

# Mental Capacity (Amendment) Bill [HL]

## EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department of Health and Social Care, will be published separately as Bill 303 – EN.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

Secretary Matt Hancock has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Mental Capacity (Amendment) Bill [HL] are compatible with the Convention rights.

# Mental Capacity (Amendment) Bill [HL]

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**B I L L**

TO

Amend the Mental Capacity Act 2005 in relation to procedures in accordance with which a person may be deprived of liberty where the person lacks capacity to consent; and for connected purposes.

**B**E IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Safeguards*

**1 Deprivation of liberty: authorisation of arrangements enabling care and treatment**

- (1) The Mental Capacity Act 2005 is amended as follows.
- (2) In section 4A (restriction on deprivation of liberty) for subsection (5) substitute— 5
- “(5) D may deprive P of liberty if, by doing so, D is carrying out arrangements authorised under Schedule AA1 (arrangements enabling the care and treatment of persons who lack capacity).”
- (3) After section 4B insert— 10
- “4C Carrying out of authorised arrangements giving rise to deprivation of liberty**
- (1) This section applies to an act that a person (“D”) does in carrying out arrangements authorised under Schedule AA1.
- (2) D does not incur any liability in relation to the act that would not have been incurred if the cared-for person— 15
- (a) had had capacity to consent in relation to D doing the act, and
- (b) had consented to D doing the act.
- (3) Nothing in this section excludes a person’s civil liability for loss or damage, or a person’s criminal liability, resulting from that person’s negligence in doing the act. 20

- (4) Paragraph 28 of Schedule AA1 applies if an authorisation ceases to have effect in certain cases.
- (5) “Cared-for person” has the meaning given by paragraph 2(1) of that Schedule.”
- (4) Before Schedule 1 insert the Schedule AA1 set out in Schedule 1 to this Act. 5
- 2 Deprivation of liberty: authorisation of steps necessary for life-sustaining treatment or vital act**
- For section 4B of the Mental Capacity Act 2005 substitute –
- “4B Deprivation of liberty necessary for life-sustaining treatment or vital act** 10
- (1) If Conditions 1 to 4 are met, D is authorised to take steps which deprive P of liberty.
- (2) Condition 1 is that the steps –
- (a) are wholly or partly for the purpose of giving P life-sustaining treatment or doing any vital act, or 15
- (b) consist wholly or partly of giving P life-sustaining treatment or doing any vital act.
- (3) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P’s condition.
- (4) Condition 2 is that the steps are necessary in order to give the life-sustaining treatment or do the vital act. 20
- (5) Condition 3 is that D reasonably believes that P lacks capacity to consent to D taking the steps.
- (6) Condition 4 is that –
- (a) subsection (7) applies, or 25
- (b) there is an emergency.
- (7) This subsection applies if –
- (a) a decision relevant to whether D is authorised to deprive P of liberty is being sought from the court, or
- (b) a responsible body is carrying out functions under Schedule AA1 with a view to determining whether to authorise arrangements that give rise to a deprivation of P’s liberty. 30
- (8) In subsection (7) it does not matter –
- (a) whether the decision mentioned in paragraph (a) relates to the steps mentioned in subsection (1); 35
- (b) whether the arrangements mentioned in paragraph (b) include those steps.
- (9) There is an emergency if D reasonably believes that –
- (a) there is an urgent need to take the steps mentioned in subsection (1) in order to give the life-sustaining treatment or do the vital act, and 40
- (b) it is not reasonably practicable before taking those steps –

- (i) to make an application for P to be detained under Part 2 of the Mental Health Act,
- (ii) to make an application within subsection (7)(a), or
- (iii) to secure that action within subsection (7)(b) is taken.”

### 3 Powers of the court to determine questions

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After section 21 of the Mental Capacity Act 2005 insert –

*“Powers of the court in relation to Schedule AA1*

#### **21ZA Powers of court in relation to Schedule AA1**

- (1) This section applies where an authorisation under Schedule AA1 –
  - (a) has effect, or
  - (b) is to have effect from a date specified under paragraph 25 of that Schedule.
- (2) The court may determine any question relating to –
  - (a) whether Schedule AA1 applies to the arrangements, or whether the authorisation conditions are met;
  - (b) what period the authorisation has effect for;
  - (c) what the authorisation relates to.
- (3) If the court determines a question under subsection (2), the court may make an order –
  - (a) varying or terminating the authorisation;
  - (b) directing the responsible body to vary the authorisation.
- (4) Where the court makes an order under subsection (3) the court may make an order about a person’s liability for anything done in carrying out the arrangements before the variation or termination.
- (5) An order under subsection (4) may, in particular, exclude a person from liability.
- (6) “Authorisation conditions” has the meaning given by paragraph 12 of Schedule AA1.”

*General*

### 4 Consequential provision etc

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- (1) The Secretary of State may by regulations make provision that is consequential on any provision made by this Act.
- (2) Regulations under this section –
  - (a) may make different provision for different purposes or areas;
  - (b) may amend, repeal or revoke any provision made by or under an Act passed before this Act or in the same Session.
- (3) The power to make regulations under this section is exercisable by statutory instrument.

- (4) Regulations under this section that repeal or amend a provision of an Act may not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament.
- (5) Any other regulations under this section are subject to annulment in pursuance of a resolution of either House of Parliament. 5
- (6) Schedule 2 makes minor and consequential amendments.

