Should the definition of 'mental disorder' under the Mental Health Act 1983 encompass autism, for the purpose of compulsory detention?

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To be sectioned under the Mental Health Act 1983 (MHA), an individual must meet the definition of 'mental disorder' as per s.1(2). Despite the scarcity in academic scholarship concerning autism within the scope of the Act¹, the 'mental disorder' definition has been considered ludicrously broad². This paper seeks to highlight that the inclusion of autism under the MHA, results in discriminatory detention based on autism-related behaviour; therefore, the removal of autism from the MHA is necessary. My approach is based on a personal familiarity in understanding autism while emphasising the need for autism awareness. First; a distinction between autism and mental health is provided, second; I analyse the legislative framework concerning compulsory detention as per s.2 of the Act, third; I critique the current safeguards in place bearing in mind disability law and finally; critique of relevant government and legislative reports is provided. All of which shape my thesis; autism should not encompass the definition of mental disorder under the MHA.

Mental health or Autism?

The World Health Organisation defines ‘good mental health’ as a state in which an individual has mental and psychological well-being³. Leading mental health support service Mind compiles a list⁴ of mental health issues (which autism is absent from) stating conditions such as depression and anxiety being common⁵. By contrast, autism, medically referred to as autistic spectrum disorder (ASD)⁶, is a lifelong developmental disability, namely, affecting an individual’s social interactions and behavioural patterns⁷. There is no ‘cure’⁸ nor medical justification for autism, however it is known to operate on a spectrum⁹; thus, individuals’ experiences and needs remain distinct from one another. Having personally witnessed the difficulties arising for those with ASD, factors particularly affected include; the ability to cope with change, levels of understanding, and decision making.

The National Autistic Society (NAS) explicitly states autism is not a mental health condition¹⁰; with mental health carrying social stigma and subsequent discrimination¹¹, using ‘mental health’ and ‘autism’ interchangeably attaches further stigma to both.

The detention of individuals with ASD has been a long-standing concern with the NAS recording a 24% increase of autistic individuals at inpatient units in 2015¹². Recent statistics reveal that 3,390 people with learning disabilities and/or autism were detained in a hospital during 2019; 1,420 of whom were in

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¹ A focus on criminal prosecutions of autistic individuals under the MHA has been noted as opposed to the removal of autism from the Act’s scope entirely.
⁸ ibid.
⁹ Department of Health, Think Autism (April 2014) p 4, para 1.3.
an adult mental health ward\textsuperscript{13} rather than a specialised ASD ward. Unspecialised wards are likely to cause severe distress to autistic individuals with sensory triggers including light, noise or crowded environments; the need to remove autism from the MHA is heightened.

Public demand for the MHA’s reform was initiated by a petition to remove autism from its scope, which gained 2657 signatures\textsuperscript{14}. Taking action further, two families in partnership with Irwin Mitchell, joined forces in a crowd-funding appeal\textsuperscript{15} to legally challenge the MHA with the hopes of removing autism from encompassing the scope of the Act\textsuperscript{16}. The NAS branded the detention of autistic individuals as a “national scandal” with over 17,000 signatures on their open letter calling on the Government to set up an Independent Review into the treatment of autistic people under the Act\textsuperscript{17}.

**Legislative scope**

Despite a clear distinction between mental health and autism, the MHA provides the right to section autistic individuals. Under s.1(2) a ‘mental disorder’ constitutes “any disorder or disability of the mind”\textsuperscript{18}; attracting criticism for being uncertain\textsuperscript{19}, likely due to its broad scope. Dawson cites Fanning’s assertion by which the expansive scope of the definition provides wide discretion to mental health professionals to determine what a mental health disorder is and whether or not the individual has one\textsuperscript{20}. However, in my view, the definition should be approached with apprehension as mental health professionals may have extensive knowledge of mental health, yet, this is unlikely to equate to a sufficient understanding of autism. As recently noted by Baroness Browning, there is a lack of psychiatrists who have a sufficient understanding of autism and therefore they are unable to differentiate between autism-related behaviour and what they believe to be psychotic behaviour\textsuperscript{21}.

