

# **MENTAL HEALTH ACT 2007**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part 1 – Amendments to Mental Health Act 1983**

##### *Chapter 1 – Changes to Key Provisions*

##### *Section 1: Removal of categories of mental disorder*

15. *Section 1* amends the wording of the definition of mental disorder in the 1983 Act from “mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind” to “any disorder or disability of the mind”.
16. The fact that a person suffers from a mental disorder does not, of itself, mean that any action can or should be taken in respect of them under the 1983 Act. Action can be taken only where particular circumstances or criteria set out in the 1983 Act apply.
17. Examples of clinically recognised mental disorders include mental illnesses such as schizophrenia, bipolar disorder, anxiety or depression, as well as personality disorders, eating disorders, autistic spectrum disorders and learning disabilities. Disorders or disabilities of the brain are not mental disorders unless (and only to the extent that) they give rise to a disability or disorder of the mind as well.
18. The section also abolishes the four categories of mental disorder used in the 1983 Act at the moment, namely mental illness, mental impairment, psychopathic disorder and severe mental impairment.

##### *Schedule 1: Categories of mental disorder: further amendments etc*

19. *Subsection (4)* of section 1 introduces Schedule 1, Part I of which replaces references in the 1983 Act to the four categories of mental disorder with references simply to mental disorder. The effect is to widen the application of the provisions in question to all mental disorders, not just those which fall within one of the four categories (or the particular category or categories to which the provision applies). Practical examples of disorders which would now be covered by those provisions are forms of personality disorder which would not be considered legally to be “mental illness” and which do not fall within the current definition of psychopathic disorder because they do not result in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned. Other examples almost certainly include certain types of psychological dysfunction arising from brain injury or damage in adulthood. Part 2 of the Schedule makes similar amendments to certain other Acts.

##### *Section 2: Learning disability*

20. *Section 2* provides that for certain provisions of the 1983 Act a person may not be considered to be suffering from a mental disorder simply as a result of having a learning disability, unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

21. The provisions in question are those which are currently limited to one or more of the four categories of mental disorder which are to be abolished by section 1. As well as criteria for detention they also include criteria for the use of guardianship in section 7 and the making of guardianship orders in section 37 of the 1983 Act.
22. The reference to association with abnormally aggressive or seriously irresponsible conduct is derived from the current definitions of “mental impairment” and “severe mental impairment” in the 1983 Act (which are removed by section 1). Accordingly, in those cases where the 1983 Act as it stands now effectively precludes the use of detention or other compulsory measures on the basis of a learning disability which is not associated with abnormally aggressive or seriously irresponsible conduct, the same will be true of the Act as amended.

### ***Section 3: Changes to exclusions from operation of 1983 Act***

23. Section 1(3) of the 1983 Act currently says that the definition of mental disorder shall not be construed as implying that a person may be dealt with under the 1983 Act as suffering from mental disorder “by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.” Section 3 substitutes for this a single exclusion stating that dependence on alcohol or drugs is not considered to be a disorder or disability of the mind (ie a mental disorder) for the purposes of section 1(2) of the 1983 Act (the definition of mental disorder).
24. Clinically, neither promiscuity nor “other immoral conduct” by itself is regarded as a mental disorder, so the deletion of that exclusion makes no practical difference. Similarly, sexual orientation (homo-, hetero- and bi-sexuality) alone is not regarded as a mental disorder. However, there are disorders of sexual preference which are recognised clinically as mental disorders. Some of these disorders might be considered “sexual deviance” in the terms of the current exclusion (for example paraphilias like fetishism or paedophilia.) On that basis, the amendment would bring such disorders within the scope of the 1983 Act.
25. The use of alcohol or drugs is not, by itself, regarded clinically as a disorder or disability of the mind (although the effects of such use may be). However, dependence on alcohol and drugs is regarded as a mental disorder.
26. The effect of the exclusion inserted by this section is that no action can be taken under the 1983 Act in relation to people simply because they are dependent on alcohol or drugs (including opiates, psycho-stimulants or some solvents), even though in other contexts their dependence would be considered clinically to be a mental disorder.
27. It does not mean that such people are excluded entirely from the scope of the 1983 Act. A person who is dependent on alcohol or drugs may also suffer from another disorder which warrants action under the 1983 Act (including a disorder which arises out of their dependence or use of alcohol and drugs or which is related to it). Nor does it mean that people may never be treated without consent under the 1983 Act for alcohol or drug dependence. Like treatment for any other condition which is not itself a mental disorder, treatment for dependence may be given under the 1983 Act if it forms part of treatment for a condition which is a mental disorder for the purposes of the 1983 Act (see section 7 below for the definition of medical treatment).