## **5 Extent, commencement and short title**

- (1) This Act extends to England and Wales only.
- (2) This section, and section 4 except subsection (6), come into force on the day this Act is passed. 10
- (3) The other provisions of this Act come into force—
  - (a) for the purpose only of enabling the exercise of any power to make regulations, on the day this Act is passed;
  - (b) for all other purposes, on whatever day the Secretary of State appoints by regulations. 15
- (4) Different days may be appointed for different purposes or different areas.
- (5) The Secretary of State may by regulations make transitional or saving provision in connection with the coming into force of any provision of this Act.
- (6) Regulations under subsection (5) may make different provision for different purposes or different areas. 20
- (7) The power to make regulations under this section is exercisable by statutory instrument.
- (8) This Act may be cited as the Mental Capacity (Amendment) Act 2018.
- (9) Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge. 25

## SCHEDULES

### SCHEDULE 1

Section 1(4)

SCHEDULE TO BE INSERTED AS SCHEDULE AA1 TO THE MENTAL CAPACITY ACT 2005

#### “SCHEDULE AA1

Section 4A(5)

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DEPRIVATION OF LIBERTY: AUTHORISATION OF ARRANGEMENTS ENABLING CARE  
AND TREATMENT

#### PART 1

##### INTRODUCTORY AND INTERPRETATION

*Contents of this Schedule* 10

- 1 In this Schedule –
- Part 1 (this Part) describes the arrangements dealt with and gives definitions (including “the responsible body”)
  - Part 2 sets out the procedure for the responsible body to authorise arrangements 15
  - Part 3 is about the duration, renewal, variation and review of authorisations
  - Part 4 is about Approved Mental Capacity Professionals (involved under Part 2 if a person objects to arrangements)
  - Part 5 is about appointing persons to give representation and support in connection with arrangements 20
  - Part 6 gives power to provide for monitoring and reporting
  - Part 7 excludes –
    - (a) mental health arrangements, and
    - (b) arrangements that are not in accordance with mental health requirements 25
  - Part 8 contains transitory provision.

*Arrangements this Schedule applies to*

- 2 (1) This Schedule applies to arrangements –
- (a) for enabling the care or treatment of a person (the “cared-for person”) described in sub-paragraph (2), 30
  - (b) that give rise to a deprivation of the cared-for person’s liberty, and

- (c) that are not excluded by Part 7.
- (2) The cared-for person must be a person who –
- (a) is aged 16 or over,
  - (b) lacks capacity to consent to the arrangements, and
  - (c) has a mental disorder. 5
- (3) The arrangements may for example be –
- (a) for the cared-for person to reside in a particular place;
  - (b) for the cared-for person to receive care or treatment at a particular place;
  - (c) for the means and manner of transport for the cared-for person to, from or between particular places. 10
- (4) The arrangements may be ones that are proposed, or that are being carried out.
- (5) If they are proposed, references in this Schedule to where or how they are carried out are to whatever is proposed in the arrangements. 15
- (6) If provision to which sub-paragraph (1)(a) and (b) apply and other provision are combined, the “arrangements” for the purposes of this Schedule do not include that other provision.
- Definitions* 20
- 3 In this Schedule –
- “Approved Mental Capacity Professional” means a person approved in accordance with Part 4 as an Approved Mental Capacity Professional for the purposes of this Schedule; 25
  - “arrangements” must be read in accordance with paragraph 2;
  - “authorisation” means authorisation of arrangements under this Schedule, and “authorise” and related words are to be read accordingly; 30
  - “authorisation conditions” has the meaning given by paragraph 12;
  - “authorisation record” has the meaning given by paragraph 24;
  - “care home” means – 35
    - (a) a place which is a care home within the meaning given by section 3 of the Care Standards Act 2000, or
    - (b) a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2) is provided wholly or mainly to persons aged 18 or over; 40
  - “care home arrangements” means arrangements, in relation to a cared-for person aged 18 or over, carried out wholly or partly in a care home; 45
  - “care home manager”, in relation to a care home or care home arrangements, means –

- (a) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the provision of residential accommodation, together with nursing or personal care, in the care home, and 5
- (b) in relation to Wales, the person who manages the care home service, within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2), at the care home, by virtue of regulations made under section 28 of that Act; 10
- “cared-for person” has the meaning given by paragraph 2(1);
- “clinical commissioning group” means a body established under section 14D of the National Health Service Act 2006;
- “English responsible body” has the meaning given by paragraph 10; 15
- “hospital” has the meaning given by paragraph 5;
- “hospital manager” has the meaning given by paragraph 7;
- “local authority” has the meaning given by paragraph 4;
- “Local Health Board” means a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006; 20
- “mental disorder” has the meaning given by section 1(2) of the Mental Health Act;
- “mental health arrangements” has the meaning given by paragraph 43; 25
- “mental health requirements” has the meaning given by paragraph 54;
- “responsible body” has the meaning given by paragraph 6;
- “specified”, except in paragraph 54, means specified in an authorisation record; 30
- “Welsh responsible body” has the meaning given by paragraph 11.

*Local authority*

- 4 (1) “Local authority” means – 35
- (a) in England –
- (i) the council of a county;
- (ii) the council of a district for which there is no county council;
- (iii) the council of a London borough;
- (iv) the Common Council of the City of London; 40
- (v) the Council of the Isles of Scilly;
- (b) in Wales, the council of a county or county borough.
- (2) For the purposes of this Schedule the area of the Common Council of the City of London is to be treated as including the Inner Temple and the Middle Temple. 45

*Hospital*

- 5 (1) “Hospital” means an NHS hospital or an independent hospital.

- (2) “NHS hospital” means –
- (a) a health service hospital as defined by section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006, or
  - (b) a hospital as defined by section 206 of the National Health Service (Wales) Act 2006 vested in a Local Health Board. 5
- (3) “Independent hospital” –
- (a) in relation to England, means a hospital as defined by section 275 of the National Health Service Act 2006 that is not an NHS hospital, and 10
  - (b) in relation to Wales, means a hospital as defined by section 2 of the Care Standards Act 2000 that is not an NHS hospital.

