

The Mental Health Act 1983 and guardianship

Factsheet 459LP
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The Mental Health Act 1983 is a law that is designed to protect the rights of people who are assessed as having a 'mental disorder'. This is a term used 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 detained in hospital, and what obligations healthcare and social care providers have to the person.

This factsheet looks at the parts of the Mental Health Act that cover the process of someone being detained in hospital against their will (sometimes referred to as 'being sectioned'), challenging someone's detention, guardianship and after-care services.

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The Mental Health Act 1983 and guardianship

The sections of the Mental Health Act

There are over 100 parts to the Mental Health Act, known as sections. Some of these sections allow people to be detained against their will, which is where the term 'sectioned' comes from. When someone is detained under the Mental Health Act, both they and their nearest relative must be informed of their rights, what is happening and how this relates to the Act.

The Act only applies in England and Wales. It does not apply in Northern Ireland, where the equivalent legislation is based on the Mental Health (Northern Ireland) Order 1986.

The following sections are likely to be the most relevant to people with dementia and their carers.

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Section 2 – Detention for assessment in hospital

Section 2 of the Mental Health Act allows people to be detained in hospital in order to have their mental condition assessed, in situations where the person themselves refuses. This can happen if health professionals think that they are behaving in a way that places their health at risk, or is a danger to themselves or others. Examples of when people with dementia may be detained under section 2 include serious cases of self-neglect and where the person is behaving in ways that challenge, such as being aggressive. A person can only be detained for a maximum of 28 days. They can of course be discharged sooner if appropriate.

An approved mental health professional (AMHP) and the person's nearest relative both have the legal power to have someone admitted to hospital under section 2 of the Mental Health Act (see 'The key roles', below, for an explanation). However, it is very unusual for a nearest relative to do this. Instead, every local authority has a duty to provide a trained team of AMHPs specifically to carry out this role. If you are concerned about someone and feel that they are a risk to themselves or others, contact your local authority social services department.

Once this has been done, two doctors must agree to the detention and sign medical recommendations that say why the person can only be treated in a psychiatric hospital. The doctors must assess the person within five days of each other. One of these doctors must have specialist experience of working with people with a mental disorder. The second should normally be someone who knows the person, such as their GP. The AMHP or nearest relative must then admit the person to hospital within 14 days of the date the medical recommendations were signed.

Once the person is in hospital under a section of the Act, they will not be allowed to leave the hospital until they are discharged and will be closely supervised.

Section 3 – Detention for treatment in hospital

Section 3 of the Act allows someone to be detained in hospital in order to receive treatment. This might apply to someone who has already been detained for a period of assessment and who then requires treatment. It could also apply if it is clear from the outset that the person will not accept treatment voluntarily. Section 3 of the Act allows someone to be detained for up to six months in the first instance. After this, the section may be renewed for a further six months, and then for a year at a time.

As with detention under section 2 of the Act, both an approved mental health professional (AMHP) or the person's nearest relative can apply for someone to be detained to hospital (see 'The key roles', below). However, the AMHP cannot admit someone to hospital under section 3 if the nearest relative doesn't agree to this.

The process for detaining someone for treatment under the Act is broadly the same as for assessment. However, the doctors must make sure there is appropriate treatment available for the person in hospital before signing the medical recommendations. If there is not, then it is likely that the person will not be detained. Treatment might include psychological therapies such as problem-solving therapy and cognitive behavioural therapy (CBT), specialist mental health nursing, medication and care.

Section 117 – After-care services

Section 117 of the Act deals with after-care services. These are the services that must be provided to someone when they are released from detention under the Mental Health Act. Local authorities and the NHS have a joint duty to make arrangements for after-care services for people who have previously been detained for treatment under section 3 of the MHA and who require them.

After-care support is not means-tested. This means that everyone who needs it will receive it, regardless of their financial situation. It must be provided free of charge and this includes care in the person's own home and paying for care home fees.

