

British Psychological Society response to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill

Call for Evidence on the Mental Capacity Bill

July 2015

Introduction

The British Psychological Society (the Society) welcomes the opportunity to respond to the Ad Hoc Committee's call for evidence in relation to the Mental Capacity Bill.

The Society believes the Mental Capacity Bill (the Bill) provides a progressive, positive and comprehensive framework with regard to capacity and best interest providing explicit principles and clear guidance for putting these into practice.

The Bill has clarified the legal position and the role of the law within capacity issues. It has illustrated the need to balance care and protection against empowerment and the individual's right. The Society welcomes the emphasis within the Bill to ensure that a person must be given all practicable help and support to enable him or her to make a decision.

The Society also welcomes the provisions in the Bill to strengthen the arrangements in relation to independent advocates, as independent advocates are a major factor to ensure all practicable help and support is provided to individuals.

However, the Society wishes to see certain amendments and clarifications within the Bill and these are outlined below:

Comment 1: this comment relates to the following sections in the Bill:

Part 2

Lack of Capacity: Protection from liability, and Safeguards

Chapter 2 – Additional Safeguards for serious interventions

Formal capacity assessments etc.

Clause 13: Formal assessment of capacity

Clause 14: Section 13: formal capacity assessments and statements of incapacity



The Society has concerns that the terminology of “a Statement of Incapacity” implies a more pervasive state than may in fact be the case. The Society therefore recommends that this be replaced by “A Statement of Current Incapacity.”

Comment 2: this comment relates to the following sections in the Bill:

Part 2, Chapter 8: Supplementary

Clause 52: Medical reports: involvement of nominated person

Clause 53: Medical reports: involvement of independent advocate

Part 10, Chapter 7: Transfer from prison etc. to hospital

Clause 209: Conditions for transfer under section 208

Part 10, Chapter 7: Transfer from prison etc. to hospital

Clause 220: Conditions for transfer to hospital under section 211, 214 or 217

Part 13: Offences

Clause 257: Forgery, false statements etc.

Part 15: Supplementary

Clause 286: Medical practitioners who may make certain medical reports

The Society also seeks to amend the text of the Bill as follows:

- The wording “**medical report**” replaced by the wording “**clinical report**”.

Comment 3: this comment relates to the following sections in the Bill:

Part 2, Chapter 2: Additional safeguards for serious interventions

Clause 13: Formal assessment of capacity

Clause 14: Section 13: formal capacity assessments and statements of incapacity



Part 2, Chapter 3: Additional safeguard: second opinion

Clause 16: Second opinion needed for certain treatment

Clause 17: Second opinion needed for continuation of medication

Clause 18: Second opinion: relevant certificates

Part 2, Chapter 4: Additional safeguard: authorisations etc.

Clause: 24: Deprivation of liberty

Clause: 25: Section 24: Deprivation

Clause: 26: Taking person to a place for deprivation of liberty

Clause: 27: Permission for absence

Part 2, Chapter 6: Extension of period of certain authorisations

Clause 39: Sections 37 and 38: extension reports

Clause 43: Extension reports: further provisions

Part 2, Chapter 7: Rights of review of authorisation

Clause 46: Applications: visiting and examinations

Clause 47: Power of certain persons to refer case to Tribunal

Clause 48: Duty of HSC trust to refer case to Tribunal

Part 2, Chapter 8: Supplementary

Clause 52: Medical reports: involvement of nominated person

Clause 53: Medical reports: involvement of independent advocate

Clause 54: Sections 52 and 53: meaning of “emergency”

Part 7: Public guardian and court visitors

Clause 128: Court visitors

Part 10, Chapter 1: Remand to hospital

Clause 162: Section 160: the medical report condition

Part 10, Chapter 3: Detention under a public protection order without restrictions

