

## **Mental Health Foundation**

### **Briefing for the Second Reading of the Mental Health Bill in the House of Lords**

**Supporting choice and self determination through advance directives, advance statements and advocacy.**

#### **1. Summary**

Choice and self determination is a cornerstone of health policy. However, the Mental Health Bill limits choice further than the existing Act, but does not place in statute a right to support to express wishes or to have those wishes formally recognised and recorded. This is inconsistent with other legislation. By enabling and supporting the expression of wishes in the Mental Capacity Act through advocacy and advance directives, but not placing parallel provision in the Mental Health Bill, this will discriminate unfairly against those detained under mental health legislation

#### **2. The Importance of Choice**

A wide range of recent health policy initiatives have aimed to increase the extent to which individuals take responsibility for their own healthcare. Patient involvement in decision-making enhances health outcomes by engaging the patient more effectively in the process of making choices about their own health, and by negotiating health and care which meets their needs. The Mental Health Bill should, as one of its key aims, enhance choices available to people within an appropriate therapeutic framework, provide support to them in expressing wishes, and ensure their wishes, where they have expressed them, are considered when decisions are made about their care. We believe this should be achieved by introducing provisions for advance decision making and advocacy into the Bill.

#### **3. Advance decision making**

The Mental Health Foundation believes that the right to express wishes in advance, and have these acknowledged, should be on the face of the Bill. The Mental Capacity Act 2005 has extended this right explicitly to those who lack capacity to make decision for themselves, stating that an individual's wishes, expressed through an advance directive, must be respected. However, the current Mental Health Bill allows no way for individuals to express a wish for their care and treatment for mental disorder and have this respected. Including this in the Code of Practice does not place sufficient

emphasis on the importance of this issue, will not ensure that it is followed, and is inconsistent with the Mental Capacity Act 2005. We therefore argue that provision for advance decision making through advance directives and advance statements should be included on the face of the Bill.

Advance directives and advance statements are documents drawn up by individuals when they are well in order to express their wishes as to their future care and medical treatment, in the event that at some point they may be unable to express those wishes themselves. The term 'advance directive' is most commonly used to refer to the anticipatory refusal of medical treatment. 'Advance statements' are more general expressions of an individual's choices about what they would like to happen in regard to their personal and home life, including their wishes related to their culture and religious beliefs, should they come to lack capacity. They may also include reference to particular treatments that an individual does or does not want and specify whom they wish to act on their behalf when unwell.

Advance directives and advance statements are important mechanisms for safeguarding and promoting a patient's interests and health. They should have a significant place in the care and treatment of people who fall under the Mental Health Act. For example, if a person lacks capacity and is in need of care and treatment, an advance directive would indicate whether the patient had stated that a treatment was to be refused. Advance refusals of treatment should be legally binding unless there are extra reasons why this should be overridden.

An advance directive is binding under common law. However, an advance directive can be over-ridden if the person is subject to compulsory treatment under the Mental Health Act 1983. We believe that this discriminates against people with mental health problems. This seems particularly anomalous when the Government is allowing advance refusals in the Mental Capacity Act which would allow people to exercise some dignity and control at the end of their lives, yet is not allowing similar dignity or control over treatment for people in non-life threatening situations, by virtue of them having a mental disorder and being detained under mental health legislation.

We believe that an important opportunity has been missed to include, as part of primary legislation, a legal basis for the use of advance directives and statements. The importance of advance directives and statements for patients should not be underestimated: they are a means of giving details of the care and treatment a patient would like to receive should they lose capacity at some time in the future; they allow a patient to specify whom they wish to act on their behalf should they become unwell; they can promote individual autonomy and empowerment; they can enhance communication between patients and those involved in their care; and they can protect individuals from receiving unwanted or possibly harmful treatment.

It is also likely that the patient's recovery will be assisted by the knowledge that their health, social and personal affairs are being attended to in a way that they have agreed to beforehand. Service users, who have confidence that their doctors will abide by their wishes when they become unwell,

experience less concern and stress about future relapses. This is backed up by recent research which has shown that advance statements in the form of crisis plans can be effective in reducing the number of compulsory admissions to hospital.

The Joint Committee on Human Rights, in its report on the 2002 draft Mental Health Bill, recommended that, *“the rights of patients to give directions about their future treatment, during periods when they are capable of doing so, should be respected where doing so would not present a threat of death or serious harm to the patient or anyone else.”*

The Mental Health Foundation therefore strongly believes that advance decisions should be given formal status by making provision for this on the face of the Mental Health Bill.

#### **4. Advocacy**

The Mental Health Foundation believes it is crucial to include an automatic right to advocacy in the reform of the Mental Health Act 1983. Access to advocacy is a means of ensuring the fundamental human rights to express wishes, and is in keeping with recently mental capacity legislation and the earlier National Service Framework for mental health. We believe that the Government’s promise to increase access to advocacy through other means does not show satisfactory commitment.

The Mental Health Foundation wishes to stress the fundamental importance within mental health legislation of the individual statutory right to advocacy for people at all stages of the process from the point of assessment and in relation to treatment under the Mental Health Act. It is our view that this should be explicit on the face of the Bill. Unless this is clearly stated and accompanied by a commitment to adequate funding to ensure that such advocacy is available, we are concerned that many people will not be able to exercise this right.

Advocates play a key role in ensuring that a person’s needs and views are effectively articulated and communicated. This is vital for a person who may be in a state of crisis, frightened and mentally distressed. An advocate can make a significant difference for someone who may have no other source of support particularly at the initial stage when a person unknown to services first presents for admission or is detained in a place of safety.

Advocacy is particularly important for people who may have no one else, such as a family member or friend, to speak on their behalf and for people whose first language is not English such as refugees and asylum seekers, or in other instances when the ability to communicate may be impaired. People from black and minority ethnic communities, who are over-represented in acute psychiatric care, greatly value access to and support from specialist advocates. Advocates also assist people with issues such as housing and benefits, worries over which can increase stress during a difficult time. With reference to the Mental Health Act, they play an important role in terms of

reassurance and in preventing crisis from escalating towards the need for compulsory treatment.

Mental health law should include an individual right to advocacy for people who are:

- Liable to compulsory treatment;
- At the point of 'examination' for assessment;
- Under an assessment order;
- Undergoing periods of compulsory treatment in the community or in hospital
- Subject to aftercare arrangements
- At the place of safety, whether it is a psychiatric hospital or police station.

Advocates should be able to:

- Attend any consultation, interview or meeting about the person's treatment and support
- Have access to the person at any reasonable time;
- Correspond or communicate in any other way with the person on any matter relating the advocate;
- Receive such information as would assist them to perform their role.

In order to ensure that this vital function is available to people at a time when they are most vulnerable, the Mental Health Foundation believes that provision for this should be made on the face of the Bill .

## **5. Contact details**

We would be happy to discuss this further with you, or provide any further information which would be helpful.

Please contact:

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