

Written evidence submitted by The Royal College of Speech and Language Therapists (MCAB06)

Mental Capacity (Amendment) Bill Public Bill Committee: January 2019

1. About the RCSLT

1.1. The Royal College of Speech and Language Therapists (RCSLT) is the professional body for speech and language therapists, speech and language therapy students and support workers in the UK. We have more than 17,000 members. We promote excellence in practice and influence health, education, employment, social care and justice policies.

1.2. Speech and language therapists work in a large range of clinical areas with clients where mental capacity assessments may be needed (e.g. stroke, progressive neurological conditions (including dementia, motor neurone disease, multiple sclerosis, Parkinson's disease), learning disabilities, mental health, brain injury, and cancer).

2. Executive Summary

2.1. The Bill rests on the decision-maker's belief that someone does or does not have the capacity to consent. People with communication needs are particularly vulnerable as many mental capacity assessors will be unaware of the impact of communication problems and may assume that someone lacks capacity to consent or to make decisions due to their communication difficulty.

2.2. Improving communication support can help people to express their wishes and preferences and will maximise client participation in decision-making. It will help to produce more accurate judgements about a person's ability to make a decision, and help prevent an assumption of incapacity and someone being deprived of their liberty unnecessarily.

2.3. We believe that the Bill can be improved to ensure that vulnerable people are better supported and risks to them are reduced.

1. Supported decision-making, including support for all people with communication difficulties, should be enshrined in law as it is in Northern Ireland in the Mental Capacity Act (Northern Ireland) 2016, in Section 4 and 5;
2. Approved Mental Capacity Professionals should be trained in awareness of speech, language and communication needs and how to support decision-making, given that communication is central to decision of mental capacity; and
3. The range of professionals able to train as Approved Mental Capacity Professionals should be extended to speech and language therapists given their specialist knowledge and expertise in communication.

3. Proposed Amendments

3.1 Amendment One

Clause 1, Page 1, line 4, at end insert -

1 (2) In Section 3 after subsection (1) (d) insert –

“and references to enabling or helping a person to make a decision about a matter are to be read accordingly”.

Rationale

This replicates Section 4 of the Mental Capacity Act (Northern Ireland) 2016. If accepted this amendment would make clear on the face of the Mental Capacity Act 2005 that individuals must be supported to express their wishes and preferences for best interests decision-making and help and support must be given to enable the person to communicate his or her decision and that there will be legal consequences if this support is not given.

3.2 Amendment Two

Clause 1, Page 1, Line 10, after Section (3) insert section 5 of the Mental Capacity Act (Northern Ireland) 2016 on “supporting person to make decision”

<http://www.legislation.gov.uk/nia/2016/18/section/5/enacted>

Rationale

This mirrors Section 5 of the Mental Capacity Act (Northern Ireland) 2016 and would make clear on the face of the Mental Capacity Act 2005 that there is a duty for people to be supported to make their own decisions. The RCLT believes this would better safeguard all people, including the most vulnerable and those at risk of being incorrectly deemed to lack mental capacity.

This amendment would deliver other objectives of the Mental Capacity (Amendment) Bill including supporting communication to enable people to express their wishes, feelings and decisions (Schedule 1, Part 2 and Schedule 1, 20 (3)); supporting people to have a voice in their future care where they have deteriorating conditions and where communication difficulties become worse over time (Schedule 1, Part 3); and supporting communication to enable a person to express their wishes, feelings, views and make decisions (35 (5) (a)).

3.3 Amendment Three

Schedule 1, Part 2, Page 11, after line 17 insert –

(d) The requirements of Section 4 of the Mental Capacity Act 2005 have been met

Rationale

This amendment would help ensure that the new legal requirement for supported decision-making proposed in the new Section 4 in the Mental Capacity Act 2005 had been followed. This would ensure that one of the authorisation conditions for depriving someone one of their liberty is that before being deprived of their liberty, they have received communication support (to help determine whether they have capacity or not).