Clause 178: Discharge from detention by responsible medical practitioner



Part 10, Chapter 4: Detention under a public protection order with restrictions

Clause 191: Reports by responsible medical practitioner

Part 10, Chapter 5: Detention under a hospital direction

Clause 199: Reports by responsible medical practitioner

Part 10, Chapter 6: Unfitness to be tried etc

Clause 202: Procedure where question of fitness to be tried arises

Part 14: Miscellaneous

Clause 264: Visiting etc. powers of medical practitioners in connection with the Tribunal

Part 15: Supplementary

Clause 286: Medical practitioners who may make certain medical reports

And throughout the text where appropriate

The Society seeks to amend the Mental Capacity Bill to include the provision for registered psychologists to act as responsible clinicians and approved clinicians, as has been the case in England and Wales since the 2007 Mental Health Act¹.

In summary, the amendments to the text of the Mental Capacity Bill will see the following:

- The wording “**or approved clinician**” inserted where “appropriate medical practitioner” or “medical practitioner” appears in the original text
- The wording “**or responsible clinician**” inserted where “responsible medical practitioner” appears in the original text.

It would also require amendments to Article 25(1) Health and Social Care (Reform) Act (Northern Ireland) 2009. This legislation provides the legal basis for the Regulation and Quality Improvement Authority (RQIA), which has the statutory authority to appoint appropriate medical practitioners.

¹ See Mental Health Act 2007, Chapter 2 Professional Roles *Approved clinicians and responsible clinicians* National Institute for Mental Health in England (NIMHE) ‘Mental Health Act 2007 New Roles Guidance for approving authorities and employers on Approved Mental Health Professionals and Approved Clinicians’, 2008

Rationale for the amendment²

The Society believes that changing the legislation to allow appropriately qualified registered psychologists to undertake formal capacity assessments will enhance the assessment and treatment of those with mental disorders. This amendment to the legislation would also ensure the specialist training and experience to diagnose and treat mental disorder offered by registered psychologists is appropriately recognised in legislation.

Currently, only medical practitioners approved by the Regulation and Quality Improvement Authority (RQIA) can undertake formal capacity assessments and statements of incapacity. This role currently sits within the domain of the medical profession. As such, only medical doctors are registered as appropriate medical practitioners. This means that decisions about compulsory treatment may not be informed by the professional best placed to advise. This is particularly the case with people who have intellectual disabilities, autistic spectrum disorders, eating disorders or personality disorders, for which the primary treatments are psychological.

The essentially collaborative nature of psychological work is particularly pertinent to the principles enshrined in the Mental Capacity Bill. The skills of psychologists can help demonstrate the value of engagement rather than compulsion in improving patient's well-being, particularly when issues regarding detention and compulsory treatment are being considered.

The Approved Clinician/Responsible Clinician roles allow professionals to inform decision making concerning treatment decisions and conditions, allowing greater consideration of alternative treatment perspectives for patients and those treating them. As a consequence, if much of the psychologist's existing or potential role is with people who are liable for detention under the legislation, the opportunity to advise decision making of clinical teams may add positively to the treatment choices available to patients.

In circumstances where a psychological perspective is paramount, the psychologist will be better placed as Responsible Clinician to negotiate the most effective care package to meet the individual's needs.

² Further information on the legal precedent for these amendments and how they would work in practice is given in Annex 1



What are the advantages of extending the role to registered psychologists?

1. *Rights based*

People who receive compulsory treatment should have access to the best advice about their care. Best interest is a fundamental principle established in the Bill and extending statutory powers to registered Psychologists would, therefore, immediately enhance patients' rights and their best interests.

2. *Multi-disciplinary sharing of additional responsibilities*

The vast majority of people being treated for mental health problems receive this voluntarily. However, for the small proportion subject to compulsory care, there is a substantial amount of associated work involving clinical assessments, the preparation of reports and attendance at tribunal hearings. The responsibility for this lies exclusively with the medical profession when it should be shared with others, particularly those with the appropriate specialist training and experience.

3. *Progressive*

The Mental Capacity Bill, underpinned as it is by fundamental principles to protect patient's best interests and the explicit requirement that all practicable help and support is provided, is a groundbreaking and world-leading piece of legislation. The amendments sought by the Society would help ensure patients receive the most appropriate assessment for their care and treatment.

