

Mental Capacity (Amendment) Bill

Memorandum for the Joint Committee on Human Rights

Introduction

1. This memorandum addresses issues in relation to the Mental Capacity (Amendment) Bill (“the Bill”) arising under (a) the European Convention on Human Rights (“ECHR” or “the Convention”) and (b) human rights contained in other international obligations of the United Kingdom. The memorandum has been prepared by the Department of Health and Social Care (“the Department”).
2. Lord O’Shaughnessy, Parliamentary Under-Secretary of State at the Department of Health and Social Care, has made a statement under section 19(1)(a) of the Human Right Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
3. This memorandum deals only with those provisions of the Bill which raise issues arising under the ECHR or relating to human rights contained in other international obligations of the United Kingdom.

Overview of the Bill

4. The Bill amends the Mental Capacity Act 2005 (“MCA”). In particular it inserts a new Schedule AA1. The Bill is based on a Law Commission draft Bill published as part of its report *Mental Capacity and Deprivation of Liberty*.¹
5. The Bill reforms the process for authorising arrangements which enable people who lack capacity to consent, to be deprived of their liberty for the purpose of delivering their care or treatment. This will include people with severe dementia, learning disabilities, head injuries and autistic spectrum disorder. The new scheme

1 Law Commission, *Mental Capacity and Deprivation of Liberty* (2017). See in particular Annex B which addresses the ECHR and other human rights obligations.

for authorising deprivations of liberty in this context is called the Liberty Protection Safeguards (albeit that this name does not appear in the Bill).

6. Clauses 1 to 5 make amendments to the MCA which are necessary for the operation of the new scheme. They make provision about restriction of liability when health and care professionals carry out arrangements under the new scheme; interim deprivation of liberty for the purpose of life-sustaining treatment in an emergency; and the powers of the Court of Protection in relation to the new authorisation scheme.
7. Clause 1(4) and Schedule 1 insert Schedule AA1, which replaces Schedule A1 to the MCA (Schedule A1 is referred to as the “Deprivation of Liberty Safeguards”, or “DoLS”). Schedule AA1 provides for a new administrative scheme for authorisation of deprivation of liberty.
8. Under Schedule AA1, a responsible body (which in most cases will be either a hospital trust, clinical commissioning group, local health board, or local authority) will be able to authorise arrangements for care or treatment giving rise to a deprivation of a person’s liberty. Unlike the DoLS, it does not matter where the arrangements will be carried out. Before a deprivation of liberty can be authorised, specified assessments must be carried out: a capacity assessment, a medical assessment of unsound mind and an assessment of whether the arrangements are necessary and proportionate. Full consultation must also be carried out with anyone with an interest in the person’s welfare.
9. Before an authorisation can be given, a pre-authorisation review must be carried out by a person who is independent from the people providing the care and treatment. In cases where the individual objects to the proposed arrangements, that review must be undertaken by an Approved Mental Capacity Professional who must meet with the person and determine whether the authorisation conditions are met.
10. Once an authorisation has been given, the person will receive a number of safeguards, including regular reviews (undertaken by the responsible body) of the

need for their care and treatment arrangements, and the right to challenge the authorisation before the Court of Protection. Schedule AA1 also imposes a duty on the responsible body to appoint an independent mental capacity advocate or an appropriate person to represent and support the person from the outset of the assessment process.

11. The Bill also provides for an interface with the Mental Health Act 1983. Broadly speaking, patients in psychiatric hospitals cannot be detained under both the Mental Health Act and the Liberty Protection Safeguards. Patients who object to their mental health care and treatment in hospital are ineligible for the Liberty Protection Safeguards. In the community, however, a person could be the subject of dual authorisations.

ECHR issues in the Bill

12. The Department considers that the Bill engages, or potentially engages, Article 5 and Article 8 of the ECHR. The Department does not consider that the provisions of the Bill infringe these rights.

Article 5 (Right to liberty and security)

13. Article 5 of the ECHR provides that:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention of ... persons of unsound mind ...

...

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

14. Moreover, case law has established that the procedure for depriving a person of their liberty on the basis of unsoundness of mind must satisfy six minimum conditions in order to comply with Article 5.²

(1) A procedure prescribed by law

15. Under Article 5, any deprivation of liberty “must be in accordance with a procedure prescribed by law”. The Strasbourg court has pointed to the importance of “fixed procedural rules”, and in particular the need for “formalised admission procedures”, in order to provide the necessary degree of legal certainty and protect the individual from arbitrariness for the purposes of Article 5.³ This requires the establishment of a specific procedure which ensures that those who may be depriving others of their liberty and, more importantly, those being deprived of their liberty, understand clearly what is required before such action can take place.

