

# **Consultation on proposed changes to ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’ and introduction of ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’**

**Questionnaire**

NHS England and NHS Improvement



# **Consultation on proposed changes to ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’ and introduction of ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’**

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To be read with the ‘Consultation on proposed changes to ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’ and introduction of ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’ have your say consultation document’.

This information can be made available in alternative formats, such as easy read or large print, and may be available in alternative languages, upon request. Please contact Andrea Collins at [england.healthandjustice@nhs.net](mailto:england.healthandjustice@nhs.net).

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## Introduction

This is a questionnaire in support of the consultation on proposed changes to ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’ and introduction of ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’.

Please complete this questionnaire and return it as follows:

- By email: england.healthandjustice@nhs.net
- By post: Health and Justice, Specialised Commissioning, Third Floor, NHS England and NHS Improvement, Skipton House, 80 London Road, London, SE1 6LU

For more information on this consultation or to complete an online questionnaire, please visit here: <https://www.engage.england.nhs.uk/consultation/transfer-and-remission-of-adult-prisoners/>.

## Section one

1. The option that best describes me or my organisation is: (please select one box)

- Patient
- Family member / carer
- Clinician
- Commissioner
- Service provider
- Partner organisation
- Charity or representative group
- Other

If you have selected ‘Other’, please provide details:

The British Medical Association is the voice of doctors and medical students in the UK. We are an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and helping them to deliver the highest standards of patient care.

If you are a service provider or a partner organisation, please describe your role:

Click or tap here to enter text.

2. Are you responding on behalf of an organisation?

- Yes
- No

If you have selected 'Yes', which organisation are you responding on behalf of?

[British Medical Association](#)

3. The first part of my postcode is: (This will help us see where in the country we are getting responses from. We won't use it to identify where you live.)

[WC1H](#)

**To share your views on the proposed changes to 'The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019', please complete the questions in section two.**

**To share your views on the proposed introduction of 'The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019', please complete section three.**

**If you would like to share your views on both of the proposed guidance documents, please complete sections two and three.**

## **Section two – questions on proposed changes to ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’**

1. Is the proposed ‘The transfer and remission of adult prisoners under the Mental Health Act 1983 good practice guidance 2019’ easy to understand?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not easy to understand
- let us know how we could make this clearer.

On the whole, the new good practice guidance is clearly set out and easy to understand. There are some sections where additional information would be helpful, and we explore these in more detail below.

Additionally, there are some areas where we have more serious concerns and believe that further changes need to be made to the suggested timescales for transfer and remission. We outline these in response to the specific questions, below.

2. Are the stages of the proposed referral, assessment and transfer process clear?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not clear
- let us know how we could make this clearer.

The guidance outlines the factors to be considered when assessing the priority of a transfer and notes that the “level of clinical priority of a referral is key to ensuring the assessment and subsequent transfer takes place within **appropriate timescales**” (emphasis added). It would be helpful for the guidance to be more specific as to what is an appropriate timescale for the most urgent cases. In the community, for example, emergency cases would be dealt with under s135 or s136 of the MHA which allows detention and assessment in a place of safety for up to **24 hours**. Could this be replicated in some way within the prison setting? Without further, more directive guidance, we are concerned that urgent referrals will not be appropriately prioritised and expedited.

Section 4.3 of the guidance, which covers applications for s47 transfers late in a person’s sentence, could benefit from more detail on how prisoners approaching the end of a sentence should be managed. It is not clear from the guidance, for example, that even

though a s47 transfer might be considered unsuitable for a prisoner close to their release date, it may be appropriate for a s2 or s3 admission to be made instead. That assessment and application process could start while the individual in question is still in prison. It is crucial that transfers are made appropriately, on the basis of clinical need. At present, this section is not sufficiently clear on the options available for someone who is approaching the end of their sentence. [Section 3.9 in the existing 2011 guidance](#) is far more helpful in this respect.