4. *Practical*

Registered (Chartered) Psychologists possess the key competencies to act as Approved Clinicians and Responsible Clinicians. Only limited further training would be required for experienced (Consultant grade) registered Psychologists to be able to perform the functions, as do doctors seeking to register as Appropriate Medical Practitioners. It is also the case that in England and Wales, registered Psychologists and other disciplines perform similar functions, and a body of relevant guidance, training and learning has emerged which could be helpful in informing the legislative amendments and practice in Northern Ireland.

Comment 4: This comment relates to the following clause of the Bill:

Part 15: Supplementary

Clause 292: Meaning of "mental disorder"

The Society strongly believes the definition of mental disorder adopted within the legislation means that patients should be examined by professionals who have the specialist training and experience to diagnose and treat mental disorder, which is indeed what registered psychologists are able to offer.

About the Society

The British Psychological Society, incorporated by Royal Charter, is the learned and professional body for psychologists in the United Kingdom. We are a registered charity with a total membership of over 50,000. The Society has 1,500 members in Northern Ireland.

Under its Royal Charter, the objective of the British Psychological Society is "to promote the advancement and diffusion of the knowledge of psychology pure and applied and especially to promote the efficiency and usefulness of members by setting up a high standard of professional education and knowledge". We are committed to providing and disseminating evidence-based expertise and advice, engaging with policy and decision makers, and promoting the highest standards in learning and teaching, professional practice and research.

ANNEX 1

- Legal precedent: How has legislation been changed in England and Wales to allow registered psychologists to undertake the role of responsible clinician and approved clinician?
- Subordinate legislation: What legislation would be required to implement these changes?
- Competencies: What are the relevant competencies health professionals must hold?
- Approved Clinician: How would the approved clinician approval process work in practice in Northern Ireland?

1. Legal precedent: How has legislation been changed in England and Wales to allow registered psychologists to undertake the role of responsible clinician and approved clinician?

The legal precedent for allowing qualified registered psychologists to undertake the role of Responsible Clinician (RC) or Approved Clinician (AC) was established in the Mental Health Act 2007³. This Act applies to both England and Wales and it amended the 1983 Mental Health Act to allow a wider range of professionals to perform the roles of responsible clinician and approved clinician.

The 2007 Act replaced the role of 'responsible medical officer' with the role of '**responsible clinician**' and introduced the role of Approved Mental Health Professional (AMHP). The responsible clinician may now be any practitioner who has been approved for that purpose (an '**approved clinician**'). As such the role of approved clinician is no longer restricted to medical practitioners and has been extended to other professions such as nursing and psychology.

"Responsible clinician" is defined as:

(a) in relation to a patient liable to be detained by virtue of an application for admission for assessment or an application for admission for treatment, or a community patient, the approved clinician with overall responsibility for the patient's case;

³ See Mental Health Act 2007, Chapter 2 Professional Roles *Approved clinicians and responsible clinicians* - <http://www.legislation.gov.uk/ukpga/2007/12/contents>

(b) in relation to a patient subject to guardianship, the approved clinician authorised by the responsible local social services authority to act (either generally or in any particular case or for any particular purpose) as the responsible clinician.

"Approved clinician" is defined as:

... a person approved by the Health Secretary to act as an approved clinician for the purposes of this Act

2. Subordinate legislation: What regulation would be required to implement these changes?

The Mental Health Act 2007 introduced greater flexibility regarding professional roles to allow a wider range of professionals to perform certain roles which are central to the 1983 Mental Health Act.