*Responsible body*

- 6 The responsible body, in relation to a cared-for person, means – 15
- (a) if the arrangements are carried out mainly in a hospital, the hospital manager;
  - (b) if paragraph (a) does not apply and the arrangements are carried out mainly through the provision of NHS continuing health care under arrangements made by a clinical commissioning group or Local Health Board, that clinical commissioning group or Local Health Board; 20
  - (c) if neither paragraph (a) nor paragraph (b) applies, the responsible local authority (see paragraph 9).
- 7 (1) “Hospital manager” means – 25
- (a) if the hospital –
    - (i) is vested in a relevant national authority for the purposes of its functions under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or 30
    - (ii) consists of any accommodation provided by a local authority and used as a hospital by or on behalf of a relevant national authority under either of those Acts,
  - the Local Health Board or Special Health Authority responsible for the administration of the hospital; 35
  - (b) in relation to England, if the hospital falls within paragraph (a)(i) or (ii) and no Special Health Authority has responsibility for its administration, the Secretary of State;
  - (c) if the hospital is vested in an NHS trust or an NHS foundation trust, that trust; 40
  - (d) if the hospital is an independent hospital –
    - (i) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of regulated activities (within the meaning of that Part) carried on in the hospital, or 45

- (ii) in relation to Wales, the person registered, or required to be registered, under Part 2 of the Care Standards Act 2000 in respect of the hospital;
- (e) if the hospital is an independent hospital and there is no person registered, or required to be registered, as described in sub-paragraphs (i) and (ii) of paragraph (d) –
- (i) in relation to a hospital in England, the Secretary of State, or
- (ii) in relation to a hospital in Wales, the Welsh Ministers. 5 10
- (2) In sub-paragraph (1) “relevant national authority” means –
- (a) the Secretary of State,
- (b) the Welsh Ministers, or
- (c) the Secretary of State and the Welsh Ministers acting jointly. 15
- 8 In paragraph 6(b) “NHS continuing health care” is to be construed in accordance with standing rules under section 6E of the National Health Service Act 2006.
- 9 (1) In paragraph 6(c), “responsible local authority”, in relation to a cared-for person aged 18 or over, means – 20
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
- (b) if there is an individual development plan for the cared-for person – 25
- (i) the local authority responsible for maintaining that plan, or
- (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in; 30
- (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014 or under Part 4 of the Social Services and Well-being (Wales) Act 2014, the local authority meeting those needs; 35
- (d) in any other case, the local authority determined in accordance with sub-paragraph (6).
- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act. 40
- (3) If more than one local authority is meeting the needs for care and support of a cared-for person under the Social Services and Well-being (Wales) Act 2014, the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Act. 45
- (4) If the cared-for person is having needs for care and support met under both of the Acts mentioned in sub-paragraph (1)(c), the

responsible local authority is the local authority determined in accordance with sub-paragraph (6).

- (5) In paragraph 6(c), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means –
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan; 5
  - (b) if there is an individual development plan for the cared-for person –
    - (i) the local authority responsible for maintaining that plan, or 10
    - (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is being provided with accommodation – 15
    - (i) under section 20 of the Children Act 1989, or
    - (ii) under section 76 of the Social Services and Well-being (Wales) Act 2014 (anaw 4),
 the local authority providing that accommodation; 20
  - (d) if none of paragraphs (a) to (c) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, the local authority that is responsible under the order for the care of the cared-for person; 25
  - (e) if none of paragraphs (a) to (d) applies, the local authority determined in accordance with sub-paragraph (6).
- (6) In the cases mentioned in sub-paragraphs (1)(d), (4) and (5)(e), the “responsible local authority” is – 30
- (a) if the arrangements provide for the cared-for person to reside in one place, the local authority for the area in which that place is situated; 30
  - (b) if the arrangements provide for the cared-for person to reside in more than one place, the local authority for the area in which the main place of residence is situated; 35
  - (c) in any other case, the local authority for the area in which the arrangements are mainly carried out.
- (7) If a building is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (6) as situated in whichever of the areas the greater (or greatest) part of the building is situated. 40
- (8) In this paragraph –
- “Education, Health and Care plan” means a plan within the meaning of section 37(2) of the Children and Families Act 2014; 45
  - “individual development plan” means a plan within the meaning of section 10 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (anaw 2).
- 10 “English responsible body” means –

- (a) a hospital manager of a hospital in England;
  - (b) a clinical commissioning group;
  - (c) a local authority in England.
- 11 “Welsh responsible body” means –
- (a) a hospital manager of a hospital in Wales; 5
  - (b) a Local Health Board;
  - (c) a local authority in Wales.

## PART 2

## AUTHORISATION OF ARRANGEMENTS

*The authorisation conditions* 10

- 12 The authorisation conditions are that –
- (a) the cared-for person lacks the capacity to consent to the arrangements,
  - (b) the cared-for person has a mental disorder, and
  - (c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person. 15

*Rights to information*

- 13 (1) Prior to the authorisation process, the cared-for person must be fully informed of their rights. 20
- (2) The responsible body must take such steps as are practicable to ensure that the cared-for person and any appropriate person or Independent Mental Capacity Advocate representing and supporting them understand the possible outcome of the assessments, the reasons why the cared-for person may be deprived of their liberty and their rights – 25
- (a) to request an Approved Mental Capacity Professional’s assessment and review of the arrangements,
  - (b) to advocacy, and
  - (c) to challenge the authorisation in court. 30
- (3) If an Independent Mental Capacity Advocate is appointed under Part 5, the advocate is to take such steps as are practicable to help the cared-for person and the appropriate person to understand the following matters – 35
- (a) the steps involved in the authorisation process,
  - (b) the purpose, duration and effect of the authorisation,
  - (c) any conditions to which the authorisation is subject,
  - (d) the reasons why the cared-for person met the qualifying requirements in question,
  - (e) the right to object to the authorisation and the right to request a review by an Approved Mental Capacity Professional, 40
  - (f) the outcome of a review of the arrangements,
  - (g) the relevant rights of the cared-for person,

- (h) how the cared-for person may exercise relevant rights.
- (4) In this paragraph, “relevant rights” includes the right to make an application to the court to challenge an authorisation decision in court under section 21ZA and the right to request a review of the arrangements. 5
- (5) The responsible body must ensure that cases are referred to court when the cared-for person’s right to a court review is engaged.

