

MPS Evidence Submission

Northern Ireland Ad Hoc Joint Committee on the Mental Capacity Bill

July 2015

About MPS

1. The Medical Protection Society (MPS) is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind.
2. MPS is not an insurance company, but a mutual (not-for-profit) organisation which exists to serve and protect its members and to safeguard their professional reputation, interests and integrity.
3. Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.
4. Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

Opening remarks

5. MPS welcomes the Mental Capacity Bill. We believe that this is important legislation that will clarify the legal rights of individuals who lack capacity and the responsibilities of people who are required to make decisions in their best interests.

6. We note that at present, mental capacity issues in relation to health and welfare interventions are largely governed by the common law in Northern Ireland, and that this is out of step with other parts of the UK in this regard.
7. We agree that there is a strong case for change and we recognise the novel approach in developing a single legislative framework for the reform of mental health legislation and for the introduction of mental capacity legislation. However, we believe careful thought should be given to all the definitions and qualifying criteria used within this legislation to minimise any future ambiguity.

Our Concerns

Part 2 – Lack of capacity: protection from liability, and safeguards

s11 - Advance Decisions

8. We are concerned about the lack of provisions dealing with the validity and applicability of advance decisions to refuse treatment (i.e. a decision you can make now to refuse a specific type of treatment at some time in the future).
9. Healthcare professionals are sometimes required to deal with difficult ethical issues surrounding advance decisions. It is far from ideal to expect them to apply principles enunciated in court judgements in circumstances where the common law is readily codifiable into the legislation. The Bill should include provisions similar to those contained within sections 24-26 of the Mental Capacity Act 2005 for England and Wales.
10. We are also concerned about the potential implications of an advance decision to refuse treatment for a mental disorder, as this may prevent doctors from treating serious psychiatric conditions such as psychosis. We appreciate the purpose of this approach is to afford parity between physical and mental illnesses, and to respect the right of people with capacity to be able to decide, in advance, which treatments they will and will not consent to. However, it could result in a situation whereby effective treatment cannot be provided to a patient, in circumstances where the patient has been deprived of their liberty (because of the risk of self-harm or harm to others).

s14 - Formal assessment of capacity

11. The Bill explains that a “formal capacity assessment” means an assessment carried out by a suitably qualified person. It is important that legislation sets out appropriate requirements for what constitutes a ‘suitably qualified’ person.

s15 - Nominated person

12. We are concerned that this section of the Bill (taken with the definitions for a nominated persons in Part 3) would routinely require a patient's nominated person to be consulted where that nominated person could be only 16 or 17 years old. We are not sure this would provide appropriate safeguards for certain vulnerable people.

s18 - Second opinion

13. The Bill requires other persons concerned with a patient's treatment to be consulted before a second opinion can be certified. It is not clear what would happen if those other persons were not available because they are on extended leave or ill. A qualifying element needs to be built into this section to allow for circumstances of this kind.

Part 3 – Nominated person

14. It is important that the roles and responsibilities of the nominated person are set out clearly in a code of practice accompanying the legislation, in order to make clear that their views will be taken into account, in conjunction with other factors, when determining what would be in the best interests of a person lacking capacity.
15. In dealing with 16 and 17 year olds who lack capacity, it would be helpful if the code of practice could incorporate guidance as to whether a decision maker should attach equal weight to the views of the nominated person and those with parental responsibility, in cases where the young person has nominated someone other than their parent/ guardian, or where the default nominated person is someone other than the parent/ guardian.

Part 4 – Independent Advocates

16. We are concerned about the practicality of implementing section 93 in Part 4 of the Bill. This requires the person to sign a formal document refusing for an advocate to be instructed or to discontinue the involvement of an advocate. It is possible to imagine a scenario in which the person verbally maintains that they do not want an advocate but refuses to sign the formal documents. It is unclear what standing an advocate may have in this situation. The legislation needs the flexibility to deal with this possibility.

Concluding remarks

17. In this submission we have outlined areas within the Mental Capacity Bill where we have concerns. These range from the practical implications of an advance decision to refuse treatment, to the definitions and requirements for certain roles, ie a nominated person.
18. We are keen to continue to play a constructive role in the Assembly's scrutiny of this Bill.

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