

HEALTH AND SOCIAL CARE BILL
2ND READING BRIEFING - HOUSE OF LORDS



The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and the Republic of Ireland and is the professional and educational organization for doctors specializing in psychiatry.

TOP LINE BRIEFING

Care Quality Commission (CQC)

The Royal College of Psychiatrists welcomes the creation of a new 'super-regulator' for health and social care with greater powers, but hopes that it is fully resourced to ensure that care is not only both safe and of good quality, but is protective of the rights of all patients and other users of services.

The new regulator will take on and continue the vital work of the Mental Health Act Commission (MHAC).

The Royal College of Psychiatrists hopes to work with Peers to explore some amendments and seek further assurances to ensure that under the new regulator the functions of the MHAC are not only protected, but are also broadened and enhanced.

This will involve:

- Assurances that regular unannounced visits to people detained under the Mental Health Act will continue; (page 2)
- A requirement that the CQC has a system for monitoring the use of Community Treatment Orders; (page 3)
- A requirement to inspect and monitor the deprivation of liberty provisions of the Mental Capacity Act; (page 3)
- Engagement with mental health service users actively as full partners in health and social care assessment, monitoring and inspection; (page 3)
- Monitoring of and reporting to Parliament on the needs and rights of detained patients; (page 3)
- Statutory notification of admissions, discharges and deaths of detained patients; (see page 4)
- An overarching principle of equality and human rights underpinning the commissions functions; (see page 5)
- Ring fencing of the actions and functions required by the CQC, so that inspections are always carried out by those with specialist experience in mental health; (page 5)
- A nominated individual at Board level of the CQC with personal responsibility for Mental Health Act matters; (page 5)
- Ensuring that the standards relating to the registration process include compliance with all relevant legislation, in particular the Mental Health Act.

Care homes: Protection under the Human Rights Act

The Royal College of Psychiatrists are keen to see that the Government introduce amendments to this Bill to ensure that Care Homes are protected under the Human Rights Act. (see page 6)

Part 1 – The Care Quality Commission (CQC)

The Royal College of Psychiatrists welcomes the strengthening of the regulation of health and social care through the creation of the Care Quality Commission in Part 1 of the Health and Social Care Bill.

We hope that this will create a more flexible, streamlined system which supports and reinforces the roles of commissioners, of Strategic Health Authorities and of providers themselves to ensure that care is both safe and of good quality.

It is vital for the protection of out patients who are detained that the functions of the Mental Health Act Commission (MHAC) are given full priority and that the Care Quality Commission is fully resourced to enable it to carry out these functions effectively.

The MHAC currently carries out the crucial role of 'safeguarding the interests of all people detained under the Mental Health Act' - protecting a group of very vulnerable people – through, for example, visiting patients regularly, providing independent second opinions when patients do not or cannot consent to treatment, investigating complaints, and monitoring the Mental Health Act

Patients detained under the Mental Health Act are in a unique position in that they are deprived of their freedom to leave hospital and their freedom to make their own decisions about their treatment. They may also be subject to seclusion, control and restraint as part of their treatment for mental disorder. We were pleased to see that the Government acknowledged the importance of the current work of the MHAC in its response to the consultation on 'The future regulation of health and adult social care in England'.

It is gratifying that the Government outlined the importance of the current work of the MHAC in its response to the consultation on 'The future regulation of health and adult social care in England' and throughout the debates in the House of Commons.

We are aware that the Bill cannot prescribe all these functions in detail or outline how resources will be allocated. However, we are keen to explore some ways to improve the Bill to secure the rights of patients at an equivalent level to that at present.

We have outlined below in more detail the key functions which must continue to be carried out by the Care Quality Commission:

Regular unannounced visits to people detained under the Mental Health Act

One of the most important functions of the MHAC has been the regular and frequent visiting of people who have been detained under the Mental Health Act.

This is a crucial tool in ensuring that patient's rights are protected, the potential for abuse is minimised, and appropriate care is provided at all times.

Some 45,000 people are detained on admission or following admission each year, and the Care Quality Commission must continue to, as the MHAC currently does, make regular unannounced visits to these people.

We were pleased that at 2nd Reading in the House of Commons the Secretary of State for Health emphasised the importance of visiting when he said:

*"I know that the MHAC places great emphasis on its visiting programme, covering each hospital and each ward that accepts detained patients. I expect the new commission to continue that approach."*¹

Recent scandals in Cornwall and Merton and Sutton demonstrate the need for a regulatory body which has the resources and the "teeth" to investigate and intervene. The MHAC currently has only the equivalent of 15 whole time staff in its Commissioner body yet comes across abuses of patients and misuse of the law on a weekly basis.

We would like the Minister to give a commitment to the policy for there to be a programme of regular unannounced visits to detained patients in the Care Quality Commission; and to ensuring the practical means for this to occur. In particular we seek an assurances that the Care Quality Commission will be adequately resourced to undertake this function.

Monitoring the use of Community Treatment Orders

The Mental Health Act now provides for community treatment orders, which will be available from 1st October this year. There are however no mechanisms for monitoring the operation of these new provisions, for instance to ensure that the practice of responsible clinicians properly safeguards patients' rights. The extended role for second opinion doctors to provide second opinions to community patients is an issue that needs to be kept under review. We believe that the Care Quality Commission has a role here in monitoring the implementation of the Act.

Inspecting and monitoring the deprivation of liberty provisions of the Mental Capacity Act.

