

Mental Capacity (Amendment) Bill [HL]

MARSHALLED
LIST OF AMENDMENTS
TO BE MOVED
IN COMMITTEE OF THE WHOLE HOUSE

The amendments have been marshalled in accordance with the Instruction of 18th July 2018, as follows –

Clause 1	Schedule 2
Schedule 1	Clause 5
Clauses 2 to 4	Title.

[Amendments marked ★ are new or have been altered]

**Amendment
No.**

Clause 1

BARONESS FINLAY OF LLANDAFF

1 Page 1, line 9, at end insert –

“() After section 4A, insert –

“4AA Compatibility with other provisions in the Mental Capacity Act 2005

Nothing under section 4B of, or Schedule AA1 to, this Act permits the authorisation of any arrangements for enabling care or treatment of a person that give rise to a deprivation of liberty which conflicts with sections 1 to 4 of this Act, or a valid decision to refuse care or treatment by the donee of a lasting power of attorney or a court-appointed deputy or contained in a valid advance decision to refuse treatment.”

LORD HUNT OF KINGS HEATH

Lord Hunt of Kings Heath gives notice of his intention to oppose the Question that Clause 1 stand part of the Bill.

Schedule 1

BARONESS THORNTON
BARONESS MURPHY
LORD HUNT OF KINGS HEATH

2 Page 6, line 2, leave out “18” and insert “16”

Schedule 1 - continued

BARONESS TYLER OF ENFIELD
 BARONESS JOLLY
 BARONESS MURPHY

- 3 Page 6, line 4, leave out “is of unsound mind” and insert “has any disorder or disability of the mind”

BARONESS MURPHY

- 4 Page 6, line 4, at end insert “, and
 (d) if living in a care home or supported accommodation, meets any one of the following conditions –
 (i) is under continuous supervision and is not permitted to leave the premises on their own, or
 (ii) is subject to the use of physical barriers to limit their access to particular areas, or
 (iii) is subject to the use of force, including physical, mechanical or chemical restraint, or
 (iv) is subject to constant close observation and surveillance.”

BARONESS JOLLY
 BARONESS THORNTON

- 5 Page 6, line 4, at end insert –
 “(2A) Arrangements that give rise to a deprivation of the cared-for person’s liberty occur when a responsible authority –
 (a) places the cared-for person, P, under continuous supervision and control,
 (b) ensures that P is not free to leave, and
 (c) deems those arrangements to be in P’s best interests.”

BARONESS THORNTON
 BARONESS MURPHY
 LORD HUNT OF KINGS HEATH

- 6 Page 6, line 40, leave out “18” and insert “16”

BARONESS BARKER

- 7 Page 10, line 7, leave out “and” and insert –
 “(ba) the arrangements are in the best interests of the cared-for person, and”

BARONESS BARKER
 BARONESS JOLLY

- 8 Page 10, line 8, after “necessary” insert “to avoid serious risk to the cared-for person”

BARONESS BARKER

- 9 Page 10, line 8, at end insert “to safeguard the well-being, wishes and feelings of the cared-for person.”

Schedule 1 - continued

- BARONESS BARKER
BARONESS JOLLY
- 10 Page 10, line 8, at end insert “because no less intrusive arrangement is available”
- BARONESS HOLLINS
LORD HUNT OF KINGS HEATH
- 11 Page 10, line 10, leave out “, other than care home arrangements,”
- 12 Page 10, line 32, at end insert –
“(h) the responsible body has taken all reasonable steps to involve the care home manager in the carrying out of assessments in relation to care home arrangements.”
- 13 Page 10, line 33, leave out from line 33 to line 37 on page 11.
- BARONESS FINLAY OF LLANDAFF
- 14★ Page 10, line 35, at end insert –
“(aa) the information provided by the care home appears to be consistent with either the assessments under paragraph 15 or the care and support plan held by the responsible body,”
- BARONESS JOLLY
BARONESS THORNTON
BARONESS MURPHY
- 15★ Page 11, line 1, leave out “in accordance with paragraphs 18 to 20” and insert “by an Approved Mental Capacity Professional”
- BARONESS JOLLY
BARONESS THORNTON
- 16 Page 11, leave out lines 3 to 8 and insert –
“(e) under paragraph 19, the Approved Mental Capacity Professional has determined that the authorisation conditions are met.”
- BARONESS BARKER
- 17 Page 11, line 9, after second “a” insert “written”
- BARONESS THORNTON
BARONESS MURPHY
LORD HUNT OF KINGS HEATH
- 18 Page 11, line 11, leave out “18” and insert “16”

