

Mental Capacity Legislation Consultation Response

June 2015

1.0 Introduction

The Trust welcomes the opportunity to comment on the Mental Capacity Bill consultation. The response has been compiled with the input of a multi-disciplinary group of staff from the Trust. The Trust supports the codification of proposals into a single framework and believes that new Bill is a welcome development which will reduce the stigma of separate mental health legislation. The Trust would emphasise the need for greater clarity in the proposals on a number of areas which should be given in advance of codes of practice and secondary legislation. The Trust would continue to highlight the need for resource to be provided by the Department to ensure that implementation of the legislation is timely and effective.

Part 1 - PRINCIPLES

During the previous consultation, the Trust supported the principles which are outlined in part 1 of the Bill, however, but suggested that principle of reciprocity should be included. The Trust is disappointed that this has not been included.

If the state takes control of a person's decision-making, the state should be bound by the legislation to increase the level of responsibility towards that individual.

Clause 6 (9), which provides for establishing what is in the person's best interests, states that *the person making a determination must, in relation to any act or decision that is being considered, have regard to whether the same purpose can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.* The Trust strongly supports this clause and believed that it should be included as a principle in part 1 of the Bill.

Part 2 – LACK OF CAPACITY: PROTECTION FROM LIABILITY, AND SAFEGUARDS

Advance Decisions; effect on section 9

The Trust would still seek greater clarity and guidance for medical professionals is required regarding the threshold at which a decision to override an advance decision, in providing life-sustaining treatment. Further guidance on how an effective decision may be obtained and shared with relevant decision-makers would be useful.

There would be concerns with regard to advance decisions in prisons; in particular in relation to hunger strikes.

Chapter 2, sections 13 and 14

The Trust welcomes the principle of capacity assessments being made by the most appropriate person but would seek further clarity on who can make a capacity assessment and at what severity of intervention, and in what instances. It is recognised that training and qualifications will be needed for the appropriate professional and that this will have a significant resource implications which would affect the Trust's ability to provide services. We would also welcome further guidance on the capacity assessment process in advance of any implementation of legislative change. The current Mental Health Order provides for payment to GPs involved in article 4 admissions. The Trust would welcome guidance on payment schedules for decision-makers in capacity assessments under the new proposed legislation and would like to reiterate this need.

The Trust would recommend that Section 14 (4) should read as follows:

Regulations will prescribe the descriptions of persons who are "suitably qualified" for the purposes of this section.

Chapter 1 Protection from Liability, and General Safeguards

Clause 9

The Trust welcomes the changes to the clauses outlined.

Trust staff continue to have concerns that the draft document does not give adequate focus on the processes for supporting those involved in capacity assessments and interventions or the processes for testing or investigating decisions made.

The Trust anticipates that some of the concerns raised will be considered in guidance.

Second opinion - Chapter 3, Clause 19

The Trust welcomes the principle of parity between physical and mental disability. The Trust welcomes the inclusion of safeguards around a second opinion. The Trust remains concerned about the practicalities of obtaining a timely second opinion from an independent doctor, (presuming the person's GP is not independent) regarding the authorisation of continued medication that is deemed to have serious consequences if it has been administered for over three months in a community setting.

Treatment with Serious Consequences - Clause 19

As previously stated, the Trust welcomes the introduction of a nominated person and the structure to identify same. The process remains unclear on the process to follow in the case of emergency situations including clarity on the role and functions of

those involved in the authorisation and validation (RQIA) process. The current legislation explicitly determines that an applicant must be an approved social worker (ASW) or the nearest relative. The Trust would like this to be equally determined in the proposed bill and to include the other functions to which an ASW will be required, or the training that will be required for other professions to take on an enhanced role.

The Trust recognises the importance of the ASW report in assisting in managing risk and formulating care plans, and would seek to ensure that this report will continue to be provided.

The Trust would seek clarification on what a care plan is; will the legislation and associated guidance provide a regionally-agreed structure on care plans and risk management plans?

Deprivation of liberty - Clause 24

The Trust raised concerns regarding the outworking of this clause during the previous consultation. The Trust remains concerned that a significant number of current residential care home residents may breach the threshold for deprivation of liberty (locked doors) and this could have significant implications for the Trust. There are some conditions which would be applicable to prisons, and this should also be considered. The Trust specifically requested further guidance on the kinds of deprivation of liberty that will have protection from liability. The Trust is disappointed that greater clarity has not been provided and would request urgent action on this matter.

Tribunals and Hospital Panel - Clause 47

The Trust would welcome clarification on who would be expected to attend for tribunal and hospital panels. Professionals who submit a report should be involved in this process and present their own evidence, as required. The Trust would welcome a return to a person-centred process rather than what may be perceived as an adversarial approach employed by the current tribunal system.

