

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

Harleen Roop

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

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.

² Stephen S. Barlow, 'The Government's Proposals to Reform the Mental Health Act' (2001) 25 *Psychiatric Bulletin* 237 .

³ World Health Organisation 'Mental health' <https://www.who.int/mental_health/en/> accessed 7 March 2020.

⁴ Mind, 'Types of mental health problems' <<https://www.mind.org.uk/information-support/types-of-mental-health-problems/>> accessed 24 Feb 2020 .

⁵ Mind, 'Mental health problems – an introduction' <<https://www.mind.org.uk/information-support/types-of-mental-health-problems/mental-health-problems-introduction/about-mental-health-problems/>> accessed 24 Feb 2020 .

⁶ NHS, 'What is Autism' (18 April 2019) <<https://www.nhs.uk/conditions/autism/what-is-autism/>> accessed 21 February 2020.

⁷ National Autistic Society, 'Autism' (8 June 2016) <<https://www.autism.org.uk/about/what-is/asd.aspx>> accessed 21 February 2020.

⁸ *ibid.*

⁹ Department of Health, *Think Autism* (April 2014) p 4, para 1.3 .

¹⁰ National Autistic Society, 'The Mental Health Act' <<https://www.autism.org.uk/get-involved/campaign/mental-health-act.aspx>> accessed 19 March 2020 .

¹¹ Mental Health Foundation 'Stigma and discrimination' (November 2015) <<https://www.mentalhealth.org.uk/a-to-z/s/stigma-and-discrimination>> accessed 21 February 2020 .

¹² Tim Nicholls, 'Transforming Care: our stories' (National Autistic Society, September 2017)

<<https://www.autism.org.uk/~media/nas/get-involved/campaign/transforming%20care%20our%20stories.ashx?la=en-gb>> accessed 21 February 2020.

an adult mental health ward¹³ 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 signatures¹⁴. Taking action further, two families in partnership with Irwin Mitchell, joined forces in a crowd-funding appeal¹⁵ to legally challenge the MHA with the hopes of removing autism from encompassing the scope of the Act¹⁶. 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 Act¹⁷.

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"¹⁸; attracting criticism for being uncertain¹⁹, 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 one²⁰. 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 behaviour²¹.

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"²². This exemption applies only to s.3 MHA²³ 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 too²⁴; 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 abnormally aggressive or seriously irresponsible behaviour"²⁵ however, the Code lacks clear provision solely for detaining autistic individuals. Hollins notes a complete removal of autism from the MHA is

¹³ NHS Digital, 'Learning Disability Services Monthly Statistics' (February 2019) <<https://digital.nhs.uk/data-and-information/publications/statistical/learning-disability-services-statistics/provisional-statistics-at-february-2019-mhsds-december-2018-final>> accessed 21 February 2020 .

¹⁴ Petitions, 'Remove Autism from the definition of Mental Disorder in the Mental Health Act' (UK Government and Parliament Petition submitted during 2017-2019) <<https://petition.parliament.uk/archived/petitions/260656>> accessed 21 February 2020.

¹⁵ Crowd Justice, 'Scandal: Detention of People with Autism & Learning Disabilities' <<http://www.crowdjustice.com/draft/3932/r/LWKl5qCxQAydxoRXDXcS7A/>> accessed 22 February 2020 .

¹⁶ Mental Health Today, 'Families launch legal fight to end MHA detentions of people with learning disabilities and autism' (23 May 2019) <<https://www.mentalhealthtoday.co.uk/families-launch-legal-fight-to-end-mha-detentions-of-people-with-learning-disabilities-and-autism>> accessed 22 February 2020.

¹⁷ National Autistic Society, 'Over 17,000 tell the Government that national scandal must end' (19 March 2019) <<https://www.autism.org.uk/get-involved/media-centre/news/2019-03-19-national-scandal-mental-health-act.aspx>> accessed 17 March 2020 .

¹⁸ Mental Health Act 1983, s 1.

¹⁹ SJ Wood, 'Reform of the Mental Health Act 1983: An Effective Tribunal System' (1993) 162 British Journal of Psychiatry 14 .

²⁰ John B Dawson, Book Review (2019) 27 MLR 705 .

²¹ HL Deb 5 November 2019, vol 800, cols 1157-58.

²² Explanatory Notes to the Mental Health Act 2007, s 2A.

²³ ibid.

²⁴ National Autistic Society Memorandum, (Parliament, 2007)

<<https://publications.parliament.uk/pa/cm200607/cmpublic/mental/memos/uc4702.htm>> accessed 16 March 2020.

²⁵ Department of Health, Code of Practice (2015).

appropriate²⁶; 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 factors²⁷; 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 misinformed 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 persons²⁸. The MHA fails to define 'nature' and 'degree'. *R v MHRT for the South Thames Region ex p. Smith*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 disorder³⁰. 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 disorder³¹; 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 be³². Therefore, what may seem a minor inconvenience to abled individuals, may become an incredibly cumbersome burden to some autistic individuals; possibly resulting in behavioural 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 discrimination³³.

