

MENTAL CAPACITY (AMENDMENT) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Mental Capacity (Amendment) Bill [HL] as brought from the House of Lords on 11 December 2018 (Bill 303).

- These Explanatory Notes have been prepared by the Department of Health and Social Care in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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These Explanatory Notes relate to the Mental Capacity (Amendment) Bill [HL] as brought from the House of Lords on 11 December 2018 (Bill 303)

Overview of the Bill

- 1 The purpose of the Mental Capacity (Amendment) Bill [HL] is to reform the process in the Mental Capacity Act 2005 (“MCA”) for authorising arrangements enabling the care or treatment of people who lack capacity to consent to the arrangements, which give rise to a deprivation of their liberty.
- 2 The Bill amends the 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* (2017).¹

Policy background

3. In 2014 the Government asked the Law Commission to review the Deprivation of Liberty Safeguards scheme (“DoLS”) (contained in Schedules A1 and 1A to the MCA). The DoLS provide a process for authorising adults who lack capacity to consent to being accommodated in a hospital or care home for the purpose of care or treatment to be deprived of liberty if it is in their best interests.
4. The DoLS scheme was introduced in 2009 following the decision of the European Court of Human Rights in *HL v United Kingdom*.² This judgment identified a gap in the law, known as the “Bournewood gap”³ The European Court held that individuals who lacked capacity and were being deprived of liberty for the purpose of treatment under the common law, rather than under the Mental Health Act, were being denied the necessary procedural safeguards demanded by Article 5 of the European Convention on Human Rights. Article 5 provides that no one shall be deprived of liberty except in specific cases (one of which is the lawful detention of persons of “unsound mind”) and “in accordance with a procedure prescribed by law”.
5. However, the DoLS have been subject to criticism since their inception. The House of Lords Select Committee on the MCA found in its 2014 post-legislative scrutiny report that the DoLS were “frequently not used when they should be, leaving individuals without the safeguards Parliament intended” and care providers “vulnerable to legal challenge”. The Committee concluded that “the legislation is not fit for purpose” and recommended its replacement.⁴
6. In 2014 the decision of the Supreme Court in the case of *Cheshire West*⁵ gave a significantly

¹ <https://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>

² [2004] ECHR 471.

³ In reference to the decision of the House of Lords in the same matter: *R v Bournewood Community and Mental Health Trust* [1999] AC 458.

⁴ In reference to the decision of the House of Lords in the same matter: *R v Bournewood Community and Mental Health Trust* [1999] AC 458.

⁵ https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

wider interpretation of deprivation of liberty than had been previously applied in the health and social care context. This increased considerably the number of people treated as being deprived of liberty, and correspondingly increased the obligations on public authorities (primarily local authorities) in connection with authorising, and providing safeguards for, these extra deprivations of liberty.

7. Following *Cheshire West*, the Government asked the Law Commission to review this area of law. The Commission's final report, which included a draft Bill, called for the DoLS to be replaced as a matter of "pressing urgency" and set out a replacement scheme. The new scheme was intended to establish a proportionate and less bureaucratic means of authorising deprivation of liberty (see footnote 1).
8. The Government's final response to that report was published on 14 March 2018⁶. The Government accepted that the current DoLS system should be replaced, and broadly agreed with the model set out in the Commission's draft Bill. This Bill is based on the Law Commission's recommendations.

Legal background

9. The relevant legal background is explained in the policy background section of these Notes (see paragraphs 3 to 8 of these Notes).

