

Terminally Ill Adults (End of Life) Bill: Second Reading (Lords)

Briefing Paper No.1 for Peers – Assisted Dying and Mental Capacity

British Association of Social Workers. September 2025

Introduction

The multidisciplinary panel is central to the Terminally Ill Adults (End of Life) Bill. Social workers are members of the panel.

The British Association of Social Workers (BASW) represents some 20,000 social workers. While BASW has no ‘in principle’ view on the Bill, it is the role of the association to ensure that the Bill takes into account the existing legal responsibilities of social workers, and if the Bill becomes law, it can be implemented in practice.

This is one of three related briefings on the Bill and key social work responsibilities. This briefing covers the topic of mental capacity (other briefings cover adult safeguarding and early support). Recommendations in relation to mental capacity are presented below with more detailed arguments and supporting evidence following.

Recommendation 1

Social workers on the panel will need to see the person seeking an assisted death where there is a question about mental capacity. (Similarly, fellow professionals on the panel (psychiatrists, legal experts) should also have the right to see a person making an application).

Currently, clause 17 (4), lines 32-33 of the Bill states that the panel must (subject to subsection 6) hear from, and may question, the person to whom the referral relates.

BASW wants to see an additional provision inserted that establishes a legal right for all professionals on the panel if necessary to see the person making the application to apply their own professional knowledge and expertise on a range of matters.

This right needs to be explicit within the legislation as an important standard for the professionals, the individual and for the public perception of the panel. This matter is too important to be relegated to any future code of practice.

BASW also recommend that subsection 6 in clause 17 is removed from the Bill. We can foresee no “exceptional circumstances” whereby at least one of the panel members would not want to hear from the individual directly.

Recommendation 2

Panel decisions on applications for an assisted death should be unanimous. There should be no abstentions. This might be thought to be implicit within the concept of a multi-disciplinary panel but given its importance it needs to be explicit in the

legislation. This would prevent any one professional perspective being outvoted or bypassed. It would give confidence to professionals to serve on the panel and confidence in the public perception of the workings of the panel.

Currently, lines 22 – 23 of Schedule 2 of the Bill says that “Decisions of a panel may be taken by a majority vote; but this is subject to sub-paragraph 3”. Sub paragraph 3 then explains that “the panel is to be treated as having decided to refuse to grant a certificate of eligibility if any member— (a) votes against a decision to grant such a certificate”.

This is a contradiction in terms.

Lines 22 – 27 of Schedule 2 must therefore be amended to be made explicitly clear that the decision of the multi-disciplinary panel should always be unanimous, and never by a majority vote.

Considerations

Mental capacity is determined by the Mental Capacity Act (MCA) 2005 and the Mental Capacity (Amendment) Act 2019. This legislation applies both in England and Wales.

In their interactions with clients (or ‘patients’, or ‘service users’ depending on the profession) professionals often take an informal view on capacity as part of their daily duties: how much does the person understand the consequences of the issues under discussion? As part of these discussions the professional seeks to obtain reasonable assurance in the interests of both the person and the professional. Indeed, anyone can make an assessment of capacityⁱ.

However, the more significant the impact of a decision the more important that determination of mental capacity is made by relevant professionals with appropriate qualifications and training. It is difficult to think of a decision that is more significant than an assisted death. For the reasons set out below, where there are concerns about mental capacity, these are best addressed by the panel social worker.

Significant decisions around capacity (for example, Deprivation of Liberty Safeguards) are undertaken by Best Interests Assessors (BIAs). While BIA accreditation can be undertaken by a range of registered professionals as a post-qualifying award the vast majority of BIAs are social workers.

While there is direct no ‘read across’ from the duties of the BIAs to an assisted death, there is an important principle here. There needs to be post qualification accreditation for those undertaking mental capacity assessments for assisted death decisions. The decision about mental capacity is uniquely important given that assisted death is irreversible and can result in a substantial transfer of assets. BASW has argued elsewhereⁱⁱ that the social worker on the panel should have demonstrable knowledge, and experience of, assessing mental capacity and that this is reflected in the post-qualifying accreditation of being a BIA. It is recognised that, in

itself, BIA accreditation is not sufficient and that additional training and development would be required. Nevertheless, this is a foundational set of skills and BASW has argued elsewhere that any future Voluntary Assisted Dying (VAD) service should seek to recruit BIA accredited social workers.

The term 'panel' can be confusing. It can imply individuals sitting in committee to consider applications and thus decisions are effectively made at 'arm's length'. An alternative model is that the professionals on the panel engage directly with the applicant where that is necessary and apply their expertise as necessary to inform panel decisions. It is unlikely that any social worker will seek to pronounce on issues of mental capacity without meeting directly with the person and undertaking an assessment. This leads to **Recommendation 1** that, if needed, social workers have the right to meet with applicants to assess mental capacity. While BASW cannot speak for other professionals serving on the panel, it seems likely that other professionals would have this expectation too in relation to their own expertise. The right to see the applicant, as part of the panel considerations, is important both for the applicant, the professional and for wider ownership of the panel model. The importance of the applicant being seen may well be implicit within this legislation, but BASW believes it is important enough to make this explicit.

Lest the possibility of the need for mental capacity assessments be thought overplayed, BASW's own judgement is that all professionals on the panel will err on the side of caution on issues of mental capacity given the irreversibility of an assisted death and their own professional and organisational liability.

This leads to **Recommendation 2** that in making a decision the multi-disciplinary panel's recommendation should be unanimous, with no abstentions. This prevents any one professional's expertise being outvoted or bypassed. This might be thought to be implicit within the concept of a multi-disciplinary panel but given its importance it needs to be explicit in the legislation. It would also give confidence to professionals to serve on the panel and confidence in the public perception of its workings.

Context

BASW has given careful consideration to the practical implications of the Bill. This has included internal deliberations, written communications from members and a webinar which was attended by 194 social workers with expertise in mental capacity assessment.

The webinar considered five key questions: Whether an assessment of mental capacity on the balance of probabilities should be replaced by a criterion of 'beyond reasonable doubt'? How might pain and exhaustion affect a mental capacity assessment? How might taking heavy medication impact on assessments? How many sessions should there be for a mental capacity assessment and at what stage should they take place? How might social workers address the issue of objectivity

while also complying with the statutory principle of supporting decision making set out in the mental capacity legislation?

All these issues, and others, will need further careful consideration, and are probably best dealt with at code of practice stage, nevertheless, these debates about application of the mental capacity legislation has foregrounded the foundational aspects of this work resulting in the two recommendations.

Contact Officer: Jonny Adamson, jonny.adamson@basw.co.uk

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ⁱ Care Quality Commission, The Mental Capacity Act 2005 Guidance for Providers. Page 4.
https://www.cqc.org.uk/sites/default/files/documents/rp_poc1b2b_100563_20111223_v4_00_guidance_for_providers_mca_for_external_publication.pdf

ⁱⁱ BASW (Sept 2025) A Response to: The Terminally Ill Adults (End of Life) Bill Impact Assessment of 14 May 2025.