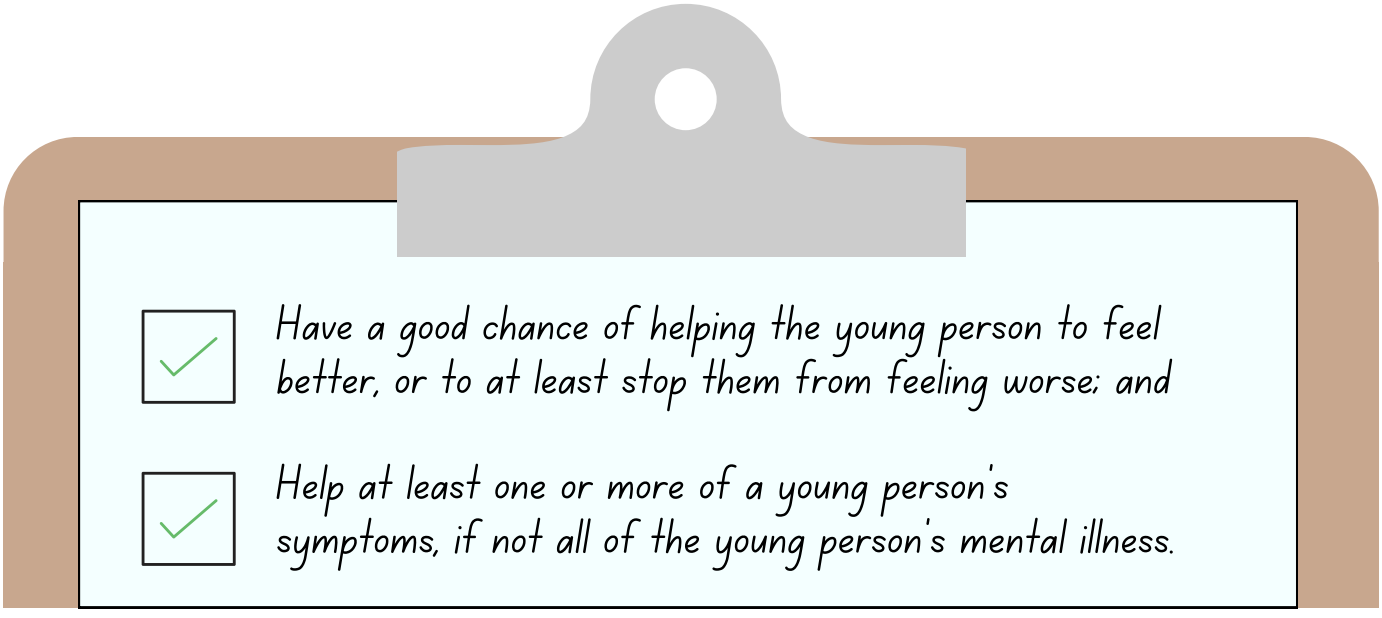
MHT
Mental Health Tribunal

Goal: least restriction
These clauses introduce strict new rules to try to stop young people being detained under the MHA when this is not necessary or justified.

Medical treatment that is right for the young person

(Clause 6)

- The Draft Mental Health Bill contains rules about deciding whether or not medical treatment is necessary and right for a young person. It says that for medical treatment to be necessary and right for a young person, it must:

