

## Introduction

- 1.1 MindWise is a leading mental health charity in Northern Ireland, delivering over 30 services run by 110 professional staff and 100+ volunteers. Our mission is to transform lives and develop new visions for mental health by challenging stigma and discrimination and providing quality services and support. We raise awareness and help more than 1000 people each day, affected by mental health issues, to tackle their problems.
- 1.2 MindWise's range of mental health services includes high and medium level supported housing services, day centres and care in the community through floating support and community bridge building. We also work within the criminal justice system; our main remit lies in policing. MindWise provides the Appropriate Adult Scheme for Northern Ireland in partnership with the DOJ as well as delivering a pilot scheme supporting young people aged 13 to 21 released from police custody who experience mental health issues.
- 1.3 MindWise welcome this groundbreaking piece of legislation and the positive effect it will have on those that we work with: people affected by mental health issues. This submission is not an authoritative view on the Bill as a whole; we have neither the resources nor expertise for full legal scrutiny of the Bill. Instead we have focused on our Service Users and how the Bill will affect them. We would be happy to give oral evidence to the committee. Our main concerns are summarised below.

## Summary of Our Concerns

### Best Interest – Civil Provisions

#### **Require consultation with an Independent Advocate (No nominated person, no Attorney)**

- 2.1 The Bill requires recourse to consult with an independent advocate about a person's (P) Best Interest **only** 'so far as it is practical and appropriate' for the medical professional to do so. MindWise is advocating for an automatic appointment of an Independent Advocate in these circumstances.

#### **Require consultation with an Independent Advocate (Non-nominated person is a family member)**

- 2.2 The Bill requires a consultation "Relevant Persons" which may include a family member not previously nominated. In such circumstance MindWise is advocating for an automatic appointment of an Independent Advocate to prevent coercion not in P's best interest.

## **Independent Advocates**

### **Introduce a more robust statutory commitment to Independent Advocate beyond Time to Time requirements described in the Bill**

- 2.3 The 'time to time' requirement described in the Bill is a minimal duty. The Bill, subsequent regulations or Code of Practice, should require each of the five Trusts to maintain permanent provision for accredited Mental Capacity Independent Advocates posts with on-call duties.

### **Best Interest – Criminal Justice Provisions**

#### **The 'Relevant Officer' should always be a medically trained person i.e. Forensic Medical Officer**

- 2.4 MindWise is concerned that the "Relevant Officer", described in the Bill is not required within the Bill to be a medically trained person. In most cases this will be a Custody Sergeant, reliant not on medical training but on NICHE computer system and the willingness of mentally vulnerable adults to disclose their health and wellbeing in a custody suite.

## **Place of Safety**

### **A 'Hierarchy of Referral' to a place of safety**

- 2.5 MindWise have an ongoing concern that police stations should only be used as a Place of Safety, for people removed by the PSNI, in exceptional circumstances. A 'hierarchy of referral' to a place of safety should prioritise referral to hospitals, or other statutory or non-statutory provision, equipped and designated as a place of safety.

## Best Interest – Civil Provisions

### Clause 7 Subsection 7(a)

#### Summary of Concern

- 3.1 MindWise is concerned that Clause 7 Subsection 7(a) only requires recourse for a person (D), normally a medical professional, to consult with an independent advocate **only** 'so far as it is practical and appropriate to do so'.

#### Rationale

- 3.2 While we acknowledge that the Bill puts in place legal protection against not acting in the "Best Interest" of a person (P), it is likely that in practice this would be difficult to check or establish.
- 3.3 By limiting provisions within the Bill to circumstances that they must judge to be 'practical and appropriate', the consequence may be such that medical professionals judging it impractical to consult with an independent advocate (due to fiduciary or time resources pressures), in circumstances where a Nominated Person, Attorney or deputy is not available.
- 3.4 This recourse to judgement, on the practicality and appropriateness of consulting with an independent advocate, may also result in some persons (D) failing to consult as a result of prior approaches and modes of action, a judgement that it is not essential to good practice.

