CONSIDERATION OF BILL (REPORT STAGE)

MENTAL CAPACITY (AMENDMENT) BILL [LORDS], AS AMENDED

NOTE

This document includes all amendments tabled to date and includes any withdrawn amendments at the end. The amendments have been arranged in the order in which they relate to the Bill.

Chris Bryant
Debbie Abrahams

Clause 6, page 5, line 10, at end insert—
“(3A) Before making any regulations under subsection (3)(b), the Secretary of State must lay before Parliament a report on—
(a) the likely effects of the provisions of this Act on persons undergoing rehabilitation for brain injuries, and
(b) the interaction between the provisions of this Act and the processes for prescribing for brain injury rehabilitation therapy.”
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

Secretary Matt Hancock

Schedule 1, page 8, line 6, leave out from “Wales,” to end of line 10 and insert “the person registered, or required to be registered, under Chapter 2 of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2) in respect of the provision of a care home service, in the care home;”

*Member’s explanatory statement*
This amendment amends the definition of “care home manager”, in Wales, so it will be the person who is the registered service provider. This mirrors the approach taken for England.

Schedule 1, page 8, line 13, at end insert—

““Education, Health and Care plan” means a plan within the meaning of section 37(2) of the Children and Families Act 2014;”

*Member’s explanatory statement*
This amendment is consequential on Amendment 22.

Schedule 1, page 8, leave out line 16

*Member’s explanatory statement*
This amendment is consequential on Amendment 13.

Schedule 1, page 8, line 17, at end insert—

““independent hospital” has the meaning given by paragraph 5;”

*Member’s explanatory statement*
This amendment is consequential on Amendment 13.

Schedule 1, page 8, line 27, at end insert—

““NHS hospital” has the meaning given by paragraph 5;”

*Member’s explanatory statement*
This amendment is consequential on Amendment 13.

Schedule 1, page 46, leave out “Hospital” and insert “NHS hospital and independent hospital”

*Member’s explanatory statement*
This amendment is consequential on Amendment 13.

Schedule 1, page 47, leave out line 47

*Member’s explanatory statement*
This amendment is consequential on Amendment 13.
Mental Capacity (Amendment) Bill [Lords], continued

Secretary Matt Hancock

Schedule 1, page 9, line 15, after “6” insert “(1)"

Member’s explanatory statement
This amendment is consequential on Amendment 18.

Secretary Matt Hancock

Schedule 1, page 9, line 16, leave out “a” and insert “an NHS"

Member’s explanatory statement
This amendment amends paragraph 6(a) so that where arrangements are carried out mainly in an independent hospital the responsible body for those arrangements will not be the hospital manager.

Secretary Matt Hancock

Schedule 1, page 9, line 17, at end insert—

“(aa) if the arrangements are carried out mainly in an independent hospital in England, the responsible local authority determined in accordance with paragraph 8A;

(ab) if the arrangements are carried out mainly in an independent hospital in Wales, the Local Health Board for the area in which the hospital is situated;”

Member’s explanatory statement
This amendment makes provision for who the responsible body will be for cases where arrangements are carried out mainly in an independent hospital in England or Wales.

Secretary Matt Hancock

Schedule 1, page 9, line 18, leave out “paragraph (a) does not apply” and insert “none of paragraphs (a) to (ab) applies”

Member’s explanatory statement
This amendment is consequential on Amendment 14.

Secretary Matt Hancock

Schedule 1, page 9, line 27, leave out “neither paragraph (a) nor paragraph (b)” and insert “none of paragraphs (a) to (b)”

Member’s explanatory statement
This amendment is consequential on Amendment 14.

Secretary Matt Hancock

Schedule 1, page 9, line 28, leave out “(see paragraph 9)” and insert “determined in accordance with paragraph 9”

Member’s explanatory statement
This amendment is consequential on Amendment 14.

Secretary Matt Hancock

Schedule 1, page 9, line 28, at end insert—

“(2) If an independent hospital is situated in the areas of two or more Local Health Boards, it is to be regarded for the purposes of sub-paragraph (1)(ab) as
situated in whichever of the areas the greater (or greatest) part of the hospital is situated.”

**Member’s explanatory statement**

This amendment provides that, for the purpose of determining who is the responsible body, if a hospital is situated in the areas of two or more Local Health Boards, it should be regarded as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.

Secretary Matt Hancock

Schedule 1, page 9, line 29, after “manager” insert “, in relation to an NHS hospital.”