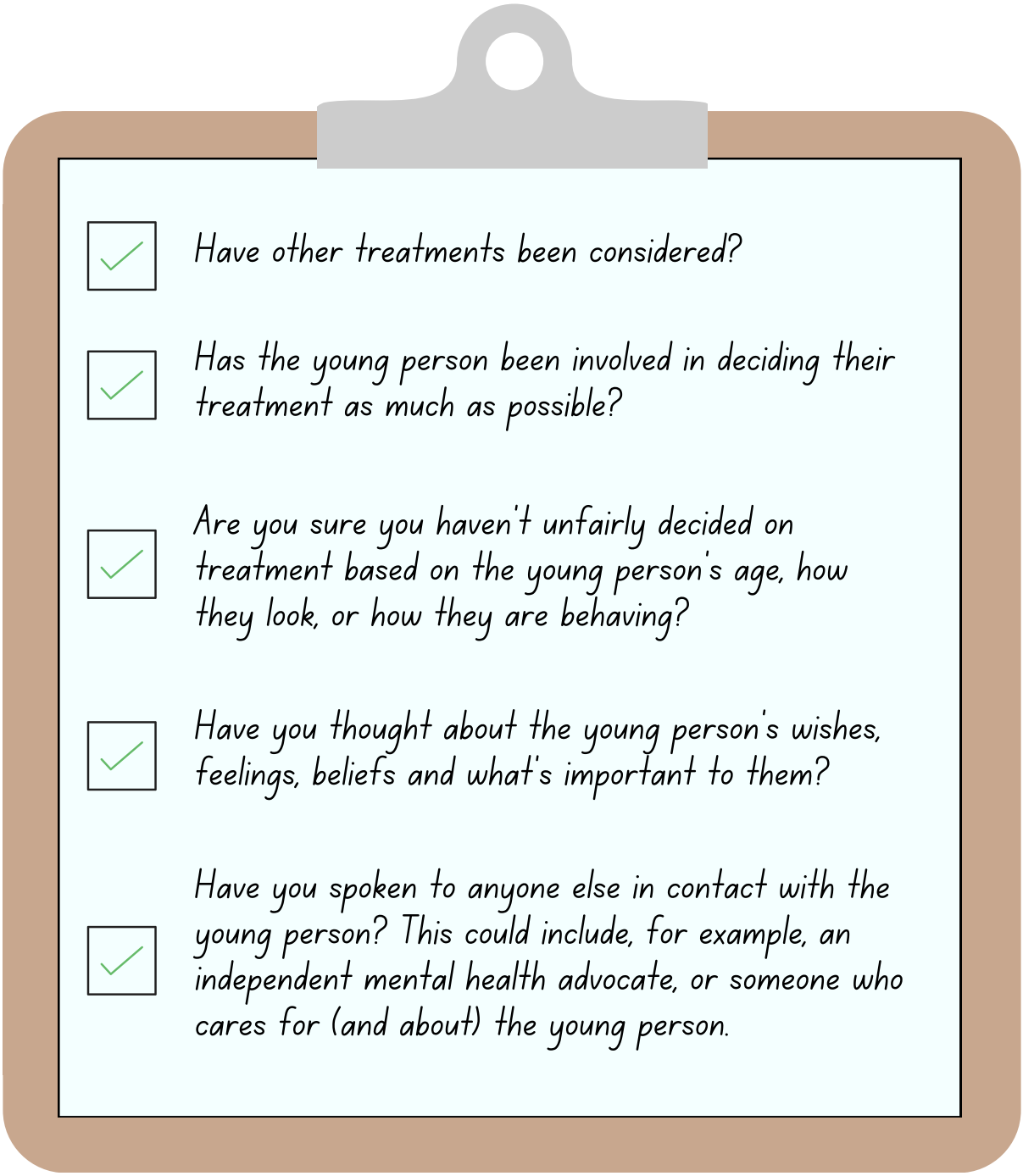


Goal: therapeutic benefit
This clause aims to make sure that medical treatment under the MHA actually benefits the young person and helps them to feel better.

Treatment

(Clause 6)

- The Draft Mental Health Bill requires the clinician who is in charge of a young person's medical treatment to follow a 'clinical checklist' when deciding whether to go ahead with treatment. This checklist includes:



- If a young person is judged to lack **capacity** or **competence** about the treatment decision, the Draft Mental Health Bill says that the clinician must take into consideration any wishes, feelings, beliefs and values that they think the young person would have (if they had the capacity or competence).

(Clause 10)

- The Draft Mental Health Bill explains the role of the 'second opinion appointed doctor' (known as SOAD). This role would be carried out by the Care Quality Commission (CQC) and would be there to make sure treatment is necessary and right for the young person.

(Clause 18)

- The Draft Mental Health Bill places a responsibility on the responsible clinician (or another doctor, if the young person is placed under a guardianship) to prepare a care and treatment plan for certain young people. These are:

  - Young people detained under the MHA
  - Young people placed under a guardianship
  - Young people on a CTO

- Where possible, both the clinician and young person should prepare and review the young person's care and treatment plan together. Other people could also be involved such as family members, IMHAs, and the young person's nominated person (NP).

- The Draft Mental Health Bill gives the government the power to make rules that say what must be included in a care and treatment plan. This could include information on:

  - *What the young person needs now, and in the future, to help them with their mental illness.*
  - *Why the young person was detained.*
  - *How the young person and people close to the young person have been included in care and treatment decisions.*
  - *Details around the young person's life outside of hospital, if this is relevant.*

Capacity
The ability for young people aged 16-17 to make decisions about their care and treatment.