### **Criteria for detention under the 1983 Act: overview**

28. [Sections 4](#) and [5](#) amend the criteria for detention in Parts 2 and 3 of the 1983 Act (see also the amendments made by section 7 *subsection (3)*). A person can be detained under the 1983 Act only where certain criteria are met. Different criteria apply to detention for different purposes. Detention of civil patients is dealt with in Part 2 of the 1983 Act. Admission for assessment can be for up to 28 days and cannot be renewed (although in limited circumstances it can be extended under section 29 of the 1983 Act pending resolution of proceedings to appoint an acting nearest relative for a patient). Admission

for treatment is for up to 6 months in the first place, and can be renewed periodically thereafter. The criteria for admission for assessment are in section 2 of the 1983 Act, the criteria for admission for treatment in section 3. Part 3 of the 1983 Act contains various powers for the courts to order the detention in hospital of people involved in criminal proceedings, either while the proceedings are in progress or as an alternative to punishment. It also contains powers for the Secretary of State (in practice the Secretary of State for Justice) to transfer prisoners to hospital for treatment. The criteria in each case are set out in the relevant section.

29. Where a patient is detained for treatment under section 3 or under Part 3, the detention must be renewed periodically. Criteria for this renewal are in section 20 of the 1983 Act. Patients detained for assessment under section 2 or for treatment under section 3 and under certain powers in Part 3 may apply to the MHRT for discharge. The criteria the MHRT must use when deciding the application are set out in sections 72-74 of the 1983 Act.

***Section 4: Replacement of “treatability” and “care” tests with appropriate treatment test***

30. Section 4 introduces a new “appropriate medical treatment test” into the criteria for detention under section 3 of the 1983 Act, related sections of Part 3 and the corresponding criteria for renewal and discharge. The effect is that these criteria cannot be met unless medical treatment is available to the patient in question which is appropriate taking account of the nature and degree of the patient’s mental disorder and all other circumstances of the case.
31. The test requires that appropriate treatment is actually available for the patient. It is not enough that appropriate treatment exists in theory for the patient’s condition. The words “nature or degree” in the appropriate treatment test are already used in the criteria for detention in the 1983 Act. Case law has established that “nature” refers to the particular mental disorder from which the patient is suffering, its chronicity, its prognosis, and the patient’s previous response to receiving treatment for disorder. “Degree” refers to the current manifestation of the patient’s disorder (*R v Mental Health Review Tribunal for the South Thames Region ex p. Smith* [1999] C.O.D. 148).
32. The appropriate medical treatment test replaces the so-called “treatability” test. The treatability test requires the relevant decision-maker to determine whether medical treatment “is likely to alleviate or prevent deterioration in the patient’s condition”. Where that test forms part of the criteria for detention under a particular section, it applies at all stages to patients suffering from mental impairment or psychopathic disorder (ie to the initial decision to detain, and both renewal and discharge from detention). However, for patients suffering from mental illness or severe mental impairment it applies only when detention is being renewed under section 20(4) of the 1983 Act (or 21B) or when the MHRT is considering discharge in accordance with the criteria in section 72(1)(b). In both these cases there is an alternative test – variously known as the “grave incapacity” or “care” test - which may be applied instead. Both the treatability test and this alternative test are abolished by this section and replaced by the appropriate medical treatment test. Because of the removal of categories of disorder by section 1 the appropriate medical treatment test applies equally to all mental disorders.
33. As an illustration, the effect of sections 1 and 4 and paragraph 2 of Schedule 1 on the criteria for applications for admission for treatment under section 3 of the 1983 Act is as follows:

**“3 Admission for treatment**

- (1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an

application (in this Act referred to as “an application for admission for treatment”) made in accordance with this section.

- (2) An application for admission for treatment may be made in respect of a patient on the grounds that—
  - (a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
  - (b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and
  - (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.; and
  - (d) appropriate medical treatment is available for him.
- (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—
  - (a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d b) of that subsection; and
  - (b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.
- (4) In this Act, references to appropriate medical treatment, in relation to a person’s mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case.

### ***Section 5: Further cases in which appropriate treatment test is to apply***

34. **Section 5** also adds the appropriate medical treatment test into three other sets of detention criteria in Part 3 of the 1983 Act. They are sections 36 (remand for treatment), 48 (transfer of unsentenced prisoners) and section 51(6) (hospital orders where it is impractical or inappropriate to bring a detainee before the court). These provisions do not at present apply to patients suffering from psychopathic disorder or mental impairment and so they do not include the so-called treatability test. As a result, the appropriate medical treatment test will be an additional requirement in these sections, rather than a replacement for an existing test.

### ***Section 6: Appropriate treatment test in Part 4 of 1983 Act***

35. **Section 6** makes related amendments to what a registered medical practitioner appointed by the Mental Health Act Commission (a Second Opinion Appointed Doctor or SOAD) must certify when giving a certificate under section 57 (treatment requiring consent and a second opinion) and section 58 (treatment requiring consent or a second opinion) of the 1983 Act authorising the giving of certain types of medical treatment for mental disorder.

36. Those sections of the 1983 Act provide procedural safeguards for patients in relation to particular types of treatment. They are summarised in the introductory material to the notes on sections 27 to 31 below.
37. As sections 57 and 58 of the 1983 Act stand, a SOAD must certify that treatment should be given, “having regard to the likelihood of the treatment alleviating or preventing deterioration of the patient’s condition”. The effect of *subsection (2)* of this section of the 2007 Act is to require SOADs instead to certify that it is appropriate for the treatment to be given. *Subsection (3)* adds a new subsection to section 64 which explains what it means for treatment to be appropriate in this context. The wording is consistent with that used in the “appropriate medical treatment” test to be added to the criteria for detention under the 1983 Act by sections 4 and 5 above.

