

Background

The General Medical Council (GMC) is an associate member of the Mental Health Alliance, a coalition of 79 organisations with an interest in the proposals to reform mental health legislation in the UK.

The GMC licenses doctors to practise medicine in the UK under the provisions of the Medical Act 1983 (as amended). Our objective, as defined in the Medical Act, is to "protect, promote and maintain the health and safety of the public". Our four main functions are:

- to keep up-to-date registers of qualified doctors;
- to foster good medical practice;
- to promote high standards of medical education; and
- to deal firmly and fairly with doctors whose fitness to practise is in doubt.

Our governing body, the Council, is made up of both medical and lay members.

Within the terms of Section 35 of the Medical Act, we have power to advise doctors on standards of professional conduct and medical ethics. We do this primarily through published guidance, which sets out standards that society and the profession expect doctors to follow throughout their working lives.

GMC's interest in the Mental Health Bill

We have an interest in the proposals in the Mental Health Bill as they have implications for doctors' ability to meet the standards of conduct and care expected in their relationships with a particularly vulnerable group of patients.

We believe it is important to ensure that people with mental disorders are able to get the treatment and care which they need, and are not subjected to compulsory assessment and treatment without appropriate safeguards of their rights and interests.

We also acknowledge that there are difficult issues surrounding the management and care of the minority of people with mental disorders who pose (or may pose) a serious risk to public safety. On this point, there is clearly a tension between the public interest in protecting individuals' rights to personal freedom and, on the other hand, protecting the public against risks of serious harm. It is a difficult task to decide how the balance should be struck.

However, it is important that any steps taken to address public safety concerns do not impose responsibilities on doctors which conflict with their professional obligations towards patients and their families and carers.

We are concerned that parts of the Mental Health Bill, as introduced into the House of Lords, did just this. In particular, it raised potential conflicts with the obligations the GMC places on doctors to make the care of their patient their first concern, to prescribe drugs or treatment only when they are satisfied that they serve the patient's needs and to provide treatment and care based on clinical need and the likely effectiveness of treatment.

The amendments passed by the House of Lords in six key areas, including the requirement for detention that a person's decision making is impaired and the reintroduction of a need for treatment to provide a benefit to the person, are important safeguards which help to redress the balance in the legislation.

House of Lords amendments

The House of Lords voted on six amendments to the Mental Health Bill:

- To set out a list of exclusions from the definition of mental disorder, to stop a person being brought under the Act on the basis solely of substance abuse, disorderly conduct, sexual orientation or cultural, religious or political beliefs
- To protect people with full decision-making capacity from being detained
- To require some likelihood that a person's health will benefit from treatment
- To limit the use of SCT to those who would otherwise be in and out of hospital and who cannot otherwise be discharged from hospital safely
- To require a medical opinion before detention can be renewed or a person placed on SCT
- To ensure children detained under the Act are placed in age-appropriate accommodation and cared for by specialists in child and adolescent mental health.

The Government has indicated that it intends to overturn all of the Lord's amendments in the House of Commons. It also made a number of changes of its own, many of which are welcome. These were:

- Reference in the Bill to the (improved) set of principles in the Code of Practice
- Improvements to the system for detaining people for mental health care under the Mental Capacity Act (the "Bournewood" provisions)
- Protecting patients with decision-making capacity from being given ECT without consent

- Allowing ‘Gillick competent’ 16 and 17 year olds to refuse treatment without their parents being able to override their refusal
- Enabling people to be moved between ‘places of safety’ to reduce the time people spend in police cells.

We have not commented on all of the Lords amendments or changes proposed by the Government and have confined our comments to those areas which are within the GMC’s remit and which potentially impact on doctors’ ability to meet their professional and ethical obligations to their patients.

GMC’s response to Lords amendments

Exclusions

We support the Government’s desire for a broad single definition of mental disorder. However, we do not believe that the additional exclusions passed by the House of Lords detract from this intention. Rather, it should provide greater clarity for those operating under the Act about when the provisions of the Mental Health Act are available and ensure that people are not detained solely on the basis of factors such as substance abuse, disorderly conduct, sexual orientation or cultural, religious or political beliefs. It does not prevent people being detained if they also have a mental disorder and meet the other criteria for detention under the Act.