Schedule 1 - continued

BARONESS BARKER
BARONESS JOLLY

- 19 Page 11, line 13, at end insert –
“(ba) that the cared-for person and persons involved in their care have been informed of the proposed arrangement and any possible alternatives,”

BARONESS THORNTON
BARONESS MURPHY
LORD HUNT OF KINGS HEATH

- 20 Page 11, line 26, at end insert –
“(1A) The responsible body may not authorise arrangements which provide for the cared-for person to reside in, or to receive care or treatment at, a particular place if there is a valid decision of –
(a) a donee of a lasting power of attorney granted by the cared-for person, or
(b) a deputy appointed for the cared-for person by the court, that the cared-for person should not reside in, or (as the case may be) receive care or treatment at, that place.”

BARONESS BARKER
BARONESS JOLLY

- 21 Page 11, line 41, after first “person,” insert “based on evidence,”

BARONESS TYLER OF ENFIELD

- 22★ Page 11, leave out lines 43 and 44 and insert –
“(b) a determination made on an assessment by a registered medical practitioner in respect of the cared-for person, that the person is of unsound mind.”

BARONESS THORNTON
LORD HUNT OF KINGS HEATH

- 23★ Page 11, line 44, at end insert –
“(c) a determination made on an assessment that steps to establish supported decision making are not practicable.
(1A) Steps to establish supported decision making are practical if, in relation to decisions about their personal welfare or property and affairs (or both), a cared-for person –
(a) is aged 16 or over, and
(b) has capacity to appoint a person to assist them in making those decisions.”

- 24 Page 11, line 44, at end insert –
“(1A) The assessment must include –
(a) a description of the steps which have been taken to establish whether the cared-for person lacks capacity;

Schedule 1 - continued

- (b) a description of the steps which have been taken to help the cared-for person to make decisions or an explanation as to why it was not practicable to take such steps;
- (c) an explanation of why it is believed that the cared-for person lacks capacity including—
 - (i) identification of the impairment or disturbance in the functioning of the cared-for person’s mind or brain by reason of which it is believed the cared-for person lacks capacity in relation to the matter, and
 - (ii) an explanation of why the cared-for person is unable to make decisions.”

BARONESS BARKER
BARONESS JOLLY

25 Page 12, line 8, after “condition” insert “or circumstances”

BARONESS JOLLY

26★ Page 12, line 9, at end insert —
“(4) If the arrangements are care home arrangements, the assessment must be carried out by an individual who has attended and passed the accredited training authorised by the local authority under section (*Training for care home managers*).”

BARONESS THORNTON
LORD HUNT OF KINGS HEATH

27 Page 12, line 10, at end insert “*and in the cared-for person’s best interests.*”

28 Page 12, line 12, at end insert “and in the cared-for person’s best interests in accordance with an assessment made under section 4.”

BARONESS HOLLINS
LORD HUNT OF KINGS HEATH

29 Page 12, line 12, at end insert —
“(1A) In determining that the arrangements are necessary and proportionate the person making the determination must take into account the views of those consulted under paragraph 17(2) placing particular weight on the wishes and feelings of the cared-for person.”

BARONESS BARKER
BARONESS JOLLY

30 Page 12, line 12, at end insert —
“(1A) The determination must be made with regard to the availability of less restrictive alternatives to the arrangements, including other places of residence or care arrangements, and any alternatives preferred by the cared-for person.”

Schedule 1 - continued

BARONESS JOLLY
 BARONESS THORNTON
 LORD HUNT OF KINGS HEATH

- 31 Page 12, line 18, at end insert –
 “(3) Where any interested party objects to the determination that arrangements are necessary and proportionate, an Approved Mental Capacity Professional (AMCP) must be engaged and the AMCP may, where they deem it necessary, refer disputes to the court.”

BARONESS FINLAY OF LLANDAFF
 LORD HUNT OF KINGS HEATH

- 32 Page 12, line 19, leave out “*Consultation*” and insert “*Duty to ascertain wishes and feelings of the cared-for person*”
 (A1) The main purpose of the consultation required under this paragraph is to try to ascertain the cared-for person’s wishes or feelings in relation to the arrangements and the likely impact of the arrangements on the cared-for person’s wellbeing.”

