

The Mental Health Act 1983

Factsheet 459LP
October 2019



The Mental Health Act 1983 is a law in England and Wales. It allows certain people to be detained in hospital against their will so they can be assessed or treated. The Act also sets out 'safeguards' to protect a person who is detained.

This factsheet looks at the parts of the Mental Health Act that are likely to be most relevant for some people with dementia and their carers. This includes the process for detaining a person in hospital against their will, which is sometimes called 'being sectioned'. This factsheet won't be relevant for all people with dementia but it may be relevant for some people.

This factsheet also explains the process for challenging someone's detention, as well as guardianship and after-care services. If the Act is used for someone with dementia it can be stressful for them and their carers. Therefore this factsheet outlines where to get help and support.

The Mental Health Act only applies in England and Wales. It does not apply in Northern Ireland. For more information see 'The law in Northern Ireland' at the end of this factsheet.

The Mental Health Act is currently being reviewed by the government and there is a possibility that the law may change. The last time it was changed was in 2007.

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The Mental Health Act 1983

The Mental Health Act is about people who have a ‘mental disorder’. Some people would choose not to use this term. However it is the term the Act uses to describe any disorder or disability of the mind, including dementia.

The Act explains in what circumstances, and for what reasons, a person may be kept (detained) in hospital. It can be used to detain a person whether or not they have the ‘mental capacity’ (the ability to decide for themselves) to agree to stay in hospital. The Act also explains what responsibilities healthcare and social care providers have to people who are detained.

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A person can only be detained if they have a ‘mental disorder’ that makes it appropriate to use the Act. They can also only be detained if it is necessary to protect them or other people. A person should not be detained unless other less-restrictive ways of giving them care and treatment have already been considered.

When someone is detained under the Act, both they and their ‘nearest relative’ must be told about their rights. They must also be told what is happening and how this relates to the Act. See the box on the next page for an explanation of the key roles to do with the Act, including ‘nearest relative’.

The key roles

Nearest relative

The meaning of 'nearest relative' is quite complicated. It is different from 'next of kin'. It is generally the person who comes first in the following list: husband, wife or civil partner (or unmarried partner who has lived with the person for at least the past six months before admission); adult son or daughter; father or mother; brother or sister; grandparent; grandchild; uncle or aunt; nephew or niece; someone (not a relative) the person has lived with for at least the past five years before admission. But there are other things that can affect who the nearest relative is, such as if someone is living abroad. It is the approved mental health professional's (AMHP's) responsibility to work out who the person's nearest relative is. The Mental Health Act gives significant powers to the nearest relative. Some of the powers are described later in this factsheet.

Independent mental health advocate (IMHA)

A person who is detained in hospital under the Mental Health Act or is subject to a guardianship order (see page 10) has the right to access an independent mental health advocate (IMHA). The IMHA will explain the person's rights. They will also support the person to exercise those rights – for example, challenging their detention or the guardianship order. The IMHA is there to make sure the person can take part in decisions that are made about their care and treatment. The IMHA is independent from the hospital and they can speak on behalf of the person at meetings.

Approved mental health professional (AMHP)

This is a professional who has had special training to understand the legal requirements for arranging an assessment or to support the nearest relative to arrange an assessment. The AMHP is the person who is responsible for deciding whether a person is detained under the Mental Health Act. They will also have the local authority's approval to carry out various functions under the Act. An AMHP might be a social worker, mental health nurse, occupational therapist or psychologist.

The sections of the Mental Health Act that are likely to be most relevant to people with dementia and their carers are explained below.

Section 2 – detention for assessment in hospital

Section 2 of the Act allows a person to be detained in hospital to have their mental condition assessed. This can happen if they refuse to do this voluntarily or if they are likely to change their mind about going into hospital. It can also happen if the person doesn't have the mental capacity to give informed consent – this means they are not able to understand all the relevant information to agree to be assessed.

A person can be detained for assessment if health professionals think they are behaving in a way that puts their health at risk. They can also be detained if health professionals think they are a danger to themselves or others. For example, a person with dementia may be detained under section 2 if they are seriously neglecting themselves. Or they may be detained if they are behaving in ways that challenge, such as being aggressive. A person can only be detained for assessment for a maximum of 28 days. They can be discharged sooner, if that is appropriate.

As well as detaining a person so their mental health can be assessed, section 2 also allows for a person to be given treatment, such as medication.

An approved mental health professional (AMHP) and a person's nearest relative both have the legal power to apply to have the person admitted to hospital under section 2. However it is very unusual for a nearest relative to do this. Instead every local authority has a trained team of AMHPs to do this role. If someone is worried about a person with dementia and thinks they are a risk to themselves or others, they can contact their local council and ask for the social services team.