We would urge the House to retain this amendment from the House of Lords.

Impaired decision-making capacity

In the guidance the GMC publishes for doctors, we make clear that doctors are expected to respect the wishes of patients who have capacity to make their own decision (about treatment or care or disclosures of confidential information), and to act in the best interests of patients who lack such capacity. These are fundamental principles of good medical practice which we would expect to see applied to decisions involving patients with mental disorders in the same way as those suffering from physical conditions.

We therefore welcome the House of Lords amendment which adds an additional condition which must be met before a person can be detained under the provisions of the Act, that a person’s ability to make decisions about treatment for their mental disorder is seriously impaired.

The Government is concerned that this may exclude from the provisions of the Act people who need treatment and have stated, “If it cannot be shown that a patient’s judgement is impaired, they cannot be detained – regardless of how much the person needs treatment and however much they, and others, are at risk without it”.

We believe, as did the House of Lords, that this view is mistaken. The purpose of the test is to ensure that compulsory treatment, against a person’s will, can only be provided where the patient’s own ability to make decisions about the treatment they

need is impaired. As the Lords made clear, if a person is suicidal or present a risk to others, as a result of their condition, their decision-making is impaired.

The test included by this amendment is deliberately less demanding than the test of capacity under the *Mental Capacity Act 2005*. This approach has been adopted in the Scottish mental health act (the "*Mental Health (Care and Treatment) (Scotland) Act 2003*"). The Scottish Code of Practice provides further guidance on the application of the impaired decision making test, which should alleviate the Government's concerns about people not receiving treatment under compulsion when it is clearly necessary:

"One difference between incapacity and significantly impaired decision-making ability arguably is that the latter is primarily a disorder of the mind in which a decision is made, resulting in the decision being made on the basis of reasoning coloured by a mental disorder. Incapacity, by contrast, broadly involves a disorder of brain and cognition which implies actual impairments or deficits which prevent or disrupt the decision-making process."

It is important to emphasise that the criterion listed at paragraph 19 above with respect to a significant impairment of decision-making ability means a significant impairment with respect to decisions about the provision of medical treatment for mental disorder."

Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice Volume 2 - Civil Compulsory Powers (Parts 5, 6, 7 & 20), Scottish Executive, September 21, 2005.

'Treatability' requirement

The GMC supports the House of Lords amendment to reinstate a treatability requirement into the 1983 Act. It provides that a person should only be detained if treatment is available which is 'likely to alleviate or prevent a deterioration of his or her condition'.

The Mental Health Bill, as introduced in the House of Lords in November 2006, removed the 'treatability' requirement from the Mental Health Act 1983, replacing it with a requirement that 'appropriate' treatment was 'available' for the person. In our view, this fell short of the treatment having to provide any discernable benefit for the patient. This was compounded by the vagueness of the terms used in the Bill including 'appropriate treatment' and taking into account 'all the other circumstances of his case'.

We are concerned that if the House of Lords amendment is overturned, doctors may be required to become involved in the detention of people who: are seen to pose a risk to others; have not been convicted of a serious offence; and for whom no treatment is available which would provide a therapeutic benefit. This would represent a fundamental change in the role of doctors which would be in conflict with their professional obligations, for example the duty to make the care of patients their

first concern and the responsibility to provide treatment and care based on clinical need and the likely effectiveness of the treatment.

The Government's proposals were aimed at a very small group of patients with dangerous personality disorder who it is said are able to flout the law by refusing to cooperate with treatment and hence claim they are untreatable. However, the test as amended by the Lords overcomes this problem while protecting those who can gain no benefit from treatment from being detained. It will allow a person to be detained if treatment is available even if the person is not receiving the treatment at present because they refuse to engage with what is offered.

We support the Mental Health Alliance's view that the Lords amendment is a very balanced amendment that achieves the Government's aims without broadening the powers of compulsion to permit preventative detention.

Use of SCT

We support the amendments made in the House of Lords to insert a new set of narrow criteria for a person's entry onto a community treatment order (CTO) ensure that they are only used for the group of patients that the Government has stated they are intended for; that is, people who can be described as 'revolving door patients'.