**Member’s explanatory statement**

This amendment is consequential on Amendment 13.

Secretary Matt Hancock

Schedule 1, page 9, line 45, at end insert—

“(ca) if the hospital is vested in a Local Health Board, that Board.”

**Member’s explanatory statement**

This amendment makes provision that the hospital manager for an NHS hospital vested in a Local Health Board will be that Board.

Secretary Matt Hancock

Schedule 1, page 9, line 46, leave out from beginning to end of line 12 on page 10

**Member’s explanatory statement**

This amendment is consequential on Amendment 13.

Secretary Matt Hancock

Schedule 1, page 10, line 20, at end insert—

“8A (1) In paragraph 6(1)(aa), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—

(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 paragraph (a) does not apply and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014, the local authority meeting those needs;

(c) in any other case, the local authority determined in accordance with sub-paragraph (4).

(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.

(3) In paragraph 6(1)(aa), “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;

(b) if paragraph (a) does not apply and the cared-for person is being provided with accommodation under section 20 of the Children Act 1989, the local authority providing that accommodation;

(c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is subject to a care order under section 31 of the Children Act.
Mental Capacity (Amendment) Bill [Lords], continued

1989 or an interim care order under section 38 of that Act, and a local authority in England is responsible under the order for the care of the cared-for person, that local authority;

(d) if none of paragraphs (a) to (c) applies, the local authority determined in accordance with sub-paragraph (4).

(4) In the cases mentioned in sub-paragraphs (1)(c) and (3)(d), the “responsible local authority” is the local authority for the area in which the independent hospital mentioned in paragraph 6(1)(aa) is situated.

(5) If an independent hospital is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.”

Member’s explanatory statement
This amendment makes provision as to who the responsible body will be in cases where arrangements are carried out mainly in an independent hospital in England.

Secretary Matt Hancock

Schedule 1, page 11, leave out lines 45 to 47.

Member’s explanatory statement
This amendment is consequential on Amendment 22.

Secretary Matt Hancock

Schedule 1, page 12, line 19, at end insert—

“12A(1) The following must publish information about authorisation of arrangements under this Schedule—

(a) the hospital manager of each NHS hospital;
(b) each clinical commissioning group;
(c) each Local Health Board;
(d) each local authority.

(2) The information must include information on the following matters in particular—

(a) the effect of an authorisation;
(b) the process for authorising arrangements, including making or carrying out—

(i) assessments and determinations required under paragraphs 18 and 19;
(ii) consultation under paragraph 20;
(iii) a pre-authorisation review (see paragraphs 21 to 23);
(c) the circumstances in which an independent mental capacity advocate should be appointed under paragraph 39 or 40;
(d) the role of a person within paragraph 39(5) (an “appropriate person”) in relation to a cared-for person and the effect of there being an appropriate person;
(e) the circumstances in which a pre-authorisation review is to be carried out by an Approved Mental Capacity Professional under paragraph 21;
(f) the right to make an application to the court to exercise its jurisdiction under section 21ZA;
(g) reviews under paragraph 35, including—

(i) when a review will be carried out;
(ii) the rights to request a review;
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

(iii) the circumstances in which a referral may or will be made to an Approved Mental Capacity Professional.

(3) The information must be accessible to, and appropriate to the needs of, cared-for persons and appropriate persons.

12B (1) Where arrangements are proposed, the responsible body must as soon as practicable take such steps as are practicable to ensure that—

(a) the cared-for person, and
(b) any appropriate person in relation to the cared-for person, understands the matters mentioned in sub-paragraph (3).

(2) If, subsequently, at any time while the arrangements are being proposed the responsible body becomes satisfied under paragraph 39(5) that a person is an appropriate person in relation to the cared-for person, the responsible body must, as soon as practicable, take such steps as are practicable to ensure that the appropriate person understands the matters mentioned in sub-paragraph (3).

(3) Those matters are—

(a) the nature of the arrangements, and
(b) the matters mentioned in paragraph 12A(2) as they apply in relation to the cared-for person’s case.

(4) If it is not appropriate to take steps to ensure that the cared-for person or any appropriate person understands a particular matter then, to that extent, the duties in sub-paragraphs (1) and (2) do not apply.

(5) In this paragraph “appropriate person”, in relation to a cared-for person, means a person within paragraph 39(5).

Member’s explanatory statement
This amendment inserts new paragraphs 12A and 12B of the new Schedule AA1 to require responsible bodies to publish information about authorisation of arrangements under the Schedule and to take steps at the outset of the authorisation process to ensure that cared-for persons and appropriate persons understand the process.