*Authorisation*

- 14 The responsible body may authorise arrangements –
- (a) under paragraph 15, if the conditions in that paragraph are met, or 10
- (b) under paragraph 16 if –
- (i) the arrangements are care home arrangements,
- (ii) the responsible body decides that authorisation should be determined under that paragraph instead of under paragraph 15, and 15
- (iii) the conditions in paragraph 16 are met.
- 15 The conditions in this paragraph are that –
- (a) the responsible body is satisfied that this Schedule applies to the arrangements, 20
- (b) the responsible body is satisfied, on the basis of the determinations required by paragraphs 18 and 19, that the authorisation conditions are met,
- (c) the responsible body has carried out consultation under paragraph 20, 25
- (d) the responsible body is satisfied that any requirement under paragraph 39 or 40, that arises in relation to the arrangements before they are authorised, has been complied with,
- (e) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 21 to 23, 30
- (f) the person carrying out the review has determined –
- (i) under paragraph 22, that the authorisation conditions are met, or 35
- (ii) under paragraph 23, that it is reasonable for the responsible body to conclude that those conditions are met, and
- (g) a draft authorisation record has been prepared in accordance with paragraph 24. 40
- 16 The conditions in this paragraph are that –
- (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 17,
- (b) having regard to the statement (and the accompanying material), the responsible body is satisfied – 45
- (i) that this Schedule applies to the arrangements,
- (ii) that the authorisation conditions are met, and

- (iii) that the care home manager has carried out consultation under paragraph 20,
  - (c) the responsible body is satisfied that any requirement under paragraph 39 or 40, that arises in relation to the arrangements before they are authorised, has been complied with, 5
  - (d) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 21 to 23, and
  - (e) the person carrying out the review has determined – 10
    - (i) under paragraph 22, that the authorisation conditions are met, or
    - (ii) under paragraph 23, that it is reasonable for the responsible body to conclude that those conditions are met. 15
- 17 (1) A statement for the purposes of paragraph 16(a) is a statement in writing by the care home manager –
- (a) that the cared-for person is aged 18 or over,
  - (b) that the arrangements give rise to a deprivation of the cared-for person’s liberty, 20
  - (c) that the arrangements are not excluded by Part 7,
  - (d) that the determinations required by paragraphs 18 and 19 have been made,
  - (e) that the care home manager has carried out consultation under paragraph 20, and 25
  - (f) that the care home manager –
    - (i) is satisfied that paragraph 21(2)(a) or (b) applies,
    - (ii) is satisfied that neither applies, or
    - (iii) is not satisfied that a decision can be made as to whether either applies. 30
- (2) The statement –
- (a) must include the reasons for what is stated under subparagraph (1)(b) and (f);
  - (b) must be accompanied by – 35
    - (i) a record of the assessments on which the determinations required by paragraphs 18 and 19 were made,
    - (ii) evidence of the consultation mentioned in subparagraph (1)(e), and
    - (iii) a draft authorisation record prepared in accordance with paragraph 24. 40

*Determinations made on capacity and medical assessments*

- 18 (1) The determinations required by this paragraph are –
- (a) a determination made on an assessment in respect of the cared-for person, that the person lacks the capacity to consent to the arrangements, and 45
  - (b) a determination made on an assessment in respect of the cared-for person, that the person has a mental disorder.

- (2) An assessment must be carried out by a person who appears to the relevant person to have appropriate experience and knowledge.
- (3) But if the arrangements are care home arrangements and authorisation is being determined under paragraph 16, an assessment may not be carried out by a person who has a prescribed connection with a care home. 5
- (4) Regulations made by the appropriate authority under sub-paragraph (3) –
- (a) may make provision about a connection of any kind (financial or otherwise), and 10
- (b) may make different provision for assessments under sub-paragraph (1)(a) and sub-paragraph (1)(b).
- (5) The “appropriate authority” means –
- (a) where the assessment is in relation to an authorisation by an English responsible body, the Secretary of State, and 15
- (b) where the assessment is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.
- (6) The assessment may be one carried out for an earlier authorisation or for any other purpose, provided that it appears to the relevant person that it is reasonable to rely on the assessment. 20
- (7) The relevant person must have regard to –
- (a) the length of time since the assessment was carried out;
- (b) the purpose for which the assessment was carried out;
- (c) whether there has been a change in the cared-for person’s condition that is likely to affect the determination made on the assessment. 25
- (8) In this paragraph “relevant person” means –
- (a) the care home manager, if the arrangements are care home arrangements and authorisation is being determined under paragraph 16, or 30
- (b) the responsible body, in any other case.

