

MENTAL CAPACITY (AMENDMENT) BILL

Memorandum from the Department of Health and Social Care to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Mental Capacity (Amendment) Bill (“the Bill”) published on 4 July 2018. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, the reason for, and the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of the Mental Capacity (Amendment) Bill is to reform the process in for authorising arrangements which enable people who lack capacity to consent, to be deprived of their liberty for the purpose of providing them with care or treatment. This process is needed in order to comply with Article 5(1) of the European Convention on Human Rights (ECHR).
3. The Bill gives effect, with some changes, to the Law Commission’s recommendations for reform of this area of law in its report: *Mental Capacity and Deprivation of Liberty* (2017).
4. The new administrative process introduced by the Bill will replace the existing authorisation process (known as the Deprivation of Liberty Safeguards scheme) which is contained in the Mental Capacity Act 2005. Under the new process, a local authority or an NHS body must arrange for the person to be assessed by health and care professionals and an independent review of those assessments must be carried out. As part of those assessments it must be confirmed that the proposed arrangements for the person’s care or treatment are necessary and proportionate before those arrangements can be put in place and the person can be deprived of liberty. This would allow, for example, people with dementia and learning disabilities to be provided with necessary care and treatment, in cases where the only means of delivering this care and treatment is by depriving them of liberty.

5. The Bill contains five clauses and has two Schedules.

C. DELEGATED POWERS

6. The Bill contains five regulation-making powers:

- a. Consequential provision (clause 4(1))
- b. Commencement (clause 5(3)(b))
- c. Transitional arrangements (clause 5(5))
- d. Appointment of Approved Mental Capacity Professionals (Schedule 1, new Schedule AA1, para 33(1))
- e. Monitoring and reporting on the operation of the scheme (Schedule 1, new Schedule AA1, para 38(1))

Clause 4(1): Consequential provision

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure where the regulations amend primary legislation; otherwise negative procedure

Context and purpose

7. This clause confers a power on the Secretary of State to make consequential provision for the purposes of the Bill, which may include consequential amendments. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation (including provisions contained in legislation in the same Session). The power to amend primary legislation is a Henry VIII power.

Justification for taking the power

8. The powers conferred by this clause are limited by the fact that any amendments made under the regulation-making power must be consequential on provisions in the Bill. Schedule 2 already includes some changes to other enactments as a consequence of the provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation.

The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation.

Justification for the procedure

9. If regulations made under this power do not amend or repeal primary legislation it is proposed that they will be subject to the negative resolution procedure. If regulations made under this power do amend or repeal provision in primary legislation it is proposed that they will be subject to the affirmative resolution procedure. This is intended to provide the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 5(3)(b): Extent, commencement and short title

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and purpose

10. This clause deals with the commencement of the provisions of the Bill. Clause 5(3)(b) provides that the provisions in the Bill come into force on such day as the Secretary of State may by regulations appoint. This includes provision to appoint different days for different areas.

Justification for taking the power

11. Delegating the power provides flexibility to ensure that the provisions in the Bill come into force at suitable dates, which cannot yet be predicted. This will ensure a period of time for preparation for all the various bodies affected, including local authorities, care homes and NHS bodies. It is, for example, possible that provisions might need to be brought into force at different times for England and for Wales.

Justification for the procedure

12. Commencement regulations would be made by statutory instrument. However, it is proposed that this should not be subject to parliamentary procedure given that the

detail of the provision to be commenced will already have been scrutinised by Parliament during the passage of the Bill. This procedure is consistent with usual practice.

Clause 5(5): Transitional arrangements

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and purpose

13. This is a power for the Secretary of State to make transitional or saving provision in connection with the coming into force of the Bill. In particular, we expect that these regulations will deal with the situation of people who are deprived of their liberty, or subject to a pending application to authorise a deprivation of liberty, when the new scheme is introduced.

Justification for taking the power

14. By bringing into force a new scheme for authorising deprivations of liberty, the Bill will create a substantial change in the way that arrangements giving rise to a deprivation of liberty are authorised for many people. It is prudent to enable provisions that allow for a smooth commencement of the Bill's provisions, and ensure clarity about the status of existing care and treatment arrangements.
15. The Department expects to take broadly the following approach. This approach is based (broadly) on the transitional arrangements put in place for coming into force of the Care Act 2014 (see Care Act 2014 (Transitional Provision) Order 2015 No 995, article 2).
 - a. After the Bill comes into force, new applications for a deprivation of liberty authorisation would be dealt with under the new, reformed process. People who are subject to an authorisation given under the existing process would continue to remain subject to that process until the authorisation comes to an end (under the existing process an authorisation can last for no more than

12 months). Once the authorisation comes to an end, any new authorisation would need to be made under the new, reformed process.