3. Are the stages of the proposed remission process clear?

- Yes
- No

If you have selected 'No', please:

- provide details on what is not clear
- let us know how we could make this clearer.

As the guidance acknowledges, not all prisoners being remitted will return to prison. The guidance could benefit from further information about what should happen if a prisoner's sentence has ended while he or she is in hospital, and either must remain in hospital under a different section of the Act or can be released. This should address any procedural issues, and also what obligations are on the mental health inpatient unit and the prison to ensure arrangements are made in the community for follow-up care.

The document does not refer to how any changes in a prisoner's classification of security level may be handled. At present, if a patient is transferred from a high security prison, they must be transferred back to that high security prison after treatment has ended – even if they have spent years in hospital and their health has improved to the extent that their security level could be downgraded as a result. Putting the arrangements in place to allow security levels to be downgraded while in hospital could help accommodate swifter transfers back to the prison estate, and this is something the guidance may like to explore.

Finally, our members report to us that one of the biggest delays with transfer out of hospital back to prison is that clinicians seem reluctant to make the decision to transfer back to prison. The guidance could benefit from additional information about the factors to be considered in making a decision to remit or, alternatively, it could be explored what other guidance for clinicians involved in such decision-making could be developed.

4. Do you feel that the proposed guidance would support the timely transfer and remission of patients?

- Yes

- No

If you have selected 'No', please provide details on what you feel is needed to support the timely transfer and remission of patients.

On the whole, the updated guidance is a welcome step forward in bringing arrangements for prisoners requiring treatment under the MHA in line with arrangements in the community. We believe that if our comments are taken into consideration, and sufficient consideration given to how implementation of the guidance is resourced and supported, it will be key in reducing delays and supporting the timely transfer and remission of patients.

5. In the proposed changes to the guidance, **the timescale for transfers would increase from 14 days to 28 days**. This proposed timescale would allow for a greater degree of assessment (up to 14 days) to ensure that individuals are transferred to the most suitable hospital to best meet their mental health needs. This proposed timeframe would also ensure alignment with the NHS England and NHS Improvement [access assessment service specification](#) and support the recommendation set out in the '[Modernising the Mental Health Act, increasing choice, reducing compulsion, final report of the Independent Review of the Mental Health Act 1983](#)'.  
(Please see the consultation document for more information on this.)

Is the proposed new timescale of 28 days appropriate for transfers?

- Yes
- No

If you have selected 'No', please:

- explain the reason for your answer
- provide details of what timescale you feel would be appropriate and why.

In principle, we are pleased to see the introduction of a clear timescale for the transfer of prisoners under the Mental Health Act. We are aware of long delays in the transfer of prisoners under the Mental Health Act and feel this is a positive step forward in reducing those delays and bringing the treatment of seriously mentally unwell offenders in line with the treatment available in the community.

At the same time, however, we have concerns about whether the 28-day limit is appropriate. Our main concern relates to how acutely unwell prisoners are to be cared for in the time period between the point of referral and a decision as to a transfer – and it is at this point that the notion of equivalence breaks down. In the community, an individual can be admitted and detained in a hospital for up to 28-days for a period of assessment before an application is made. In this time period, they will be able to access and receive appropriate care and treatment, in an environment that has been designed for this purpose. We know that prisons often do not have the facilities or the specialist staff to support and care for an acutely unwell prisoner, and to prevent his or her health deteriorating further.

If an assessment has been made by a psychiatrist that an individual must be admitted to hospital for further assessment and care, transfer must take place with immediacy. It would be unacceptable for an emergency medical or surgical admission to be delayed for up to two weeks; the same should be the case for mental illness.

At the moment, the guidance refers to the Mental Capacity Act 2005 (MCA) as the framework for decision-making for patients who lack capacity. The MCA is much more limited in the treatment safeguards it provides than the MHA, and we have concerns about knowledge and implementation of the MCA in detention settings. Treatment under the MCA will not be able to meet the needs of those awaiting transfer to hospital in the prison setting and emphasises the urgency with which transfers should be handled.