To enable the changes in the 2007 Mental Health Act to be implemented, the Mental Health Act 1983 Approved Clinician (General) Directions 2008 and the Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations were passed.⁴

These Directions and Regulations also set out the duties of Health Boards and Local Authorities regarding approval requirements, duration of approval, suspension of approval and their duty to maintain records of approved clinicians. The full list of provisions of the subordinate legislation is provided below:

- Function of approval
- Approval to act as an approved clinician
- Period of approval
- Conditions of approval
- Suspension of approval
- End of approval
- Records
- Transitional arrangements
- Professional requirements
- Relevant competencies

⁴ Mental Health Act 1983 Approved Clinician (General) Directions 2008 - http://webarchive.nationalarchives.gov.uk/20130107105354/http://dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_086550.pdf

See also Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations 2008 - http://www.legislation.gov.uk/uksi/2008/1206/pdfs/uksi_20081206_en.pdf



3. Competencies: Professional Roles and Relevant Competencies

To enable the implementation of the Mental Health Act 2007 in practice, subordinate legislation was introduced. This legislation - the Mental Health Act 1983 Approved Clinician (General) Directions 2008 and the Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations - set out how Approved Clinicians are to be approved by health boards and trusts, the professions from which approved clinicians can be drawn and what competencies they must demonstrate.

This subordinate legislation set out the professional requirements⁵ and relevant competencies that must be met for those professionals seeking to become approved clinicians. These are:

- Professional Requirements

The professional requirements are that the person is—

- (a) a registered medical practitioner;
- (b) a psychologist registered in Part 14 of the Register maintained under article 5 of the Health Professions Order 2001.⁶
- (c) a first level nurse, registered in Sub-Part 1 of the Nurses' Part of the Register maintained under article 5 of the Nursing and Midwifery Order 2001, with the inclusion of an entry indicating their field of practice is mental health or learning disabilities nursing;
- (d) an occupational therapist registered in Part 6 of the Register maintained under article 5 of the Health Professions Order 2001; or
- (e) a social worker, registered as such with the General Social Care Council⁷.

- Competencies

This subordinate legislation also set out the relevant competencies professionals must meet to undertake the role of approved clinician and responsible clinician. A summary of the knowledge and experience professionals must hold is listed below and a comprehensive list can be found in Annex 1 (pg. 10)⁸:

- The role of the approved clinician and responsible clinician
- Legal and Policy Framework

⁵ Mental Health Act 1983 Approved Clinician (General) Directions 2008 and Mental Health Act 1983 Approved Clinician (General) (Amendment) Directions 2009.

⁶ 2006 Statutory Instrument No.254

An amendment to the Mental Health Act 1983 Approved Clinician (General) Directions 2008 came into force from 1st July 2009 to reflect the statutory regulation of psychologists had transferred from the British Psychological Society to the Health and Care Professions Council (HCPC). Psychologists wishing to become approved clinicians must be registered with the HCPC

⁷ Now Health and Care Professions Council

⁸ Mental Health Act 1983 Approved Clinician (General) Directions 2008 and Mental Health Act 1983 Approved Clinician (General) (Amendment) Directions 2009.

- Assessment
- Treatment
- Care Planning
- Leadership and Multi-Disciplinary Team Working
- Equality and Cultural Diversity
- Communication

4. Approved Clinician: How would the approval process work in practice?

The amendments sought to this Bill will also require the existing regulations regarding approval process to be amended. These amendments would relate to Article 25(1) Health and Social Care (Reform) Act (Northern Ireland) 2009.

Additional Information

- Post-Legislative Scrutiny

The Mental Health Act 2007 underwent post-legislative scrutiny by the House of Commons Health Select Committee in 2013. The Health Select Committee inquiry did not uncover any concerns with the extension of the approved clinician role to a wider range of professionals including psychologists.⁹

- British Psychological Society Approved Clinician Peer Review Panel

In response to the changes introduced in England and Wales by the 2007 Mental Health Act, the British Psychological Society, as the professional body for psychologists, established an Approved Clinician Peer Review Panel. This panel has an explicitly advisory function and its purpose is twofold:

- To provide quality assurance for employers as to the professionally verified weight of evidence submitted by applicants and, for regional registration and approvals panels, provides advice concerning the professional quality of the applicant's submission.
- To provide applicants with a general guide to the approvals process, especially the identification, acquisition and demonstration of the required competencies.