⁶ <http://qna.files.parliament.uk/ws-attachments/861932/original/180314%20Response%20to%20Law%20Commission%20on%20DoLS%20-%20final.pdf>

Territorial extent and application

10. Clause 5 sets out the territorial extent of the Bill, that is, the jurisdictions in which the provisions of the Bill form part of the law. The extent of the Bill can be different from its application. Application is about where a provision of a Bill produces a practical effect.
11. The Bill extends and applies to England and Wales only.
12. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned.
13. The matters to which the provisions of the Bill relate are not within the legislative competence of the National Assembly for Wales, and do not alter the competence of the Welsh Government except in a way that is consequential, supplementary or incidental to the subject matter of the Bill. Accordingly, no legislative consent motion is being sought in relation to any provision of the Bill. This position is subject to change. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.
14. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Safeguards

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

15. Clause 1(4) inserts the new Schedule AA1 to the MCA. This Schedule contains the new administrative scheme for authorising arrangements enabling the care and treatment of persons who lack capacity to consent to those arrangements, which give rise to a deprivation of liberty (referred to in these Notes as the Liberty Protection Safeguards). It will replace Schedules A1 and 1A to the MCA, with those Schedules being repealed under paragraph 2 of Schedule 2 to the Bill. More information on the contents of Schedule AA1 can be found in paragraphs 26-74 of these Notes.
16. Clause 1(2) amends section 4A of the MCA so as to refer to the new Schedule AA1.
17. Subsection (3) inserts a new section 4C, “Carrying out of authorised arrangements giving rise to deprivation of liberty”. This provides a person carrying out arrangements that are authorised under Schedule AA1 with a defence to civil and criminal liability in relation to non-negligent acts done while carrying out the authorised arrangements.

Clause 2: Authorisation of steps necessary for life-sustaining treatment or vital act

18. Clause 2 amends section 4B of the MCA so as to provide express authority for a person to take steps to deprive another person of their liberty if four conditions are met (see subsections (2) to (6)). Broadly speaking, section 4B gives authority to take steps to deprive a person of their liberty in three circumstances (see subsections (6) and (7)): (1) where a decision relevant to whether there is authority to deprive the person of liberty is being sought from a court; (2) where a responsible body is determining whether to authorise arrangements under Schedule AA1; or (3) in an emergency. An “emergency” is defined in subsection (9).
19. In each situation the person must reasonably believe that the person to be deprived of liberty lacks the capacity to consent to the steps being taken (see subsection (5)). The deprivation of liberty must also be necessary either to provide the person with life-sustaining treatment or to prevent a serious deterioration in their condition (see subsections (2) to (4)). The authority in subsection (7)(b) to deprive a person of liberty while an authorisation is being sought under Schedule AA1 takes the place, in part, of the current provision within the DoLS system for urgent authorisations.

Clause 3: Powers of the court to determine questions

20. Clause 3 inserts a new section 21ZA “Powers of court in relation to Schedule AA1” into the MCA. It replaces section 21A of the MCA, which will be repealed under paragraph 2 of Schedule 2 to the Bill.
21. The new section 21ZA sets out the powers of the Court of Protection in relation to arrangements authorised under Schedule AA1.

General

Clause 4: Consequential provision etc

22. Clause 4 grants the Secretary of State a regulation making power to make provision that is consequential on any provision of the Bill. This includes the power to amend, repeal or revoke primary or secondary legislation. The regulation making power must be exercised by statutory instrument. The regulations will be subject to the negative procedure (annulment in pursuance of a resolution of either House of Parliament), save where the Secretary of State proposes to make changes to primary legislation, in which case the affirmative procedure applies (where a draft of the instrument must be laid before and approved by a resolution of each House of Parliament).
23. Clause 4(6) highlights that minor and consequential amendments are made in Schedule 2.

Clause 5: Extent, commencement and short title

24. Clause 5 sets out that the Bill extends to England and Wales only.
25. Clause 4 (except subsection (6)) and clause 5 come into force on the day the Bill is passed. All other provisions of the Bill will come into force on a date determined by the Secretary of State by regulations. Clause 5(5) grants the Secretary of State a regulation making power to make transitional and saving provision.