6. In the proposed changes to the guidance, **the remission process would be completed within a maximum of 14 days.**

Remission to prison may be requested under Section (s) 50, 51 or 53 of the Mental Health Act if the responsible clinician, any other approved clinician or a Mental Health Tribunal advises the Secretary of State for Justice that:

- treatment in hospital is no longer required or
- no effective treatment is available in the hospital where the patient is detained.

Alternatively, if the First Tier Mental Health Tribunal concludes that under s47 a transferred patient would be entitled to a discharge if they were a restricted hospital order patient, then the hospital manager may return them to prison, subject to any comments made by the First Tier Tribunal and the decision of the Secretary of State for Justice.

Is the proposed new timescale of 14 days appropriate for remission to prison?

- Yes
- No

If you have selected 'No', please:

- explain the reason for your answer
- provide details of what timescale you feel would be appropriate and why.

We feel that the timescales for transfer and remission should be switched. The period of time for transfer should be shorter than the period of time for remittal, by virtue of the fact that in the former, a person is deemed to be acutely unwell and in need of treatment as a matter of urgency. The latter is a matter of process and ensuring correct follow-up and longer-term treatment, for which there is less urgency.

7. Are there any changes or additions that could be made to the proposed guidance that you feel would help clinicians ensure the safe and timely referral, assessment, transfer and remission of individuals to and from mental health in-patient services?

- Yes
- No

If you have selected 'Yes', please state what changes could be made and why.

We have outlined above the sections where we feel changes could be made.

8. Is the proposed dispute resolution process clear?

- Yes
- No

If you have selected 'No', please:

- provide details on what is not clear
- let us know how we could make this clearer.

The guidance could benefit from specifying who the third-party clinical assessor should be. Our assumption is that it would have to be an approved mental health professional or another approved clinician, but in the absence of clear guidance, it is not clear.

9. Please provide any comments that you have about the potential impact on equality and health inequalities which may arise as a result of the proposed changes that we have described?

As noted above, we are concerned that prisoners may experience a further deterioration in health in the intervening time between referral and transfer. We believe that this may contribute to worsening inequality in treatment and outcomes between offenders and the rest of the community.

10. If you have views that are not covered in the previous questions, or would like to add anything, please do so here:

Click or tap here to enter text.

11. Would you like to be kept up to date with information about this consultation?

- Yes
- No

If you have selected 'Yes', please give us your email or postal address. These will be used only to keep you up to date on this consultation and not for any other purpose.

Please contact Ruth Campbell, Senior Policy Advisor (Medical Ethics and Human Rights) (RCampbell@bma.org.uk)

## **Section three – questions on the proposed ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’**

1. Is the proposed ‘The transfer and remission of immigration removal centre detainees under the Mental Health Act 1983 good practice guidance 2019’ easy to understand?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not easy to understand
- let us know how we could make this clearer.

On the whole, the new good practice guidance is clearly set out and easy to understand. We have some serious concerns, however, about the content of the guidance which we address in response to the various questions, below. We believe these need to be urgently addressed before the guidance can be published.

2. Are the stages of the proposed referral, assessment and transfer process clear?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not clear
- let us know how we could make this clearer.

We are extremely concerned that the guidance does not contain any references about how it relates to Rule 35 of the Detention Centre Rules (which exists to bring anyone whose health is likely to be injuriously affected by continued detention to the attention of centre management, with a view to their detention being reviewed) or the Adults at Risk Policy (which assesses whether a person being considered for detention is an “adult at risk”).

It is clear that any detainee who is seriously mentally unwell to the extent that they require transfer to a psychiatric hospital is, by definition, an adult at risk, and someone for whom continued detention will be injurious to their health. The guidance must refer to the interface between this guidance and the various processes in place for identifying vulnerability and reviewing the appropriateness of detention.