BARONESS HOLLINS
 BARONESS FINLAY OF LLANDAFF
 LORD HUNT OF KINGS HEATH

- 33 Page 12, line 24, at end insert –
 “(za) the cared-for person,”

BARONESS FINLAY OF LLANDAFF

- 34 Page 12, leave out lines 36 to 38

BARONESS HOLLINS
 LORD HUNT OF KINGS HEATH

- 35 Page 12, line 38, at end insert –
 “(3A) In addition, the consultation required by sub-paragraph (2) must seek views on whether any less restrictive alternatives could be made available.”

BARONESS BARKER

- 36 Page 12, leave out lines 39 to 41 and insert –
 “(4) The person conducting the consultation must make a written record a copy of which must be supplied to persons identified under paragraph 17(2) of this Schedule.
 (5) A record of consultation conducted under this Act must be included in the draft authorisation record prepared in accordance with paragraph 12(g) of this Schedule.”

- 37 Page 13, line 3, after “not” insert “employed by an organisation”

Schedule 1 - continued

BARONESS HOLLINS
LORD HUNT OF KINGS HEATH

38 Page 13, line 10, after “person” insert “or those interested in their welfare”

39 Page 13, line 10, after “wish” insert “for them”

40 Page 13, line 14, after “person” insert “or those interested in their welfare”

41 Page 13, line 15, after “wish” insert “for them”

BARONESS FINLAY OF LLANDAFF

42 Page 13, line 15, at end insert –

- “(c) a person interested in the welfare of the cared-for person or involved in caring for that person has expressed concerns about the arrangements, or
- (d) the rationale for the arrangements is based on the risk to others, or
- (e) the arrangements involve restrictions on contact with named persons.”

BARONESS HOLLINS
LORD HUNT OF KINGS HEATH

43 Page 13, line 15, at end insert –

- “(c) the responsible body receives a reasonable request for a review by an Approved Mental Capacity Professional from the cared-for person or anyone engaged in caring for them or interested in their welfare, or
- (d) there is reason to believe that it would be appropriate for the assessment to be carried out by an Approved Mental Capacity Professional.”

BARONESS BARKER
BARONESS JOLLY

44 Page 13, line 15, at end insert –

- “(c) there is reason to believe that it would be appropriate for the assessment to be carried out by an Approved Mental Capacity Professional.”

45 Page 13, line 21, at end insert –

- “(c) consider whether an application should be made to the Court of Protection, having regard to the rights of the cared-for person under Article 5 and Article 8 of the European Convention on Human Rights.”

Schedule 1 - continued

BARONESS BARKER

- 46 Page 13, line 24, leave out from “person” to second “and” in line 26 and insert “unless it is agreed with people authorised under paragraph 17(2) of this Schedule that it is neither necessary nor appropriate to do so”

BARONESS FINLAY OF LLANDAFF

- 47 Page 13, line 30, at end insert –
“(c) consider whether the view of the Court of Protection should be sought.”

BARONESS JOLLY
BARONESS THORNTON

- 48 Page 13, line 30, at end insert –
“(c) consider whether a referral to the court is required.”

BARONESS BARKER
BARONESS HOLLINS
LORD HUNT OF KINGS HEATH

- 49 Page 13, line 34, at end insert –
“(aa) meet with the cared-for person, and”

BARONESS FINLAY OF LLANDAFF

- 50★ Page 13, line 34, at end insert –
“(aa) consider whether it is necessary to verify the information independently by meeting the cared-for person, and”

BARONESS HOLLINS
BARONESS BARKER
BARONESS JOLLY
LORD HUNT OF KINGS HEATH

- 51 Page 14, line 7, at end insert –
“(5) The responsible body must ensure that the cared-for person, any appropriate person, and any Independent Mental Capacity Advocate supporting and representing them, are given copies of the authorisation record as soon as possible after authorisation is granted.”

- 52 Page 14, line 7, at end insert –
“(5) The responsible body must provide copies of the authorisation record to any persons consulted under paragraph 17 if they request a copy, unless there is a good reason not to do so.”

Schedule 1 - continued

BARONESS HOLLINS
LORD HUNT OF KINGS HEATH

53 Page 14, line 7, at end insert –

“Rights to information and appeal

21A(1) This paragraph applies if the arrangements are authorised.