Schedules

Schedule 1: Schedule to be inserted as Schedule AA1 to the Mental Capacity Act 2005

Overview

26. Schedule 1 inserts Schedule AA1 into the MCA. This will replace Schedules A1 and 1A to the MCA. Schedule AA1 provides for the new administrative scheme for the authorisation of arrangements enabling care or treatment of a person who lacks capacity to consent to the arrangements, which give rise to a deprivation of that person's liberty (referred to as the "Liberty Protection Safeguards"). Under Schedule AA1, a responsible body (defined in paragraph 6) will be able to authorise arrangements giving rise to a deprivation of a person's liberty in any setting.
27. Before a responsible body can authorise the arrangements, it must be satisfied that three authorisation conditions are met (see paragraph 12): (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person has a mental disorder; and (3) the arrangements are necessary and proportionate to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person. A person who is not involved in the day-to-day care of, or in providing any treatment to, the person, and who does not have a prescribed connection with a care home (see paragraph 21), must also carry out a pre-authorisation review to determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met. In cases where the person is objecting to the proposed arrangements, an Approved Mental Capacity Professional (see paragraph 21(2)) must carry out the pre-authorisation review. In that case, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.
28. Once an authorisation has been given, there are a number of safeguards put in place for the person. These include regular reviews of the authorisation by the responsible body or care home (see paragraph 35), and the right to challenge the authorisation before the Court of Protection (under clause 3).

29. The effect of Part 5 is that the person is to be represented and supported either by an “appropriate person” or an Independent Mental Capacity Advocate (IMCA) when an authorisation is being proposed and while an authorisation is in place.
30. Part 7 of Schedule AA1 sets out the interface between the Liberty Protection Safeguards scheme and the Mental Health Act 1983. Broadly speaking, patients who are detained under the Mental Health Act 1983 or who are objecting to their treatment, cannot be made subject to an authorisation under Schedule AA1. But in the community a person could be subject to an authorisation under Schedule AA1 and subject to Mental Health Act requirements, so long as the authorisation does not conflict with those requirements (see paragraphs 42(b) and 54 of the new Schedule AA1).

Part 1: Introductory and interpretation

31. Paragraph 1 describes the contents of Schedule AA1.
32. Paragraph 2 sets out the arrangements and the persons that are within the scope of the Schedule. Schedule AA1 applies to the arrangements for enabling the care or treatment of a “cared-for person” which give rise to a deprivation of that person’s liberty, and are not mental health arrangements under Part 7. A “cared-for person” is defined in sub-paragraph (2) as a person who is aged 16 or over, lacks capacity to consent to the arrangements and has a mental disorder.
33. Schedule AA1 applies to arrangements enabling care or treatment to be provided; it does not apply to the direct delivery of the care and treatment (this is addressed elsewhere in the MCA: see sections 5 and 6). For example, Schedule AA1 could apply to arrangements to ensure that less restrictive practice is being followed. The delivery of the person’s care and treatment at the care home would be governed by section 5 of the MCA.
34. Paragraph 2(3) clarifies that the arrangements may apply in more than one setting. For example, if someone is receiving care in a care home, it would be possible for their arrangements to apply when receiving treatment during a planned hospital admission.
35. Paragraph 3 sets out key definitions for the purposes of Schedule AA1.
36. Paragraph 4 sets out the meaning of “local authority” for the purposes of Schedule AA1.
37. Paragraph 5 defines “hospital” for the purposes of this Schedule as either an independent hospital or an NHS hospital.
38. Paragraph 6 identifies the responsible body in the case of a particular individual. The effect of paragraph 6 is that the “hospital manager” (as further defined in paragraph 7) is responsible for authorising arrangements carried out mainly in a hospital, and a clinical commissioning group (in England) or local health board (in Wales) is responsible in the case of arrangements carried out through NHS continuing health care (but not mainly in a hospital). A local authority is the responsible body in all other cases, including where care is arranged by the local authority, and where care is provided to people paying for their own care (self-funders).
39. Paragraph 7 defines a “hospital manager” for the purposes of paragraph 6. This is the NHS body that manages an NHS hospital, the person in whose name an independent hospital is registered or, in the small number of cases where there is no registered person the Secretary of State or Welsh Ministers. Sub-paragraph (2) defines the “relevant national authority” for the purpose of

this paragraph as meaning either the Secretary of State or the Welsh Ministers or the Secretary of State and the Welsh Ministers acting jointly.