16. The Bill clearly establishes such a procedure in Schedule AA1. For example, the Bill provides clearly stated criteria for authorisations to be given, a process for assessments of whether these criteria are satisfied and time limits for authorisation and review.⁴

17. Article 5 does not, however, require a procedure that is as complex or bureaucratic as the current DoLS authorisation scheme. The Bill therefore aims to simplify the existing authorisation process, so that it is less complex and easier to understand for all involved. For example, the Bill does not retain the requirement in the DoLS scheme that six separate assessments must be undertaken in all cases, nor the detailed provisions on who can undertake the assessments.

(2) Objective medical expertise

² *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 (App No 6301/73) at [39]. This was reiterated in the context of deprivation of liberty in care homes in *Stanev v Bulgaria* (2012) 55 EHRR 22 (App No 36760/06) (Grand Chamber decision) at [145].

³ *HL v UK* (2005) 40 EHRR 32 (App No 45508/99) at [120].

⁴ See paras 12, 15, 22 and 23, and 31 of Schedule AA1.

18. In order to comply with Article 5(1)(e) the person must be reliably shown by “objective medical expertise” to be of unsound mind.⁵ The time at which a person must be reliably established to be of unsound mind is that of the adoption of the measure depriving that person of their liberty as a result of that condition.⁶
19. The Bill meets this procedural requirement (the need for objective medical expertise) by providing that there must be objective medical evidence of the person’s unsoundness of mind before any deprivation of liberty is authorised (paragraphs 2(c) and 15(1)(b) of Schedule AA1).
20. The Bill does not specify who can carry out the medical assessment. This is a change to the current DoLS scheme which requires that a “mental health assessment” must be carried out in most cases by a psychiatrist who has completed specialist DoLS training.⁷ Schedule AA1 is intended to be more flexible in this regard and allow other types of medical clinicians to supply the necessary evidence. This is compatible with Strasbourg case law which has indicated that objective medical expertise can be provided by general practitioners, psychotherapists and psychologists.⁸
21. The Government intends that the Mental Capacity Act Code of Practice would give guidance on which professionals could supply the necessary objective medical expertise, and in which circumstances.

(3) Necessary and proportionate

22. In order to comply with Article 5(1) the deprivation of liberty must be “lawful”. But the Strasbourg jurisprudence emphasises that in order to protect the individual from arbitrariness, it is not sufficient that the deprivation of liberty is in conformity with national law. It must also be shown to be necessary in the circumstances, in the sense that less intrusive measures would not suffice and the measures are

⁵ *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 (App No 6301/73) at [39]. The only exception is in emergency cases.

⁶ *OH v Germany* (2012) EHRR 29 (AppNo 4646/08) at [78].

⁷ Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, SI 2008 No 1858, reg 4.

⁸ See *Rivera v Switzerland* (2014) (App No 8300/06) at [59]; *G v E and others* [2010] EWCACiv 822, [2012] Fam 78 at [60]; *Re X* [2014] EWCOP 25, [2015]

1 WLR 2454 at [15], and *Re NRA* [2015] EWCOP 59 at [224].

proportionate to the aim pursued.⁹ A deprivation of liberty is therefore only justified if “other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest”.¹⁰ The deprivation of liberty may be “necessary” not only where the person needs “therapy, medication or other clinical treatment to cure or alleviate” their condition, but also where the person needs “control and supervision” to prevent them, for example, causing harm to themselves or other persons.¹¹

23. The Bill meets this procedural requirement by providing that in all cases there must be consideration of whether the deprivation of liberty is “necessary” and “proportionate” before any deprivation of liberty is authorised (paragraph 12(b) and 16 of Schedule AA1). This determination must be undertaken by a health or care professional who is considered to have the appropriate knowledge and experience.

(4) Review requirement

24. Article 5 requires that the validity of continued confinement depends upon the persistence of the mental disorder of a kind or degree warranting compulsory confinement.¹² Therefore, there must be in place a mechanism to ensure that the persistence of the disorder (and thus the continuing need for the person to be deprived of liberty) is kept under appropriate review by the detaining authority.

25. The Bill achieves compliance with Article 5 in this respect by including detailed review provisions. Under Schedule AA1 the responsible body is required to specify a programme of regular reviews in the person’s authorisation record (paragraph 31 of Schedule AA1). This will enable the responsible body to set fixed dates for review or say that it will review at certain intervals. The Government intends that the Code of Practice will provide examples of cases where, for example, more frequent reviews would be appropriate and list factors relevant in making this decision. Schedule AA1 also provides that earlier reviews must be carried out if,

⁹ *Witold Litwa v Poland* (2001) 33 EHRR 53 (App No 26629/95) at [78] and *Saadi v UK* (2008) 47 EHRR 17 (App No 13229/03) at [54].