#### Amendment/Action

- 3.5 To avoid this failure to comply with the purpose of the legislation, MindWise would advocate for the insertion of provisions within the Bill to include an automatic appointment of an Independent Advocate in circumstance where it would appear that:
- a person (P) over 16 might lack capacity in relation to any act done or decision made under the Bill, and
  - no Nominated Person has previously been appointed by P. or,
  - no attorney or deputy has been or is appointed.
- 3.6 MindWise envisage Independent Advocates being on call around NI to reduce delays and costs whilst allowing them to become specialists in relation to this Bill.

## **Clause 7 Subsection 11 (a-f)**

### **Summary of Concern**

- 4.1 Clauses 7 Subsection 7 describes how person (D) must – “... consult with relevant people.” These “relevant people” are described in Subsection 11 a-f, and could at subsection 11 (a), (c), (d) and (e) include family members.
- 4.2 MindWise concern relates to circumstance where the only “Relevant Person” is a family member who has not been previously nominated by P, i.e. those described in Clauses 7 Subsection 11 (d) as “anyone engaged in caring for P or interested in P’s welfare”.
- 4.3 We would again encourage provisions with the Bill to include a statutory requirement to consult with an independent advocate [as listed in Subsection 11(b) and whose powers and functions are described in Part4 Clause 84 of the Bill] instead of, or in addition to the non-nominated family member.

### **Rationale**

- 4.4 We believe this recourse to an independent advocate is required because a family member, if solely consulted by person D as a ‘Relevant Person’ may have more reason to improperly coerce a person (P) with regards to their capacity or treatment, for their own rather than the person (P)’s interests.
- 4.5 As well as supporting the person (P) in trying to establish capacity, the Independent Advocate, will also be able to assist person (D) in coming to a joint decision on P’s “Lack of Capacity”, followed by a joint decision on what is in the “Best Interest” of P. This puts an additional safeguard in place as it allows for an independent voice to influence the process.

### **Amendment/Action**

- 4.6 MindWise would advocate for the insertion of provisions within the Bill to include an automatic appointment of an Independent Advocate in circumstance where:
  - a person (P) over 16 might lack capacity in relation to any act done or decision made under the Bill, and
  - the only ‘relevant person’ is a family member / person who has not been previously nominated i.e. currently described in the Bill as “anyone engaged in caring for P or interested in P’s welfare”

## **Independent Advocates**

### **Clause 84 Subsection 4**

#### **Summary of Concern**

- 5.1 MindWise is concerned about the ad hoc arrangements for appointing Independent Advocates as described in Clause 84 Subsection 4. This defines an “Independent Advocate” as being “a person to whom the Trust may from time to time offer instructions under Clause 89.”

#### **Rationale**

- 5.2 MindWise would argue that the effective implementation of the safeguards contained in this Bill, with or without the proposed default of the automatic appointment of an Independent Advocate as argued for above, cannot be achieved effectively, timely and to the required standard through the use of the ad-hoc arrangements referred to in Clause 84 Subsection 4.
- 5.3 Under Clause 89 Trusts are required to provide an Independent Advocate ‘where appropriate’, and under Clause 84 Subsection 2, these arrangements may include provision for payments in relation to the person carrying out these functions.
- 5.4 This ‘time to time’ requirement is a minimal duty, and MindWise is concerned that it would appear that the Departments will be relying on the good-will and limited resources of the community / voluntary sector by making ad-hoc payments which do not cover the full costs of employing and training an Independent Advocate.
- 5.5 It is our view that firmer provisions should be brought forward to ensure that there is a duty on the Trusts, the HSCB or the DHSSPS / DoJ to properly resource permanent provision for accredited Mental Capacity Independent Advocates.
- 5.6 Furthermore, as Professor Phil Fennell commented on at the Ad-hoc Joint Committee meeting on the Mental Capacity Bill on 30 June 2015, the Bill may be too complex in its provisions for ad-hoc independent advocates, which may lead to legal complexities. Employing people who specialise in this area of work would allow for appropriate training and experiencing and, assist the accreditation process referred to in Clause 84 Subsection 7(b).