The difficulty in convening Tribunals at present can lead to delays. The Trust would seek assurance that the Tribunal will be able to meet promptly.

The Trust would welcome further definition and regulation with regard to who constitutes a responsible person.

The Trust would request an amendment to Clause (3) to read as follows:

*For the purpose of providing information for the purposes of a reference under this section, any medical or **clinical** practitioner authorised by or on behalf of the person to whom the authorisation relates may do anything within section 264 (visiting etc powers) in relation to the person.*

Part 3 - NOMINATED PERSON

The Trust would seek clarification for instances in which a nominated person may be incapacitated (ie suffers a condition which may affect their ability to make a decision.)

The Trust would continue seek assurance that the Tribunal could meet in a timely fashion to consider whether a nominated person was acting in the best interests of P.

The Bill suggests that decisions on serious intervention would extend beyond statutory health and social care providers to independent sector providers. The Trust would have concerns that the extension of powers to bodies which are external to public authorities may not provide the same level of human rights protections under section 6 of the Human Rights Act.

Part 4- INDEPENDENT ADVOCATES:

The Trust continues to seek clarification on who will be appropriate to act as an independent advocate including the vetting, training and supervision arrangements. It is important to note that independent advocates must be adequately funded as the process of application to Trust Panel requires them to be consulted. Hence, if they are not available the application cannot proceed.

The Trust is not in a position to commission advocacy services; this would be a conflict of interest. In order to maintain distance between the Trust and organisations with service level agreements with the Trust, a regional approach to managing independent advocacy arrangements should be taken, and should not be the responsibility of individual Trusts.

Part 5 - LASTING POWER OF ATTORNEY

The Trust maintains the view that the Office of Public Guardian must be resourced to allow clear process and timely intervention in disputes to ensure that decisions can be made effectively, particularly in respect of patient discharge from hospital.

Part 7 - PUBLIC GUARDIAN AND COURT VISITORS

The Trust welcomes the introduction of the Office of Public Guardian keeping a registered list of lasting power of attorney, but queries whether it would be practical to consult this list in cases of emergency.

It would be useful to include further detail on identification and access to records.

Part 9 - TRANSFER BETWEEN JURISDICTIONS

The Trust would see benefit in arrangements being identified for transfer of patients to and from the Republic of Ireland being explicitly referenced in clauses 252 and

253. Guidance on how to facilitate transfers would be useful, as this could cause delays in treatment if not agreed in advance.

Clause 62 (2) Meaning of emergency

The Trust welcomes clause 62 (2) but reiterates a concern raised during the initial consultation stage that this should be amended to read:

at risk of harm to P **or others**. The Trust would seek guidance on who determines the reasonableness of steps taken to assure safeguards are met.

Clause 177 Protection order

The purpose of a protection order remains unclear regarding what benefit may be derived by placing a person unfit to plead and unwilling to seek treatment into a therapeutic environment. It is also unclear where such a facility would be located or how it funded and supported.

Clause 278 – Warrants

Concerning Clause 278(2), The Trust would recommend an amendment to include the text in bold:

The justice may issue a warrant authorising any constable accompanied by a medical practitioner **and approved social worker** to enter the premises, if need be by force, and remove the person, **or to undertake an assessment in the premises.**
Place of Safety.

The Trust recognises the need for a place of safety and that the Trust should provide a place of safety that can provide equality of care and which does not stigmatise mental health service users. The Trust strongly supports the development of places of safety within community and voluntary settings. A place of safety needs to provide documented minimum standards of care which would offer consistency between different providers but provide the best interests of a client. This not always be in a hospital and the Trust would recommend consideration for scoping alternatives.

The Bill does not reference issues of conveyance and custody; The Trust believes that this could be explicitly prescribed in the final Bill. Interface with Safeguarding Vulnerable Adults legislation should also be considered.

Children - Clauses 254 and 255

The Trust would seek further clarification on the matter of parental capacity in respect of decisions regarding a child in need of treatment, particularly in relation to the Trust as corporate parent.

SCHEDULE 2 - Authorisation of short-term detention in hospital for examination etc

In clause 2, the Trust would recommend that the text be amended from An appropriate healthcare professional to an appropriate **health and social care** practitioner.

10.0 Conclusion

The Trust welcomes the Mental Capacity Bill. In order to ensure effective implementation, it will be critically important to produce secondary legislation and codes of practice and guidance in advance of implementation. The Trust recognises that significant resource will be needed to implement the proposed structures.

The Trust is aware of a working group which Consultant Forensic Psychiatrist Dr Bownes is contributing expertise, which is parallel to the Bill process. The Trust will continue to work in collaboration with the working group.