There is usually an upper limit on how much the NHS and a local authority will spend on an individual's care home fees. The NHS and local authority will normally tell you what the limit is. Often they will provide a list of care homes in the area within this budget and families can choose from this list.

However, if someone wishes to move into a different and more expensive care home to that chosen by the NHS or local authority, they can choose to pay a top-up fee. This means they can pay the difference between the amount the NHS or local authority are willing to pay and the cost of the person's chosen home.

It is possible for after-care support to be withdrawn if the NHS and the local authority together decide that the person's needs have changed. In order to receive after-care, the person must have a continuing requirement for support. This support must meet a need connected with the person's mental disorder, and reduce the risk of a deterioration of their mental condition. If this is no longer the case, the after-care support could

be withdrawn and the person's care needs reassessed on a means-tested basis, meaning they may have to pay for some or all of their care costs. If you are concerned that after-care is going to be removed inappropriately you should seek legal advice.

Challenging a detention under the Mental Health Act

If you believe someone is being wrongly detained under a section of the Mental Health Act, you can challenge the decision. This can be done in one of four ways.

- Ask the health professional in charge of their care (known legally as 'the responsible clinician') to discharge them.
- Ask the hospital manager to discharge them. The manager will hold a meeting (called a hearing) with the people in charge of the hospital and other hospital staff. There is no time limit for when this hearing should be held.
- Talk to the nearest relative. They have the power to discharge the person, however they must give written notice to the hospital and the discharge can be overridden by the doctor on medical grounds.
- Apply to a First-tier Tribunal in England or a Mental Health Tribunal in Wales. A tribunal is able to hear cases where the person or their representative believes that they should be discharged from hospital. They have the power to discharge the person if they feel that they no longer need to be detained. Staff on the hospital ward, an independent mental health advocate (IMHA) or the hospital's Mental Health Act administrator can help put people in touch with a solicitor to represent them at the hearing. The Law Society of England and Wales also has a list of solicitors who are accredited to represent people at these hearings – see 'Other useful organisations' for details.

You can try all of these options at the same time to challenge a section decision, you do not need to try one at a time or follow any particular order.

What happens when a section expires?

If the section is not renewed or replaced by another section, the person can discharge themselves from hospital. However, a doctor or nurse can detain someone trying to leave the hospital, if they feel they should stay until another assessment is made. This is because the hospital always has a duty to make sure patients' needs will be met in the community after they are discharged.

Guardianship

Sometimes it will not be necessary to detain someone for assessment or treatment in hospital. The Mental Health Act allows for individuals called 'guardians' to be appointed. These are people with special legal powers to make some decisions on behalf of a person with a mental disorder.

A guardianship order is not the same as a hospital section made under the Mental Health Act. Guardianship orders and sections are similar in that people who are the subject of a guardianship order may have decisions made for them that they might not agree with. However, it can be more pleasant and less restrictive for the person to remain living where they are than to go into hospital.

Doctors should consider whether guardianship is more appropriate than detaining someone in hospital.

A guardian has three powers.

- They have the right to decide where the person lives.
- They can require the person to attend specified places for medical treatment, work, education or training.
- They can demand that a doctor, approved mental health professional (AMHP) or other specified person is able to visit the person where they live.

The decisions made by a guardian must be the least restrictive option for the person with a mental disorder, and must always be made in the person's best interests. The guardian cannot authorise medical treatment and has no control over a person's money or property.

Except for the residence power, the guardian cannot legally force a person to do something they don't want to do. The success of being a guardian therefore depends a lot on the quality of the relationship between them and the person with a mental disorder. The residence power allows a guardian to take the person to the place they are specified to live in, if they will not go there voluntarily.

The process of applying for guardianship is similar to having someone detained under Section 2 of the Mental Health Act. An AMHP or the person's nearest relative can apply for it if the person is placing their own health at risk, or is a danger to themselves or others. An AMHP cannot make an application for a guardianship order if the nearest relative does not agree to it.

In most cases the local authority is named as the guardian, but a friend or relative may also be appointed. A guardianship order lasts for six months in the first instance. After this, it may be renewed for a further six months, and then for a year at a time.