#### **Amendment/Action**

- 5.7 We believe it is necessary to remove reference within the Bill of ‘time to time’ ad hoc arrangements mentioned at Clause 84 Subsection 4, in favour of more robust statutory commitment to ensure an Independent Advocate is available to oversee and deliver the safeguards presented within the Bill.
- 5.8 To ensure that Independent Advocacy is provided in an effective and timely manner and to the standard required, MindWise would advocate for a provision in statute, either in the Bill or subsequent regulations or Code of Practice, for each of the five Trusts to maintain permanent provision for accredited Mental Capacity Independent Advocates posts with on-call duties. This would allow for accreditation, training and specialisation of these Mental Capacity Independent Advocates to meet the

safeguards set in the Bill and proposed above and a timely response when the need for an Independent Advocate arises.

## **Best Interest – Criminal Justice Provisions**

### **Clause 155 Subsections 2 and 3**

#### **Summary of Concern**

6.1 MindWise is concerned that the person [D], referred to as the “Relevant Officer”, is not required within the Bill to be a medically trained person.

#### **Rationale**

6.2 Under existing provisions within the Bill the Relevant Officer will:

- Determine if the removed person (RP) is unable to make a decision
- Engage and consult with “Relevant People”
- Decide what is in RP’s “Best Interest”

6.3 In practice the current provisions of the Bill means this “Relevant Officer” in the custody suite as a ‘place of safety’ [defined in Clause 137 Subsection 4], will be the Custody Sergeant on duty.

6.4 Custody Sergeants are custody specialists rather than medical professionals and often work in a pressurised and noisy environment. In addition, they have to rely on the so-called NICHE computer system being used by the PSNI for the identification of mentally vulnerable adults which relies heavily on the individual’s self-awareness and willingness to disclose their current mental health and wellbeing in the environment of a custody suite.

6.5 This is unlikely to allow for the Custody Sergeant to be able to establish accurately if the RP is able to make a decision, consult effectively with the relevant people described in the Bill, and deciding what is in the “Best Interest” of RP.

6.6 MindWise is concerned that as presently formulated, Custody Sergeants will be given responsibilities under this Section of the Bill for which they are not best placed, trained, and will be taking decision in an unsuitable environment, with the time needed to undertake these responsibilities properly.

#### **Amendment/Action**

6.7 While in practice this is often already the case, MindWise believes that the Bill should be amended to enshrine in legislation that the “Relevant Officer” in a custody suite [as referred to in Clause 155 Subsection 3] should only have an obligation to refer the RP to the Forensic Medical Officer on duty.

6.8 This medically trained person should then carry out the duties of “D” including making determining if RP is able to make a decision, as well as engaging and consulting with the “Relevant People and deciding what is in RP’s “Best Interest”.

## **Place of Safety**

### **Clause 158 and 137 Subsection 4**

#### **Summary of Concern**

- 7.1 MindWise have an ongoing concern that police stations should only be used as a Place of Safety, for people removed by the PSNI, in exceptional circumstances.

#### **Rationale**

- 7.2 At present “place of safety” is defined (Clause 137 Subsection 4) as any hospital whose managing authority is willing, and any police station. However, no alternative accommodation, delivered by either statutory or non-statutory providers, is currently considered adequate as ‘Place of Safety’ under the current provisions of the Bill.
- 7.3 The Bill does make provision, at Clause 158 Subsection 2 for alternative accommodation to be named as a place of safety by the Department of Justice. MindWise believe that these alternative forms of accommodation should urgently be developed within NI.
- 7.4 MindWise’s concern is founded on our experience as an organisation delivering mental health and well-being services to persons in custody suites. We believe that police stations are an inappropriate environment as a place of safety or in which to assess a person, P’s capacity and ‘best interests’ as the environment itself may contribute additional stress.
- 7.5 As has been previously stated, the Bill’s provision relies heavily on the individual’s (P) self-awareness and willingness to disclose their current mental health and wellbeing in the environment of a custody suite.

#### **Amendment/Action**

- 7.8 We believe an assessment of ‘Capacity’ or ‘Best Interest’ in a custody suite should be avoided when possible, and alternative ‘Places of Safety’ developed and referred to in a designated order of preference described as statute obligation within the Bill.
- 7.9 This so called ‘hierarchy of referral’ would place an obligation on person D to attempt to first refer person P to a place safety that is either an equipped hospital, or as yet undesignated, alternative place of safety. The Bill should make clear that referral of a person to a police station should only take place in exceptional circumstances and these should also be described in statute.