- b. Any pending applications under the existing process may be treated as an application under the new, reformed process (provided that the responsible body has the necessary information and/or is prepared to carry out fresh assessments or determinations).
- c. Authorisations given by the Court of Protection would remain in place following the commencement of the new legislation. The Court will be expected when reviewing these authorisations to invite the local authority or NHS body to assess the person for an authorisation under the new, reformed process.
- d. Any pending applications for Court authorisations could either be left to run their course (and be determined by the Court), or alternatively they could be treated as an application under the new, reformed process.

Justification for the procedure

16. No parliamentary procedure is proposed for regulations made under this power. This is consistent with the commonly accepted practice to have no procedure for such statutory instruments (including the Care Act 2014 (Transitional Provision) Order 2015 mentioned above). The regulation-making power applies to procedural matters which are concerned with how the new legislation will be brought into effect.

Schedule 1 (new Schedule AA1, paragraph 33(1)): Approved Mental Capacity Professionals: requirements

Power conferred on: The Secretary of State and the Welsh Ministers

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

17. The Bill provides at paragraph 33(1) of Schedule 1 (new Schedule AA1) that the Secretary of State and Welsh Ministers can prescribe in regulations the criteria for

approval as an Approved Mental Capacity Professional (AMCP). The AMCP is a specialist role undertaken by health and care professionals for the purposes of the new administrative scheme. Specifically, the AMCP determines whether or not the responsible body can give an authorisation for deprivation of liberty in cases where the person is objecting to the proposed arrangements (or the family is objecting on the person's behalf). The local authority is responsible for approving individual health and care professionals as capable of carrying out the new role. It can only do this if the person meets the requirements set out in secondary legislation.

Justification for taking the power

18. This regulation-making power recreates an existing power contained in paragraph 129 of Schedule A1 to the Mental Capacity Act. This enables the Secretary of State and Welsh Ministers to make provision through regulations about the selection, and eligibility, of persons to carry out assessments under the Deprivation of Liberty Safeguards (including the best interests assessor).
19. These regulations have been subject to regular change, as is the identity of the responsible regulatory body who approves the relevant training. It is also possible that in future other relevant circumstances may change too. For example the range of health and care professionals who can undertake the role may need to increase or decrease in response to fluctuating numbers of available professionals.
20. The Department intends to adopt a similar approach to prescribing criteria for approval as an AMCP as adopted in the existing regulations in relation to best interests assessors: the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.
21. It is expected that the regulations will require that in England the person must be one of the following:
 - a. an approved mental health professional;
 - b. a registered social worker;
 - c. a first level nurse;
 - d. a registered occupational therapist; or
 - e. a chartered psychologist.
22. It is expected that the regulations will also require that the local authority must be satisfied that the person:
 - a. is not suspended from the relevant professional register or list;

- b. has at least two years post registration experience in their profession;
 - c. has successfully completed training that has been approved by the Secretary of State (or when it is operational, Social Work England) to be a best interests assessor;
 - d. has completed training/further training in the past 12 months; and
 - e. has the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision making.
23. It is expected that the regulations will enable existing best interests assessors to be 'fast-tracked' into the new role so that there are sufficient numbers of AMCPs in place when the new, reformed process in the Bill comes into force.
24. As is currently the case under the existing legislation, the Bill again gives the Welsh Ministers power to prescribe in regulations the criteria for approval as an AMCP. This is to allow regulations to reflect specific arrangements in Wales, where health and social care policy is devolved. The Welsh Government intends to adopt a similar approach to prescribing criteria for approval as an AMCP as it adopted in the existing regulations in relation to best interests assessors: the Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009.
25. The regulation-making power has been narrowed from the original Law Commission draft and is limited to the matters that the Governments wish to specify and no further.