⁹ House of Commons Health Select Committee Post-legislative Review of the Mental Health Act 2007 - <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/584/584.pdf>



ANNEX 2 – Full list of competencies for the role of approved clinician and responsible clinician

Below is a full list of the competencies that registered psychologists and other health professionals must demonstrate in order to be considered for the roles of approved clinician and responsible clinician in England. These competencies are outlined in The Mental Health Act 1983 Approved Clinician (General) Directions 2008 and The Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations 2008.

SCHEDULE 2

Relevant Competencies

1. The role of the approved clinician and responsible clinician

1.1. A comprehensive understanding of the role, legal responsibilities and key functions of the approved clinician and the responsible clinician.

2. Legal and Policy Framework

2.1. Applied knowledge of—

(a) mental health legislation, related codes of practice and national and local policy and guidance;
(b) other relevant legislation, codes of practice, national and local policy guidance, in particular, relevant parts of the Human Rights Act 1998¹⁰, the Mental Capacity Act 2005¹¹, and the Children Acts¹², and

(c) relevant guidance issued by the National Institute for Health and Clinical Excellence (NICE).

2.2. In the above paragraph “relevant” means relevant to the decisions likely to be taken by an approved clinician or responsible clinician.

3. Assessment

3.1. Demonstrated ability to—

(a) identify the presence of mental disorder;
(b) identify the severity of the disorder, and
(c) determine whether the disorder is of a kind or degree warranting compulsory confinement.

3.2. Ability to assess all levels of clinical risk, including risks to the safety of the patient and others within an evidence-based framework for risk assessment and management.

3.3. Demonstrated ability to undertake mental health assessments incorporating biological, psychological, cultural and social perspectives.

4. Treatment

4.1. Understanding of—

(a) mental health related treatments, i.e. physical, psychological and social interventions, and
(b) different treatment approaches and their applicability to different patients.

4.2. Demonstrated high level of skill in determining whether a patient has capacity to consent to treatment.

4.3. Ability to formulate, review appropriately and lead on treatment for which the clinician is appropriately qualified in the context of a multi-disciplinary team.

4.4. Ability to communicate clearly the aims of the treatment, to patients, carers and the team.

¹⁰ 1998 c.42

¹¹ 2005 c.9

¹² Children Act 1989(c.41) and Children Act 2004 (c.31)



5. Care Planning

5.1. Demonstrated ability to manage and develop care plans which combine health, social services and other resources, ideally, but not essentially, within the context of the Care Programme Approach.

6. Leadership and Multi-Disciplinary Team Working

6.1. Ability to effectively lead a multi-disciplinary team.

6.2. Ability to assimilate the (potentially diverse) views and opinions of other professionals, patients and carers, whilst maintaining an independent view.

6.3. Ability to manage and take responsibility for making decisions in complex cases without the need to refer to supervision in each individual case.

6.4. Understanding and recognition of the limits of their own skills and recognition of when to seek other professional views to inform a decision.

7. Equality and Cultural Diversity

7.1. Up-to-date knowledge and understanding of equality issues, including those concerning race, disability, sexual orientation and gender.

7.2. Ability to identify, challenge, and where possible redress discrimination and inequality in all its forms in relation to approved clinician practice.

7.3. Understanding of the need to sensitively and actively promote equality and diversity.

7.4. Understanding of how cultural factors and personal values can affect practitioners' judgements and decisions in the application of mental health legislation and policy.

8. Communication

8.1. Ability to communicate effectively with professionals, patients, carers and others, particularly in relation to decisions taken and the underlying reasons for these.

8.2. Ability to keep appropriate records and an awareness of the legal requirements with respect to record keeping.

8.3. Demonstrated understanding, and ability to manage, the competing requirements of confidentiality and effective information sharing, to the benefit of the patient and other stakeholders.

8.4. Ability to compile and complete statutory documentation and to provide written reports as required of an approved clinician.

8.5. Ability to present evidence to courts and tribunals.