Mental Health Network

THE NHS CONFEDERATION

briefing

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Implementing the Mental Health Act 2007

What boards need to know and do

Key points

- New mental health legislation means that mental health trusts can now progress with making a real difference for their service users.
- The recent amendments update the Mental Health Act 1983 and the Mental Capacity Act 2005.
- There are significant implications for commissioners, particularly in relation to advocacy services and the provision of age-appropriate settings for children and adolescents.
- Implementation of the amendments is being staged, with some of the most significant changes becoming operational on 3 November 2008.
- A revised code of practice for the Mental Health Act 2007 also comes into force in November 2008.

The Mental Health Act 2007 updated the Mental Health Act 1983 and the Mental Capacity Act 2005. The recent amendments to the 1983 Act provide clarity in the legal criteria for the use of compulsion, and better safeguards for mental health service users, with new rights to advocacy, the ability to displace their nearest relative and the right to refuse electro-convulsive therapy. Flexibilities in staff roles support new ways of working, changes are made to place of safety arrangements, and supervised community treatment is introduced.

This *Briefing* outlines the key points of the new legislation and sets out what trust boards need to do to implement it and the timescales for doing so.

Background

The new Act brings mental health law into line with service modernisation and current case law. It also ensures compliance with human rights legislation and European convention. The Act ends the uncertainty of the past few years and means that mental health trusts are better placed to progress with making a real difference for their service users.

Since the Act's Royal Assent in July 2007, the National Institute of Mental Health in England (NIMHE) has been providing implementation support. Implementation of the amendments is being staged, with some of the most significant changes becoming operational on 3 November 2008. Important new advocacy provisions come into force in April 2009, and primary care trusts (PCTs) must commission age-appropriate environments for children and young people by 2010.

NIMHE has provided an implementation self-assessment tool (ISAT) which

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supports board-level assurance of timely preparation for the changes (see box on right).

The Department of Health consulted widely on the code of practice and the regulations that underpin the new legislation. The resulting 2008 code of practice introduces five new principles which govern decisions and actions made under the Act (see box on page 3). When making decisions on how they provide care, practitioners and service providers should demonstrate that they have taken account of each principle and will need to be able to explain any departure from one or more of the principles.

The implementation self-assessment tool (ISAT)

Providers and commissioning bodies can use the ISAT to benchmark their systems and make progress in the effective implementation of the Act. The ISAT places particular emphasis on:

- the collection, analysis and use of data to improve services
- delivery of the Act within an ethical framework
- engagement of service users in planning, delivery and monitoring.

The Healthcare Commission recognises the ISAT as evidence of self-assurance for core standards.

For more information, see **http://mhact.csip.org.uk**

The revised legislation

This *Briefing* covers the implementation of the 2007 amendments to the Mental Health Act 1983. The Government used the same parliamentary process to introduce an amendment to the Mental Capacity Act 2005, concerning deprivation of liberty. The scope of this change includes, but goes beyond, mental health services and is not included in this paper; instead, it is described in NHS Confederation Briefing 117, *The Mental Capacity Act*.

Definition of mental disorder

The 2007 Act simplified the definition of mental disorder so that one definition now applies throughout. Categories of disorder are abolished, and this amendment complements the changes to the criteria for detaining service users.

Key issue: It is no longer necessary to put a legal label to patients' disorders. All mental health disorders are now treated in the same way. Alcohol and drug dependence remain excluded, but 'sexually deviant' mental disorders are now included.

Criteria for detention

A new 'appropriate medical treatment' test applies to all powers of detention for treatment. As a result, service users cannot be compulsorily detained for treatment unless appropriate medical treatment is available to them. The 'treatability test' no longer applies.

Key issues: The changes to the criteria do not affect the validity of an existing detention. However, processes need to be in place to ensure that service users currently detained or with a planned admission will meet the amended criteria for detention after 3 November. After this date, responsible clinicians, hospital managers and any necessary tribunal must apply the amended criteria, including the appropriate medical treatment test. There may be some legal challenges about what constitutes appropriate treatment, at least initially.

Medical treatment continues to include psychological intervention and specialist mental health rehabilitation and care. An appropriate range of interventions must be available to meet the needs of the local population.

Supervised community treatment (SCT)

New community treatment orders require suitable service users to undergo a period of supervised community treatment following an initial period of detention in hospital for treatment. This amendment will allow some service users with a mental disorder to live in the community while subject to certain conditions to ensure they continue with the medical treatment they need. The responsible clinician can recall them to hospital if necessary.

Key issue: Trusts will need to ensure effective individual care planning and that health and social care resources are available in the community to provide appropriate community

medical treatment. It will also be necessary to monitor the impact of SCT to inform the planning of future service models.