40. Paragraph 9 identifies which local authority is the responsible local authority in any given case. Sub-paragraph (1) defines “responsible local authority” in relation to people over 18, and sub-paragraph (5) defines “responsible local authority” in relation to people aged 16 and 17. For people over 18, in most cases, it will be the local authority where the individual is ordinarily resident for social care purposes. However, in the case of self-funders and where a person’s care and support needs are being met under more than one piece of social care legislation, sub-paragraph (6) provides that the local authority for the area where the arrangements provide for the person to reside, or to mainly reside in the case of arrangements relating to more than one location, will be the responsible body.
41. Paragraphs 10 and 11 define “English responsible body” and “Welsh responsible body” respectively.

Part 2: Authorisation of arrangements

42. Paragraph 12 sets out three authorisation conditions which must be satisfied before a responsible body may authorise arrangements. The authorisation conditions are that: (1) the person lacks capacity to consent to the arrangements; (2) the person has a mental disorder; and (3) the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person.
43. Paragraph 13 sets out that prior to authorisation the person must be informed of their rights. Sub-paragraph (2) puts a duty on the responsible body to ensure that the person and any appropriate person or IMCA supporting them understand the possible outcomes of the assessments, the reasons why the person may be deprived of their liberty, and their rights under the Liberty Protection Safeguards scheme. These include the right to request a review by an AMCP, the right to advocacy and the right to challenge an authorisation in court. Sub-paragraph (3) requires an IMCA appointed under Part 5 to take steps to help the person and any appropriate person to understand various matters relating to the authorisation process.
44. Paragraph 14 sets out that a responsible body may authorise arrangements in accordance with paragraph 15 where the conditions in that paragraph are met. However, where the arrangements are “care home arrangements”, the responsible body can decide whether to determine authorisation in accordance with either paragraph 15 or paragraph 16. “Care home arrangements” are defined in paragraph 3 as arrangements in relation to a person 18 or over which are carried out wholly or partly in a care home. Both paragraph 15 and paragraph 16 set out conditions which must be satisfied before an authorisation can be given. The conditions in paragraph 16, which applies to care home arrangements, include a role for the care home manager (defined in paragraph 3). The general effect is that the Care Home Manager arranges the assessments and must provide a statement to the responsible body (paragraph 16(a)). Paragraph 17 provides further detail of what the care home manager’s statement to the responsible body under paragraph 16(a) must contain. The requirements under paragraph 17 largely mirror those under paragraph 15.
45. Paragraph 18 requires a determination to be made, following a capacity and medical assessment, that the person lacks the capacity to consent to the arrangements, and has a mental disorder, for

the purposes of paragraph 15(a)-(b). Sub-paragraph (2) provides that the assessments must be carried out by a person who appears to the responsible body to have appropriate experience and knowledge. Sub-paragraph (3) sets out that a person with a prescribed connection with a care home may not undertake the assessments if the authorisation is being determined in accordance with paragraph 16.