Objecting to a guardianship order

A guardianship order cannot proceed if the nearest relative objects to it. If the objection is raised when the order is being applied for, it will not go ahead. Once an order has been made and a guardian has been appointed, the nearest relative can still object to it if they do not think that it is necessary.

If this happens, the matter will be taken to a tribunal. The tribunal can decide to either end the guardianship order or not to end it, or they can make certain other orders.

There are some circumstances in which the tribunal must agree to end the guardianship order. This will be if:

- at the time the tribunal considers the case, the person no longer has a mental disorder
- the guardianship order is not necessary for the welfare of the person or for the protection of others.

Lasting powers of attorney, deputies and the Mental Health Act

The Mental Health Act does not affect the power that attorneys (people appointed through a lasting power of attorney (LPA)) or deputies (who may be appointed by the Court of Protection if no LPA has been made), have to make decisions about the person's welfare or property and affairs, if they lack capacity. Even if someone is detained under the Mental Health Act, the attorney or deputy can still carry out their role. However, they cannot:

- give consent for the person to have certain mental health medical treatments, as identified in the Mental Health Act
- make decisions about where a person should live if that person has a guardian appointed to them.

A person can still create a lasting power of attorney and a deputy can still be appointed when the Mental Health Act is being used to detain them, or a guardian has been allocated.

For more about powers of attorney and deputyship see factsheet 472, **Lasting powers of attorney**, or factsheet 530, **Becoming a deputy for a person with dementia**.

The key roles

Nearest relative

The nearest relative is generally the person who comes first in the following list: husband, wife or civil partner; son or daughter; father or mother; brother or sister; grandparent; grandchild; uncle or aunt; nephew or niece; someone (not a relative) that the person has lived with for at least the last five years.

Independent mental health advocate (IMHA)

A person detained in hospital under the Act has the right to access an independent mental health advocate who will explain their rights and how they can challenge their detention. Advocates have access to the person's medical records and operate independently from the hospital.

Approved mental health professional (AMHP)

A professional who has had special training to help people in relation to the Mental Health Act. They might be a social worker or mental health professional (such as a community psychiatric nurse).

Other useful organisations

Law Society

113 Chancery Lane
London WC2A 1PL

020 7242 1222 (general enquiries)
Contact form on website
www.lawsociety.org.uk

The body representing solicitors in England and Wales. It provides details of law firms and solicitors practising in England and Wales, and useful information about legal specialties and fees, as well as tips about what to ask and what to expect from a solicitor.

Mental Health Foundation

Colechurch House
1 London Bridge Walk
London SE1 2SX

020 7803 1100
Contact form on website
www.mentalhealth.org.uk

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 does not run a helpline, but produces a wide range of information through its publications and website.

Mind

Unit 9, Cefn Coed Parc
Nantgarw
Cardiff CF15 7QQ

0300 123 3393 (Mindinfo line 9am–6pm weekdays)
info@mind.org.uk
www.mind.org.uk

Mental health charity that publishes information on all aspects of mental health and provides a range of support through 200 local associations.

Rethink Mental Illness

89 Albert Embankment
London SE1 7TP

0300 5000 927 (Monday to Friday, 10am–1pm)
info@rethink.org
www.rethink.org

Charity providing advice and information to anyone affected by mental health problems through their helpline. They also provide direct services and support groups.

SANE

St Mark's Studios
14 Chillingworth Road
London, N7 8QJ

0203 805 1790
0300 304 7000 (Helpline, 6pm–11pm daily)
info@sane.org.uk
www.sane.org.uk

Charity working to improve the quality of life for people affected by mental illness. It provides help and information to those experiencing mental health problems, their families and carers through the helpline.

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

A list of sources is available on request.

Alzheimer's Society National Dementia Helpline England, Wales and Northern Ireland:

0300 222 1122

9am–8pm Monday–Wednesday

9am–5pm Thursday–Friday

10am–4pm Saturday–Sunday

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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.

