

## Howard League for Penal Reform's response to the Department of Health and Social Care's White Paper on reforming the Mental Health Act 1983

April 2021

### Summary

1. The Howard League welcomes the opportunity to respond to the White Paper on reforming the Mental Health Act 1983.
2. The Howard League agrees that the reforms should reflect the principles of choice and autonomy, least restriction, therapeutic benefit and the person as an individual, and that they must address the disproportionate use of compulsion and detention for Black patients. However, it is not clear how and whether the current proposals will achieve all of these aims.
3. It is right that police stations and prisons should be removed as "places of safety" for people who have been deemed to require treatment and care in hospital. The proposals should go further and ensure that prisons are never used as a place of safety by abolishing the possibility of adults and children being remanded to prison for their own protection or welfare. The Howard League has argued in its work with the All-Party Parliamentary Group on Women in the Penal System that "prison for their own protection" is outdated and wrong and has put forward simple and cogent proposals to abolish it.
4. The focus on reducing delays for people who need to be transferred from prison to hospital is welcome. Howard League lawyers have represented extremely unwell young people who have not been transferred to hospital for long periods because there are no available beds. A new time limit may not achieve the desired reduction in delays if the availability of hospital placements remains scarce: the priority should be to ensure there is sufficient high-quality support for people with mental health problems in hospital and the community.
5. The proposal to treat people with a learning disability or autism differently depending on whether or not they have been accused of committing a crime risks the unnecessary criminalisation of people in these groups. There is also a risk that people with a learning disability or autism may find themselves deprived of liberty but with less robust safeguards in place. These proposals should be abandoned in favour of ensuring high quality and humane care for people with a learning disability who are detained, along with much more community support to reduce the need for detention in the first place and help people leave hospital more quickly.

## **1. About the Howard League for Penal Reform and summary of response**

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 The Howard League's legal team works directly with children and young adults in prison, many of whom have mental health problems, sometimes necessitating a transfer to hospital. The Howard League provides administrative support to the All-Party Parliamentary Group on Women in the Penal System, which is conducting an inquiry into reducing the arrests and imprisonment of women. This response draws on the legal and policy work of the Howard League.
- 1.4 The Howard League would welcome the opportunity to provide further information about any of the points below.

## **2. It is not clear that the proposed reforms will address the long-standing racial disparities in mental health treatment**

- 2.1 The Howard League agrees that the reforms should reflect the principles of choice and autonomy, least restriction, therapeutic benefit and the person as an individual. The realisation of these principles will require a significant investment in and expansion of community services, as envisioned in the NHS Long Term Plan. Community mental health support must meet the needs of all service users. This will include culturally appropriate services for people from Black and minority ethnic backgrounds.
- 2.2 The Howard League is currently working on a guide to anti-racist lawyering, in partnership with an expert advisory board. The guide aims to improve the quality of representation for Black clients by giving criminal defence lawyers the confidence to challenge discrimination at the police station and in court.<sup>1</sup> In the advisory board meetings and in focus groups carried out to inform the guide, the Howard League has heard that discrimination in the criminal justice system compounds accumulated racial disadvantage across many areas of life. The relationship between disparities in mental health treatment and in the criminal justice system is especially worrying. In addition to the shockingly high rates of detention and compulsory treatment of Black people under the Mental Health Act, far too many Black people with mental health problems end up in police custody and prison. As the White Paper acknowledges, Black people are disproportionately referred to mental health services via the criminal justice system rather than primary care services. Similarly, Black children are more likely than white children to be referred to mental health services by youth justice or social care workers as opposed to by a GP (Edbrooke-Childs and Patalay, 2019).<sup>2</sup>

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<sup>1</sup> <https://howardleague.org/legal-work/making-sure-black-lives-matter-in-the-criminal-justice-system/>