Justification for the procedure

26. By virtue of section 65(2) of the Mental Capacity Act, regulations made under this power will be subject to the negative parliamentary procedure.
27. The Bill follows the approach suggested by the Law Commission in its draft Bill. It also follows the approach of section 114 of the Mental Health Act 1983 (as amended), under which the negative parliamentary procedure applies to regulations making provision for approving persons to act as Approved Mental Health Professionals (AMHPs), a broadly similar role to AMCPs. The Department proposes that this procedure is appropriate for the power to specify criteria for AMCPs in this Bill too. This will help to ensure consistency with the 1983 Act.
28. The Department notes that the predecessor existing power in paragraph 129 of Schedule A1 to the Mental Capacity Act is subject to the affirmative procedure. This

may have been appropriate when a power of this nature had yet to be exercised for the first time – that is no longer the case. The Department agrees with the Law Commission and proposes that the negative procedure provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Schedule 1 (new Schedule AA1, paragraph 38(1)): Monitoring and reporting

Power conferred on: the Secretary of State and Welsh Ministers

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

29. The Bill provides at paragraph 38 of Schedule 1 (new Schedule AA1) that the Secretary of State and Welsh Ministers can make provision for monitoring and reporting on the operation of the new administrative scheme. The aim is to ensure effective oversight of the new scheme. It is expected that the regulator will be able to identify any problems in how the scheme is being implemented, respond to individual cases and identify national and local trends involving those being deprived of liberty.

30. Paragraph 38 is also intended to ensure continued compliance with the Optional Protocol to the United Nations Convention Against Torture which is designed to strengthen protections against the abuse of people deprived of liberty.¹ The United Kingdom ratified this in December 2003, and it came into force in June 2006. It requires adequate systems to be in place at a national level to conduct inspection visits to places of detention, and for State Parties to set up or designate one or more “national preventive mechanisms” to conduct visits to places of detention.² In the United Kingdom, the Government collectively designated 18 existing bodies (including the DoLS prescribed bodies).

Justification for taking the power

31. This regulation-making power recreates a similar regulation-making power in paragraph 162 of Schedule A1 to the Mental Capacity Act 2005. In particular, the

¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (18 December 2002) A/RES/57/199.

² As above, Arts 3 and 17.

regulations may require one or more prescribed bodies to carry out these functions, and can give the body authority to visit the places where the person is being deprived of liberty, visit and interview persons being deprived of liberty, and require the production of, and to inspect, records relating to the care or treatment being provided.

32. The new power relates to regulatory bodies whose identity and functions are subject to regular change (for example, in Wales a new regime for inspection and enforcement was recently introduced as a result of the Registration and Inspection of Social Care Act 2016).
33. As is currently the case under the existing legislation, the Bill again gives the Welsh Ministers power to prescribe in regulations the criteria provision for monitoring and reporting on the operation of the new administrative scheme. This is to allow regulations to reflect specific arrangements in Wales, where health and social care policy is devolved. For example, England has a single regulator for all health and social care settings, while Wales maintains separate regulators for health and social care.
34. The Department intends to adopt a similar approach as adopted in the existing regulations in relation to best interests assessors: the Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments – Amendment) Regulations 2009. These regulations prescribe that in England this function is carried out by the Care Quality Commission. The Welsh Ministers have not exercised the existing power.
35. The regulation-making power has been narrowed from the original Law Commission draft and is limited to the matters that the Government wishes to specify and no further. For example, the Law Commission Bill would have allowed the Secretary of State and Welsh Ministers more flexibility in specifying different types of regulatory activities for individual cases.

Justification for the procedure

36. By virtue of section 65(2) of the Mental Capacity Act, regulations made under paragraph 38 of Schedule 1 (new Schedule AA1) would be subject to the negative parliamentary procedure.

37. The Bill follows the approach suggested by the Law Commission in its draft Bill. It also follows the approach of section 59(1) of the Health and Social Care Act 2008, under which the negative parliamentary procedure applies to regulations specifying additional functions for the Care Quality Commission. The Department considers this procedure is appropriate for the power to give the Care Quality Commission functions relating to the oversight and monitoring of the administrative scheme in this Bill too. This will help to ensure consistency with the 2008 Act.
38. The Department notes that the predecessor existing power in paragraph 162 of Schedule A1 to the Mental Capacity Act is subject to the affirmative procedure. This may have been appropriate when a power of this nature had yet to be exercised for the first time – that is no longer the case. The Department agrees with the Law Commission and proposes that the negative procedure provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Department of Health and Social Care

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