Additional safeguards for patients

Nearest relative

Service users are currently unable to 'displace' their nearest relative, which is incompatible with the Human Rights Act 1998. The 2007 Act amends this to allow service users to apply to court to displace their nearest relative. It also adds civil partners to the nearest relative list.

Key issue: The courts will still expect a high standard of evidence to be proved before taking the major decision to displace an existing nearest relative.

Electro-convulsive therapy

The 2007 Act offers more scope for detained service users to refuse electro-convulsive therapy. It also makes provision to add further treatments that service users could also refuse.

Mental health advocacy

Service users detained under the Mental Health Act 1983 now have a statutory right to an advocacy service. The new legislation puts a duty on service providers to inform service users about advocacy services and to take all practical steps to make sure they understand what is available to them and how they can obtain help.

Key issues: From April 2009, commissioners will have a statutory duty to provide independent mental health advocacy as a service which is available to qualifying patients detained under the Act. An advocate (independent of the service providing care or treatment) will be available to support each detained service user who wishes to use this service for the duration of periods of compulsion.

The role of the mental health advocate includes ensuring that the service user has full information about the application of the Act in their particular case and the various safeguards which are available to them, including entitlement to legal representation and appeal to a tribunal.

The advocacy service may require information from the service provider in order to undertake its duties; for example, access to relevant records or reports concerning the decision to use compulsion under the Act.

The key amendments

The Mental Health Act 2007 updated the Mental Health Act 1983 and Mental Capacity Act 2005.

The Mental Health Act 2007 ("the Act") includes the following amendments to the Mental Health Act 1983:

- a single definition of mental disorder with fewer exclusions
- the introduction of a requirement for appropriate medical treatment
- the introduction of supervised community treatment
- the provision of additional safeguards for patients
- changing professional roles
- improved access to review tribunals
- an age-appropriate service for children and young adolescents
- changes to place of safety arrangements.

The Act also contains one amendment to the Mental Capacity Act 2005, which addresses provisions required by a European Court of Human Rights ruling that a man with autism had been unlawfully deprived of his liberty by Bournewood Community Mental Health NHS Trust.

Advocacy staff may support the service user by having discussions with clinicians, or attending care programme approach meetings or ward rounds. NIMHE's best practice guidance suggests that a local engagement protocol be agreed between advocacy services and mental health service providers.

Commissioners need to assess the local needs for Mental Health Act advocacy in preparation for their statutory duty to provide this service. Consideration should be given to the local demography of detained service users in terms of ethnicity, language, age and special needs such as sensory or learning disabilities.

Professional roles

The new legislation broadens the group of practitioners who can take on the functions currently performed by the approved social worker and responsible medical officer. The new role of responsible clinician can be undertaken by a number of qualified mental health professionals with the appropriate skills and training.

Key issue: It is vital that resources are made available and protected for the training and ongoing support of professionals who adopt the new role.

The local social service authority (LSSA) remains responsible for the provision of training and authorisation of the new role of approved mental health professional.

Mental health review tribunals

Some hospital managers will have to refer some service users to mental health review tribunals sooner than they do now. Also, the Secretary of State for Health and Welsh ministers can now reduce the amount of time before a service user's case is automatically referred. But the Government has said that it won't do this until tribunal and health and social care resources allow.

Age-appropriate services

From 2010, trusts must provide an environment in hospital for child and adolescent mental health in-patients which is appropriate to their age (subject to their particular needs). PCTs will be required to state where child and adolescent mental health service (CAMHS) beds exist and to provide this information to the courts.

Key issues: There is currently a shortage of CAMHS inpatient beds; therefore, mental health providers and commissioners will need to

New guiding principles

The revised code of practice introduces a new set of guiding principles which replace those in place for the Mental Health Act 1983 now. These five principles inform decisions rather than determine them. All decisions must, of course, be lawful and informed by good professional practice. A summary of the principles is shown below.

- **Purpose** – decisions under the Act must be taken with a view to minimising the undesirable effects of mental disorder by maximising the safety and well-being of service users, promoting their recovery and protecting others from harm.
- **Least restriction** – people taking action with a service user's consent must try to minimise the restrictions they impose on the service user's liberty.
- **Respect** – people taking decisions under the Act must recognise and respect the diverse needs, values and circumstances of each service user, including their race, religion, culture, gender, age, sexual orientation and any disability they might have.
- **Participation** – as far as is practicable, service users must be given the opportunity to be involved in planning, developing and reviewing their own treatment. The involvement of carers, family members and other people with an interest in the service user's welfare should be encouraged and their views taken seriously.
- **Effectiveness, efficiency and equity** – people taking decisions under the Act must seek to use the resources available to both them and service users in the most effective, efficient and equitable way.

ensure that they have sufficient age-appropriate settings to meet the needs of children and adolescents requiring this level of care.