- (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 outcome of the assessments, the reasons why the cared-for person is being deprived of their liberty and their rights to request an Approved Mental Capacity Professional’s assessment, advocacy, review and to challenge the authorisation in court.
- (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 –
- (a) the effect of the authorisation;
 - (b) the purpose of the authorisation;
 - (c) the duration of the authorisation;
 - (d) any conditions to which the authorisation is subject;
 - (e) the reasons why the cared-for person met the qualifying requirements in question;
 - (f) the right to request an Approved Mental Capacity Professional's assessment;
 - (g) the outcome of a review of the arrangements;
 - (h) the relevant rights of the cared-for person;
 - (i) 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 and the right to request a review of the arrangements.
- (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.”

BARONESS BARKER
BARONESS JOLLY

54 Page 14, line 7, at end insert –

“Duty to inform the cared-for person about the authorisation and their rights

21A(1) This paragraph applies if the arrangements are authorised.

- (2) The responsible body must take such steps as are practicable to ensure that the cared-for person and any appropriate person or IMCA representing and supporting them understand all of the following –
- (a) the effect of the authorisation;
 - (b) the right to make an application to the court to exercise its jurisdiction under section 21ZA;

Schedule 1 - continued

- (c) the right to request an independent assessment by an Approved Mental Capacity Professional under paragraph 18;
 - (d) the right to have an appropriate person appointed; and
 - (e) the right to have an IMCA appointed.
- (3) Those steps must be taken as soon as is practicable after the authorisation is given.
- (4) Those steps must include the giving of appropriate information both orally and in writing, and using any appropriate communication aids or reasonable accommodations to support the person's understanding."

BARONESS BARKER
BARONESS TYLER OF ENFIELD

55

Page 14, leave out lines 17 to 32 and insert –

- “23(1) An authorisation ceases to have effect –
- (a) at the end of the period of 12 months beginning with the day it first had effect,
 - (b) at the end of such shorter period determined by the responsible body at the time it determines that the conditions for authorisation are met,
 - (c) on such earlier date than the date given by paragraph (a) as the responsible body may from time to time determine,
 - (d) if the authorisation is renewed in accordance with paragraph 37, at the end of the renewal period, or
 - (e) when a suspension comes to an end as described in paragraph 41(2)(b).
- (2) An authorisation also ceases to have effect if, at any time, the responsible body believes or ought reasonably to suspect –
- (a) that the cared-for person has, or has regained, capacity to consent to the arrangements which are authorised,
 - (b) that the cared-for person is no longer of unsound mind, or
 - (c) that the arrangements are no longer necessary and proportionate.
- (3) But an authorisation does not cease to have effect for the reason described in sub-paragraph (2)(a) if –
- (a) the capacity assessment which was relied on in determining that the condition in paragraph 14(a) is met states –
 - (i) that the cared-for person's capacity to consent to arrangements is likely to fluctuate, and
 - (ii) that any periods during which the person is likely to have capacity to consent is likely to last only for a short period of time, and
 - (b) the responsible body reasonably believes that the gaining or regaining of capacity will last only for a short period of time.

Schedule 1 - continued

- (4) The Secretary of State must by regulations prescribe a definition of “fluctuate” and “short” for the purposes of sub-paragraph (3)(a)(i), (ii), and (b) above.
- (5) In a case where –
- (a) an authorisation relates to arrangements which provide for the cared-for person to reside in, or to receive care or treatment at, a specified place, and
 - (b) at any time, the responsible body believes or ought reasonably to suspect that there is a conflicting decision about the cared-for person residing in, or receiving care or treatment at, that place,
- the authorisation ceases to have effect in so far as it relates to those arrangements.
- (6) There is a conflicting decision for the purposes of sub-paragraph (4)(b) if there is a valid decision of –
- (a) a donee of a lasting power of attorney granted by the cared-for person, or
 - (b) a deputy appointed for the cared-for person by the court, that the cared-for person should not reside in, or (as the case may be) receive care or treatment at, the specified place.
- (7) If at any time an authorisation relates to arrangements which conflict with requirements arising under legislation relating to mental health, the authorisation ceases to have effect in so far as it relates to those arrangements.