**Section 7: Change in definition of “medical treatment”**

38. *Subsection (1)* of section 7 amends the definition of medical treatment in section 145(1) to read:  
“medical treatment” includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care (but see also subsection (4) below)”.  
39. Accordingly, the definition covers medical treatment in its normal sense as well as the other forms of treatment mentioned. Practical examples of psychological interventions include cognitive therapy, behaviour therapy and counselling. “Habilitation” and “rehabilitation” are used in practice to describe the use of specialised services provided by professional staff, including nurses, psychologists, therapists and social workers, which are designed to improve or modify patients’ physical and mental abilities and social functioning. Such services can, for example, include helping patients learn to eat by themselves or to communicate for the first time, or preparing them for a return to normal community living. The distinction between habilitation and rehabilitation depends in practice on the extent of patients’ existing abilities – “rehabilitation” is appropriate only where the patients are relearning skills or abilities they have had before.  
40. *Subsection (2)* inserts a new subsection (4) in section 145 of the 1983 Act (interpretation) to provide that references in the 1983 Act to medical treatment for mental disorder mean medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations. This applies to all references in the 1983 Act to medical treatment in relation to mental disorder, including references to appropriate medical treatment to be inserted by sections 4 to 6 above.

SUMMARY OF EFFECT OF AMENDMENTS IN **CHAPTER 1 OF PART 1**

<i>Provision</i>	<i>Currently applies to</i>	<i>Will apply in future to</i>	<i>Learning disability provision to apply in future</i>	<i>“Treatability” test applies now</i>	<i>Appropriate medical treatment test to apply in future</i>
<b>Civil Patients (Part 2 of the Act)</b>					
Admission for assessment for up to 28 days (section 2)	Mental disorder	Mental disorder	#	#	#
Key: MI = mental illness, MM = mental impairment, PD = psychopathic disorder, SMM = severe mental impairment					

*These notes refer to the Mental Health Act 2007  
(c.12) which received Royal Assent on 19 July 2007*

<i>Provision</i>	<i>Currently applies to</i>	<i>Will apply in future to</i>	<i>Learning disability provision to apply in future</i>	<i>“Treatability” test applies now</i>	<i>Appropriate medical treatment test to apply in future</i>
Admission for treatment (s3)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
“Holding power” for patients already in hospital (s5)	Mental disorder	Mental disorder	#	#	#
Guardianship (s7)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
<b>Patients concerned in criminal proceedings (Part 3 of the Act)</b>					
Remand to hospital for report (s35)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
Remand to hospital for treatment (s36)	<b>Mi, Smm</b>	Mental disorder	#	#	#
Hospital order (s37)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
Hospital order without conviction (s37(3) & 51(5))	<b>Mi, Smm</b>	Mental disorder	#	#	#
Interim hospital order (s38)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
Hospital and limitation directions (s45A)	<b>Pd</b>	Mental disorder	#	#	#
Transfer direction – sentenced prisoner (s47)	<b>Mi, Mm, Pd, Smm</b>	Mental disorder	#	#	#
Transfer direction – other (s48)	<b>Mi, Smm</b>	Mental disorder	#	#	#
Key: MI = mental illness, MM = mental impairment, PD = psychopathic disorder, SMM = severe mental impairment					

### **Section 8: The fundamental principles**

41. **Section 8** amends section 118 of the 1983 Act to insert new subsections (2A) to (2D) into the existing provision regarding the requirement to have a Mental Health Act Code of Practice.

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(c.12) which received Royal Assent on 19 July 2007*

42. The new subsection (2A) requires the Secretary of State to include in the Code of Practice a statement of principles that he or she thinks should inform decisions made under the 1983 Act.
43. New subsection (2B) contains a list of issues that the Secretary of State must ensure are addressed in the statement of principles when preparing it. Under new subsection (2C) the Secretary of State must also have regard to the desirability of ensuring the efficient use of resources and the equitable distribution of services.
44. The responsibility for preparing and revising the Code of Practice in relation to Wales was transferred to the National Assembly for Wales, but, by virtue of the Government of Wales Act 2006, this function transferred to and is now exercisable by the Welsh Ministers.
45. New subsection (2D) provides that the people listed in section 118(1)(a) and (b) shall have regard to the Code of Practice. This is to confirm in statute the status of the Code of Practice, as elaborated on by the House of Lords in the case of *R v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte Munjaz* [2005] UKHL 58. Those people listed in section 118(1)(a) and (b) (as amended by the 2007 Act) are registered medical practitioners, approved clinicians, managers and staff of hospitals, independent hospitals and care homes, and approved mental health professionals dealing with patients admitted to hospital, or subject to guardianship or SCT under the 1983 Act; and registered medical practitioners and members of other professions dealing with patients suffering from a mental disorder.