3.4 Amendment Four

Schedule 1, Part 4, Page 20, after line 47 insert –

37 The person able to approved as an Approved Mental Capacity Professional must be one of the following:

- a. an approved mental health professional;**
- b. a registered social worker;**
- c. a first level nurse;**
- d. a registered occupational therapist;**
- e. a chartered psychologist;**
- f. a registered speech and language therapist**

Rationale

This amendment extends the range of professionals who are able to be approved as an Approved Mental Capacity Professional to include speech and language therapists. Currently, under The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, only an approved mental health professional, a registered social worker, a first level nurse, a registered occupational therapist or a chartered psychologist is legally able to undertake a best interests assessment. The RCLT believes that widening the range of professionals able to act as the new Approved Mental Capacity Professionals to include speech and language therapists is necessary for a number of reasons.

- *Addressing the projected shortfall* - extending the range of professionals able to train as Approved Mental Capacity Professionals would address the Government's significant shortfall in the number of professionals currently available to be Approved Mental Capacity Professionals. Alongside this shortage of professionals, the need for mental capacity assessments will increase as people live longer and with conditions that may impact on their mental capacity and/or ability to demonstrate it. As this demand cannot be met by the current health and social care professionals who undertake this role then the range of professionals who can undertake this role must be expanded.
- *Specialist knowledge and expertise of speech and language therapists* - given their specialist knowledge and expertise in speech, language and communication, and the impact difficulties with communication can have on perceptions of an individual's mental capacity, the range of professionals able to be approved as an Approved Mental Capacity Professional should be extended to include speech and language therapists. Currently, speech and language therapists are not able to train to be Best Interests Assessors. Based on their expertise in supporting communication and facilitating decisions making, we seek a change to the law so speech and language therapists can train to be Approved Mental Capacity Professionals.
- *Law Commission review* – the Law Commission's review of Mental Capacity and Deprivation of Liberty, received evidence that the new Approval Mental Capacity Professional role should be extended to include speech and language therapists. The Law Commission also commented that through Regulations the Secretary of State could specify which professions could undertake the new Approved Mental Capacity Professional role, and the Government should "*prescribe a broader list (allowing additional professions or practitioners to undertake this role such as advocates, speech therapists and psychotherapists).*"

3.5 Amendment Five

Schedule 1, Part 4, Page 21, after line 12 insert –

(3) The regulations must specify that the training of an Approved Mental Capacity Professional includes:

- **Training in speech, language and communication needs, the impact these can have on mental capacity and on an individual’s ability to demonstrate whether or not they have mental capacity; and**
- **how to support an individual with supported decision-making, including seeking the advice of a speech and language therapist in the mental capacity assessment.**

Rationale

The ability to communicate is central to make your own decisions and thus is determining mental capacity. Mental capacity assessors often do not recognise or know how to support communication difficulties. It is essential that all Approved Mental Capacity Professionals receive training in speech, language and communication. This would ensure that Approved Mental Capacity Professionals are supported to understand and recognise communication difficulties, to ascertain client’s views and to respond in a way that maximises supported decision-making. This would help ensure that the new legal requirement for supported decision-making proposed in the new Section 4 in the Mental Capacity Act 2005 is met.

Due to their lack of awareness of communication needs, assessors too infrequently seek professional support from speech and language therapists to assist in capacity assessments. Adding this to the Bill would help to ensure that assessors and the client can receive appropriate help from a speech and language therapist in the mental capacity assessment process and in supporting decision-making.

3.6 Amendment Six

Schedule 1, Part 7, Page 25, after line 16 insert –

(2) Those circumstances include any speech, language and communication needs P may have and how those needs have been supported

Rationale

There are important links between mental health and speech, language and communication needs. Communication needs put people at risk of developing mental health problems and those with mental health problems may also have communication needs. Being able to communicate is essential in explaining concerns with mental health so it is essential that any communication difficulties are identified and supported if a person is to meaningfully be able to object.

4 References

1 The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.

https://www.legislation.gov.uk/uksi/2008/1858/pdfs/uksi_20081858_en.pdf

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