Although the age-appropriate amendment is not scheduled for commencement until April 2010, commissioners and providers can use the time beforehand to prepare for implementation. Successful implementation will necessitate reconfiguration of existing resources, some of which rest with working age mental health services.

NIMHE is providing information for users and carers, guidance for commissioning, and an environmental audit tool to ensure boards are assured that clinically appropriate standards can be met.

Commissioners need to be able to assure themselves that trusts can demonstrate how they will meet the resource implications.

'Place of safety' joint work with police and ambulance services

The 2007 amendments include a power, available since April 2008, to move a person, taken by the police, from one 'place of safety' to another.

The Royal College of Psychiatrists has led the production of up-to-date multi-agency guidelines which set national standards, and a national template for data collection in this area, endorsed by the NHS Confederation and other partners in health, social care and the criminal justice system. Local joint agency protocols now require review. They must include clarity on the designation of the preferred place of safety, updating of conveyance procedures, and confirmation of respective agency responsibilities.

For parts of the country which still routinely expect the police to provide a facility, there may be both safety and resource issues for the NHS to address. Commissioners and regulators will expect to see significantly improved data collection regarding local use and performance standards on the use of Section 136.

Foundation trust managers

Bringing arrangements for foundation trust hospital managers into line with those for NHS trusts, the 2007 Act allows NHS foundation trusts to exercise their power of discharge by appointing people specifically to act on their behalf. Foundation trusts may continue to appoint their non-executive directors to exercise this power and they will be able to delegate to appointees who cannot be directors or to other employees of the foundation trust.

Key issue: This arrangement was enacted in July 2007 to bring foundation trust hospital managers in line with those of NHS trusts.

Implementation

The NHS Confederation's Mental Health Network played an active role in influencing the Mental Health Bill on its journey through Parliament, and has worked hard to influence the implementation programme and code of practice. The Network continues to liaise with the Department of Health and has maintained strong links with NIMHE and stakeholders to ensure that its members are fully supported in preparing for implementation.

'Mental health providers and commissioners will need to ensure that they have sufficient age-appropriate settings to meet the needs of children and adolescents'

Code of practice

The revised code of practice covering the Mental Health Act 2007 comes into force in November 2008. The Department of Health consulted widely with the people who provide and receive services under the Mental Health Act to revise the code of practice. The code provides guidance to registered medical practitioners, approved clinicians, managers and other hospital staff, and approved mental health professionals on how they should proceed when undertaking their duties under the Act.

While the Act does not impose a legal duty to comply with the code, the staff listed above must "have regard to the code" and record and explain any reasons for not adhering to it.

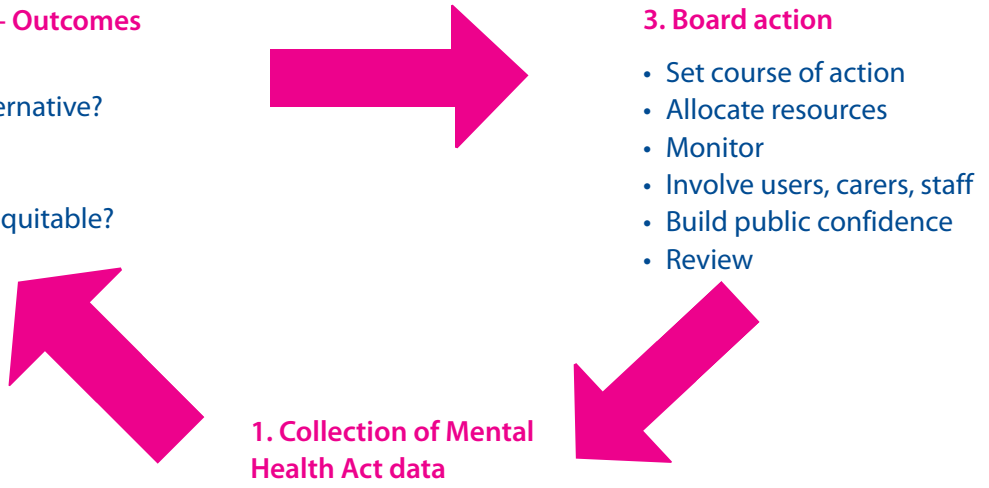
Commissioners

The new legislation has particular implications for those responsible for commissioning mental health services.

Intelligent information

The introduction of five principles to

Figure 1. Strategy for managing intelligent information



guide all decisions and actions taken under the Act (see box on page 4) provides an important opportunity – and a coherent framework – for commissioners to contract for 'intelligent information' about the use of compulsion in the population for which they are responsible. Figure 1 sets out what boards need to do.