46. Paragraph 18(6) permits a responsible body or care home manager in making determinations or submitting a statement for that purpose to rely upon assessments carried out previously, including those prepared for another purpose, so long as it is reasonable to do so. Sub-paragraph (7) sets out the factors that the responsible body or care home manager must have regard to when considering whether it is reasonable to rely upon an existing assessment. The intention is that an existing assessment can be relied on, provided that it gives a reliable indication of the person's current situation.
47. Paragraph 19 requires a determination to be made that the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person, for the purposes of paragraph 12(c). The determination is to be made by a person who appears to the care home manager or responsible body to have appropriate experience and knowledge to make the determination. If the arrangements are care home arrangements being authorised in accordance with paragraph 16, the assessment must not be carried out by a person who has a prescribed connection with a care home (sub-paragraph (4)).
48. Paragraph 20 sets out who the responsible body or care home manager must consult in order for arrangements to be authorised under Schedule AA1. Sub-paragraph (3) sets out that the main purpose of the consultation is to ascertain the person's wishes and feelings in relation to the arrangements. Sub-paragraph (4) sets out that this duty only applies to the extent that it is practicable and appropriate to do so.
49. Paragraph 21 sets out the process for the pre-authorisation review, which must be arranged by the responsible body and carried out in all cases. This provides the degree of independence as required by case law arising from Article 5 of the ECHR. Sub-paragraph (1) excludes people involved in the day-to-day care or treatment of the person or someone who has a prescribed connection with a care home from carrying out the pre-authorisation review (see paragraph 15(e) and 16(d)). Sub-paragraph (2) sets out that the review must be carried out by an Approved Mental Capacity Professional where it is reasonable to believe that the person does not wish to reside or receive care or treatment in the place provided for by the arrangements and that the views of any relevant person must be considered in making that determination.
50. Paragraph 22 sets out that the Approved Mental Capacity Professional must review the information relied on by the responsible body and determine whether the conditions in paragraph 12(a) to (c) have been met. Sub-paragraph (2) sets out that the Approved Mental Capacity Professional must meet with the person if it is appropriate and practicable to do so. The Approved Mental Capacity Professional must also consult with any person listed in paragraph 20(2) and take any other action so far as they consider appropriate in order to make the determination.
51. Paragraph 23 requires that where the pre-authorisation review is not carried out by an Approved Mental Capacity Professional, the person carrying out the review must review the information relied on by the responsible body and determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.
52. Paragraph 24 sets out what must be contained within an authorisation record. Subparagraph (3) provides that where a draft authorisation record has been prepared in accordance with paragraph 15(g) or 17(2)(b)(iii), that draft record becomes the authorisation record and that it supersedes any

earlier authorisation record. The authorisation record specifies all arrangements authorised for the person; it is intended that the record can travel with them between different settings.

Part 3: Duration renewal and review of authorisation

53. Paragraph 25 sets out when an authorisation has effect. This is either immediately or from a later date specified by the responsible body, which can be no later than 28 days later.
54. Paragraph 26 sets out when an authorisation ceases to have effect. This is either at the end of period of 12 months or at the end of a shorter period determined by the responsible body (see sub-paragraphs 1). Sub-paragraph (2) provides that if the authorisation is renewed under paragraph 29, the authorisation ceases to have effect at the end of the renewal period. The responsible body may at any time determine that the authorisation ceases to have effect from any earlier day (sub-paragraph (3)). An authorisation will cease to have effect if at any time the responsible body determines that the conditions for the authorisation are not met (sub-paragraph (4)). An authorisation will also cease to have effect in relation to any arrangements so far as they are not in accordance with mental health requirements (sub-paragraph (5)).
55. In the event that an authorisation ceases to have effect (in whole or in part) under paragraph 26(4) or (5), paragraph 27 requires the responsible body to take reasonable steps to notify any person who is likely to be carrying out the arrangements that the arrangements are no longer authorised. Paragraph 28 further specifies that where an authorisation ceases to have effect under paragraph 26(4) or (5), the arrangements are to be treated as authorised for the purposes of section 4C unless the person carrying out the arrangements knew or ought to have known that the arrangements were no longer authorised, any of the conditions were not met or the arrangements were not in accordance with mental health conditions.
56. Paragraph 29(1) sets out the renewal period for authorisations. It allows a first renewal for up to 12 months, and subsequent renewals for up to three years at a time. Paragraph 30 sets out that a responsible body may renew an authorisation in accordance with paragraph 31 where the conditions in that paragraph are met. However, where the arrangements are “care home arrangements”, the responsible body can decide whether to renew the authorisation in accordance with either paragraph 31 or paragraph 32.
57. Paragraph 31(a)(ii) requires that the responsible body must be satisfied that it is unlikely that there will be any significant change in the person’s condition during the renewal period which would affect whether the authorisation conditions are met (paragraph 124). This is to ensure that longer-term renewals are only used in the case of persons whose condition and circumstances are likely to be long-term and stable. The responsible body must also carry out consultation in accordance with paragraph 20.
58. Paragraph 32(a) sets out that for care home arrangements being renewed in accordance with paragraph 32 the care home manager must provide the responsible body with a statement (see paragraph 33) before the authorisation can be renewed. The requirements for the statement under paragraph 33 mirror the requirements under paragraph 31. The statement must confirm that the authorisation conditions (see paragraph 12) continue to be met and that it is unlikely that there will be any significant change in the person’s condition during the renewal period which would affect whether the authorisation conditions would be met, the care home manager must also provide the responsible body with evidence that they have consulted in accordance with paragraph 20. The responsible body may renew the authorisation in reliance on that statement.