The 2007 amendment of the MHA attempted to clarify the s.1(2) definition as per s.2A; an individual with a learning disability shall not be considered to suffer from a mental disorder or requiring hospital treatment “unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part”\textsuperscript{22}. This exemption applies only to s.3 MHA\textsuperscript{23} concerning detention for treatment and there is no such additional requirement for those with autism. In 2007, the NAS urged for s.2A to be applied to those with autism too\textsuperscript{24}; however, I question how effective such inclusion would be as the threshold and the definition of ‘abnormally aggressive or seriously irresponsible conduct’ is yet to be clarified. The Code of Practice (Code) states that “bizarre or unusual behaviour is not the same as abnormal behaviour and what they believe to be psychotic behaviour”\textsuperscript{25} however, the Code lacks clear provision solely for detaining autistic individuals. Hollins notes a complete removal of autism from the MHA is

\begin{itemize}
  \item \textsuperscript{18} Mental Health Act 1983, s 1.
  \item \textsuperscript{20} John B Dawson, Book Review (2019) 27 MLR 705.
  \item \textsuperscript{21} HL Deb 5 November 2019, vol 800, cols 1157-58.
  \item \textsuperscript{22} Explanatory Notes to the Mental Health Act 2007, s 2A.
  \item \textsuperscript{23} ibid.
  \item \textsuperscript{25} Department of Health, Code of Practice (2015).
\end{itemize}
appropriate\textsuperscript{26}, with which I wholly agree, as the current safeguarding guidance fails to account for factors arising from autism.

It should be noted that the MHA does not require the medical profession to consider external factors\textsuperscript{27}; raising further concern as autistic individuals are likely to be affected by external factors. The lack of consideration for such external factors may result in misinformation detentions against autistic individuals.

**The detention criteria**

Section 2 MHA allows an application for admission for assessment to be made if an individual is suffering from a mental disorder of a nature or degree which warrants the detention for assessment, and if they ought to be detained for their health or safety or to protect other persons\textsuperscript{28}. The MHA fails to define ‘nature’ and ‘degree’. \textit{R v MHRT for the South Thames Region ex p. Smith}\textsuperscript{29} established that ‘nature’ indicates the mental disorder the individual is suffering from, its chronicity, its prognosis, and the individual’s previous response to receiving treatment for the disorder\textsuperscript{30}. With autism being an untreatable lifelong developmental disability, the ‘nature’ element does not align with the condition of autism.

Furthermore, ‘degree’ was construed as the current manifestation of the individual’s disorder\textsuperscript{31}; as autism operates on a spectrum, knowing the ‘degree’ of an autistic individual is extremely tough to clarify. An autistic individual’s ‘current manifestation’ is equally challenging to construe; as autistic people may struggle to cope with unexpected change, however minor it may be\textsuperscript{32}. Therefore, what may seem a minor inconvenience to abled individuals, may become an incredibly cumbersome burden to some autistic individuals; possibly resulting in behavioral outbreaks. Yet again, insufficient clarification fails to be implemented; and the ‘nature’ and ‘degree’ elements of the detention criteria under s.2 fail to account for the experiences of autistic individuals. The absence of clear criteria applicable to autistic individuals, is highly problematic; reinforcing apprehension and discrimination\textsuperscript{33}.

Despite the lack of consideration for autistic individuals, the ‘nature’ and ‘degree’ definitions are reaffirmed\textsuperscript{34} within the Code which states s.2 should only be enacted if “the full extent of the nature and degree of the patient’s condition is unclear”\textsuperscript{35}. This ‘clarification’ is deeply troubling as it relies on the assumption of being “unclear”; therefore, preserving the right to detain autistic individuals in situations where their behaviour is simply misunderstood.

Additionally, the s.2 provision notes public safety concerns; in situations where an individual expresses outward violence towards others, detention \textit{may} be justifiable. However, given the lack of suitable guidance relating to individuals with ASD, there is a major gap in protection which allows discriminatory detention, based on autism-related behaviour, to occur. Interestingly, Szmukler and Holloway note that discrimination of individuals with mental disorders increases stigma which results in the individual avoiding relevant services; leading to less public protection as opposed to more.\textsuperscript{36} Iqbal supports their argument by highlighting that reservations concerning the MHA reform have stemmed from a public safety perspective rather than patient care\textsuperscript{37}. Such arguments are relevant as public safety concerns