¹⁰ *Witold Litwa v Poland* (2001) 33 EHRR 53 (App No 26629/95) at [78] and *Stanev v Bulgaria* (2012) 55 EHRR 22 (App No 36760/06) (Grand Chamber decision) at [143].

¹¹ *Hutchison Reid v UK* (2003) 37 EHRR 9 (App No 50272/99) at [52].

¹² *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 (App No 6301/73) at [39].

for example, a reasonable request is made by any person or there is a significant change in the person's condition or circumstances.

26. In addition, the Bill provides that the person would have the right to support from an independent mental capacity advocate (IMCA) or appropriate person throughout the period of the authorisation (paragraphs 35 to 37 of Schedule AA1). The role of the IMCA or appropriate person is to "represent and support" the person. As part of this role, the IMCA or appropriate person should make representations to the responsible body if they feel that a review of the person's situation is needed, or indeed if they feel that the conditions justifying the giving of an authorisation no longer applied.

(5) Independence

27. Whilst there has not been extensive jurisprudence in the context of Article 5(1)(e), the Strasbourg court has confirmed a need for some degree of independence between those charged with delivering care and treatment to a person and those charged with determining whether to authorise a deprivation of liberty under an administrative scheme.¹³

28. Under Schedule AA1 the necessary element of independence is secured through the pre-authorisation review process. A responsible body cannot give an authorisation unless the case has been through this process. Cases in which there are no objections to the proposed authorisation (either by the cared-for person or anyone else on their behalf) will be considered by an independent person to confirm that it is reasonable for the responsible body to conclude that the conditions for an authorisation are met. That person cannot be someone who is involved in the day-to-day care of, or providing any treatment to, the cared-for person (paragraphs 18(1) and 20 of Schedule AA1).

29. Cases in which there is an objection to the proposed authorisation are referred to the Approved Mental Capacity Professional. The purpose is to determine that the

¹³ *IN v Ukraine* (2016) (App No 28472/08) at [81].

conditions for the authorisation of arrangements are met. In order to make this determination, the Approved Mental Capacity Professional must review the information on which the responsible body has relied in concluding that the conditions are met. They would also be required to meet with the person and consult friends, family and others with an interest in the person's welfare (paragraphs 18(2) and 19 of Schedule AA1).

(6) Access to a court

30. Article 5(4) provides the right to a speedy judicial decision concerning the lawfulness of detention and ordering its termination, if it proves unlawful. It entitles a detained person to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the lawfulness of the deprivation of liberty.¹⁴

31. Under the DoLS this right is given effect by section 21A of the MCA, which enables the Court of Protection to review a standard or urgent authorisation, and vary or terminate it. This is retained by the Liberty Protection Safeguards. The Bill achieves this procedural requirement (access to a court) by providing that the person can challenge their authorisation before the Court of Protection, which has wide powers to for instance make declarations and discharge the person from detention (clause 3 of the Bill).

32. The Government recognises the findings of the Law Commission that the Court of Protection has been criticised for being slow, cumbersome and expensive.¹⁵ It will continue to work with the Court with a view to addressing these issues.

Other Article 5 related matters

33. The Department also notes that the right under Article 5(4) must be “practical and effective and not theoretical and illusory”, and that this may give rise to a need for

¹⁴ *Idalov v Russia* (2012) (App No 5826/03) at [161].

¹⁵ Law Commission, *Mental Capacity and Deprivation of Liberty: Consultation Paper* (2015), 11.24.

legal representation in cases of deprivation of liberty involving those of unsound mind.¹⁶ Currently non-means tested legal aid is available to those making applications under section 21A of the MCA by virtue of Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and regulations made under the Act.¹⁷ The Bill does not impact upon the scope of legal aid as set out in that Act, but consequential amendments will need to be made to the regulations that sit under LASPO to ensure that the current policy position is maintained. The Department therefore considers that, in combination with the current legal aid provisions and with consequential amendments to the regulations under LASPO, the Bill ensures that the right under Article 5(4) is effective.

34. The Bill also contains further measures to ensure that there is effective protection against arbitrary deprivation of liberty, in particular the regulatory requirements designed to ensure that prescribed bodies (for example, the Care Quality Commission) must monitor and report on the implementation of the Liberty Protection Safeguards (paragraph 38 of Schedule AA1). The regulatory scheme in the Bill is discussed later in this memo.

Article 8 (Right to respect for private and family life)

35. A deprivation of liberty may also engage Article 8 rights to private and family life.

36. The right to family and private life guarantees “respect for” private life, family life, home and correspondence. Article 8 prohibits the state from unjustifiably interfering with these often overlapping rights. It also imposes positive obligations on the state to adopt policies which are designed to secure these rights positively. These positive obligations may require the state to take action to stop interferences with the right caused by its own inaction, or to stop interferences caused by the actions of other private individuals.¹⁸

¹⁶ See, for example, *MS v Croatia (No 2)* (2015) (App No 75450/12) at [152] to [154].