Competence
The ability for children under the age of 16 have to make decisions about their care and treatment. Often referred to as 'Gillick competence' because of the case taken to court by Victoria Gillick.

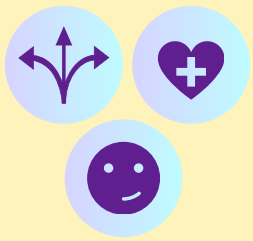
CQC
Care Quality Commission

Guardianship
Guardianship can be an alternative to being detained in hospital for those aged 16 and over. A Guardian (which could be a young person's Local Authority) can make certain decisions about the young person and their care outside of hospital.

NP
Nominated person (see page 9).

- The Draft Mental Health Bill also includes key times when a care and treatment plan must be reviewed. This includes:

  - After any significant changes to the young person's mental illness and how they are feeling.
  - If the young person's situation is to be considered at a MHT.
  - When a review is requested by people such as the young person, their NP, IMHA, or anyone else the patient has mentioned in their care and treatment plan (only if they can give a good reason for requesting it).
  - If the young person might become a community patient, or they may be discharged from hospital.



Goal: choice, therapeutic benefit, and individuality
These clauses are trying to make sure young people are involved in their treatment as much as possible and that the treatment is necessary and right for them as an individual.

Nominated person

(Clauses 21 and 22) (plus Schedule 2 of the Draft Mental Health Bill)

- The Draft Mental Health Bill introduces a new role to replace the nearest relative (NR) role. The Independent Review found that the laws around family in the MHA were out-of-date and didn't work well. This new role is called a nominated person (NP).

- A young person would choose their NP and make sure it is someone they trust. The NP should know what the young person's wishes and feelings are and support the young person while they are detained under the MHA.

- As long as the young person has the capacity or competence to choose their NP, a young person could choose their NP:

  - Before going into hospital (if they are going to be an informal patient);
  - When they have their MHA assessment; and
  - Once they are in hospital.

- If the young person doesn't have the capacity or competence to choose their NP, an approved mental health professional (**AMHP**) can choose their NP. When the young person regains capacity, they can choose a different NP if they want to.

16 or over

When an AMHP is deciding the young person's NP, and the young person is aged 16 or over, they must decide with the help of the patient's wishes and feelings, or choose the young person's **deputy** (if they have one) to be their NP.

15 or under

When an AMHP is deciding the young person's NP, and the young person is aged 15 or under, the AMHP must choose the local authority (if the child is the subject of a **care order**) or someone else who has **parental responsibility** of the child.

- A NP must be aged 16 or over **unless** the young person is under 16, in which case the NP must be aged 18 or over.
- The young person and NP must sign a statement in front of a witness. This witness can be a health professional or an IMHA.
- After the young person has signed their NP statement, the witness must sign their own statement. This is to confirm that the witness agrees that:

- *The young person has the capacity or competence to choose their NP;*
- *The NP has the capacity or competence to be a NP and is suitable for the role; and*
- *This decision made by the young person was done fairly and they weren't put under any pressure from others when choosing their NP.*

Signature _____

NR
Nearest relative

AMHP
Approved mental health professional

Deputy
A deputy is a person the Court of Protection appoints to make decisions for a patient if they do not have capacity.

Care order
When a child is made the subject of a care order, the local authority has legal responsibility for the child.

Parental responsibility
All the rights, duties, and responsibilities which a parent of a child has by law.

- The NP would have the same role and rights as the old NR role. This includes the right to:

  - Ask for an assessment for the young person;
  - Ask for the young person to be detained under the MHA;
  - Ask for the young person to be discharged from hospital; and
  - Apply to the MHT to challenge the young person's detention.

- The NP would also have some extra legal powers. This includes the right to:

  - Be consulted about the young person's care and treatment plan;
  - Be consulted about the young person being transferred between hospitals;
  - Be consulted about renewals and extensions to the young person's detention or CTO; and
  - Disagree with the use of a CTO for the young person.