*Determination that arrangements are necessary and proportionate*

- 19 (1) The determination required by this paragraph is a determination made on an assessment that the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person. 35
- (2) When making a determination under this paragraph regard must be had (amongst other matters) to the cared-for person’s wishes and feelings in relation to the arrangements.
- (3) The determination must be made by a person who appears – 40
- (a) to the care home manager, if the arrangements are care home arrangements and authorisation is being determined under paragraph 16, or
- (b) to the responsible body, in any other case,
- to have appropriate experience and knowledge to make the determination. 45

- (4) If the arrangements are care home arrangements and authorisation is being determined under paragraph 16, an assessment may not be carried out by a person who has a prescribed connection with a care home.
- (5) Regulations made by the appropriate authority under sub-paragraph (4) may make provision about a connection of any kind (financial or otherwise). 5
- (6) The “appropriate authority” means—
- (a) where the assessment is in relation to an authorisation by an English responsible body, the Secretary of State, and 10
- (b) where the assessment is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.

### *Consultation*

- 20 (1) Consultation under this paragraph must be carried out—
- (a) if the arrangements are care home arrangements and authorisation is being determined under paragraph 16, by the care home manager; 15
- (b) otherwise, by the responsible body.
- (2) The following must be consulted—
- (a) the cared-for person, 20
- (b) anyone named by the cared-for person as someone to be consulted about arrangements of the kind in question,
- (c) anyone engaged in caring for the cared-for person or interested in the cared-for person’s welfare,
- (d) any donee of a lasting power of attorney or an enduring power of attorney (within the meaning of Schedule 4) granted by the cared-for person, 25
- (e) any deputy appointed for the cared-for person by the court, and
- (f) any appropriate person and any independent mental capacity advocate concerned (see Part 5). 30
- (3) The main purpose of the consultation required by sub-paragraph (2) is to try to ascertain the cared-for person’s wishes or feelings in relation to the arrangements.
- (4) If it is not practicable or appropriate to consult a particular person falling within sub-paragraph (2) the duty to consult that person does not apply. 35

### *Pre-authorisation review*

- 21 (1) A pre-authorisation review for the purposes of paragraph 15(e) or 16(d) must not be by— 40
- (a) a person who is involved—
- (i) in the day-to-day care of the cared-for person, or
- (ii) in providing any treatment to the cared-for person, or

- 
- (b) a person who has a prescribed connection with a care home.
- (2) The review must be by an Approved Mental Capacity Professional if—
- (a) the arrangements provide for the cared-for person to reside in a particular place, and it is reasonable to believe that the cared-for person does not wish to reside in that place, or 5
- (b) the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place. 10
- (3) In determining whether either of paragraph (a) or (b) of sub-paragraph (2) applies, the responsible body must consider the views of any relevant person about the wishes of the cared-for person that are brought to the responsible body’s attention. 15
- (4) In sub-paragraph (3) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person’s welfare.
- (5) Regulations made by the appropriate authority under sub-paragraph (1)(b) may make provision about a connection of any kind (financial or otherwise). 20
- (6) The “appropriate authority” means—
- (a) where the pre-authorisation review is in relation to an authorisation by an English responsible body, the Secretary of State, and 25
- (b) where the pre-authorisation review is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.
- 22 (1) If the review is by an Approved Mental Capacity Professional (whether or not paragraph 21(2) applies), the Approved Mental Capacity Professional must— 30
- (a) review the information on which the responsible body relies, and
- (b) determine whether the authorisation conditions are met. 35
- (2) Before making the determination the Approved Mental Capacity Professional must—
- (a) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and 40
- (b) consult any other person listed in paragraph 20(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.
- 23 If the review is not by an Approved Mental Capacity Professional, the person carrying out the review must— 45
- (a) review the information on which the responsible body relies, and

- (b) determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

*Authorisation record*

- 24 (1) An authorisation record is a record relating to a cared-for person, specifying all arrangements authorised for the time being for that person, and specifying in relation to any arrangements – 5
- (a) the time from which the authorisation has effect, and when it is to cease to have effect under paragraph 26(1), (2) or (3),
  - (b) the programme for reviewing the authorisation,
  - (c) how the requirements of Part 5 are complied with, and 10
  - (d) anything else this Schedule requires to be specified.
- (2) An authorisation record may include any other information.
- (3) When the responsible body authorises arrangements the draft authorisation record required by paragraph 15(g) or 17(2)(b)(iii) – 15
- (a) becomes the authorisation record, and
  - (b) supersedes any earlier authorisation record.
- (4) The responsible body must revise the authorisation record if there is any change in any of the matters that are specified or required to be specified in it.

PART 3 20

DURATION, RENEWAL, VARIATION AND REVIEW OF AUTHORISATION

*Time for which authorisation has effect*

- 25 (1) An authorisation has effect from the time at which the responsible body gives the authorisation, unless at that time the responsible body specifies a later time. 25
- (2) The time specified must not be later than the end of the period of 28 days beginning with the day on which the responsible body gives the authorisation.
- 26 (1) An authorisation ceases to have effect (if not renewed) – 30
- (a) at the end of the period of 12 months beginning with the day it first has effect, or
  - (b) at the end of any shorter period specified by the responsible body at the time it gives the authorisation.
- (2) If the authorisation is renewed in accordance with paragraph 29, it ceases to have effect at the end of the renewal period. 35
- (3) If the responsible body at any time determines that an authorisation is to cease to have effect from any earlier day, it ceases to have effect from that day.
- (4) An authorisation ceases to have effect if, at any time, the responsible body believes or ought reasonably to suspect that any of the authorisation conditions are not met. 40

- (5) An authorisation ceases to have effect in relation to arrangements so far as at any time they are not in accordance with mental health requirements.