For example, commissioners may wish to use the framework provided by the guiding principles to understand why compulsion is being used in a particular locality or specialist needs group. It will help them understand the extent to which Mental Health Act assessments result in detaining service users or whether there are other outcomes, such as the impact of emergency work, the balance between assessment or the use of treatment orders in association with demographics of the detained population. Commissioners will be interested to know the factors that make a difference in these outcomes as well as the duration of compulsion where it is used, and the relationship with lengths of stay in hospital or the take up of alternatives such as supervised community treatment or guardianship.

Examining data about the least restrictive alternatives will indicate which alternatives to compulsion or hospital admission may be most effective. The principles concerning respect and participation can be applied as quality indicators which involve continuous feedback from service users and carers with direct personal experience of applying the Act, local organisations such as MIND or mental health advocacy providers. The fifth principle concerns the use of resources and achieving best value in the use of staff time and facilities, the costs of appropriate treatments, and using available budgets. Such data can be used as intelligent information at executive level when it is applied to review service trends and outcomes and to inform courses of action. Systematically applying the guiding principles framework will influence the allocation of resources intended

Other key points for commissioners

Commissioners need to be aware of all the changes that update the 1983 Mental Health Act, in particular, commissioners need to know:

- An appropriate range of interventions must be available to meet the needs of the local population.
- From April 2009, commissioners will have a statutory duty to provide advocacy services to patients detained under the Act.
- The impact of SCT should be monitored to inform future service models.
- From 2010, commissioners must provide age-appropriate settings in hospitals to meet the needs of children and adolescents.

to support the application of the Act where appropriate. Reporting at board meetings open to the public will provide an important opportunity to involve and use feedback from service users and carers. The stigma associated with severe mental disorders and 'sectioning' can only be addressed through building public confidence in dependable local services that can be shown to be safe as well as orientated towards recovery and greater social inclusion.

Support for trusts

The Department of Health gave NIMHE a key role in the preparation for these changes and in ensuring successful implementation.

Implementation is being supported by a number of best practice publications and other materials, available on NIMHE's implementation website. This national programme is delivering support through: local implementation networks which are active across England; a 'train the trainers' workstream which includes a range of briefing and training materials; and regional conferences which, over the last year, have focused upon each of the main amendments to the Act.

Confederation viewpoint

The NHS Confederation's Mental Health Network has supported preparation for successful local implementation. We now hope that our members can make a difference to service users' care under the amended Act. There are some key changes that may be a challenge, and trust boards may wish to monitor local issues, including:

- ISAT benchmarking
- the impact of supervised community treatment
- progress in ensuring age-appropriate environments for children and young people.

Monitoring ethnicity will continue to be a priority for mental health services, in particular in relation to supervised community treatments. As increased treatment is offered in the community, it will be important for organisations to monitor the impact for the future planning of services, including the provision of culturally appropriate services.

The Mental Health Network is working to improve partnership working between healthcare and organisations which deal with people who come into contact with the criminal justice system. We therefore strongly support the change to Section 136 arrangements regarding places of safety. The police station is rarely the right environment to assess a mentally distressed person and may add to stigma and discrimination through the impression that the subject may be involved in criminal behaviour.

In April 2009 the Care Quality Commission will come into force; we are keen that patients who require detention continue to receive the same level of protection offered by the Mental Health Act Commission.

If you have any comments on the issues raised in this *Briefing*, please contact
Steve.Shrubb@nhsconfed.org

Further information

The Mental Health Act 2007. NHS Confederation briefing issue 148, July 2007
www.nhsconfed.org/publications

National Institute for Mental Health in England (NIMHE)
www.nimhe.csip.org.uk

Implementation of the Mental Health Act 2007: transitional arrangements. DH, July 2008
www.dh.gov.uk/en/Publicationsandstatistics (Gateway ref 10307)

Mental Health Act 2007, commencement orders, regulations and other secondary legislation
www.dh.gov.uk/en/Healthcare/NationalServiceFrameworks/Mentalhealth/DH_077359

The Mental Health Network

The Mental Health Network was established as part of the NHS Confederation to provide a distinct voice for mental health and learning disability service providers. We aim to improve the system for the public, patients and staff by raising the profile of mental health issues and increasing the influence of mental health and disability providers.

The NHS Confederation is the only independent membership body for the full range of organisations that make up today's NHS. Its ambition is a health system that delivers first-class services and improved health for all. As the national voice for NHS leadership, the NHS Confederation meets the collective needs of the whole NHS as well as the distinct needs of all of its parts through its family of networks and forums. The Mental Health Network is one of these.

To find out more about the Mental Health Network, visit **www.nhsconfed.org/mental-health** or email **mentalhealthnetwork@nhsconfed.org**

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THE NHS CONFEDERATION

The NHS Confederation
29 Bressenden Place London SW1E 5DD

Tel 020 7074 3200 Fax 0870 487 1555
Email enquiries@nhsconfed.org
www.nhsconfed.org