BRITISH PSYCHOLOGICAL SOCIETY

O P I N I O N

Pt 1 - INTRODUCTION

1. I am instructed on behalf of the British Psychological Society ('BPS') in relation to amendments made by the House of Lords to the Mental Health Bill 2006 ('MHB'). This Opinion follows a Consultation held on April 4th 2007. I agreed to provide a written Opinion expeditiously. This Opinion is, necessarily, shorter than I would have wished because of the urgency with which it is required.

2. In summary, I am asked to address the following questions:

   (i) Whether MHB, as originally introduced to the House of Lords on November 16th 2006 ('the first stage') complied with the European Convention on Human Rights ('ECHR').

   (ii) Whether the analysis of the Joint Committee on Human Rights ('JCHR') to the effect that MHB was not compatible with the ECHR at the first stage is correct.

   (iii) Whether all the amendments to MHB made by the House of Lords ('the second stage') are necessary in order for MHB to comply with the EC HR.

3. The remainder of this Opinion is structured as follows. Pt 2 outlines MHB as introduced to the House of Lords at the first stage. Pt 3 analyses the response of the JCHR. Pt 4 provides a summary of the nature of the amendments made to MHB at the second stage. Pts 5-7 address the three questions posed in my instructions. Finally, Pt 8 sets out my main Conclusions.

Pt 2 – MHB AT THE FIRST STAGE[1]

4. MHB at the first stage was concerned to introduce a range of medical expertise driven by competency requirements rather than professional qualifications. To that end, the Responsible Medical Officer ('RMO') was proposed to be replaced by a new statutory construct, the Responsible Clinician ('RC') which – in turn – bore a relationship with another statutory creation, the Approved Clinician ('AC').

5. The RMO (as defined in s. 34 of the Mental Health Act 1983) is *'the registered medical practitioner in charge of the treatment of the patient.'* The position is, invariably, held by a consultant psychiatrist.

6. Under MHB the RC replaces the RMO. It means (materially) *'the approved clinician with overall responsibility for the patient's treatment'* (see clause 8(10)(a)). This takes one to clause 13(5) which defines AC by reference to a person approved by the Secretary of State. The (draft) Approved Clinician Directions ('Approvals') envisaged in clause 13(5) include (see Schedule 1) persons without professional medical qualifications (though they also include a registered medical practitioner).

7. Crucially, too, the draft Approvals define the term *'relevant competencies'* without which approval will not be given (see Schedule 2). Those competencies

[1] References to MHB in Pt 2 are references to MHB at the first stage.

reflect a comprehensive knowledge of mental disorder and its evaluation and treatment.

8. The effect of MHB at the first stage was that a person other than a registered medical practitioner but who had demonstrated a relevant competence and, hence, been approved by the Secretary of State, would possess important statutory powers under MHB (as, eg, renewal of detention: see Pt 3 below).

Pt 3 – THE JCHR RESPONSE TO MHB AT THE FIRST STAGE

9. The preliminary legal advice (see JCHR 4th Report) was that there were significant human rights issues engaged in MHB at the first stage.

10. The JCHR was particularly concerned that while initial detention under MHB would still be based on *objective medical expertise* (see *Winterwerp v. The Netherlands* (1979) 2 EHRR 387), *renewal* of detention would be by the RC, who need not be a doctor, reporting to the Managers of the Hospital that the conditions justifying detention continued to be met (see Report at paragraph 21).

11. It is, perhaps, unfortunate that the Government advanced a somewhat equivocal understanding of what was entailed in the notion of *objective medical expertise.* As recorded in paragraph 23 of the 4th Report, it said this:

> *'[T]his [i.e. the Winterwerp reference] means relevant medical expertise, and not necessarily that of a registered medical practitioner. For example, a psychologist would have relevant skills in this context and be able to recognise that a person was suffering from a mental disorder and the knowledge to go to someone else with the appropriate expertise when needed.'*

12. The JCHR did not agree with that understanding, and (see paragraph 26 of the 4th Report) by reference to the decision of the European Court of Human Rights in *Varbanov v. Bulgaria* (judgment October 5 2000, especially at paragraph 47)

suggested that Strasbourg always contemplated that a medical assessment, in the context of the presence or absence of mental disorder, would always be undertaken by a psychiatrist.

13. As explained below, I consider this to be a misreading of *Verbanov* and far too rigid a reading of the likely approach of the Strasbourg Court were the question of whether medical professional qualification – as opposed to a demonstration of medical competence – was a pre-requisite to objective medical expertise, was in issue before the Court.