<sup>2</sup> <https://pubmed.ncbi.nlm.nih.gov/30768415/>

- 2.3 It is important that the NHS and the government recognise the mental health impact of structural and interpersonal racism, including racism within the criminal justice system. Police brutality and violence against Black people can lead to the development of both personal and intergenerational trauma (Smith Lee and Robinson, 2019; Browning et al, 2021).<sup>3</sup> In general, longitudinal research has shown that racism is associated with poorer mental health outcomes over an extended period (Hackett and Ronaldson, 2020).<sup>4</sup> Structural inequalities and experiences of racism are at least partly responsible for the greater risk of psychosis among Black people, though this still fails to account for the much higher rates of compulsory treatment and detention which Black patients are subjected to (Nazroo et al, 2019).<sup>5</sup>
- 2.4 The White Paper proposes a Patient and Carer Race Equality Framework and culturally appropriate advocacy. Though these proposals are welcome, it is not clear that they will counter the accumulated disadvantage experienced by Black people who come to the attention of mental health services or enter the criminal justice system with unmet mental health needs. The government should consider the interplay between racial disparities in mental health care and in the criminal justice system, as well as the impact of structural racism, and should make specific proposals for reducing the criminalisation of Black people with mental health problems.

### **3. The proposals on “places of safety” are welcome but should go further**

- 3.1 It is right that police stations and prisons should be removed as “places of safety” for people who have been deemed to require treatment and care in hospital. The government should commit to providing the necessary funding for provision to ensure that the option of placing people in penal custody for as places of safety can be abolished.
- 3.2 The provisions in the Bail Act 1976 which allow courts to remand people to prison for their own protection or welfare should also be repealed. Last year, the Howard League published an All-Party Parliamentary Group briefing on provisions in the Bail Act which allow judges and magistrates to remand an adult to prison for their “own protection” or to remand a child to prison for their “welfare”. Women who are in mental health crisis are particularly vulnerable to arrest and remand for their “own protection”. The briefing argued that this power is outdated and wrong and that the provisions must be repealed: prison is in no way safe and people in crisis need treatment and care, not punishment (Howard League, 2020).<sup>6</sup> The White Paper is a missed opportunity to amend the Bail Act and bring it in line with the proposed Mental Health Act reforms.

### **4. The time limit for transfers from prison to hospital will only reduce delays if there are sufficient hospital placements**

- 4.1 The Howard League welcomes the focus on reducing delays for people who need to be transferred from prison to hospital. However, a new time limit will only reduce delays if enough beds are available. The Howard League’s legal team has supported young people who cannot be moved to hospital for months at a time because there is no available bed, even though they are in desperate need of care and treatment in hospital

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<sup>3</sup> <https://journals.sagepub.com/doi/full/10.1177/0095798419865152>;

<https://www.sciencedirect.com/science/article/abs/pii/S0306453020303073>

<sup>4</sup> <https://blogs.biomedcentral.com/bmcseriesblog/2020/11/18/racism-could-be-fueling-poor-health-among-minority-groups-in-the-uk/>

<sup>5</sup> <https://onlinelibrary.wiley.com/doi/10.1111/1467-9566.13001#shil13001-bib-0035>

<sup>6</sup> <https://howardleague.org/wp-content/uploads/2020/10/APPG-For-their-own-protection-FINAL.pdf>

which cannot be provided in prison. This includes a young person who had such a serious history of self-harm that he had to be held in a constant watch cell until he could be transferred.