*Notification that arrangements have ceased to have effect*

- 27 If an authorisation of arrangements ceases to have effect (in whole or in part) under paragraph 26(4) or (5), the responsible body must take reasonable steps to ensure any person likely to be carrying out the arrangements is notified. 5

*Authorisation coming to an end early: arrangements to be treated as authorised*

- 28 (1) This paragraph applies if an authorisation ceases to have effect (in whole or in part) under paragraph 26(4) or (5). 10
- (2) For the purposes of section 4C (carrying out of authorised arrangements: restriction of liability) the arrangements are to be treated as authorised unless the person carrying out the arrangements knows or ought to know that – 15
- (a) the arrangements are no longer authorised,
  - (b) any of the authorisation conditions are not met, or
  - (c) the arrangements are not in accordance with mental health requirements.

*Renewal* 20

- 29 (1) The responsible body may, on one or more occasions, renew an authorisation in accordance with paragraph 31 or 32 for a specified period (“the renewal period”) of – 25
- (a) 12 months or less, on the first renewal, and
  - (b) 3 years or less, on any subsequent renewal.
- (2) An authorisation which has ceased to have effect cannot be renewed.
- 30 The responsible body may renew an authorisation – 30
- (a) under paragraph 31, if the conditions in that paragraph are met, or
  - (b) under paragraph 32 if – 35
    - (i) the authorisation relates to care home arrangements,
    - (ii) the responsible body decides that renewal should be determined under that paragraph instead of under paragraph 31, and
    - (iii) the conditions in paragraph 32 are met.
- 31 The conditions in this paragraph are that – 40
- (a) the responsible body is satisfied –
    - (i) that the authorisation conditions continue to be met, and
    - (ii) that it is unlikely that there will be any significant change in the cared-for person’s condition during

- the renewal period which would affect whether those conditions are met, and
- (b) the responsible body has carried out consultation under paragraph 20.
- 32 The conditions in this paragraph are that – 5
- (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 33,
- (b) having regard to the statement (and the accompanying material), the responsible body is satisfied –
- (i) that the authorisation conditions continue to be met, 10
- (ii) that it is unlikely that there will be any significant change in the cared-for person’s condition during the renewal period which would affect whether those conditions are met, and 15
- (iii) that the care home manager has carried out consultation under paragraph 20.
- 33 (1) A statement for the purposes of paragraph 32(a) is a statement in writing by the care home manager –
- (a) that the authorisation conditions continue to be met, 20
- (b) that it is unlikely that there will be any significant change in the cared-for person’s condition during the renewal period which would affect whether those conditions are met, and
- (c) that the care home manager has carried out consultation under paragraph 20. 25
- (2) The statement must be accompanied by evidence of the consultation.

*Variation*

- 34 The responsible body may vary an authorisation if the responsible body is satisfied – 30
- (a) that consultation under paragraph 20 has been carried out, and
- (b) that it is reasonable to make the variation.

*Reviews*

- 35 (1) In this paragraph “the reviewer” means the responsible body unless, in relation to care home arrangements, the responsible body decides the care home manager should be the reviewer for the purposes of this paragraph. 35
- (2) For any authorisation the responsible body must specify a programme of regular reviews that the reviewer must carry out. 40
- (3) The reviewer must also carry out a review –
- (a) if the authorisation is varied under paragraph 34;
- (b) if a reasonable request is made by a person with an interest in the arrangements; 45

- (c) if the cared-for person becomes subject to mental health arrangements;
  - (d) if the cared-for person becomes subject to mental health requirements;
  - (e) if sub-paragraph (4) applies; 5
  - (f) if (in any other case) the reviewer becomes aware of a significant change in the cared-for person’s condition or circumstances.
- (4) This sub-paragraph applies where –
- (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place, 10
  - (b) the reviewer becomes aware that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and 15
  - (c) the pre-authorisation review under paragraph 21 was not by an Approved Mental Capacity Professional.
- (5) For the purposes of sub-paragraph (4)(b) –
- (a) the reviewer must consider all the circumstances so far as they are reasonably ascertainable, including the cared-for person’s behaviour, wishes, feelings, views, beliefs and values, but 20
  - (b) circumstances from the past are to be considered only so far as it is still appropriate to consider them.
- (6) The care home manager must report to the responsible body on any review the manager carries out. 25
- (7) On any review where sub-paragraph (4) applies, the reviewer must refer the authorisation to an Approved Mental Capacity Professional for a determination as to whether the authorisation conditions are met. 30
- (8) Before making the determination, the Approved Mental Capacity Professional must –
- (a) review the authorisation,
  - (b) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and 35
  - (c) consult any other person listed in paragraph 20(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so. 40

#### PART 4

##### APPROVED MENTAL CAPACITY PROFESSIONALS

- 36 Each local authority must make arrangements –
- (a) for persons to be approved as Approved Mental Capacity Professionals, and 45
  - (b) to ensure that enough Approved Mental Capacity Professionals are available for its area.

- 37 (1) The appropriate authority may by regulations –
- (a) prescribe the criteria which must be met for a person to be eligible for approval as an Approved Mental Capacity Professional;
  - (b) prescribe matters which a local authority must or may take into account when deciding whether to approve a person as an Approved Mental Capacity Professional; 5
  - (c) provide for a prescribed body to approve training for persons who are, or who wish to become, Approved Mental Capacity Professionals. 10
- (2) Regulations under sub-paragraph (1)(a) may include criteria relating to qualifications, training or experience.
- (3) If regulations made by the Secretary of State under sub-paragraph (1)(c) provide for Social Work England to approve training, the regulations may – 15
- (a) give Social Work England power to charge fees for approval;
  - (b) give Social Work England power to make rules in relation to the charging of fees;
  - (c) make provision in connection with the procedure for making those rules (including provision requiring Social Work England to obtain the Secretary of State’s approval before making rules). 20
- (4) Section 50(2) to (7) of the Children and Social Work Act 2017 apply for the purposes of sub-paragraph (3) as they apply for the purposes of that section. 25
- (5) “Prescribed” means prescribed by the regulations.
- (6) The “appropriate authority” means –
- (a) the Secretary of State, in relation to the approval of a person by, or a person approved by, a local authority whose area is in England, and 30
  - (b) the Welsh Ministers, in relation to the approval of a person by, or a person approved by, a local authority whose area is in Wales.