14. I also note that the JCHR reasoning does not appear to address the relationship between MHB and the Approvals.

Pt 4 – AMENDMENTS TO MHB BY THE HOUSE OF LORDS

15. The effect of amendments to MHB made by the House of Lords at the second stage would require the endorsement of a registered medical practitioner (i.e. a qualified doctor) to relevant decisions made by an RC who was not a registered medical practitioner (see clause 32 resulting in revisions to clauses 17A and 17F of MHB).

Pt 5 – QUESTION 1: DID MHB AT STAGE ONE COMPLY WITH THE ECHR?

16. In my view, MHB at the first stage was ECHR-compliant. Importantly, one should not – from a Convention perspective – look at MHB in isolation from the Approvals.

17. As explained above, the (draft) Approvals - at least in their current form – require a relevant competence. The competence required by the Approvals is extremely

comprehensive. It includes (for example) the ability in the context of assessment to:[2]

- identify the presence or absence of mental disorder and the severity of the disorder;
- undertake a broad mental health assessment and formulations incorporating biological, psychological, cultural and social perspectives;
- have a broad understanding of all mental health related treatments (i.e. physical, psychological and social interventions).

18. Of course, if either: (i) the Approvals were less comprehensively drafted or (ii) the State failed to implement the Approvals and approved persons who did not demonstrate the required competencies, there might be a Convention breach.

19. To say that, however, is very different from the proposition that MHB read with the Approvals fails to comply with the ECHR because it does not require specific medical professional qualifications.

20. In my view, the Strasbourg Court requires substance over form. Although the issue of whether a psychiatric medical qualification is required to constitute objective medical expertise has not arisen before the Court I do not consider it likely that Strasbourg would hold that national legislation that required the relevant competencies mandated by these Approvals would be other than Convention compatible.

[2] This list is far from exhaustive. There are (for example) also detailed leadership, multi disciplinary team working, treatment and care planning requirements.

Pt 6 – QUESTION 2: DO I AGREE WITH JCHR's ANALYSIS?

21. It follows that I do not agree with the JCHR's initial advice. The *Varbanov* decision on which much reliance has been placed appears to have involved the question of whether a prosecutor's or police examination would be sufficient authority for compulsory detention on the particular facts of that case. As I read the ruling the Strasbourg Court held (unsurprisingly) that it would not and contrasted it with an assessment by a psychiatrist.

22. However, nothing in that decision (or, therefore, in the JCHR's analysis) compels the conclusion that a mandatory State requirement to demonstrate the competencies required to be shown by Schedule 2 of the Approvals would amount to anything other than objective medical expertise.

23. As indicated earlier, the JCHR preliminary legal advice does not appear to grapple with these Approvals and, I consider, has assumed that which it would in any event be necessary to prove (and which seems to me to be unlikely), namely that Strasbourg would hold a detailed and mandatory competency requirement of the kind to be found in Schedule 2 of the Approvals to be less than Convention compliant.

Pt 7 – ARE THE AMENDMENTS TO MHB AT THE SECOND STAGE NECESSARY?

24. It follows from the above analysis that the House of Lords amendments are, in my view, unnecessary to ensure Convention compliance.

25. In Consultation I suggested a possible amendment which would incorporate an express competency requirement into MGB itself either by setting out a detailed scheme of competences currently to be found in the draft Approvals or else by requiring Approvals to contain a scheme of relevant competencies. Either of

these amendments would make absolutely clear what is in any event implicit, namely that only suitably competent persons should be approved by the Secretary of State to exercise the relevant statutory functions in MHB.

Pt 8 – MAIN CONCLUSIONS

26. My main Conclusions are these:

(i) MHB at the first stage was entirely Convention compliant.

(ii) This is because MHB must be read in conjunction with the Approvals.

(iii) Only highly competent persons would, under the legislative scheme, then envisaged be permitted to exercise relevant statutory functions under the MHB. I consider and advise that the competencies required to be demonstrated under Schedule 2 of the Approvals (and referred to in MHB) amount to *objective medical expertise* as required by the ECHR in respect of those functions.[3]

(iv) I do not agree with the JCHR provisional view that a professional medical qualification is required or that Strasbourg has ever ruled to that effect. Properly analysed the case relied on by the JCHR is not authority for that proposition.

(v) It follows that the House of Lords' amendments are and were unnecessary. I can, though, see the desirability of an amendment that incorporated the idea of required competences into the MHB itself.

[3] I agree with the JCHR that such expertise is likely to be required for many of these functions.

27. I hope that this, necessarily skeletal expression of view, is helpful.

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BRITISH PSYCHOLOGICAL SOCIETY

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