- With the current MHA, if the NR uses their powers in a way that the AMHP thinks is unreasonable, then the NR can be removed which means they are stopped from supporting the young person. Under the Draft Mental Health Bill, instead of being removed, the NP could be temporarily overruled by the AMHP in certain situations. The situations where the AMHP could temporarily overrule the NP if they thought they were being unreasonable are:

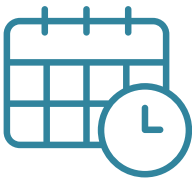
  - If the NP objects to the young person being detained in hospital under section 3 of the MHA or guardianship;
  - If the NP objects to the young person being on a CTO; and
  - If the NP asks for the young person to be discharged from hospital but the responsible clinician believes the young person would be likely to act in a dangerous way to themselves or others. In this situation, the NP would have to wait 3 months to ask again for the young person to be discharged.

Goal: choice
These clauses are aiming to make sure young people have a choice about who officially supports them while they are in hospital.

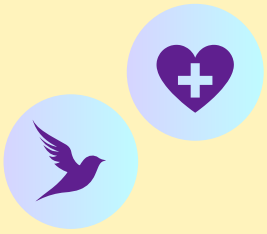
Detention periods

(Clause 26)

- The Draft Mental Health Bill changes the initial amount of time a young person can be detained under the MHA.
- If a young person is detained under section 3 (assessment and treatment) then they can only be detained for up to 3 months (instead of the current period of 6 months). After these first 3 months, the section 3 detention can be renewed:



  - For another 3 months (instead of 6 months);
  - Then for a further 6 months; and
  - Then for 12 month periods at a time.



Goal: least restriction and therapeutic benefit
This clause is trying to make sure that young people are detained only if this is still beneficial to them, and for the least amount of time possible.

Mental Health Tribunal

(Clause 27)

- The Draft Mental Health Bill changes the time periods for applying to the Mental Health Tribunal.

  - Young people detained under section 2 (assessment) would be able to apply to the MHT within 21 days of detention (instead of the current time period, which is 14 days).
  - Young people detained under section 3 (assessment and treatment) would be able to apply to the MHT within three months (instead of six months, so it is in line with new detention periods set out above).

Goal: least restriction
This clause is trying to make sure that young people have greater access to the MHT so they can challenge their detention.

Help and Information for patients

(Clause 34) (plus Schedule 3 of the Draft Mental Health Bill)

- The Draft Mental Health Bill makes a big change to which young people can get help from an independent mental health advocate (IMHA) while in hospital. The current MHA says that only formal patients have the legal right to receive help from an IMHA but the Draft Mental Health Bill gives informal patients this legal right too.

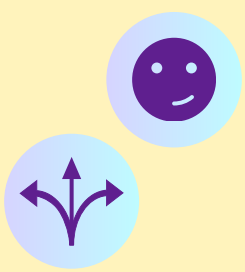
- The Draft Mental Health Bill also creates an 'opt out' system for young people who are formal patients. This means that IMHAs would automatically visit the young person when they are detained in hospital and ask them if they would like some help. The young person can then either agree to receiving help from the IMHA, or say no ('opt out') to the automatic help.

- Young people who are informal patients wouldn't be part of the 'opt out' system. Instead, the Draft Mental Health Bill requires hospital managers (or another responsible person) to give them information about their right to an IMHA and the help that is available. They must make sure that informal patients fully understand their right to an IMHA, and information about this right should be given to them through both speaking and writing.

(Clauses 35 and 36)

- The Draft Mental Health Bill requires hospital managers to tell young people who are formal patients and their NP about their right to complain and how to make a complaint. They must make sure that formal patients fully understand their right to complain and information should be given to young people through both speaking and writing. This should happen as soon as possible after a young person is first detained.

- Hospital managers will also have a duty to inform community patients about their right to make a complaint.



Goal: choice and individuality
These clauses try to make sure that, with the help of an IMHA, young people are involved in decisions about their own care, their individual needs are given priority when decisions are made, and their rights protected.

Help for informal patients vs help for formal patients

The table below shows the different types of help that informal and formal patients receive under the current MHA, and the help they would receive under the changes proposed in the Draft Mental Health Bill.

	Informal patients		Formal patients	
	Current MHA	Under the Draft Mental Health Bill	Current MHA	Under the Draft Mental Health Bill
Legal right to receive help from an advocate		✓	✓	✓
'Opt out' system				✓
Duty on hospital managers to provide information about the right to advocacy		✓	✓	
Duty on hospital managers to provide information about the right to complain				✓

Has anything been missed?