59. Paragraph 34 permits the responsible body to vary an authorisation where consultation in accordance with paragraph 20 has taken place and it is reasonable to make the variation. This will give responsible bodies flexibility to adapt arrangements where reasonably necessary. Any variation of an authorisation will trigger a review of the authorisation (paragraph 35(3)(a)).
60. Paragraph 35(2) requires a responsible body to specify a programme of regular reviews. The review must be carried out by a reviewer, who is defined under sub-paragraph (1) as the responsible body. In relation to care home arrangements, the responsible body can also decide that the care home manager will be the reviewer. This is to ensure that authorisation records which travel with the person between different settings are reviewed by successive responsible bodies.
61. Paragraph 35(3) provides that the reviewer must review an authorisation if any of the conditions specified apply, including: upon a variation under paragraph 34; if a reasonable request is made by a someone with an interest in the arrangements; if the person becomes subject to mental health arrangements or different Mental Health Act requirements; or where the person objects to the arrangements and the pre-authorisation review (paragraphs 21-23) was not carried out by an Approved Mental Capacity Professional. A review will also be triggered where there is a significant change in the person's condition or circumstances.
62. Sub-paragraphs (4) and (7) require a referral to an Approved Mental Capacity Professional in circumstances where the reviewer becomes aware that a case now calls for such a referral (where the person subsequently objects to the arrangements).
63. Sub-paragraph 35(8) sets out what the Approved Mental Capacity Professional must do when a case is referred to them for review.

Part 4: Approved Mental Capacity Professionals

64. Paragraph 36 requires each local authority to make arrangements for the approval of persons to act as Approved Mental Capacity Professionals. Each local authority is also required to make arrangements to ensure that there are sufficient numbers of persons approved as Approved Mental Capacity Professionals for its area.
65. Paragraph 37 enables the Secretary of State and Welsh Ministers to prescribe in regulations the criteria for approval as an Approved Mental Capacity Professional, matters which a local authority must or may take into account when deciding whether or not to approve a person as an Approved Mental Capacity Professional, and provide for a prescribed body to approve training for Approved Mental Capacity Professionals. Sub-paragraph (2) provides that the regulations may include criteria relating to qualifications, training or experience.
66. Sub-paragraph (3) provides that if the regulations made by the Secretary of State under paragraph 37(1) provide for Social Work England to approve the training for Approved Mental Capacity Professionals, then the regulations may grant Social Work England the power to charge fees for approval.

