The **Regulation** and **Quality Improvement Authority**

Our Ref TN/KK

6 July 2015

Dr Kathryn Aiken
Clerk, Ad Hoc Joint Committee on the Mental Capacity Bill
The Committee Clerk
Room 144, Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX

Dear Dr Aiken

Ad Hoc Joint Committee on the Mental Capacity Bill

Thank you for your letter dated 9 June which RQIA received on the 11 June 2015.

RQIA has reviewed the memorandum relating to the Mental Capacity Bill introduced to the Northern Ireland Assembly on 8 June 2015.

RQIA submitted a comprehensive response to the Department of Health, Social Services and Public Safety in September 2014 through the formal consultation processes. The attached document details additional comments from RQIA, based on the content of the Mental Capacity Bill as introduced to the NI Assembly.

Should you have any queries or require any further information please contact Theresa Nixon, Director of Mental Health, Learning Disability and Social Work on 028 9051 7564.

Yours sincerely

Glenn Houston

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Chief Executive

Cc Theresa Nixon, Director of Mental Health, Learning Disability and Social Work, RQIA

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Established under The Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003

1.0	**Introduction** The Regulation and Quality Improvement Authority (RQIA) is the independent body responsible for monitoring and inspecting the availability and quality of health and social care services in Northern Ireland, and encouraging improvements in the quality of those services. RQIA's role is set out in Article 35 of the Health and Personal Social Services (Quality, Improvement and Regulation)(Northern Ireland) Order 2003[1] (2003 Order). The constitution of RQIA is set out in Schedule 1of the 2003 Order. The duties, functions and processes of RQIA are described in Section 1.6 of the Management Statement and Financial Memorandum for the Regulation and Quality Improvement Authority (amended September 2010). The responsibilities and functions of the former Mental Health Commission transferred to RQIA in 2009 with enactment of the Health and Social Care Reform Act (Northern Ireland). The Mental Health and Learning Disability team in RQIA undertake a range of activities in their role in oversight of the Mental Health (Northern Ireland) Order 1986 (MHO). These responsibilities include: • scrutiny of detention and guardianship processes • inspection of mental health and learning disability inpatient facilities, and • appointment of medical practitioners to undertake the responsibilities associated with Part II and Part IV of the Mental Health (NI) Order 1986. RQIA is also designated as a National Preventive Mechanism (NPM) by the United Kingdom Government under the, Optional Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).
2.0	**General Comments** The introduction of this legislation is a progressive step and places Northern Ireland in a world leading position in this area of law as it is the first time mental health and mental capacity legislation has been brought together in a single statement. The "principles" approach proposed in the Bill is a positive development in respect of removing the specified exclusions around the particularly stigmatising conditions of Personality Disorder, Alcohol Dependence and Sexual Deviance in Mental Health (Northern Ireland) Order[2] (MHO), Article 3(2). The principles underpinning the Bill represent an opportunity to make implicitly good practice explicit. RQIA is mindful of the balance required

[1] Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003

[2] Mental Health (Northern Ireland) Order 1986

	and the tensions which may result in supporting a patient's autonomy and acting in the patient's best interest. RQIA welcomes the fact that a decision will only be made for another person as a last resort and once all practicable help and support have been given to enable the person to do so for himself / herself. RQIA is pleased to see that a best interest test is required and the wide number of people who should be involved in this. The refinement of the Bill, since the consultation stage, to enhance clarity around best interests decision making, giving greater prominence to the wishes and feelings of the person lacking capacity is acknowledged and welcomed. RQIA also welcomes the safeguards in the Bill to protect the rights of individuals who are deemed to lack decision making capacity, including independent advocacy, the reform of the powers of attorney and the creation of new offences of neglect and ill treatment of those who lack capacity. The Bill will help implement the recommendations of the Bamford Review of Mental Health and Learning Disability[3] and will assist in addressing areas of law which are not currently human rights compliant.
3.0	**Important Considerations** There are a number of areas which will require further consideration. These have been included in RQIA's response to the formal consultation in 2014. RQIA would like to emphasis the following specific comments.
3.1	**References to RQIA** The current MHO sets out a specific role for RQIA in several articles, particularly in Part VI. RQIA also has a role in relation to oversight of detention and guardianship processes, appointment of medical practitioners for the purposes of Parts II and IV of the MHO, and protection of patients' rights in terms of quality of care and treatment and protection of property. The Mental Capacity Bill specifically references RQIA in **19 separate sections**[4]. Details of the specific role and functions for RQIA are not explicitly described in the Bill, as they are in the current MHO. The regulatory role of RQIA is vital in ensuring that there is consistency in the implementation of the Bill and the associated subordinate legislation for all those who require the safeguards enshrined in the legislation. RQIA's role in the oversight of the implementation of regulations, and in particular, the ability to access relevant records and documentation should be clearly described as it is critical that RQIA can

