

Parliamentary Brief



The Law Society

Mental Health Bill

Second Reading House of Commons

Monday 16 April 2007

The Law Society strongly opposed the Mental Health Bill as originally introduced in the House of Lords. The Bill lacked sufficient legal precision and relied too much on profession discretion. It is crucial that mental health law which governs the use of coercive powers overriding individual autonomy is sufficiently precise and clearly defined. This helps protect patients from unjustified interference in their human rights.

However, we believe that the expert scrutiny undertaken by the House of Lords and the amendments made to six key areas of the Bill – each receiving cross party support - provide an opportunity for the Government to achieve ethical mental health law. The Society, therefore, urges the Government not to overturn these measured and judicious changes.

Why the House of Lords amendments must not be overturned

1. Exclusions

The Bill now includes a list of 'exclusions' which ensure that people cannot be detained under the Mental Health Act 1983 (the 1983 Act) solely on the basis of: drug or alcohol misuse; sexual identity or orientation; illegal acts; or cultural, religious or political beliefs. The Law Society believes it is unacceptable to widen the scope of mental health legislation to include such behaviour and preferences where there is no evidence of a true mental disorder. The Government believes that inappropriate detentions are best avoided through clinical discretion – but in our view the interpretation of the law which authorises detention and compulsory medical treatment is too important to rest on individual interpretations. In other words, clear legal exclusions are essential to prevent inappropriate detention

2. The treatability test

The amended Bill would require that a person can only be detained if they can be given treatment that is likely to alleviate or prevent deterioration in their condition. We strongly support this provision. As a matter of medical and legal ethics, mental health law should not be used to lock people away because they are perceived to be dangerous but for whom no beneficial treatment can be found. That is the province of criminal law. The Government claims that this amendment would lead to people with a personality disorder being discharged or turned away because they are not thought treatable. We do not agree that this legal test would exclude any significant group of patients – including people with a personality disorder for whom effective treatments exist.

3. Impaired decision making test

The Bill as amended ensures that people who retain full decision making capacity cannot be detained and forcibly treated under the 1983 Act. Any other individual with capacity who has a physical illness has the legal right to refuse treatment even if this refusal would have serious consequences – and it is clearly discriminatory not to extend that right to the people with a mental health diagnosis who refuse treatment. We are clear that this amendment would not exclude a mentally disordered person who was a danger to themselves or other people from compulsory detention and treatment under the 1983 Act – since their decision making ability would by definition be impaired.

4. Renewals of detention

We welcome the amendments passed by the House of Lords which ensure that every renewal of an existing detention must be agreed by a doctor. The Government takes the view that this decision can be taken by other professionals – such as psychologists, nurses, social workers and occupational therapists – who need not be medically qualified. The Law Society strongly believes that this would fail to satisfy the requirement under the European Convention on Human Rights (ECHR) that deprivation of liberty must be based on ‘objective medical expertise.’ It would also be inconsistent and create confusion in the law not to require a doctor to agree the renewal of Mental Health Act detentions - when under the Bournemouth proposals a doctor is required to agree the renewal of detention for mental incapacitated people in hospitals or care homes.

5. Community treatment orders

The eligibility criteria for community treatment orders (CTOs), which were agreed by the House of Lords, would ensure that these orders are only used for genuine ‘revolving door patients’ – which is precisely the group of patients the Government says it wants this provision to cover. This would prevent CTOs from being overused as a substitute for hospital inpatient treatment - since clinicians would need to think carefully before imposing a CTO which will interfere with a person’s right to respect for his family and private life under article 8 ECHR.

Also, the conditions that can be attached to a CTO are extremely wide and could include “a condition that the patient abstains from a particular conduct”. This raises the alarming possibility of psychiatric ASBOs. It is essential that this condition is either removed – or that patients should be given the right to seek review of the conditions in a CTO.

6. Children and young people

We welcome the House of Lords amendments which would place a duty on health authorities to provide age appropriate accommodation for children detained under the 1983 Act. This would help to reduce the widespread practice of placing vulnerable children on acute adult psychiatric wards. The changes would also require children to be assessed and supported by specialist child and adolescent mental health clinicians.

Other key issues in the Bill

Nearest Relative

Under the 1983 Act the nearest relative has extensive powers including the power to block admission and discharge a patient. The appointment of the nearest relative is determined by a hierarchical list and the patient has little say in this - even if they dislike the person or have an abusive relationship with them.

We welcome the Government's agreement to give further consideration to a proposal that a patient should be able to choose their nearest relative. This would help to avoid the unnecessary legal costs of requiring a patient to go to court to displace a nearest relative to which they objected. It would also provide greater legal clarity – since the identification of a person's nearest relative can be one of the most complex issues in the 1983 Act and where mistakes are commonplace.

Charging Bournemouth patients for detention

The Government indicated in response to amendments tabled in the House of Lords that the principle of means testing will apply to people deprived of their liberty in residential care homes under the 'Bournemouth' provisions, who will therefore be liable to charges for the accommodation in which they are detained. In our opinion this is discriminatory and a potential breach of Articles 5 and 6 and Article 14 of the ECHR since a person deprived of liberty in a hospital in their own best interests will not be charged for the detention whereas a person detained for their own best interests in a care home will.

We are aware that there may be concerns about the cost implications of the State having to pay the care home costs of people detained under the Bournemouth provisions. However, we believe that as a basic legal principle people cannot be charged for care whilst they are deprived of their liberty under health care law.

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