The Joint Committee on the Draft Mental Health Bill said there are some important rights and responsibilities missing from the Bill. The Committee said that young people have needs which are different from adults when they are in the mental health system, and so they should also have specific legal protections. The Committee's main concerns surrounding young people were:

Capacity and competence

- Young people aged 16-17 are considered in law to have the 'capacity' to give consent to and make decisions about their care and treatment unless there is clear evidence to show they don't. This legal presumption comes from different legislation – the Family Law Reform Act 1969 and the Mental Capacity Act 2005.

- Children under 16 are believed **not** to automatically have 'competence' to make decisions about their care and treatment unless there is clear evidence to show they do. If a child has a clear understanding about the decision that is being made affecting them, and they also understand the possible consequences of this decision, then they will be seen as what is called 'Gillick competent'.

This name comes from a big court case in the 1980s, where a mother tried to stop her daughters who were aged under 16 from receiving contraceptive advice without her knowledge. The mother's name is Victoria Gillick. The judges decided that children under the age of 16 can give consent to medical treatment, and make decisions about their own health, when they have clear understanding. This is known as being 'Gillick competent'.

The judges ruled that there is no fixed age for children under the age of 16 being able to make decisions about their medical treatment; it all depends on the individual child, their history and circumstances, and the decision that is being made.

Some people are worried that the way Gillick competence is decided isn't very consistent. The Independent Review said the law should set out a clear way for working out if a child under the age of 16 has competence. It said this should be in line with the Mental Capacity Act 2005, so that the same legal rules apply to everyone. But the government said this doesn't fit into the Draft Mental Health Bill, and a better place for this to be discussed would be the **MHA Code of Practice**. The MHA Code of Practice will be updated once the new Mental Health Bill is passed by parliament.

Without a clear and consistent system for working out children's competence, there is a strong worry that those under the age of 16 will not benefit as much from the Draft Mental Health Bill as they should. This is because some of the biggest improvements set out in the Draft Mental Health Bill apply only to patients who are considered to be legally able to make their own decisions.

MHA Code of Practice
A set of guidelines and rules explaining how people should or must work under the MHA. Although the Code of Practice is not a law, it must be followed by everyone involved in a young person's care and treatment unless there are very strong reasons not to. Failure to follow the Code of Practice can be challenged.

Inappropriate settings: out of area placements

- In the current MHA Code of Practice, it says that hospital care should be given as close as possible to the place and people that a young person wants to be close to, for example their family. In 2016, the NHS promised that "inappropriate locations far from the family home" would be "eliminated" by 2021. But this has not happened, and every year over 1,000 children receive 'out of area' hospital care for mental health reasons.

- The law currently says that the CQC must be told within 48 hours if a young person is placed out of area. The Independent Review recommended that this should be shortened from 48 hours to 24 hours, and that the family of young people placed out of area should be supported to keep in contact with the young person. The government disagreed with a shorter 24 hour notice period and family support.

Inappropriate settings: young people on adult wards

- The current MHA says that patients under the age of 18 must be cared for in environments suitable to their age. It doesn't, however, ban the use of adult wards for children and young people. In 2016, the NHS promised that "inappropriate use of beds in adult wards" would be "eliminated" by 2020/21.

But this has not happened. Nearly 200 children and young people were admitted to adult wards for more than 48 hours in 2020/21. The following year (2021/22), this number had increased to 260 children.

- The current MHA Code of Practice considers young people on adult wards as a serious incident and says that if a young person is on an adult ward for longer than 48 hours, the CQC must be told. The Independent Review recommended that should be shortened to 24 hours, but the government disagreed.

The Committee said that the government must use the Draft Mental Health Bill as an opportunity to protect young people from inappropriate settings like adult wards or out of area placements. The Committee suggested that the Draft Mental Health Bill should place a responsibility on hospital managers to make sure there are enough services for young people. It also suggested that if a young person is ever placed in an inappropriate setting, there must be proof that this is actually in the young person's best interests.

Advance choice documents

- Advance choice documents would be filled out by a young person and would hold information about a young person's wishes and preferences for care and treatment in case they ever lose the capacity or competence to make decisions about their care and treatment.

- In the White Paper, the government spoke about giving young people the opportunity to have advance choice documents. However, the Draft Mental Health Bill uses the Mental Capacity Act 2005 definition of advance decisions which only applies to adults.

- If young people had the opportunity to make advance choice documents, they would be able to provide instructions on what care and treatment they would like to receive if they ever lost the capacity or competence to make these decisions.

The concern is that without advance choice documents, young people wouldn't be benefiting from the Draft Mental Health Bill as much as adults.

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