Secretary Matt Hancock

Schedule 1, page 12, line 32, after “practicable” insert “and appropriate, having regard to the steps taken under paragraph 12B and the length of time since they were taken.”

Member’s explanatory statement
This amendment amends the duty in paragraph 13(2) of the new Schedule AA1 for a responsible body to take steps, as soon as arrangements are authorised, to ensure that cared-for persons and appropriate persons understand matters relating to the authorisation, to reflect the fact the body may have already have done that very recently under new paragraph 12B (inserted by Amendment 24).

Secretary Matt Hancock

Schedule 1, page 12, line 33, leave out from “any” to “understands” in line 34 and insert “appropriate person”

Member’s explanatory statement
This amendment amends the duty in paragraph 13(2) so that the duty to ensure that cared-for persons and appropriate persons understand matters relating to an authorisation does not also apply to independent mental capacity advocates (who can be expected to understand those matters) in line with the new duty in paragraph 12B (inserted by Amendment 24).
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

Secretary Matt Hancock

Schedule 1, page 12, line 34, leave out from “understands” to end of line 5 on page 13 and insert “the matters mentioned in paragraph 12A(2)(a), (c), (d), (f) and (g) as they apply in relation to the cared-for person’s case”

Member’s explanatory statement
This amendment aligns the description of matters that must be explained to the cared-for person and any appropriate person with the list of matters in new paragraph 12A (inserted by Amendment 24).

Secretary Matt Hancock

Schedule 1, page 14, line 46, at end insert—
“(1A) The person who makes the determination need not be the same as the person who carries out the assessment.”

Member’s explanatory statement
This amendment makes it clear that a determination need not be made by the same person who carries out an assessment. A person could, for example, make a determination based on an assessment carried out previously by a different person (paragraph 18(6) of the new Schedule AA1 allows for this).

Secretary Matt Hancock

Schedule 1, page 14, leave out lines 47 and 48 and insert—
“(2) The appropriate authority may by regulations make provision for requirements which must be met by a person—
(a) making a determination, or
(b) carrying out an assessment,
under this paragraph.

(2A) Regulations under sub-paragraph (2) may make different provision—
(a) for determinations and assessments, and
(b) for determinations and assessments required under sub-paragraph (1)(a) and determinations and assessments required under sub-paragraph (1)(b).”

Member’s explanatory statement
This amendment provides power to make regulations setting out requirements which must be met for a person to make a determination or carry out an assessment. The requirements will relate to matters such as knowledge and experience. Different requirements may be set out for a person making a determination than a person carrying out an assessment.

Secretary Matt Hancock

Schedule 1, page 15, line 12, after “the” insert “determination or”

Member’s explanatory statement
This amendment is consequential on Amendment 29.

Secretary Matt Hancock

Schedule 1, page 15, line 14, after “the” insert “determination or”

Member’s explanatory statement
This amendment is consequential on Amendment 29.
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

Secretary Matt Hancock

Schedule 1, page 15, line 16, leave out “The” and insert “An”

Member’s explanatory statement
This amendment is to make it clear that the assessment being referred to is an assessment on which a determination under the paragraph is made.

Chris Bryant
Debbie Abrahams

Schedule 1, page 15, line 24, at end insert—
“(d) the effects of any treatment undergone by the cared-for person, including prescription brain injury rehabilitation therapy.”

Secretary Matt Hancock

Schedule 1, page 15, line 32, leave out “made on an assessment” and insert “by a person, who meets requirements prescribed by regulations made by the appropriate authority, made on an assessment by that person”

Member’s explanatory statement
This amendment is to make it clear that a determination required under paragraph 19 of the new Schedule AA1 must be made by the same person who carries out the assessment on which that determination is based and that person must meet requirements set out in regulations.

Secretary Matt Hancock

Schedule 1, page 15, leave out lines 38 to 44

Member’s explanatory statement
This amendment is consequential on Amendment 33.

Secretary Matt Hancock

Schedule 1, page 15, line 46, leave out from “16,” to “by” in line 1 on page 16 and insert “a determination may not be made”

Member’s explanatory statement
This amendment is consequential on Amendment 33.

Secretary Matt Hancock

Schedule 1, page 16, line 7, leave out “assessment” and insert “determination”

Member’s explanatory statement
This amendment is consequential on Amendment 33.