[3] The Bamford Review of Mental Health and Learning Disability, DHSSPS, 2009
[4] Sections 18, 43, 77, 119, 125, 126, 129, 184, 185, 186, 193, 194, 201, 247, 250, 251, 256, 266 and 286

	access patients' records to identify any deficiencies in care and treatment.
3.2	**Regulations** Regulations are referred to in **43 separate sections** throughout the Mental Capacity Bill[5]. It is difficult for RQIA to comment on the robustness of the provisions of the Bill in these sections, without the details expected to be included in this subordinate legislation. It is anticipated that RQIA will have a significant regulatory role in the oversight of the implementation of regulations, relevant to the functions of RQIA. Regulations must define: • the regulatory role of RQIA, including access to records and relevant information • the regulatory powers that RQIA may use, including access to records and relevant information RQIA expects that regulations will include unambiguous definitions throughout, explanation of roles and responsibilities and the details of the mandatory timeframes for the implementation of regulations where required. The use of language such as "as soon as is practicable" and "recently enough" must be avoided and instead explicit terminology must be used throughout the regulations. RQIA understands that the Bill team at DHSSPS will provide clarity regarding the additional regulatory powers available for use by RQIA which exist in current legislation, such as the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003[6]. It is imperative that the subordinate legislation is completed and consulted on as soon as possible to allow for publication at the same time as the proposed enactment of the legislation.
3.3	**Codes of Practice** The Codes of Practice will be extremely important documents for those involved in operating the proposed legislation. There are numerous examples of issues where the MHO is silent or the scenario has not been referenced adequately in the current Code of Practice[7] or Guide[8].

[5] Sections 10, 14, 16, 17, 20, 31, 33, 39, 42, 43, 48, 55, 56, 60, 77, 78, 84, 85, 86, 93, 94, 96, 116, 124, 130, 131, 136, 144, 158, 181, 205, 226, 236, 237, 247, 248, 249, 251, 252, 253, 262, 265 and 266
[6] Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 Articles 40(5)(b), 40(6), 43(2)(b), 43(c)
[7] The Mental Health (Northern Ireland) Order, 1986 Code of Practice
[8] The Mental Health (Northern Ireland) Order, 1986 A Guide

	For example, Article 11 of the MHO allows for rectification of errors of a technical nature in documentation completed under Article 9 (assessment period), within a specified period of time. Once a patient has been detained for treatment under Article 12 of the MHO, any errors cannot be rectified. Should an error be noted outside of the timeframe allowed in the MHO, RQIA advises that the assessment period should start again at day one. The requirement to begin the assessment period again at day one has been questioned by various persons making the decision regarding a period of detention of a patient for treatment. In reality the patient has already undergone a period of assessment for a maximum of 14 days, which has led to a determination that the patient should remain in hospital for a period of treatment. There is no specific detail in the current legislation or supporting guidance to clarify if the original assessment period should be regarded as relevant or irrelevant, thereby indicating a timeframe for an assessment period and protection of the rights of the patient. The Codes of Practice must address this type of scenario to ensure consistency in the application of the safeguards enshrined in the legislation by all relevant professionals, across all Trust areas. Practical examples and explicit definitions must be included. The use of language such as "as soon as is practicable" and "recently enough" must be avoided and instead explicit terminology must be used throughout the Codes of Practice. It is important that consultation extends as widely as possible on the required Codes of Practice to enable practitioners to highlight where guidance may need to be made more explicit. This will assist in ensuring that the legislation is easily understood. It will be essential that the Code of Practice is implemented in all Trusts using a similar methodology to provide the safeguards that the legislative framework suggests. The Codes of Practice must be produced and consulted on as soon as possible to allow for their publication at the same time as the enactment of the legislation.
3.4	**Provision of sufficient resources and appropriate training** The Mental Capacity Bill is a significant document which focuses on an individual's capacity to make decisions in relation to their health, welfare and finances. The legislation will no longer focus on those individuals in mental health and learning disability hospitals, but rather any person in