As part of the process, two doctors must agree that the person should be detained. The doctors need to sign medical recommendations that say why the person needs to be detained in hospital to be assessed. The doctors must see the person within five days of each other (if they see the person separately).

One of the doctors must have specialist experience of working with people who have a mental disorder. The second doctor should normally be someone who knows the person. For example it could be their GP.

The AMHP or the person's nearest relative must have the person admitted to hospital within 14 days of the date when the last medical recommendation is signed. The AMHP or the person's nearest relative must also have seen the person within the 14 days before they are admitted.

Once the person is in hospital they will be closely supervised. They will not be allowed to leave the hospital until they are discharged.

Section 3 – detention for treatment in hospital

Section 3 of the Act allows for someone to be detained in hospital so that they can receive treatment. This could apply to someone who has already been detained under Section 2 and who then needs to be treated for longer.

Section 3 of the Act allows for a person to be detained for up to six months to begin with. After this the section may be renewed for another six months, and then for a year at a time.

As with detention under section 2 of the Act (explained on page 5) either an AMHP or the nearest relative can apply for a person to be detained in hospital for treatment. However, an AMHP can't admit a person to hospital under section 3 if the person's nearest relative doesn't agree to this. See 'The key roles' on page 4 for more information about AMHPs and nearest relatives.

The process for detaining someone for treatment under the Act is similar to the process for detaining someone for assessment. However, before the doctors sign the medical recommendations they must make sure appropriate treatment is available for the person in hospital. Treatment could include medication, specialist mental health nursing care and psychological therapies, such as cognitive behavioural therapy. If someone has been treated with medication for three months or more against their will, an approved doctor must give a second opinion for this treatment to continue.

Some treatments can't be given to a person unless certain additional criteria are met. These include electroconvulsive therapy.

Sections 135 and 136 – powers of the police

Sections 135 and 136 of the Act give certain powers to the police. This includes the power to remove a person from their home or a public place to a 'place of safety' for a mental health assessment, or so other arrangements can be made for their treatment or care. An AMHP and a doctor should be involved in this process. The place of safety is usually a police station or a hospital.

Section 117 – after-care services

Section 117 of the Act deals with after-care services. These are the services that a person must be given when they are released from detention for treatment under section 3. The local authority and the NHS have a joint duty to arrange after-care services if a person needs them.

After-care support is not means-tested. This means that everyone who needs after-care services will get them, no matter how much money they have. After-care must be provided free of charge. This includes paying for care in the person's own home and paying for care home fees.

The NHS and the local authority must arrange for the person to move to a care home or receive a care package that meets their needs. This must happen even if it means paying for the person to live in a care home that is not on any 'standard' list of homes that the NHS or local authority normally pay for.

If someone is offered a care home that meets their needs but they want to move into a different and more expensive care home, they can choose to pay a top-up fee. This means they can pay the difference between the amount the NHS or local authority pay and the cost of their chosen care home.

The NHS and the local authority can withdraw after-care support if they decide together that the person's needs have changed. To receive after-care, a person must have an ongoing need for support. The support must meet a need that is connected to their mental disorder. It must also reduce the risk that their mental condition will deteriorate. The aim is to reduce the risk of the person being readmitted to hospital. However, if the person no longer needs support connected to their mental disorder, the after-care support could be withdrawn. If this happens the person's care needs will be reassessed using a means-test. They may then have to pay for some or all of their care costs. If someone is worried that after-care is going to be removed inappropriately, they may need to ask for specialist advice. See 'Other useful organisations' on page 14 for some suggestions about who can help.

Safeguards and challenges to a detention under the Act

The powers that are created by the Mental Health Act can have a significant effect on a person's freedoms. This is why the Act also contains some safeguards to protect the person's rights.

One of the main rights the Act creates is the right for the detained person to have access to an independent mental health advocate (IMHA). See 'The key roles' on page 4 for more information about IMHAs. The person's nearest relative also has the right to ask for an IMHA to be appointed to support the person. IMHAs generally visit hospital wards, or hospital staff can help people contact one.

If someone is being wrongly detained under sections 2 or 3 of the Mental Health Act, this can be challenged in the following ways.