As with our comments on the proposed referral, assessment and transfer process for adults in prisons, we have concerns about how acutely unwell detainees are to be cared for in the time period

between the point of referral and a decision as to a transfer. This is even more pressing in light of the fact that immigration detention is known to have a negative impact on mental health, and the fact that immigration removal centres (IRCs) are likely to be even less able than prisons to support the care and treatment of an acutely unwell individual. Again, as with our comments on the transfer of prisoners, although the guidance refers to the Mental Capacity Act 2005 as a way of managing detainees, doctors will be very limited in what they can achieve with this in the interim.

An additional factor to consider, which is not currently reflected in the guidance, is that immigration detainees are held in administrative detention only. The guidance does not make any reference to care and treatment being the “least restrictive option”, in line with the MHA Code of Practice. In many cases – with perhaps the exception of foreign national ex-offenders (FNOs), for whom there may be additional security considerations – s47 or s48 transfers may be wholly disproportionate. It may be that the most appropriate option for a severely unwell detainee requiring inpatient treatment is release from immigration detention and admission under s2 or s3 of the MHA.

The guidance notes that determination of the responsible commissioner will be a “complex issue”, but that ordinarily will be the CCG of which the GP at which the person is registered, or the CCG in whose geographical area the individual is “usually resident”. This overlooks a large number of detainees who may not have been usually resident in any particular area in the UK. The guidance notes that treatment should not be refused or delayed due to uncertainty or ambiguity as to who the responsible commissioner is, but unless this issue is addressed upfront in the guidance – for example, placing responsibility on the CCG in the area in which the IRC is located – it is entirely likely that it will be.

Bullet point two of section 4.1.1 needs to be redrafted as it does not make sense currently. Is it intended to refer to an assessment rather than assessor?

### 3. Are the stages of the proposed remission process clear?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not clear
- let us know how we could make this clearer.

The guidance notes that a decision to remit will be made by the mental health inpatient service. How does this sit with Rule 35 and the Adults at Risk Policy? Even if someone has been successfully treated, continued detention may still be considered inappropriate (see below). If a Rule 35 report or an Adults at Risk policy

assessment has not been made prior to transfer, the remission process must allow for this to take place.

The guidance notes that not all transferred patients will return to an IRC, but only refers to instances where changes in circumstances or legal status will mean the patients has to be released from immigration detention. This section must also refer to circumstances where continued detention is deemed inappropriate under Rule 35 or the Adults at Risk policy.

Where patients are being released to the community, there must be more in the guidance document to address obligations on the mental health inpatient service under s.117 with regards to arranging appropriate aftercare. The guidance refers to the fact that release can place a burden on the treating unit – and indeed, it will require greater consideration of entitlements and access to care than it would for other patients – but it is not clear that this is in fact “inappropriate”. In these cases, we would like to see greater support and guidance from the Home Office.

4. Do you feel that the proposed guidance would support the timely transfer and remission of patients?

- Yes
- No

If you have selected ‘No’, please provide details on what you feel is needed to support the timely transfer and remission of patients.

As noted above, we have very serious concerns about the content of the guidance. In response to the questions above and below, we have outlined what we believe needs to be addressed urgently – including consideration of the relationship between the guidance, Rule 35 and the Adults at Risk Policy and consideration of the “least restrictive option” principle. We believe that immigration detainees could, and should, be assessed and treated much more quickly than the 28-day time limit created by this guidance.

5. In the proposed guidance, **the timescale for transfers would be 28 days**. This proposed timescale would allow for a greater degree of assessment (up to 14 days) to ensure that individuals are transferred to the most suitable hospital to best meet their mental health needs. This proposed timeframe would also ensure alignment with the NHS England and NHS Improvement [access assessment service specification](#) and support the recommendation set out in the [‘Modernising the Mental Health Act, increasing choice, reducing compulsion, final report of the Independent Review of the Mental Health Act 1983’](#).