	any setting who may experience permanent, temporary or fluctuating capacity to make the relevant decisions about their health, welfare and/or finances. Implementation of the legislation will hold significant relevance for more than 1500 services regulated, inspected and reviewed by RQIA. It is difficult to quantify the resources required by RQIA to meet the requirements of the Bill. The implementation of a significant number of the provisions contained in the proposed legislation is dependent on the detail of the subordinate legislation supporting the Bill. For example, the regulations have not been provided to specify the persons who will prescribe certain medications requiring a second opinion, and what these certain medications might be. RQIA cannot determine the number of second opinions that will be required or the number of medical practitioners it may need to appoint to provide the second opinion. Associated administrative, quality assurance and training requirements are therefore unclear at this time. RQIA will require further discussion about this matter with the DHSSPS. The principles set out in the Bill will mean a significant change in thinking and practice for those involved in working to the legislation, including RQIA. A substantial programme of training, support and guidance must be provided. This will be an onerous but essential task to ensure that the principles included in the legislative framework are firmly embedded in practice across every discipline. It may take time for those professionals who have practiced in accordance with the MHO to adapt to the changes required in this single legislative framework. It may be equally difficult for those who have never had to consider any of the principles in their practice before now to make this transition. It is incumbent on all involved in working to this new proposed legislation to ensure that they have the necessary training, knowledge and understanding of the requirements of the Bill. All employers will need to ensure that they have the necessary support systems in place to facilitate staff development and the safe and proper transition from one significant piece of legislation to another.
3.5	**Transition Arrangements** It is important that the transition arrangements for those who are subject to the MHO at the implementation stage of the Mental Capacity Bill are specified and agreed prior to the enactment of the new legislation.
3.6	**Implications for Children and Young People** The Mental Capacity Bill applies where "a person ("P") is aged 16 or over". RQIA is concerned that those age under 16 years are excluded from accessing the safeguards enshrined in the Mental Capacity Bill. RQIA acknowledge that the current MHO will be amended for those aged under 16 years, and that a review of The Children Order (Northern

	Ireland)[9] is planned; RQIA is unaware of the expected timeline for the review of The Children Order(NI). RQIA is unable to make comment on the robustness of the proposed legislative framework for those aged under 16 years, except to note that the current proposals are not consistent with the vision set out in the Bamford Review. In terms of a capacity based legislative framework, which is situation- and decision-specific, many 15 years olds clearly have the capacity to make relevant decisions about their health and welfare e.g. to accept or refuse certain medications. Current case law allows "competent" children to accept, but not to refuse, treatments and this creates potential conflicts in clinical practice between respecting the autonomy of capacitous individuals and the existing legal provisions. RQIA believes that a legal framework which recognises emerging capacity in children should be developed. RQIA would urge the DHSSPS to expedite the review of the Children (NI) Order and the capacity framework relating to children and young people. It is vital that all children who require hospital treatment, whether voluntary or detained, have access to adequate safeguards and protections which are at least equivalent to these over 16, including independent advocacy. It is vital that a robust rights-based legal framework for decision-making in relation to the health and welfare of children is put in place, which can be implemented alongside existing human rights legislation. RQIA note that transitional arrangements for those approaching age 16 are not specified in the Bill. These will need to be clearly described, to ensure parity of service provision, and consistency in the implementation of the Bill for all young people in this category. Significantly, RQIA note that the offences included in the Mental Capacity Bill, particularly ill-treatment and wilful neglect **(Part 13, 2561) page 138)** do not apply to children and young people under the age of 16. RQIA would suggest that this provision is included in the amendments to the MHO.
4.0	**Specific Comments** RQIA wishes to make the following comments on specific sections of the Mental Capacity Bill.
4.1	**Part 1: Principles** Overall the principles of autonomy and best interests as set out in **Part 1 (pages 1-5)** of the Mental Capacity Bill are positive. The steps to be taken to support a person to make a decision present a significant step forward in involving a person in their care and treatment.
4.2	**Part 2: Lack of Capacity: Protection from Liability, and Safeguards**