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\textsuperscript{28} Mental Health Act 1983, s 2(2).
\textsuperscript{30} Explanatory Notes to the Mental Health Act 2007, s 4.
\textsuperscript{31} ibid.
\textsuperscript{33} Nicholas Chown, “Do you have any difficulties that I may not be aware of? A study of autism awareness and understanding in the UK police service” (2009) 12 International Journal of Police Science & Management 256.
\textsuperscript{35} ibid para 14.27, 118.
\textsuperscript{36} George Szmukler and Frank Holloway, ‘Reform of the Mental Health Act: Health or Safety?’ (2000) 177 British Journal of Psychiatry 196.
\textsuperscript{37} Iqbal F, ‘Concerns over Reform of the Mental Health Act’ (2000) 177 British Journal of Psychiatry 563.
appear to be a reservation for removing autism from the MHA, as opposed to the patient’s perspective. Alternatively, one may suggest autism should be removed from civil proceedings as opposed to criminal proceedings for a matter of safety. Although such assertions would be an incredible step forward for the rights of individuals with autism, as R (Hall) v Secretary of State for Justice addressed, inadequate training is provided to prison staff on how to manage an autistic prisoner. The lack of autism awareness throughout the legal system is a major issue, one which can only be remedied through the education of autism; beginning with understanding autism is not a mental health condition, therefore, it should not be legally considered as such.

**Invisible disability, invisible safeguards**

Prior to the UN Convention on the Rights of Persons with Disabilities (CRPD), international human rights law rendered the detention of those with mental disorders and disabilities as lawful. The UK was among the first signatories to the CRPD; ratifying its Option Protocol in 2009. The CRPD aims to promote, protect and ensure the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities, yet the inclusion of autism under the MHA demonstrates the contrary. Graham previously predicted the CRPD’s impact on the UK to be minimal, proving correct as Lady Hale noted the preservation of the MHA has a strong standing as the CRPD’s rights have not been turned into directly enforceable rights under domestic law. Thus, through the MHA’s inclusion of autism, the UK fails to wholly implement the CRPD as the detention of those with autism is rendered lawful, contrary to international human rights standards.

Safeguarding attempts were made within the MHA’s 2007 amendment; the Deprivation of Liberty Safeguards (DoLS), implemented within the Mental Capacity Act (MCA) 2005 which came into force in 2009. The DoLS were a result of the 2004 ECtHR decision in HL v UK as the realisation of the ‘Bournewood Gap’ identified the absence of procedures for detaining persons of unsound mind. However, the reality of closing the Bournewood Gap by the DoLS has been criticised; as Pearce and Jackson highlight the case law demonstrates a significant number of individuals who lack capacity fall outside the provisions. Whether the DoLS apply is a convoluted task in itself, as deciding whether to rely on the MHA or MCA becomes a difficult task; nonetheless, if an individual meets the s.2 MHA criteria and actively objects to assessment, the MHA should be used. This affords a gap in protection for those with ASD who are nonverbal or struggle with communication generally; lack of objection appears to indicate that the DoLS apply.

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38 Holly Bridden, ‘Amending the Mental Health Act: Part 5 – Amendments to affect people with learning disabilities and/or autism?’ accessed 8 May 2020.
39 R (Hall) v SSJ [2016] EWHC 1905 (Admin) at [121].
44 Lady Hale, ‘Is it time for yet another Mental Health Act?’ (Royal College of Psychiatrists Annual Conference, Birmingham, 24 June 2018).
45 Ruth Cairns, Genevra Richardson and Matthew Hotopf, “Deprivation of Liberty: Mental Capacity Act Safeguards versus the Mental Health Act” (2010) 34 The Psychiatrist 246.
46 H.L. v United Kingdom app no. 45508/99.
48 Nasreen Pearce and Sue Jackson, ‘The Deprivation of Liberty Safeguards Part 7: has the UK bridged the Bournewood gap?’ (2012) 42 Family Law, 1123.
50 Ruth Cairns, Genevra Richardson and Matthew Hotopf, (n 43).
The DoLS have attracted criticism due to the lack of a clear definition; confusing practitioners in determining a threshold level\textsuperscript{51}. With the Joint Committee on Human Rights (JCHR) rendering the DoLS scheme as “broken”\textsuperscript{52} calling for its reform in 2019; evidently, the current safeguard mechanisms in place do not offer sufficient protection for those with autism. The absence of adequate safeguards in place for autistic individuals exemplifies the necessity to remove autism from the MHA entirely.