Despite the lack of consideration for autistic individuals, the 'nature' and 'degree' definitions are reaffirmed³⁴ 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"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 *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.³⁶ Iqbal supports their argument by highlighting that reservations concerning the MHA reform have stemmed from a public safety perspective rather than patient care³⁷. Such arguments are relevant as public safety concerns

²⁶ Sheila Hollins, Keri-Michele Lodge, and Paul Lomax, "The Case for Removing Intellectual Disability and Autism from the Mental Health Act – ERRATUM" (2019) 215 *British Journal of Psychiatry* 691 .

²⁷ Simone Aspis, (National Survivor User Network) <<https://www.nsun.org.uk/mental-health-and-disabled-people-with-learning-difficulties-ld-and-autism-asc>> accessed 16 March 2020.

²⁸ Mental Health Act 1983, s 2(2).

²⁹ *R v Mental Health Review Tribunal for the South Thames Region ex p. Smith* [1999] C.O.D. 148 .

³⁰ Explanatory Notes to the Mental Health Act 2007, s 4.

³¹ *ibid*.

³² National Autistic Society, 'Obsessions, repetitive behaviour and routines' (Oct 2016) <<https://www.autism.org.uk/about/behaviour/obsessions-repetitive-routines.aspx##routines>> accessed 7 March 2020.

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 .

³⁴ Department of Health, Code of Practice (2015) p 114, para 14.6 .

³⁵ *ibid* para 14.27, 118.

³⁶ George Szmukler and Frank Holloway, 'Reform of the Mental Health Act: Health or Safety?' (2000) 177 *British Journal of Psychiatry* 196.

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 proceedings³⁸ 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 prisoner³⁹. 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 lawful⁴⁰. The UK was among the first signatories to the CRPD; ratifying its Option Protocol in 2009⁴¹. The CRPD aims to promote, protect and ensure the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities⁴², yet the inclusion of autism under the MHA demonstrates the contrary. Graham previously predicted the CRPD's impact on the UK to be minimal⁴³, 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 law⁴⁴. 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 through the MHA's 2007 amendment; the Deprivation of Liberty Safeguards (DoLS), implemented within the Mental Capacity Act (MCA) 2005 which came into force in 2009⁴⁵. The DoLS were a result of the 2004 ECtHR decision in *HL v UK*⁴⁶; as the realisation of the 'Bournemouth Gap' identified the absence of procedures for detaining persons of unsound mind⁴⁷. However, the reality of closing the Bournemouth 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 provisions⁴⁸. Whether the DoLS apply is a convoluted task in itself, as deciding whether to rely on the MHA or MCA becomes a difficult task⁴⁹; nonetheless, if an individual meets the s.2 MHA criteria and *actively* objects to assessment, the MHA should be used⁵⁰. 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.

³⁸ Holly Bridden, 'Amending the Mental Health Act: Part 5 – Amendments to affect people with learning disabilities and/or autism?' <https://www.rlb-law.com/briefings/mental-health-law/amending-the-mental-health-act-part-5-amendments-to-affect-people-with-learning-disabilities-and-or-autism/#_ftn1> accessed 8 May 2020 .

³⁹ *R (Hall) v SSJ* [2018] EWHC 1905 (Admin) at [121].

⁴⁰ United Nations General Assembly, 'Thematic Study by the Office of the High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities' A/HRC/10/48, (26 January 2009) p 15, para 48.

⁴¹ Office for Disability Issues, 'UK Initial Report On the UN Convention on the Rights of Persons with Disabilities' (May 2011) .

⁴² UN Convention on the Rights of Persons with Disabilities, Article 1 .

⁴³ James Graham, *Autism, Discrimination and the Law: A Quick Guide for Parents, Educators and Employers*, (Jessica Kingsley Publishers 2008) .

⁴⁴ Lady Hale, 'Is it time for yet another Mental Health Act?' (Royal College of Psychiatrists Annual Conference, Birmingham, 24 June 2018) <<https://www.supremecourt.uk/news/speeches.html>> accessed 10 March 2020 .

⁴⁵ Ruth Cairns, Geneva 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 .

⁴⁷ Jon Holbrook, 'A distorted view' (2014) 164/7605 *NLJ* <[https://www.newLawjournal.co.uk/issuearticles/7605](https://www.newlawjournal.co.uk/issuearticles/7605)> accessed 10 March 2020.

⁴⁸ Nasreen Pearce and Sue Jackson, 'The Deprivation of Liberty Safeguards Part 7: has the UK bridged the Bournemouth gap?' (2012) 42 *Family Law*, 1123.

⁴⁹ Nick Brindle and Tim Branton, "Interface between the Mental Health Act and Mental Capacity Act: Deprivation of Liberty Safeguards" (2010) 16 *Advances in Psychiatric Treatment* 430 .