Part 5: Appointment of IMCA

67. The effect of paragraphs 38 to 40 of Schedule AA1 is that from the point that arrangements are proposed under the Schedule to the point when the authorisation comes to an end, the person is to be represented and supported either by an “appropriate person” (see paragraph 39(5)) or an Independent Mental Capacity Advocate (“IMCA”).
68. A responsible body must take all reasonable steps to appoint an IMCA if either of paragraph 39(2) or (3) apply, unless there is an appropriate person who would be suitable to represent and support the person, who consents to being appointed and is not engaged in providing care or treatment to the person in a professional role. Sub-paragraph (2) applies if the person has capacity to consent to being represented by an IMCA, and makes a request for one. Sub-paragraph (3) applies if the person lacks the capacity to consent, unless the responsible body is satisfied that the appointment of an IMCA would not be in the person’s best interests. Paragraph 40 sets out the circumstances in which the appropriate person must themselves be provided with an IMCA.

Part 6: Monitoring and reporting

69. Paragraph 41 gives the Secretary of State and Welsh Ministers regulation-making powers to make provision for monitoring and reporting on the operation of Schedule AA1. The regulations could prescribe one or more body to undertake this function. The regulations could also confer authority to visit places where arrangements authorised under Schedule AA1 are carried out, to meet with persons and to require the disclosure of information.

Part 7: Excluded arrangements: mental health

70. Paragraphs 42-54 set out that Schedule AA1 will not apply to people who are subject to mental health arrangements (paragraphs 42(a)-53) or where arrangements under Schedule AA1 would be inconsistent with a mental health requirement (paragraphs 42(b) and 54). These provisions are intended to replicate the current effect of Schedule 1A to the MCA.
71. Paragraphs 42(a) and 43-53 provide that patients detained under the Mental Health Act 1983 cannot be made subject to an authorisation under Schedule AA1. Paragraph 47(4) also sets out that where an individual who could be detained under the Mental Health Act objects to being detained in relation to that mental disorder or for the purpose of being given treatment for a mental disorder (and a Court appointed deputy or donee of a Lasting Power of Attorney has not consented), they cannot be made subject to an authorisation under Schedule AA1.
72. Paragraph 42(b) read together with paragraph 54 permits individuals who are not detained under the Mental Health Act but are subject to requirements imposed under it, to be subject to an authorisation under Schedule AA1 so long as the authorisation does not conflict with those mental health requirements. For example, where a person is subject to guardianship under the Mental Health Act, an authorisation could not be granted under Schedule AA1 which provided for a person to reside in a different place to that specified by the guardian.

Schedule 2: Minor and consequential amendments

Part 1: Amendments to the Mental Capacity Act 2005

73. Part 1 of Schedule 2 to the Bill makes a number of minor and consequential amendments to the MCA.

Part 2: Amendments to other legislation

74. Part 2 of Schedule 2 to the Bill makes minor and consequential amendments to other legislation.

Financial implications of the Bill

75. The financial implications of the Bill are set out in the accompanying impact assessment which will be published on the Government's website.

Parliamentary approval for financial costs or for charges imposed

76. A money resolution and a ways and means resolution are required for the Bill. (A money resolution is required where a bill authorises new charges on the public revenue – broadly speaking, new public expenditure – and a ways and means resolution is required where a bill authorises new charges on the people – broadly speaking, new taxation or other similar charges.)

77. There is potential public expenditure under various provisions of the Bill. The Bill may also lead to increases in public expenditure under other Acts, in particular under the Local Government Finance Act 1988 due to the increase in revenue support grant that will be needed to fund the additional functions of local authorities in England. In particular, [paragraphs 14 to 16] of new Schedule AA1 to the MCA (inserted by Schedule 1 to the Bill) enable public sector bodies ("responsible bodies") to authorise arrangements giving rise to a deprivation of liberty if certain conditions, such as obtaining assessments and consultation, are met. The responsible body will also have on-going functions such as producing an authorisation record and carrying out reviews and variations of authorisations (paragraphs [24, 34 and 35] of Schedule AA1). In addition, the Bill confers the function of approving Approved Mental Capacity Professionals ("AMCPs") on local authorities (paragraph [36] of Schedule AA1), and the cost of funding the functions of AMCPs will be met from public funds. Part 5 of Schedule AA1 provides for the appointment of Independent Mental Capacity Advocates and makes provision about their functions. The cost of these advocates will also be met by public funds.

