

Draft Mental Health Bill

Memorandum to the Joint Committee on the Draft Mental Health Bill concerning integration of the Draft Bill with the Mental Capacity Bill

Summary of recommendations

- Significant amendments are needed in both Bills to address inconsistencies, potential confusion, and inappropriate use of either Bill for people who could be affected by both.
- Safeguards to address the Bournemouth case and meet the European Court's ruling should be contained in the Mental Capacity Bill but widened to include other groups who lack capacity to consent to being in hospital, residential care or nursing homes.
- The Government should complete its consultation on safeguards to meet the European Court's ruling on Bournemouth in time to allow amendments regarding those safeguards to be incorporated into the Mental Capacity Bill.
- Guidance from Government is urgently needed to cover Bournemouth type situations that may arise prior to primary legislation being passed that incorporates the necessary safeguards.

1. The Making Decisions Alliance (MDA) is a coalition of national and regional disability and older people's organisations that came together in 2002 to campaign for the introduction of mental capacity legislation. The current membership of the MDA is listed below.
2. Many of the member organisations are also members of the Mental Health Alliance (MHA) and we are broadly supportive of the MHA's submission to the Joint Committee. Of particular concern to the MDA are the issues raised in the MHA's response to Question 8 posed by the Committee concerned with integration between the Draft Mental Health Bill and the Mental Capacity Bill (MCB). We view this as an extremely problematic area, particularly in light of the recent European Court ruling on the Bournemouth case, and would urge the Committee to consider these issues very carefully. In summary these are:
 - 2.1 Different philosophies and procedures underlying the two Bills yet the same individuals may find themselves subject to both.
 - 2.2 The failure of both Bills to adequately provide the safeguards necessary to meet the European Court's ruling on the Bournemouth case.

- 2.3 Inconsistencies in the level of safeguards between the two Bills for people who lack capacity that are being treated with ECT.
 - 2.4 The potential for confusion and inappropriate use of the MCB to detain and compel people with mental disorders to receive treatment without clear safeguards.
 - 2.5 The potential for confusion for practitioners as to which piece of legislation to use, what is in an incapacitated person's best interests, and the least restrictive alternative, taking into account significantly different definitions of the latter in the two Bills.
 - 2.6 Discrimination against people with mental disorders who have advance refusals of treatment which can be over-ridden where they apply to the mental disorder but must be respected if they apply to a physical disorder.
3. The MDA is particularly concerned about the implications of the European's Court's ruling on the Bournemouth case and the recent announcement that the Government will be carrying out a consultation on how best to address this issue. While the MDA fully supports the principle of a consultation process we are very concerned that the timing of this may prevent it being addressed in the MCB. The MDA believes that the MCB is the more appropriate Bill for inclusion of the safeguards to address the Bournemouth ruling. This is because the European Court's ruling primarily concerned the unlawful detention of Mr L, as opposed to the treatment he received. Thus the situation could equally as well apply (and almost certainly does at present) to people who lack capacity to consent and are detained in hospital for treatment for physical illnesses and people who lack capacity to consent and are detained in residential care or nursing homes, particularly people with dementia. Although we recognise that adults with mental disorders who lack capacity to consent are a particularly important group, and our amendment to the MCB reflected this, we would ideally like to see the safeguards necessary to meet the European Court's ruling on the Bournemouth case applied to this much broader group of people. These safeguards include:
- 3.1 Clear conditions and assessment process for the safeguards;
 - 3.2 Clarity concerning the duties of the responsible clinician and the availability of a second opinion from someone with the relevant clinical expertise concerning the person's illness and/or lack of capacity to consent;
 - 3.3 Notification and appointment of a representative for the person (independent advocacy);
 - 3.4 Preparation, approval and procedure for review of a care plan;
 - 3.5 Procedure for resolving disputes, including applications to the Court of Protection
4. We would also draw the Committee's attention to the fact that neither Bill is likely to become law in the immediate future and therefore there is an urgent need for guidance to be issued on how any situations comparable to the Bournemouth should be handled in light of the European Court's ruling before being addressed in primary legislation.

For further information please contact the MDA co-chairs:

Richard Kramer, Turning Point, 020 7702 2300, Richard.Kramer@turning-point.co.uk, or Toby Williamson, Mental Health Foundation, 020 7802 0332, TWilliamson@mhf.org.uk. Information is also available on the Making Decisions Alliance website: www.makingdecisions.org.uk

Members of the Making Decisions Alliance

- Action on Elder Abuse
- Addavoice
- Age Concern England
- Alzheimers Concern Ealing
- Alzheimer's Society
- Beth Johnson Foundation
- Carers UK
- The Centre for Policy on Ageing
- Cloverleaf Advocacy
- Consumer Forum
- The Down's Syndrome Association
- Foundation for People with Learning Disabilities
- Headway
- Help The Aged
- Horsham Gateway Club
- Independent Advocacy Service
- Kent Autistic Trust
- Leonard Cheshire
- Mencap
- The Mental Health Foundation
- Mind
- Motor Neurone Disease Association
- The National Autistic Society
- North Staffordshire Users Group
- The Oaklea Trust
- Patient Concern
- POPAN
- The Relatives and Residents Association
- Respond
- Rethink
- St Clements Patients Council
- Scope
- Sense
- Skills for People
- The Stroke Association
- Turning Point
- United Response