Secretary Matt Hancock

Schedule 1, page 16, line 9, leave out “assessment” and insert “determination”

Member’s explanatory statement
This amendment is consequential on Amendment 33.
Mental Capacity (Amendment) Bill [Lords], continued

Barbara Keeley
Paula Sherriff
Alex Norris
Thangam Debbonaire
Alex Cunningham
Debbie Abrahams

Schedule 1, page 16, line 12, leave out from “out” to the end of line 16, and insert “by the responsible body.”

This amendment would require the responsible body to carry out the consultation in all cases.

Secretary Matt Hancock

Schedule 1, page 16, line 13, leave out from second “arrangements” to end of line 14 and insert—and—

(i) authorisation is being determined under paragraph 16, or
(ii) renewal is being determined under paragraph 32,

by”

This amendment is to make it clear that consultation under paragraph 20 of the new Schedule AA1 for the purposes of renewal of authorisation under paragraph 32 of that Schedule is to be by the care home manager.

Barbara Keeley
Paula Sherriff
Alex Norris
Thangam Debbonaire
Alex Cunningham
Debbie Abrahams

Dr Dan Poulter

Schedule 1, page 17, line 13, at end insert—

“(ca) the arrangements are being authorised under paragraph 16 of this Schedule, or”

This amendment would require an AMCP to review all cases where the responsible body is authorising arrangements based on a statement provided by a care home manager.

Secretary Matt Hancock

Schedule 1, page 18, line 7, after “being” insert “, and the responsible body for the time being,”

This amendment is to clarify that the responsible body in relation to a cared-for person may change during the lifetime of an authorisation and, if it does, that change is to be recorded in the authorisation record.
Mental Capacity (Amendment) Bill [Lords], continued

Alex Cunningham
Debbie Abrahams

Schedule 1, page 18, line 21, at end insert—

“Authorisation charges

24A No charges may be made in relation to the steps taken in determining whether
the responsible body may authorise the arrangements for the cared-for person.”

Chris Bryant
Debbie Abrahams

Schedule 1, page 18, line 35, at end insert “or
(c) at the end of a period of prescription brain injury rehabilitation therapy
undergone by the cared-for person.”

Chris Bryant
Debbie Abrahams

Schedule 1, page 20, line 4, after “met” insert “taking into account any treatment to
be undergone by the cared-for person, including prescription brain injury rehabilitation
therapy.”

Secretary Matt Hancock

Schedule 1, page 20, leave out line 45 and insert—

“(a) on a variation under paragraph 34;”

Member’s explanatory statement
This amendment ensures that a review will take place on a variation under paragraph 34.

Secretary Matt Hancock

Schedule 1, page 21, line 7, after “(4)” insert “or (5A)”

Member’s explanatory statement
This provides for a duty to carry out a review in the circumstances described in the new sub-
paragraph (5A) (inserted by Amendment 44).

Secretary Matt Hancock

Schedule 1, page 21, line 10, at end insert—

“(3A) A review under sub-paragraph (3)(a) must be carried out before the
authorisation is varied or, if that is not practicable or appropriate, as soon as
practicable afterwards.”

Member’s explanatory statement
This amendment provides that a review under sub-paragraph (3)(a) must be carried out before the
authorisation is varied, or if that is not practicable or appropriate, it must be carried out as soon
as possible after variation.

Secretary Matt Hancock

Schedule 1, page 21, line 18, leave out from “paragraph” to end of line 19 and
insert “21—

(i) was not by an Approved Mental Capacity Professional, or
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

(ii) was by an Approved Mental Capacity Professional solely because paragraph 21(2)(c) or (d) applied.”

Member’s explanatory statement
This amendment expands the duty to refer to an Approved Mental Capacity Professional on a review so it applies in certain cases where a pre-authorisation review under paragraph 21 of the new Schedule AA1 has been carried out by an Approved Mental Capacity Professional.

Secretary Matt Hancock

Schedule 1, page 21, line 26, at end insert—

“(5A) This sub-paragraph applies where sub-paragraph (4) does not apply and—

(a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,

(b) a relevant person informs the reviewer or (if the reviewer is not the responsible body) the responsible body that they believe that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and

(c) the relevant person makes a reasonable request to the person informed under paragraph (b) for a review to be carried out.

(5B) In sub-paragraph (5A) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person’s welfare.”

Member’s explanatory statement
This amendment provides for an additional situation which will trigger a duty to review an authorisation.