The new criteria include the necessity to undertake an assessment of the nature and degree of the person's mental disorder, and the likelihood of compliance with medication, together with the risk of the patient relapsing. It also retains the existing supervised discharge as a less coercive means of keeping a patient who has been discharged under supervision, which is consistent with the principle of minimising restrictions on liberty, which is one of the fundamental principles to be included by the Government in the Code of Practice.

Renewal of detention

The GMC welcomes the House of Lords amendment to require a registered medical practitioner to examine a patient and agree before a renewal of detention can occur or a person can be placed on a Community Treatment Order. This has the effect of ensuring that decisions about renewal of detention (or commencement of CTOs) receive a similar degree of consideration as the original order for detention.

The Government's proposal was for the decision to renew detention to be taken by the person's responsible clinician with a requirement to consult with a registered medical practitioner (if the RC was not one). We were concerned that the duty to consult was too vague and did not include any mechanism to resolve disagreements between the responsible clinician and those who they were required to consult. This could place 'consulted' doctors in a difficult position and they may be placed in the situation of being involved in the continued detention of a person who they do not believe meets the criteria for detention.

The amendment to require agreement between the responsible clinician and a registered medical practitioner also provides an additional safeguard for people detained under the Act.

We believe this provision could be extended to the situation where the Responsible Clinician is also a registered medical practitioner; to require agreement in these circumstances with another registered medical practitioner who is an Approved Clinician. This would ensure that decisions to renew detention or place a person on a CTO are always taken by two qualified professionals.

GMC's response to the Government's proposed changes

Reference in the Bill to the (improved) set of principles in the Code of Practice

We are pleased that the Government has made some concessions on the issue of guiding principles by agreeing to provide a reference in the Bill to an improved set of principles in the Code of Practice which certain people performing functions under the Act (such as doctors, approved clinicians, managers and staff of hospitals) must have regard to. However, we are disappointed that, despite widespread consensus in the House of Lords, the Government has not agreed to include a clear set of overarching principles on the face of the Mental Health Act.

We believe that this would be a valuable way of providing clarity about the scope and purpose of the Bill, so that those working within its framework or affected by its provisions are clear about the basis on which it is considered legitimate to intervene in the lives of people with a mental disorder.

Improvements to the system for detaining people for mental health care under the Mental Capacity Act (the so-called Bournemouth provisions)

We welcome the Government's intention to amend the *Mental Capacity Act 2005* to address the implications of the judgment of the European Court of Human Rights in *H.L. v. the United Kingdom* (the 'Bournemouth' judgment).

The further amendments the Government has proposed, such as providing a mechanism for anyone with a concern (such as a family member or carer) to trigger an assessment of whether a person is deprived of their liberty if the hospital or care home has not done so provide greater clarity about the nature of these provisions and their application.

However, we believe that these legislative provisions need to be combined with clear guidance in the Mental Capacity Act Code of Practice, including examples of how the provisions will apply in different situations. This will provide help provide clarity for the professionals required to apply the provisions as well as those who may be subject to them.

Allowing 'Gillick competent' 16 and 17 year olds to refuse treatment without the agreement of their parents

We welcome the Government's decision to bring forward an amendment to allow 16 and 17 year olds to refuse treatment for a mental disorder, without the possibility of

their parents being able to override that decision. We believe this is a welcome first step in rationalising this complex area of law.

As the Mental Health Act provides an alternative to parental consent to detain and treat patients who refuse treatment we believe it is not appropriate to rely on parental consent when faced with the refusal of a competent 16 or 17 year old patient with a mental disorder. These amendments will provide helpful clarity in this area. Using the provisions of the Mental Health Act also provides other safeguards, such as access to the Mental Health Tribunal which are not available if young people are treated in hospital with the consent of their parent(s).

We would also encourage the Government to provide clear guidance in the Code of Practice to the Mental Health Act about the interaction between the Mental Health Act, the Mental Capacity Act and other legislation such as the Children Act in this, and other areas, where there is potential overlap between the Mental Health Act and other legislation.

For more information:

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