

The Mental Health Act 1983 and guardianship

The Mental Health Act (MHA) is designed to protect the rights of people in England and Wales who are assessed as having a 'mental disorder'. This is a general term used in the act to describe any disorder or disability of the mind, including dementia. The act does not apply in Northern Ireland, where the equivalent legislation is based on the Mental Health (Northern Ireland) Order 1986.

This factsheet looks at the parts of the Mental Health Act that cover the process of 'being sectioned', challenging a section, guardianship and after-care services.

The person with [dementia](#) and their nearest relative must be informed of their rights and what is happening in relation to the Mental Health Act.

The sections of the Mental Health Act

The MHA consists of over 100 parts, called sections. The following sections are the most relevant to people with dementia and their carers:

Section 2 ? Detention for assessment in hospital

If health professionals think that a person with dementia is behaving in a way that places their health at risk or is a danger to themselves or others, they can be detained in hospital under section 2 of the act so that they can be assessed. This process is often known as 'being sectioned'.

A person can initially be detained in hospital for assessment for a maximum of 28 days.

An approved mental health professional (AMHP) and the person's nearest relative both have the legal power to have someone admitted to hospital under a section of the Mental Health Act (see 'The key roles' section for an explanation of these roles). However, it is very unusual for a nearest relative to do this. Every local authority has a duty to provide a trained team of AMHPs specifically to carry out this role.

Two doctors must then agree to the section and sign medical recommendations stating why someone can only be treated in a psychiatric hospital. One of these doctors must have special experience in working with people with a mental disorder. The second should normally be someone who knows the person, such as their [GP](#). The doctors must assess the person within five days of each other. The AMHP or nearest relative must then admit the person to hospital within 14 days of when the medical

recommendations were signed.

A person who is in hospital under a section is not allowed to leave the hospital and will be closely supervised.

Section 3 ? Detention for treatment in hospital

Section 3 of the act allows someone to be detained in hospital for treatment, initially for up to six months. After this time, the section may be renewed for a further six months, and then for a year at a time. Detention for treatment can take place if the person is already detained under section 2 for an assessment or if it is clear at the outset that the person will not accept treatment voluntarily.

Either an approved mental health professional or the person's nearest relative can apply for someone to be sectioned and admitted to hospital (see 'The key roles', section, for an explanation of these roles). However, the AMHP cannot admit someone to hospital under section 3 if the nearest relative doesn't agree to this. The process is the same as for detaining someone for a mental health assessment under section 2 (above), except that the doctors must confirm there is appropriate treatment available for the person in hospital. 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

Local authorities and the NHS have a joint duty to make arrangements for the care and support of someone who has previously been detained for treatment under section 3 of the MHA and who is in need of after-care services. This support is not means-tested (the person will receive it regardless of their financial situation). It must be provided free of charge and includes care in the person's own home and paying for care home fees.

Sometimes, the local authority may decide that a person is no longer eligible for after-care support under section 117 and will have to start paying for their own care. If you are concerned that after-care is going to be removed inappropriately you should seek legal advice.

Challenging a section

A section can be challenged in four ways. The options for the person being sectioned are outlined below:

- Ask the health professional in charge of their care (the responsible clinician) to discharge them.
- Ask for 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. The nearest relative can discharge them, 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 if they are in England or a Mental Health Tribunal in Wales. Staff on the hospital ward, an independent mental health advocate or the hospital's Mental Health Act administrator, can help put people in touch with a solicitor to represent them at a First-tier Tribunal hearing. The Law Society of England and Wales also has a list of solicitors who are accredited to represent people at these hearings ? see 'Useful organisations'.

The person can try all the options available to them at the same time to challenge a section decision.

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, if they feel they should stay in the hospital until another assessment is made. The hospital always has a duty to make sure patients' needs will be met in the community after they are discharged.

Guardianship

The Mental Health Act also allows for individuals called 'guardians' to be appointed to help someone live as independently as possible in the community. They can make some decisions on behalf of people with a mental disorder. These decisions must be the least restrictive and made in the person's best interests.

A guardianship order is not the same as a hospital section made under the Mental Health Act. Doctors should consider whether guardianship is more appropriate than detaining someone in hospital. 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. The guardian must always act in the person's best interests.

Guardianship can be arranged if an approved mental health professional or the person's nearest relative applies for it, and the person's situation meets the same requirements of a section (see 'Section 2 ? Detention for assessment in hospital', above). An approved mental health professional cannot make an application for a guardianship order if the nearest relative does not agree that it should happen.

In most cases the local authority is named as the guardian, but a friend or relative may be appointed. A guardianship order cannot proceed if the nearest relative objects to it.

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.

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 with the person. 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 guardian cannot authorise [medical treatment](#) and has no control over a person's money or property.

A guardianship order initially lasts for six months and can be renewed for a further six months and then annually.

Objecting to a guardianship order

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

The tribunal can decide to either end the guardianship order or not to end it, or they can make certain other orders.

Guardianship must end 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 and deputies, and the Mental Health Act

The Mental Health Act does not stop people appointed as attorneys through a lasting power of attorney (LPA) or deputies (who may be appointed by the Court of Protection if no LPA has been made) from making decisions about welfare or property and affairs for a person without capacity. 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 be appointed when the Mental Health Act is being used to detain them, or a guardian has been allocated.

For more about Lasting powers of attorney and deputies please see [factsheet 472, Enduring power of attorney and lasting powers of attorney](#).

Detaining someone under a section of the Mental Health Act or depriving them of their liberty under the Mental Capacity Act

The Mental Capacity Act 2005 aims to protect people who do not have the mental ability to make decisions about their health and welfare and/or property and financial affairs. There may be occasions when a person who does not have mental capacity does not qualify to be detained under the Mental Health Act but needs to be deprived of their liberty in order to receive appropriate care and treatment. In such circumstances, under the Mental Capacity Act a hospital or care home must get formal authorisation. This is known as a Deprivation of Liberty Safeguards authorisation.

For more information see [factsheet 483, Deprivation of Liberty Safeguards \(DoLS\)](#).

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

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

Approved mental health professional

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).

For details of Alzheimer's Society services in your area, visit alzheimers.org.uk/localinfo

For information about a wide range of dementia-related topics, visit alzheimers.org.uk/factsheets

Useful organisations

Law Society

113 Chancery Lane
London WC2A 1PL
T 020 7242 1222 (general enquiries)
E contact@lawsociety.org.uk
W 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
T 020 7803 1100
E mhf@mhf.org.uk
W 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

Mind infoline
PO Box 277
Manchester M60 3XN
T 020 8519 2122 0300 123 3393 (Mindinfoline 9am-6pm weekdays)
E info@mind.org.uk
W 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.

NHS Direct

T 0845 4647

W www.nhsdirect.nhs.uk

Official website and 24-hour telephone helpline for the NHS. Provides information about health problems and how to keep healthy.

SANE

First Floor Cityside House

40 Adler Street

London E1 1EE

T 020 7375 1002 0845 767 8000 (Helpline, 6?11pm daily)

E info@sane.org.uk

W 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.

Rethink Mental Illness

89 Albert Embankment

London SE1 7TP

T 0300 5000 927 (Monday to Friday, 10am?1pm)

E info@rethink.org

W 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.

Factsheet 459

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Reviewed by: Natalie Melling, Best Interests Assessor and Caroline Bielanska, Director, Solicitors for the Elderly

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 11 22

9.00am-5.00pm Monday-Friday

10.00am-4.00pm Saturday-Sunday

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