[6] The Mental Health (Northern Ireland) Order 1986
[9] The Children Order (Northern Ireland) 1995

	The safeguards provided in the Mental Capacity Bill, in **Part 2, pages 6-36** information about second opinions, authorisation for certain interventions, advance decision making, the use of independent advocates and nominated persons are welcomed. There is a clearer accountability process regarding decision making. The Mental Capacity Bill provides robust provisions in terms of patients' rights and the requirement to provide justification for the use of interventions. RQIA notes that there is a noticeable focus on protection from liability, rather than positive obligation and professional duty and responsibility to act. This has the potential to lead to defensive practice. RQIA suggests that the Codes of Practice must be definitive in the description of professional accountability in terms of duty to care for an individual. **Second opinion – relevant certificates 18(2) Page 11, line 26** RQIA is unclear why the word "may" is been used at 18 (2). This wording implies that the appropriate medical practitioner can visit and examine P, and can examine any related records, but that this is not obligatory. A second opinion could therefore be made without the appropriate medical practitioner having met or examined P. RQIA suggests that the necessity to visit and examine P and related records should be made explicit. **Second opinion – relevant certificates 18(5) 16(6) Page 11** An "appropriate medical practitioner" could mean a number of different professionals depending on the detail of the regulations which define "medication with serious consequences". RQIA expects that the regulations will be specific in the description of the qualifications, skills and experience of the "appropriate medical practitioner" who may be appointed by RQIA.
4.3	**Part 9: Power of Police to Remove Person to Place of Safety** The Police Service of Northern Ireland (PSNI) perform an important public duty in this respect. The explicit responsibility of the PSNI to keep specific records and produce annual reports on the use of these provisions is welcomed. There are specific circumstances in which RQIA would wish to be informed of the PSNI's use of these provisions, for example, when a person who has been brought to a place of safety as defined in the Mental Capacity Bill is admitted to hospital for care and treatment as a result of meeting the requirements of the Bill. These circumstances will require further discussion and clarification with the DHSSPS and DOJ.
4.4	**Part 11: Transfer between Jurisdictions, pages 134 - 137** These provisions would appear to be based on persons aged 16 and over. No consideration appears to have been given to under 16s when

	making these proposals. RQIA suggests that any amendment of the MHO should consider transfer arrangements for those aged under 16 years.
4.5	**Part 15: Panels** RQIA expects that regulations mentioned in **section 283 pages 152-153** will reference a specific role for RQIA in oversight of the implementation of these regulations and provide direction and extensive clarity in the implementation of the provisions. A regulatory role for RQIA in these provisions will be vital in ensuring that there is consistency and independent scrutiny in the implementation of these provisions and the associated subordinate legislation across all panels in all Trust areas.
5.0	**Conclusion** RQIA welcomes the introduction of a capacity based legislative framework, whilst acknowledging that the implementation of such a framework will not be without challenges. The principles underpinning the Mental Capacity Bill represent an opportunity to make implicitly good practice explicit. RQIA places emphasis on the importance of regulations and Codes of Practice in determining how the Bill is enacted. The implementation of the primary and subordinate legislation and the Codes of Practice will require significant investment in time, expertise and funding. It is imperative that RQIA's regulatory and inspectorial role and responsibility is unambiguously described and protected in both primary and subordinate legislation.