- The health professional who is in charge of the person's care can be asked to discharge them. This professional is known legally as the 'responsible clinician'. This is an informal way to challenge the decision.
- The 'hospital managers' can be asked to hold a hearing to decide whether to discharge the person. These are not the general managers of the hospital. They are members of a special team that is set up to make sure the Act is applied properly.
- The nearest relative of the person who is being detained has the power to discharge them. However they must give the hospital written notice and a doctor can override the discharge if they think the person is a danger to themselves or to other people.
- An application can be made to a First-tier Tribunal (Mental Health) in England or a Mental Health Review Tribunal in Wales. A tribunal can hear cases where a person (or their representative) believes they should be discharged from hospital. The tribunal has the power to discharge the person if it thinks they no longer need to be detained. Staff on the hospital ward or an IMHA can help people contact a solicitor who can represent them at a tribunal hearing. Legal aid (public funding) is available to help people who are detained pay for tribunal legal costs. The Law Society of England and Wales has a list of solicitors who are accredited to represent people at tribunal hearings. See 'Other useful organisations' on page 14 for details.

These options can be tried together rather than in any particular order. However it's important to be aware that there are time limits for tribunal applications. An IMHA or a solicitor can provide information about the time limits.

The tribunal will itself automatically review a person's detention after a certain period of time. The length of this period of time will depend on the circumstances of the person's detention.

Guardianship

It isn't always necessary to detain a person in hospital for them to be assessed or treated. When detention isn't necessary, section 7 of the Mental Health Act gives the option for an individual called a 'guardian' to be appointed. A guardian has special legal powers to make some decisions for a person who has a mental disorder.

It is rare for a person with dementia to have a guardianship order but it is an option.

A 'guardianship order' is not the same as a 'hospital section' that is made under the Mental Health Act. However guardianship orders and hospital sections are similar. For example if a person is the subject of a guardianship order, decisions may be made for them that they might not agree with. But it can be less restrictive for the person to stay living in their community than to go into hospital. Doctors should therefore consider whether guardianship is more appropriate than detaining someone in hospital.

A guardian has three powers:

- to decide where the person lives
- to require the person to go to specific places for medical treatment, work, education or training (but they can't use force to take the person there)
- to demand that a doctor, an AMHP or another specified person is able to visit the person where they live.

The decisions a guardian makes must be the least restrictive option for the person with a mental disorder. The guardian must also always make decisions in the person's best interests. They can't authorise medical treatment and they can't control a person's money or property.

Except for having the power to decide where a person lives (which includes the power to bring them back if they leave), a guardian can't legally force a person to do something they don't want to do. Being a successful guardian therefore depends a lot on the relationship the guardian has with the person with the mental disorder.

The process to apply for guardianship is similar to the process for having a person detained under section 3 of the Mental Health Act (see page 6). An AMHP or the person's nearest relative can apply for guardianship if the person is putting their own health at risk or if they are a danger to themselves or others. An AMHP cannot apply for a guardianship order if the person's nearest relative does not agree to it.

The person's local authority is usually named as their guardian. Or occasionally a friend or relative of the person may be appointed as the guardian. A guardianship order will last for six months to begin with. After this it may be renewed for another six months and then for a year at a time.

Objecting to a guardianship order

A guardianship order can't go ahead if the person's nearest relative objects to it. If they object when the order is still being applied for, the order will not go ahead. The nearest relative can also object to an order after it has been made and a guardian has been appointed, if they think the guardianship is not necessary. If this happens the matter will go to a tribunal. The tribunal can decide whether or not to end the guardianship.

A tribunal must agree to end a guardianship order in certain circumstances. For example this will happen if:

- the person no longer has a mental disorder at the time when the tribunal considers the case
- the guardianship order is not necessary for the person's welfare or to protect other people.

If a person has a guardian appointed for them, the person has the right to access an IMHA. See 'The key roles' on page 4 for more information about IMHAs.

Lasting powers of attorney and deputies

An ‘attorney’ is a person who is appointed through a legal document called a Lasting power of attorney (LPA). A ‘deputy’ is someone who may be appointed by the Court of Protection if a person has not made an LPA while they had the mental capacity to do so. Under the Mental Capacity Act 2005, attorneys and deputies have the power to make decisions about a person’s welfare or their property and affairs if the person doesn’t have the mental capacity to make these decisions for themselves. The Mental Health Act does not affect this power. If a person is detained under the Mental Health Act, the attorney or deputy can still carry out their role. However they can’t:

- give consent for the person to have certain medical treatments for their mental health, where the Act says the person being detained must give their consent
- make decisions about where the person should live, if they are detained under a section or a guardian has been appointed to them.

If the Mental Health Act is being used to detain a person or a guardian has been appointed, the person can still create an LPA (if they have the mental capacity to do so) and a deputy can still be appointed.

For more information about Lasting powers of attorney and deputyship see factsheet 472, **Lasting power of attorney** or factsheet 530, **Deputyship**.