⁵⁰ Ruth Cairns, Geneva 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 level⁵¹. With the Joint Committee on Human Rights (JCHR) rendering the DoLS scheme as “broken”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 revision⁵³, 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”⁵⁴. Having been revised, the Code was given effect through s.188 MHA depending on an individual’s role⁵⁵; 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 staff⁵⁶. 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 patients⁵⁷. 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 usability⁵⁸; 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 MHA⁵⁹

The 2012 Winterbourne View scandal exposed harrowing levels of abuse suffered by autistic individuals in care homes⁶⁰, 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 persists⁶¹. Thus, the NHS’ 2017 Transforming Care programme aimed to reduce inappropriate hospital admissions and length of stay⁶²; pledging to make a minimum 35% reduction of detention rates concerning individuals with learning disabilities and autism by March 2019⁶³. Recent data reveals at least 2260 individuals with learning disability and/or autism being detained in April 2019⁶⁴; demonstrating the failure to meet the previous target set by the government in 2015⁶⁵, with detention

⁵¹ Ajit Shah and Chris Heginbotham, “Newly Introduced Deprivation of Liberty Safeguards: Anomalies and Concerns” (2010) 34 *The Psychiatrist* 243.

⁵² Joint Committee on Human Rights, *The Rights to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards* (seventh report, 2017-2019 HL 161 HC 890) .

⁵³ Mind, ‘Revised Code of Practice for the Mental Health Act published’ (Jan 2015) <<https://www.mind.org.uk/news-campaigns/news/revised-code-of-practice-for-the-mental-health-act-published/>> accessed 10 March 2020.

⁵⁴ Department of Health, *Stronger Code: Better Care* (July 2014) para 20.19.

⁵⁵ *R (Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58.

⁵⁶ Department of Health (n 54) figure (i), 12.

⁵⁷ *ibid* figure (ii), 13.

⁵⁸ Care Quality Commission, *Mental Health Act Code of Practice 2015* (2019) 4 .

⁵⁹ Lady Hale (n 44) .

⁶⁰ BBC News, ‘Winterbourne View: Autism Society wants punch probe’ (Oct 2012) <<https://www.bbc.co.uk/news/uk-england-bristol-20040935>> accessed 7 April 2020.

⁶¹ Department of Health, *No voice unheard, no right ignored* (March 2015) 3 .

⁶² NHS England, *Transforming Care* (Jan 2017) 6 .

⁶³ NHS England, *Building the right support* (Oct 2015) para 3.18, 27.

⁶⁴ NHS Digital (April 2019), ‘Learning disability services monthly statistics’ <<https://digital.nhs.uk/data-and-information/publications/statistical/learning-disability-services-statistics/provisional-statistics-at-march-2019-mhds-january-2019-final>> accessed 17 March 2020.

⁶⁵ NHS England (n 62) .

rates reducing by a mere 19%⁶⁶. 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 failure⁶⁷; 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 1998⁶⁸. The Commission highlighted detention continues despite concerns that the individual does not require such detention⁶⁹ 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 autism⁷⁰. 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 individuals⁷¹; 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 available⁷². 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 decisions⁷³. 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 (IRMHA) aimed to address rising detention and concerns regarding human rights and dignity⁷⁴; 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 aid⁷⁵. Further acknowledgement of professionals in care who "do not understand the specific needs of a person with autism"⁷⁶ 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 autism⁷⁷. 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' element⁷⁸ 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 autism⁷⁹. The recognition of reduced support services is not a satisfactory

⁶⁶ Mencap, 'Government fails to transform care for people with a learning disability and/or Autism' (18 April 2019) <<https://www.mencap.org.uk/press-release/government-fails-transform-care-people-learning-disabilities-and-or-autism>> accessed 6 March 2020 .

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.

⁷¹ National Autistic Society, 'New report says what needs to change to make Transforming Care work for autistic people' (26 September 2017) <<https://www.autism.org.uk/get-involved/media-centre/news/2017-09-26-transforming-care.aspx>> accessed 27 February 2020.

⁷² Hollins, Lodge, and Lomax, (n 26) .

⁷³ Nicholls (n 12).

⁷⁴ Mind, 'Mental Health Act Review' <<https://www.mind.org.uk/about-us/our-policy-work/mental-health-act-review/>> accessed 27 February 2020 .

⁷⁵ Independent Review of the Mental Health Act 1983, *Modernising the Mental Health Act* (Dec 2018) 184 .

⁷⁶ *ibid*.

⁷⁷ *ibid* at 190 .

⁷⁸ Tim Nicholls, 'What does the Independent Review of the MHA mean for autistic people?' (Mental Health Today, Dec 2018) <<https://www.mentalhealthtoday.co.uk/blog/what-does-the-independent-review-of-the-mental-health-act-mean-for-autistic-people/>> accessed 27 February 2020.

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.

Harleen Roop completed a LLB in 2019 and further pursued an LLM in Human Rights Law from Queen Mary, University of London. Harleen is keen to explore intersecting and emerging areas of human rights, law, and policy, with hopes to uphold the rights of others.

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 Nicholls (n 12).

⁸⁵ *Dorset Council v A Mother* [2019] EWFC 62.

⁸⁶ The Independent Review of Learning Disability and Autism in the MHA, Final report (Dec 2019) <<https://www.irmha.scot/>> accessed 7 April 2020.

⁸⁷ *ibid.*