**The Code of Practice**

Prior to its 2015 revision\textsuperscript{53}, the Department of Health (DoH) revealed the Code acknowledged autistic individuals could meet the detention criteria “without having any other form of mental disorder, even if autism is not associated with abnormally aggressive or seriously irresponsible behaviour”\textsuperscript{54}. Having been revised, the Code was given effect through s.188 MHA depending on an individual’s role\textsuperscript{55}; however, concerns arise as the Code’s optimistic safeguarding intentions fail to carry substantive legal obligations.

The Code explicitly states that where the terminology “must” is used, legal obligations are inferred; applying to doctors, approved professionals, local authorities, and staff\textsuperscript{56}. However, where “should” is the chosen terminology, a departure from the Code is permitted, provided it is recorded and documented. Therefore, commissioners of health services, the police, ambulance and others in social services are not legally bound by the Code and should merely assist the Care Quality Commission (CQC) and people involved in visiting or dealing with the care of detained patients\textsuperscript{57}. The Code is incapable of effectively providing safeguarding protection as it fails to infer persistent legal obligations to the detriment of autistic individuals. The CQC recommended the Code give clear guidance to improve its usability\textsuperscript{58}; yet, these recommendations are essentially futile if the Code fails to infer legal duties upon all individuals involved in detention.

**Yes, it is time for yet another MHA\textsuperscript{59}**

The 2012 Winterbourne View scandal exposed harrowing levels of abuse suffered by autistic individuals in care homes\textsuperscript{60}, exemplifying the lack of procedural safeguards. The DoH addressed concerns that despite initiatives being launched to safeguard autistic individuals, the issue of detention and length of stay persists\textsuperscript{61}. Thus, the NHS’ 2017 Transforming Care programme aimed to reduce inappropriate hospital admissions and length of stay\textsuperscript{62}; pledging to make a minimum 35% reduction of detention rates concerning individuals with learning disabilities and autism by March 2019\textsuperscript{63}. Recent data reveals at least 2260 individuals with learning disability and/or autism being detained in April 2019\textsuperscript{64}; demonstrating the failure to meet the previous target set by the government in 2015\textsuperscript{65}, with detention

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\textsuperscript{54} Department of Health, Stronger Code: Better Care (July 2014) para 20.19.

\textsuperscript{55} R (Munjaz) v Ashworth Hospital Authority [2005] UKHL 58.

\textsuperscript{56} Department of Health (n 54) figure (ii), 12.

\textsuperscript{57} ibid figure (ii), 13.

\textsuperscript{58} Care Quality Commission, Mental Health Act Code of Practice 2015 (2019) 4.

\textsuperscript{59} Lady Hale (n 44).


\textsuperscript{61} Department of Health, No voice unheard, no right ignored (March 2015) 3.

\textsuperscript{62} NHS England, Transforming Care (Jan 2017) 6.

\textsuperscript{63} NHS England, Building the right support (Oct 2015) para 3.18, 27.


\textsuperscript{65} NHS England (n 62).
rates reducing by a mere 19%. The need for reform of the Act and tailored support services for individuals with ASD is heightened as targets have failed dramatically.

The Equality and Human Rights Commission addressed the government’s March 2019 target failure recommending that the new MHA contain a clear statutory duty on providers to inform patients of their rights under the Act, the Equality Act 2010 and the Human Rights Act 1998. The Commission highlighted detention continues despite concerns that the individual does not require such detention while calling for a legal duty to be placed onto local authorities to ensure sufficient community services and to have budgets in place to provide care services for individuals with autism. Although such recommendations are welcomed, little attention has been paid to the complete removal of autism from the MHA entirely or introducing specific provisions for those with ASD.