(Please see the consultation document for more information on this.)

Is the proposed timescale of 28 days appropriate for transfers?

- Yes

- No

If you have selected 'No', please:

- explain the reason for your answer
- provide details of what timescale you feel would be appropriate and why.

As noted above in relation to question 2, immigration detainees are held in administrative detention only. For this reason transfer under s48 may, in some circumstances, be wholly inappropriate. If this is the case, release from immigration detention and admission to hospital under s2 and s3 may be more appropriate, and therefore there is no need for a 28-day time limit as set out in the guidance.

Where there are additional considerations of risk or security, for example, in relation to a foreign national ex-offender (FNO), then a 28-day time limit for transfer under s47 or s48 may be more appropriate.

Where this is the case, our concerns in relation to the treatment of acutely unwell prisoners apply equally. We have concerns about how acutely unwell detainees are to be cared for in the time period between the point of referral and a decision as to a transfer – noting that IRCS and healthcare staff will be severely limited (perhaps more so than prisons) in what they can do to prevent a further deterioration in health.

6. In the proposed guidance, **the remission process would be completed within a maximum of 14 days.**

Remission to prison may be requested under Section (s) 50, 51 or 53 of the Mental Health Act if the responsible clinician, any other approved clinician or a Mental Health Tribunal advises the Secretary of State for Justice that:

- treatment in hospital is no longer required or
- no effective treatment is available in the hospital where the patient is detained.

Alternatively, if the First Tier Mental Health Tribunal concludes that under s47 a transferred patient would be entitled to a discharge if they were a restricted hospital order patient, then the hospital manager may return them to prison, subject to any comments made by the First Tier Tribunal and the decision of the Secretary of State for Justice.

Is the proposed timescale of 14 days appropriate for remission to prison?

- Yes
- No

If you have selected 'No', please:

- explain the reason for your answer
- provide details of what timescale you feel would be appropriate and why.

As we have made clear above, in response to question 2, any detainee who is seriously mentally unwell to the extent that they require transfer to a psychiatric hospital is, by definition, an adult at risk, and someone for whom continued detention is will be injurious to their health. The section on remission must be clearer about circumstances where an individual will not be remitted back to an IRC, and on the appropriate measures (and timescale that these should take place) that should be put in place.

It is concerning that this section of the consultation form refers to “remission to prisons”. Although the guidance itself is clear about detainees being remitted to “IRCs”, this mistake, however innocent seems to suggest the same blanket policies are being applied to both, without any consideration of the issues unique to the immigration detention setting.

7. Are there any changes or additions that could be made to the proposed guidance that you feel would help clinicians ensure the safe and timely referral, assessment, transfer and remission of individuals to and from mental health in-patient services?

- Yes
- No

If you have selected ‘Yes’, please state what changes could be made and why.

We have outlined above the sections where we feel changes could be made.

8. Is the proposed dispute resolution process clear?

- Yes
- No

If you have selected ‘No’, please:

- provide details on what is not clear
- let us know how we could make this clearer.

The guidance could benefit from specifying who the third-party clinical assessor should be. Our assumption is that it would have to be an approved mental health professional or another approved clinician, but in the absence of clear guidance, it is not clear.

9. Please provide any comments that you have about the potential impact on equality and health inequalities which may arise as a result of the proposed guidance?

Click or tap here to enter text.

10. If you have views that are not covered in the previous questions, or would like to add anything, please do so here:  
Click or tap here to enter text.

11. Would you like to be kept up to date with information about this consultation?

- Yes
- No

If you have selected 'Yes', please give us your email or postal address.  
These will be used only to keep you up to date on this consultation and not for any other purpose.

Please contact Ruth Campbell (Senior Policy Advisor, Medical Ethics and Human Rights) at [RCampbell@bma.org.uk](mailto:RCampbell@bma.org.uk).