Deprivation of Liberty Safeguards (DoLS)

The Mental Capacity Act 2005 allows for a different set of processes to be used to ‘deprive a person of their liberty’ (to take away some of their freedom) when they don’t have mental capacity to consent to that deprivation. These processes are called the Deprivation of Liberty Safeguards (DoLS). They might be followed if a person needs care that involves supervision and restriction.

There is overlap between DoLS and the Mental Health Act. This is a very complex area of law and is not always straightforward – particularly around whether it is most appropriate to follow DoLS or the Act.

Any deprivation of a person's liberty must be proportionate to preventing them (not anyone else) from harm. It must also be in the person's best interests.

The DoLS regime has recently also been reviewed by the government. The law is set to change in October 2020. The new system will be called the 'Liberty Protection Safeguards' (LPS). For more information on the current law see factsheet 483, **Deprivation of Liberty Safeguards (DoLS)**.

The law in Northern Ireland

The relevant law in Northern Ireland is the Mental Health (Northern Ireland) Order 1986. This is similar to the Mental Health Act in England and Wales, but there are some differences.

As in England and Wales, a person in Northern Ireland can be detained in hospital to be assessed or treated if they have a 'mental disorder' and they are a danger to themselves or others. However, there are some differences around the process and how long they can be detained.

Northern Ireland also has similar rules about guardianship (see page 10), but again there are some differences in the detail around this.

There is no equivalent in Northern Ireland to Section 117 of the Mental Health Act, which deals with providing aftercare services (see page 7).

There are also important general differences in the way care is provided and paid for in Northern Ireland compared with England and Wales. For more information see factsheet NI532, **Paying for care and support in Northern Ireland**.

As in England and Wales, the law in Northern Ireland is set to be changed. However there is no confirmed date for when this will happen.

For more information about the law in Northern Ireland see www.nidirect.gov.uk/articles/your-rights-health. For help and support contact Law Centre NI (see 'Other useful organisations' on page 14).

Other useful organisations

Civil Legal Advice

0345 345 4345 (9am–8pm Monday–Friday, 9am–12.30pm Saturday)
www.gov.uk/civil-legal-advice

Civil Legal Advice (CLA) can advise people about legal aid. CLA can also help people find a solicitor who works under legal aid.

Law Centre NI

admin@lawcentreni.org
www.lawcentreni.org

Law Centre NI provides free legal advice in Northern Ireland. It advises on specific areas of law including health and social care.

The Law Society

020 7242 1222
www.lawsociety.org.uk

The Law Society represents solicitors in England and Wales. It provides details about law firms and solicitors who practise in England and Wales. It also provides information about legal specialisms and fees, as well as tips about what to ask and what to expect from a solicitor.

Mental Health Foundation

020 7803 1100
www.mentalhealth.org.uk

Mental Health Foundation provides information, carries out research, campaigns and works to improve services for anyone affected by mental health problems, whatever their age and wherever they live. It provides a wide range of information through its publications and website.

Mind

0300 123 3393
info@mind.org.uk
www.mind.org.uk

Mind is a mental health charity that publishes information on all aspects of mental health. It also provides a range of support through 200 local associations.

Rethink Mental Illness

0808 801 0525 (1pm–4pm Monday–Friday)
advice@rethink.org
www.rethink.org

Rethink Mental Illness is a charity that provides advice and information to anyone affected by mental health problems through its helpline. It also provides direct services and support groups.

SANE

support@sane.org.uk
www.sane.org.uk

SANE is a charity that works to improve the quality of life for people affected by mental illness. Through its helpline it gives help and information to people who are experiencing mental health problems, their families and carers.

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Our information is based on evidence and need, and is regularly updated using quality-controlled processes. It is reviewed by experts in health and social care and people affected by dementia.

Reviewed by: Natalie Lee, senior social worker, Approved Mental Health Professional and Best Interests Assessor, and Irene Chenery, consultant, Harrison Drury Solicitors and member of Solicitors for the Elderly

This factsheet has also been reviewed by people affected by dementia.

To give feedback on this factsheet, or for a list of sources, please email publications@alzheimers.org.uk

People affected by dementia need our support more than ever. With your help we can continue to provide the vital services, information and advice they need.

To make a single or monthly donation, please call us on **0330 333 0804** or go to alzheimers.org.uk/donate

Alzheimer's Society is the UK's leading dementia charity. We provide information and support, improve care, fund research, and create lasting change for people affected by dementia.

For support and advice, call us on **0333 150 3456** or visit alzheimers.org.uk



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