Again, through the new provisions in the Mental Capacity Act there is the system for the lawful deprivation of liberty of a compliant person with a mental disorder, who lacks capacity to consent, if it is in that persons best interests. As is well known the largest population covered by these provisions include those with learning disabilities, Alzheimer's disease or dementia and those with chronic and enduring mental health problems. They are vulnerable to neglect and abuse. They may be detained longer than is necessary if there is a lack of a person to take up their case.

It must be a role of the Care Quality Commission to inspect and monitor the deprivation of liberty provisions of the Mental Capacity Act.

Engagement with mental health service users actively as full partners in health and social care assessment, monitoring and inspection

All health and social care provision must involve the full engagement with those who are using services. This is especially important for patients detained under the Mental Health Act.

Furthermore, involving service users is an essential step towards a full understanding of the impact of detention and the quality of care at individual providers. The Mental Health Commission has made real progress on user involvement and it is vital that this progress is driven forward in the Care Quality Commission.

This must involve ensuring that patients/service users are able to contact the regulator at any time and to be treated with sympathy and understanding. The role of the Commission is to get to the heart of the patient experience, to

¹ Commons Hansard 26 Nov 2008: Col 38

understand the way the Act impacts on their lives, and to ensure as far as possible that the Act is operated encourages and facilitates improvements in care rather than the reverse. It is only by engaging users as the true voice of experience that the effect of detention can be assessed.

Reporting to Parliament on the needs and rights of detained patients

We believe that a specific duty should be placed on the Care Quality Commission, on an identified member of the Board, to be responsible personally to Parliament for the monitoring of the Mental Health Act, for the protection of the rights of detained patients, and for reporting to Parliament regularly (annually) on the condition of services for detained patients and those subject to compulsion in the community.

Notification of admissions, discharges and deaths of detained patients and other relevant information

The Care Quality Commission should take on the role of reporting admissions, discharges, deaths, and other relevant information of detained patients.

Gathering this information is vital in order to get an accurate impression of how the Mental Health Act is being used. Furthermore, it reassures both patients/service users and carers that these matters are being regularly monitored.

To undertake its functions adequately, the new regulator will need high quality information on which to base decisions, for instance when to intervene having identified a deterioration of care or the likelihood that patients' rights are being abrogated.

The College believe that the collection of the following information needs to be guaranteed:

- a notification of all deaths of detained patients and those notified to the coroner;
- a notification of all serious and untoward incidents and deaths of informal patients from unnatural causes, all homicides by detained or informal patients, and all incidents of serious injury to patients receiving in-patient care; howsoever caused;
- a notification of all formal admissions and discharges including discharges to community treatment orders and compulsion in the community;
- notification of all mental health review tribunal decisions whether for continued detention or for discharge.

For all of these categories it will be essential to have information on age, gender and ethnicity.

Having an overarching principle of equality and human rights.

One of the most features of the Mental Health Act Commission, as evidenced by their biennial reports, has been their expertise in, and concern to foster an understanding of, human rights principles. They have faithfully pointed out where breaches, or potential breaches of human rights may have occurred . They have become true guardians of the Act .

This has also been instrumental in giving a voice to those who are detained, those who provide care, and those who campaign for better care. It also links directly with the recent Department of Health initiative to create a human rights framework. It is vital that there be statutory principle of the need for the new Commission to promote equality and human rights in carrying out its functions .

OTHER ISSUES

Ring fencing of the actions and functions required by the CQC, so that those with specialist experience in mental health always carry out inspections.

The Care Quality Commission staff carrying out the functions above must be adequately and appropriately trained. A specialist mental health team or department within the Care Quality Commission should also be established, which incorporates the present MHAC staff and Commissioner team.

It is essential to the effective monitoring of mental health care that the Care Quality Commission has an expert body of appropriately trained staff equivalent to the current body in the MHAC. The tasks that will be undertaken are not simply bureaucratic or organisational; but involve an understanding and appreciation of the unique circumstances of detained patients.

The standards required for registration process must include compliance with all relevant legislation, in particular the Mental Health Act.

There will be over 30,000 providers of varying sizes who will be regulated by the Care Quality Commission. Some will be small providers. It is important that the standards relating to the registration process ensure compliance with relevant legislation, such as the Mental Health Act. The list could be determined by a consultation process, but would involve Acts such as the NHS Act, Midwives Act and equalities legislation. The list could be provided in Regulations if the Act imposed a duty on the Secretary of State to draw up Regulations to this effect.

Care homes: Protection under the Human Rights Act

The Commission will regulate the standards of care for all people in residential care. While the Human Rights Act (HRA) covers those detained under the Mental Health Act, any voluntary and informal patients (by far the majority) may not be covered if they are cared for in care homes that are in private hands. The anomalous position that applies results from case law, most recently the judgment in the House of Lords in *YL*, a decision the government itself regrets. A person who receives care from the local authority, under its statutory duty, will be covered by the HRA if the care is provided directly by the authority but not if the local arrangement involves a private provider working under contract with the authority. Both the government and the Joint Committee on Human Rights has strongly criticised this position.

For vulnerable people who lack capacity to protect their interests and complain about their standard of care the protection given by the HRA is crucial. The gap in protection for non-detained patients depending upon the nature of the contractual relationship of the provider is indefensible.

The current Bill is an excellent opportunity to address this problem. We believe that the Government intend to introduce amendments to close the loophole and we urge Peers to keep the pressure on until this happens.

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