- 4.2 The Howard League agrees with the Royal College of Psychiatrists' warning (cited in the consultation document) about introducing a statutory time limit which is not properly resourced. There is a danger that psychiatrists will stop recommending transfer to hospital in cases where it is sorely needed. The government should commit to providing sufficient psychiatric beds for both forensic and civil patients. It may be that a sufficiency duty akin to that required of Children's Services under s22G of the Children Act 1989, which requires local authorities to have sufficient accommodation for looked after children, is required.
  - 4.3 Increasing the availability of psychiatric beds could reduce criminalisation, as well as ensuring that people who need to be transferred from prison to hospital receive timely and appropriate care. Longitudinal research shows that transfers from prison to hospital have typically increased after a fall in the number of available (non-forensic) psychiatric beds. This suggests that people who require specialist care and treatment in hospital end up receiving prison sentences when beds are scarce, either because their treatment needs go unmet and lead to offending behaviour or because psychiatrists avoid recommending hospital orders if they know that there are no available beds.<sup>7</sup>
  - 4.4 Further reforms are needed to improve mental health provision for people in prison. Transfers to hospital are rare and there is a gap in service provision for the many people who require therapeutic care which is not available to them in the prison setting (Glorney et al, 2020).<sup>8</sup> Most people in prison have a history of mental ill-health. A recent study suggests that more than half of adults in prison have had contact with mental health services, and 72 per cent of children in youth custody are assessed to have a mental health concern (Tyler et al, 2019; Youth Justice Board, 2021).<sup>9</sup>
- 5. People with a learning disability or autism who meet the criteria for detention should receive humane care based on their needs, not whether they have committed a crime**
- 5.1 The White Paper proposes removing people with a learning disability or autism from the second part of the Mental Health Act (the civil sections) but not the third part (the forensic sections). The Howard League is concerned that this proposal could have unintended consequences and that it could increase the risk of criminalisation for some people with a learning disability or autism. It should be replaced by a commitment to ensuring that people with learning disabilities or autism receive high-quality, humane care if they are detained and that there is much more investment in community services. Treatment should be based on each person's needs and not on whether they have committed an offence.
  - 5.2 In New Zealand, autistic people and people with learning disabilities are excluded from mental health legislation but may be detained under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 if they have committed a criminal

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<sup>7</sup> Keown, Patrick (2019), 'Offenders with mental disorders in prison and the courts: links to rates of civil detentions and the number of psychiatric beds in England – longitudinal data from 1984 to 2016', *BJPsych Open*, 5(9), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6854357/>

<sup>8</sup> <https://www.tandfonline.com/doi/pdf/10.1080/14999013.2020.1743389?needAccess=true>

<sup>9</sup> <https://link.springer.com/article/10.1007/s00127-019-01690-1>;

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/956621/youth-justice-statistics-2019-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956621/youth-justice-statistics-2019-2020.pdf)

offence. Qualitative research with care managers in New Zealand suggests that some people are placed under this legislation not because of their offending behaviour, but because other services are struggling to manage them: as a result, they are criminalised for behaviour which could be dealt with through a behaviour support plan (Prebble et al, 2012).<sup>10</sup>

- 5.3 The proposal may create a legislative gap which leads to people with a learning disability or autism being deprived of their liberty under the Mental Capacity Act in situations where they would previously have been detained under the Mental Health Act. If this happens, it will give people with a learning disability or autism who are deprived of their liberty less protection than those currently detained under the Mental Health Act are afforded. The Mental Health Act has more safeguards, has more accessible rights and attracts greater independent scrutiny than the Mental Capacity Act (Gilbert, 2021).<sup>11</sup>

## **6. Conclusion**

- 6.1 The Howard League welcomes the aims of the White Paper, especially reducing compulsion and detention and addressing racial disparities in the use of the Act. However, some of the proposals may have unintended consequences and would be better addressed through resource commitments. The White Paper should also go further by fully preventing prisons from being used as a place of safety or protection, and by doing more to counter the accumulated disadvantage experienced by Black people who come to the attention of mental health services.

**The Howard League for Penal Reform  
21 April 2021**

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<sup>10</sup> <https://www.tandfonline.com/doi/abs/10.1080/09687599.2012.695527?journalCode=cdso20>

<sup>11</sup>

<https://www.york.ac.uk/media/healthsciences/images/research/prepare/reportsandtheircoverimages/Understanding%20the%20MHA%20&%20MCA%20interface.pdf>