78. There is a power in paragraph [37] of Schedule AA1 to make provision in regulations for a body to approve training for AMCPs. The power enables the Secretary of State to make provision for this body to be Social Work England and to enable them to charge fees at a level that exceeds cost.

Compatibility with the European Convention on Human Rights

79. The Secretary of State for Health and Social Care, 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 are compatible with the Convention rights".

80. The Government has published a separate memorandum on ECHR issues with an assessment of compatibility of the Bill's provisions with the Convention rights. This memorandum is published on the Government's website.

Related documents

81. The following documents are relevant to the Bill and can be read at the stated locations:

- Law Commission report: Mental Capacity and Deprivation of Liberty, Law Com No 372, (2017), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/lc372_mental_capacity.pdf
- Mental Capacity (Amendment) Bill: JCHR memorandum (2018), available at: <https://publications.parliament.uk/pa/bills/2018.07.03%20-%20JCHR%20memo%20-to%20committee.pdf>
- Mental Capacity (Amendment) Bill: Impact assessment (2018), available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>
- Mental Capacity (Amendment) Bill: Delegated powers memorandum (2018), available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/18117-DPM.pdf>
- Report of the House of Lords Select Committee on the Mental Capacity Act 2005 (2014), available at: <https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>

Annex A - Territorial extent and application in the United Kingdom

- The provisions of the Bill (clauses 1-5 and Schedules 1 and 2) extend and apply to England and Wales. In the view of the UK government, these provisions are within the legislative competence of the Scottish Parliament and the Northern Ireland Assembly for the purposes of English Votes for English Laws (EVEL).⁷
- Under House of Commons Standing Order No. 83J(10)(e), Standing Orders Nos. 83J to 83X do not apply to Bills whose main purpose is to give effect to proposals contained in a report by a Law Commission. As explained at paragraph 6 above, this Bill omits several provisions contained in the Law Commission's draft Bill and makes some changes to the Law Commission provisions included in the Bill.

| Provision | Extends to E & W and applies to England? | Extends to E & W and applies to Wales? | Extends and applies to Scotland? | Extends and applies to Northern Ireland? | Would corresponding provision be within the competence of the National Assembly for Wales? | Would corresponding provision be within the competence of the Scottish Parliament? | Would corresponding provision be within the competence of the Northern Ireland Assembly? | Legislative Consent Motion needed? |
|------------|--|--|----------------------------------|--|--|--|--|------------------------------------|
| Clause 1 | Yes | Yes | No | No | No | Yes | Yes | No |
| Clause 2 | Yes | Yes | No | No | No | Yes | Yes | No |
| Clause 3 | Yes | Yes | No | No | No | Yes | Yes | No |
| Clause 4 | Yes | Yes | No | No | No | Yes | Yes | No |
| Clause 5 | Yes | Yes | No | No | No | Yes | Yes | No |
| Schedule 1 | Yes | Yes | No | No | No | Yes | Yes | No |
| Schedule 2 | Yes | Yes | No | No | No | Yes | Yes | No |

⁷ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Subject matter and legislative competence of devolved legislatures

82. The Bill relates exclusively to England and Wales. In the opinion of the UK government, the subject matter of the Bill is within the devolved legislative competence of the Scotland and Northern Ireland legislatures (mental capacity is not a reserved matter within Schedule 5 to the Scotland Act 1998 and is not an excepted matter or a reserved matter within Schedule 2 or Schedule 3 to the Northern Ireland Act 1998).

MENTAL CAPACITY (AMENDMENT) BILL [HL]

EXPLANATORY NOTES

These Explanatory Notes relate to the Mental Capacity (Amendment) Bill [HL] as brought from the House of Lords on 11 December 2018 (Bill 303).

Ordered by the House of Commons to be printed, 11 December 2018

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