¹⁷ See regulation 5 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

¹⁸ *X v Netherlands* (1986) 8 EHRR 235 (App No 8978/80) at [23] and *Moldova v Romania (No 2)* (2007) 44 EHRR 16 (App Nos 41138/98 and 64320/01) at [93].

37. Although Article 8 of the ECHR contains no explicit procedural safeguards, it has been established that it contains implicit procedural requirements. These requirements are aimed at giving a person a degree of involvement in decisions affecting their private and family life that is sufficient to protect their interests, the requisite degree of involvement being calibrated to the circumstances of the case, and the seriousness of the interference with the rights that the Article protects.¹⁹

38. The Bill satisfies the procedural requirements contained in Article 8 by providing for:

- a. a process for enabling any deprivation of liberty which is required in order to deliver care and treatment which is considered to be in the person's best interests;
- b. the requirement that any authorisation can only be justified on the basis that the arrangements are necessary and proportionate (paragraph 12(b) and 16 of Schedule AA1). A deprivation of liberty is therefore only justified if other less severe measures have been considered and found to be insufficient to, for example, safeguard the individual;
- c. in all cases, consultation with the person's friends, family and anyone with an interest in their welfare, before an authorisation can be given or renewed (paragraph 17 of Schedule AA1);
- d. additional scrutiny by an Approved Mental Capacity Professional in cases where a person is objecting to being required to reside or receive care or treatment in the place to which the authorisation relates (paragraphs 35 to 37 of Schedule AA1); and
- e. the duty to appoint an advocate or appropriate person to represent and support the person throughout the life of any authorisation, to ensure (amongst other matters) that the person is involved as far as possible in the process, and their wishes and feelings are taken into account (paragraphs 18(2) and 19 of Schedule AA1).

¹⁹ For example, *Moser v Austria* (2006) (App No 12643/02) at [67]; *Shtukaturov v Russia* [2012] EHRR 27 (App No 44009/05) at [88] to [89]; and *Lashin v Russia* (2013) App No 33117/02 at [80] to [81] and [88].

39. The Department also intends to provide guidance in relation to how practitioners in individual cases can ensure compliance with Article 8 within the Mental Capacity Act Code of Practice.

Other international human rights issues in the Bill

United Nations Convention on the Rights of Persons with Disabilities (“CRPD”)

40. The United Kingdom ratified the CRPD in 2009. Two provisions of the CRPD are particularly relevant for the purposes of the Bill. Article 12 sets out the right of persons with disabilities to enjoy legal capacity on an equal basis with others. Article 14 of the Convention stipulates that the “existence of a disability shall in no case justify a deprivation of liberty”.

41. The Bill complies with Article 12 as the Liberty Protection Safeguards scheme places emphasis on the wishes and feelings of the person and ensures that those wishes and feelings are considered at all stages throughout the authorisation process, including during ongoing review of the authorisation (paragraph 32 of Schedule AA1). The Liberty Protection Safeguards also provide for the appointment of Independent Mental Capacity Advocates and representatives in order to support and represent the person throughout the authorisation process.

42. The Bill complies with Article 14 as a deprivation of liberty based on disability alone could not be authorised under Schedule AA1. For example, amongst other requirements, the deprivation of liberty must always be necessary and proportionate (paragraph 12(b) and 16 of Schedule AA1). It is noted that this analysis is consistent with the interpretation of the underlying right to liberty contained in Article 9 of the International Covenant on Civil and Political Rights.²⁰

Optional Protocol to the United Nations Convention against Torture

²⁰ UN Human Rights Committee, General Comment 35 on Article 9 ICCPR (December 2014) para 19.

43. The United Kingdom ratified the Optional Protocol to the UNs Convention Against Torture – which is designed to strengthen protections against the abuse of people deprived of liberty – in December 2003 and it came into force in June 2006. It requires adequate systems to be in place at a national level to conduct inspection visits to places of detention, and for State Parties to set up or designate one or more “national preventive mechanisms” to conduct visits to places of detention.²¹ In the United Kingdom, the Government collectively designated 18 existing bodies (including the DoLS prescribed bodies such as the Care Quality Commission).

44. In the Bill, the Secretary of State and Welsh Ministers are given regulation-making powers to require prescribed bodies to monitor and report on the operation of the new scheme (paragraph 38 of Schedule AA1). This would allow both Governments to continue to make provision for the current prescribed bodies to undertake this role, and prescribe other bodies where necessary. This provision ensures the Bill is compliant with the Optional Protocol.

²¹ As above, Articles 3 and 17.