## PART 5 35

## APPOINTMENT OF IMCA

*Appointment of Independent Mental Capacity Advocate*

- 38 (1) Paragraphs 39 and 40 apply to the responsible body at all times while arrangements are authorised or are being proposed.
- (2) In those paragraphs “IMCA” means an independent mental capacity advocate. 40
- 39 (1) The responsible body must take all reasonable steps to appoint an IMCA to represent and support the cared-for person if –
- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and 45

- (b) sub-paragraphs (4) and (5) do not apply.
- (2) An IMCA should be appointed if the cared-for person –
- (a) has capacity to consent to being represented and supported by an IMCA, and
- (b) makes a request to the responsible body for an IMCA to be appointed. 5
- (3) An IMCA should be appointed if –
- (a) the cared-for person lacks capacity to consent to being represented and supported by an IMCA, unless
- (b) the responsible body is satisfied that being represented and supported by an IMCA would not be in the cared-for person’s best interests. 10
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect. 15
- (5) This paragraph does not apply if the responsible body is satisfied that there is a person (an “appropriate person”) who –
- (a) would be a suitable person to represent and support the cared-for person,
- (b) consents to representing and supporting the cared-for person, and 20
- (c) is not engaged in providing care or treatment for the cared-for person in a professional capacity.
- (6) A person is not to be regarded as a suitable person unless –
- (a) where the cared-for person has capacity to consent to being represented and supported by that person, the cared-for person does consent, or 25
- (b) where the cared-for person lacks capacity to consent to being represented and supported by that person, the responsible body is satisfied that being represented and supported by that person would be in the cared-for person’s best interests. 30
- 40 (1) If the cared-for person has an appropriate person, the responsible body must take all reasonable steps to appoint an IMCA to support the appropriate person if – 35
- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and
- (b) sub-paragraph (4) does not apply.
- (2) An IMCA should be appointed if the appropriate person –
- (a) has capacity to consent to being supported by an IMCA, and 40
- (b) makes a request to the responsible body for an IMCA to be appointed.
- (3) An IMCA should be appointed if –
- (a) the appropriate person lacks capacity to consent to being supported by an IMCA, and 45

- (b) the responsible body is satisfied the appropriate person’s being supported by an IMCA would be in the cared-for person’s best interests.
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect. 5

PART 6

MONITORING AND REPORTING

- 41 (1) The appropriate authority may by regulations make provision for, and in connection with, requiring one or more bodies prescribed by the regulations to monitor, and report on, the operation of this Schedule. 10
- (2) The regulations may include provision giving a prescribed body authority – 15
  - (a) to visit any place where arrangements authorised under this Schedule are carried out;
  - (b) to meet with cared-for persons;
  - (c) to require the production of, and to inspect, records relating to the care or treatment of persons.
- (3) The “appropriate authority” means – 20
  - (a) in relation to the operation of this Schedule in relation to England, the Secretary of State, and
  - (b) in relation to the operation of this Schedule in relation to Wales, the Welsh Ministers.

PART 7

25

EXCLUDED ARRANGEMENTS: MENTAL HEALTH

*Excluded arrangements*

- 42 This Schedule does not apply to arrangements if –
  - (a) they are mental health arrangements (see paragraphs 43 to 53), or
  - (b) they are not in accordance with mental health requirements (see paragraph 54). 30

*Kinds of mental health arrangements*

- 43 For the purposes of this Schedule arrangements in relation to a person (“P”) are “mental health arrangements” if paragraph 44, 45, 46, 47 or 48 applies. 35
- 44 This paragraph applies if –
  - (a) P is subject to the hospital treatment regime, and
  - (b) P is detained in a hospital under that regime.
- 45 This paragraph applies if – 40
  - (a) P is subject to the hospital treatment regime,

- 
- (b) P is not detained in a hospital under that regime, and  
(c) the arrangements are for enabling medical treatment for mental disorder.
- 46 This paragraph applies if P is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or 5  
(b) anything which has the same effect, under another England and Wales enactment,  
and the arrangements are for enabling medical treatment for mental disorder. 10
- 47 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that P is subject to—
- (a) a guardianship application under section 7 of the Mental Health Act,  
(b) a guardianship order under section 37 of that Act, or 15  
(c) anything which has the same effect as something within paragraph (a) or (b), under another England and Wales enactment.
- (3) Condition 2 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder. 20
- (4) Condition 3 is that P objects—
- (a) to being accommodated in a hospital for that purpose, or  
(b) to being given some or all of that treatment.
- (5) Condition 4 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects. 25
- (6) For provision about determining whether P objects see paragraph 49.
- 48 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that— 30
- (a) an application in respect of P could be made under section 2 or 3 of the Mental Health Act, and  
(b) P could be detained in a hospital in pursuance of such an application, were one made.
- (3) Condition 2 is that P is not subject to any of these— 35
- (a) the hospital treatment regime;  
(b) a community treatment order under section 17A of the Mental Health Act;  
(c) a guardianship application under section 7 of the Mental Health Act; 40  
(d) a guardianship order under section 37 of the Mental Health Act;  
(e) anything which has the same effect as something within paragraph (b), (c) or (d), under another England and Wales enactment. 45