Families remain concerned with the lack of local support made available to autistic individuals; and the government felt those with ASD were being detained due to their autism-associated behaviour despite being aware that no appropriate medical treatment was available. However, little has been done to remedy this issue; the NAS recommended strengthening the law concerning the rights of individuals in, or at risk of, inpatient care and for professionals to listen to individuals and their families in implementing decisions. Although this may facilitate current safeguarding mechanisms, the exclusion of autism from the s.1(2) MHA ‘mental disorder’ definition altogether would prevent admission at the very first instance. Additionally, as discussed prior, the current safeguarding mechanisms like the Code and DoLS are not nearly as effective as they should be.

Set up in 2017, the Independent Review of the MHA (IRMH) aimed to address rising detention and concerns regarding human rights and dignity; familial concerns were addressed, that placing autistic individuals in a system which is not designed to cater for their specific needs causes mental health issues rather than provide support or aid. Further acknowledgement of professionals in care who “do not understand the specific needs of a person with autism” was made; evidencing the lack of knowledge, awareness and mindfulness of autism, likely to contribute to the unsettling lack of protection afforded to autistic individuals. Among other recommendations, the Code’s amendment was suggested, to clarify the best practice for individuals with autism. However, given the legality of the Code as previously discussed, I approach such recommendations with caution.

Alternatively, amending the detention criteria to create a ‘substantial risk’ or ‘significant harm’ element has been suggested. Yet, such propositions fail to address that individuals with ASD feel restricted due to being detained for an increasing amount of time and unsupported by staff who simply do not understand the nature of autism. The recognition of reduced support services is not a satisfactory

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67 Equality and Human Rights Commission, Our advice to parliament: reforming the Mental Health Act (July 2019).
68 ibid at 7.
69 ibid.
70 ibid at pp 18, para 49.
72 Hollins, Lodge, and Lomax, (n 26).
73 Nicholls (n 12).
76 ibid.
77 ibid at 190 .
79 National Autistic Society (n 10).
excuse to legally detain autistic individuals, if the definition were to be changed the destination could be changed from the outset80.

The JCHR acknowledged that autistic individuals can be sectioned without having a treatable mental health condition81 whilst agreeing that autistic individuals need stronger legal rights. It was recommended that there be a legal duty on local authorities to ensure sufficient community-based services and hold effective budgets to implement care services for autistic individuals82. Further suggestions to narrow the MHA criteria to situations where treatment is necessary, unavailable in the community (as a last resort), to the benefit of the individual or where a risk of significant harm to others is present83 were made. Although such recommendations may mildly alleviate the discriminatory detention of autistic individuals, the Act would still allow for the “human right to liberty to be overridden because of a lack of services”84.

With recent evidence exemplifying the lack of resources available to local authorities, particularly relating to sufficient care85; autistic individuals must not be allowed to fall through such gaps in protection. As opposed to the JCHR’s recommendations, Scotland’s Independent Review of Learning Disability and Autism in the Mental Health Act (IRMHA) recommended removal of autism from the definition of mental disorder86. The basis for such removal was rooted in the CRPD and acknowledgement that behaviour which “causes serious harm to others is not ‘mental illness’”87. These recommendations adequately account for the lived experiences of individuals with ASD, representing the necessary step forward for human rights and anti-discrimination against disabled individuals.

Uncertainty should not warrant detention

The inclusion of autism in the MHA facilitates disability discrimination; disregarding the specific needs and behaviours arising from autism. The Government has long-acknowledged the issue of detention of autistic individuals, yet efforts have failed to address the fundamental issue; autism is not a mental illness, therefore, should not be governed by law as such. Through the inclusion of autism under the s.1 definition of mental disorder under the MHA, a conflated understanding of autism and mental health conditions is generated. Thus, current mental health law perpetuates confusion, misunderstanding and discrimination against autistic individuals. The detention criteria in s.2 MHA ironically includes, yet excludes, those with autism; as the very language of the criteria render it virtually impossible for sufficient consideration of autistic individuals to be noted. Supplementary protections are flawed, as the Code fails to infer substantive legal obligations on those responsible for initial detention and care, presenting a clear safeguarding gap of protection. Therefore, the MHA is in urgent need of reform, to remove autism from its scope so the MHA aligns with international human rights law as opposed to permitting (un)lawful detention.

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80 ibid.
81 Joint Committee on Human Rights, The detention of young people with learning disabilities and/or autism (second report); (2019, HL 10, HC 121).
82 ibid.
83 ibid.
84 ibid.
87 ibid.