Secretary Matt Hancock

Schedule 1, page 21, line 32, at end insert—

“(7A) On any review where sub-paragraph (5A) applies, the reviewer or (if the reviewer is not the responsible body) the responsible body may refer the authorisation to an Approved Mental Capacity Professional and, if the Approved Mental Capacity Professional accepts the referral, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.”

Member’s explanatory statement
Where a duty to review arises due to the new sub-paragraph (5A) (inserted by Amendment 44) this amendment provides for a power to refer the authorisation to an Approved Mental Capacity Professional.

Secretary Matt Hancock

Schedule 1, page 21, line 33, after “determination” insert “mentioned in sub-paragraph (7) or (7A)”

Member’s explanatory statement
This amendment is consequential on Amendment 45.
Schedule 1, page 23, line 1, leave out paragraphs 39 and 40 and insert—

“39 (1) The responsible body must appoint an IMCA to represent and support the cared-for person if—

(a) one or more of sub-paragraphs (2), (3), (4) or (5) applies, and

(b) sub-paragraph (6) does not apply.

(2) The cared-for person makes a request to the responsible body for an IMCA to be appointed.

(3) The responsible body has not identified an “appropriate person” to support and represent the cared-for person in matters connected with the authorisation.

(4) The responsible body has identified an “appropriate person” to support and represent the cared for person in matters connected with the authorisation, and they have made a request to the responsible body for an IMCA to be appointed.

(5) The responsible body has reason to believe one or more of the following—

(a) that, without the help of an IMCA, the cared-for person and any appropriate person supporting and representing them would be unable to understand or exercise one or more of the relevant rights;

(b) that the cared-for person and any appropriate person supporting and representing them have each failed to exercise a relevant right when it would have been reasonable to exercise it;

(c) that the cared for person and any appropriate person supporting and representing them are each unlikely to exercise a relevant right when it would be reasonable to exercise it.

(6) The cared-for person objects to being represented and supported by an IMCA.

(7) A person is not to be regarded as an “appropriate person” to represent and support the cared-for person in matters connected with this schedule unless—

(a) they consent to representing and supporting the cared-for person,

(b) they are not engaged in providing care or treatment for the cared-for person in a professional capacity,

(c) where the cared-for person is able to express a view about who they would like to represent and support them, the cared-for person agree to being represented and supported by that person,

(d) where the cared-for person is unable to express a view about who they would like to represent and support them, the responsible body has no reason to believe that the cared-for person would object to being represented and supported by that person,

(e) they are both willing and able to assist the cared-for person in understanding and exercising the relevant rights under this Schedule, including with the support of an IMCA if appropriate.

(8) The “relevant rights” under this schedule include rights to request a review under Part III of this Schedule, and the right to make an application to the court to exercise its jurisdiction under section 21ZA of this Act.”

Member’s explanatory statement

This amendment would broaden the provision of advocacy, ensuring that advocates are provided as a default unless the cared-for person does not want one.
Consideration of Bill (Report Stage): 8 February 2019

Mental Capacity (Amendment) Bill [Lords], continued

Secretary Matt Hancock

Schedule 1, page 28, line 21, at end insert—

“(1A) And, for the purposes of this Schedule, arrangements which relate to a person are “not in accordance with mental health requirements” if the person is subject to mental health requirements and the arrangements are not in accordance with them.”

Member’s explanatory statement

This amendment is to make it clear that arrangements can be authorised under the new Schedule AAI if there are no “mental health requirements” that apply in relation to the person who is to be subject to the arrangements.

ORDER OF THE HOUSE [18 DECEMBER 2018]

That the following provisions shall apply to the Mental Capacity (Amendment) Bill [Lords]:

Committal

1. The Bill shall be committed to a Public Bill Committee.

Proceedings in Public Bill Committee

2. Proceedings in the Public Bill Committee shall (so far as not previously concluded) be brought to a conclusion on Thursday 24 January 2019.

3. The Public Bill Committee shall have leave to sit twice on the first day on which it meets.

Proceedings on Consideration and up to and including Third Reading

4. Proceedings on Consideration and any proceedings in legislative grand committee shall (so far as not previously concluded) be brought to a conclusion one hour before the moment of interruption on the day on which proceedings on Consideration are commenced.

5. Proceedings on Third Reading shall (so far as not previously concluded) be brought to a conclusion at the moment of interruption on that day.

6. Standing Order No. 83B (Programming committees) shall not apply to proceedings on consideration and Third Reading.

Other proceedings

7. Any other proceedings on the Bill may be programmed.