- (4) Condition 3 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder.
- (5) Condition 4 is that P objects –
- (a) to being accommodated in a hospital for that purpose, or
  - (b) to being given some or all of that treatment.
- (6) Condition 5 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
- (7) For provision about determining whether P objects see paragraph 49. 10
- 49 (1) In determining whether P objects, regard must be had to all the circumstances (so far as they are reasonably ascertainable), including the following –
- (a) P’s behaviour;
  - (b) P’s wishes and feelings;
  - (c) P’s views, beliefs and values.
- (2) But regard is to be had to circumstances from the past only so far as it is still appropriate to have regard to them. 15

*Mental health arrangements: the hospital treatment regime*

- 50 (1) P is subject to the hospital treatment regime if P is subject to –
- (a) an application, order or direction listed in column 1 of the Table, under the section of the Mental Health Act listed in column 2, or
  - (b) anything that has the same effect as any of those, under another England and Wales enactment,
- subject to sub-paragraph (2). 20 25
- (2) P is not subject to the hospital treatment regime during any period for which P is subject to –
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) anything which has the same effect, under another England and Wales enactment.
- 30

<i>Obligation</i>	<i>Mental Health Act section</i>	
Application for admission for assessment	Section 2	35
Application for admission for assessment	Section 4	
Application for admission for treatment	Section 3	
Order for remand to hospital	Section 35	
Order for remand to hospital	Section 36	
Hospital order	Section 37	40

<i>Obligation</i>	<i>Mental Health Act section</i>	
Interim hospital order	Section 38	
Order for detention in hospital	Section 44	
Hospital direction	Section 45A	5
Transfer direction	Section 47	
Transfer direction	Section 48	
Hospital order	Section 51	

*Mental health arrangements: other definitions*

- 51 In this Part – 10
- “donee” means a donee of a lasting power of attorney granted by P;
- “England and Wales enactment” means an enactment, in the Mental Health Act or elsewhere, which extends to England and Wales (whether or not it also extends elsewhere); 15
- “hospital” has the same meaning as in Part 2 of the Mental Health Act;
- “learning disability” has the meaning given by section 1(4) of the Mental Health Act;
- “medical treatment” is to be read in accordance with paragraph 52. 20
- 52 In “medical treatment for mental disorder” –
- (a) “medical treatment” has the same meaning as in the Mental Health Act (see section 145(1) and (4)), but
- (b) in the case of a person with learning disability, the medical treatment is not to be considered by reason of that disability to be for mental disorder unless the disability is associated with abnormally aggressive or seriously irresponsible conduct by that person. 25
- 53 A decision of a donee or deputy is valid if it is made – 30
- (a) within the scope of the person’s authority as donee or deputy, and
- (b) in accordance with Part 1 of this Act.

*Mental health requirements*

- 54 (1) In this Schedule “mental health requirements” means any of the following – 35
- (a) a requirement imposed in respect of a person by a guardian exercising the power under section 8 of the Mental Health Act;
- (b) a condition or direction imposed or given in respect of a person by a responsible clinician exercising the power 40

- under section 17 of the Mental Health Act (leave of absence from hospital);
- (c) a condition specified by a responsible clinician in a community treatment order made in respect of a person under section 17A of the Mental Health Act (for the imposition of conditions, see section 17B of that Act); 5
- (d) a requirement imposed by a guardian in respect of a person who is the subject of a guardianship order under section 37 of the Mental Health Act (see section 40 of and Part 1 of Schedule 1 to that Act); 10
- (e) a condition imposed by the Secretary of State on the discharge from hospital of a person subject to a restriction order under section 42 of the Mental Health Act;
- (f) a condition imposed by any of the persons or bodies listed in sub-paragraph (2) when a person is conditionally discharged under section 73 of the Mental Health Act. 15
- (2) The persons or bodies for the purpose of sub-paragraph (1)(f) are—
- (a) the First-tier Tribunal;
- (b) the Mental Health Review Tribunal for Wales; 20
- (c) the Secretary of State;
- (d) the Welsh Ministers.

## PART 8

## TRANSITORY PROVISION

- 55 Until the repeal of section 324 of the Education Act 1996 made by paragraph 4(1) and (9) of Schedule 1 to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (anaw 2) comes fully into force— 25
- (a) paragraph 9(1)(b) has effect as if there were substituted— 30
- “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
- (i) the local authority responsible for maintaining that plan or statement, or
- (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”, 35
- (b) paragraph 9(5)(b) has effect as if there were substituted— 40
- “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
- (i) the local authority responsible for maintaining that plan or statement, or
- (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”, and 45



- (a) omit the entry relating to authorisation under Schedule A1, and
  - (b) in the definition of “local authority”, for “Schedule A1” substitute “Schedule AA1”.
- 8 (1) Section 65 (rules, regulations etc) is amended as follows.
- (2) After subsection (2) insert – 5
  - “(2A) Any statutory instrument containing regulations made by the Welsh Ministers under Schedule AA1 is subject to annulment in pursuance of a resolution of the National Assembly for Wales.”
- (3) Omit subsections (4A) to (4C).

PART 2

10

AMENDMENTS TO OTHER LEGISLATION

*Mental Health Act 2007 (c. 12)*

- 9 In Part 1 of Schedule 9 to the Mental Health Act 2007 (amendments to Mental Capacity Act 2005) omit paragraphs 2, 5(3), 6, 7(3) and (4), 8, 9, 10(2) and (3) and 11. 15

# **Mental Capacity (Amendment) Bill [HL]**

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## **B I L L**

To amend the Mental Capacity Act 2005 in relation to procedures in accordance with which a person may be deprived of liberty where the person lacks capacity to consent; and for connected purposes.

*Brought from the Lords, 11 December 2018.*

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*Ordered, by the House of Commons, to be  
Printed, 11 December 2018.*

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