BARONESS BARKER

56 Page 14, leave out lines 30 to 32

57 Page 14, line 37, after “arrangements” insert “and anyone authorised under paragraph 17(2) of this Schedule”

58 Page 15, leave out lines 7 and 8

BARONESS BARKER

BARONESS JOLLY

59 Page 17, line 2, at end insert –

“(6A) The care home manager must report to the responsible body any request for a review which is deemed unreasonable. An Approved Mental Capacity Professional must maintain a record of requests which have been refused.”

BARONESS BARKER

60 Page 17, line 23, at end insert –

“(c) that a named officer is responsible for the training, conduct and performance of Approved Mental Capacity Professionals.”

Schedule 1 - continued

BARONESS FINLAY OF LLANDAFF

- 61★ Page 17, line 23, at end insert –
 “(c) for a named person to be in charge of training and revalidation of Approved Mental Capacity Professionals,
 (d) for honorary contracts with neighbouring local authorities and health bodies as required.”

BARONESS BARKER

- 62 Page 17, line 33, at end insert –
 “(d) prescribe the period of time within which an individual must be reapproved in order to continue to practise as an Approved Mental Capacity Professional.”

BARONESS FINLAY OF LLANDAFF

BARONESS HOLLINS

BARONESS BARKER

BARONESS JOLLY

- 63 Page 18, line 18, leave out “the manager is of the opinion” and insert “there is reason to believe”
- 64 Page 18, line 32, leave out “only”

BARONESS FINLAY OF LLANDAFF

- 65 Page 18, line 33, at end insert “or a person concerned with the welfare of the cared-for person has requested independent support for the cared-for person”

BARONESS HOLLINS

BARONESS BARKER

BARONESS JOLLY

- 66 Page 18, line 33, at end insert “or if the responsible body has reason to believe that paragraphs 36 and 37 apply”

BARONESS HOLLINS

LORD HUNT OF KINGS HEATH

- 67 Page 19, line 1, leave out “should” and insert “must”

BARONESS BARKER

BARONESS JOLLY

- 68 Page 19, leave out lines 2 and 3

BARONESS HOLLINS

LORD HUNT OF KINGS HEATH

- 69 Page 19, leave out lines 2 to 5 and insert “requests to be supported by an IMCA”

Schedule 1 - continued

- 70 Page 19, leave out lines 6 to 11 and insert—
“(3) An IMCA must be appointed if the relevant person is satisfied that being represented and supported by an IMCA is necessary to support and enable the cared-for person to understand the authorisation and their rights, or to exercise rights of challenge.”
- BARONESS BARKER
BARONESS JOLLY
- 71 Page 19, leave out lines 7 and 8
- 72 Page 19, line 10, leave out “would be in the cared-for person’s best interests” and insert “is necessary to enable the person to understand the authorisation and their rights.”
- BARONESS HOLLINS
BARONESS BARKER
BARONESS JOLLY
LORD HUNT OF KINGS HEATH
- 73 Page 19, leave out lines 24 to 26 and insert—
“(a) the cared-for person does not object to being represented and supported by that person, and”
- 74 Page 19, leave out lines 27 to 31 and insert—
“(b) the person is both willing and able to help the cared-for person to understand their rights, involve them in decisions, and assist them in exercising rights of challenge if they wished to do so.”
- BARONESS BARKER
BARONESS JOLLY
- 75 Page 19, leave out lines 38 to 42
- BARONESS HOLLINS
LORD HUNT OF KINGS HEATH
- 76 Page 19, leave out lines 38 to 42 and insert—
“(2) An IMCA must be appointed if the appropriate person makes a request to the relevant person for an IMCA to be appointed.”

Schedule 1 - continued

BARONESS HOLLINS
 BARONESS BARKER
 BARONESS JOLLY

- 77 Page 19, leave out lines 43 to 48 and insert –
- “(3) An IMCA must be appointed if the appropriate person would have substantial difficulty helping the cared-for person to understand their rights, involving them in decisions, and assisting them to exercise rights of challenge if they wished to do so, without the support of an IMCA.”

LORD HUNT OF KINGS HEATH
As an amendment to Amendment 77

- 78★ At end insert –
- “(4) In this paragraph, “relevant rights” includes the right to make an application to the court and the right to request a review of the arrangements.
- (5) The responsible body must ensure that cases are referred to the court when the cared-for person’s right to a court review is engaged.”

BARONESS HOLLINS
 LORD HUNT OF KINGS HEATH

- 79 Page 20, line 3, at end insert –
- “(5) The appropriate authority may by regulations make provision for how an IMCA is to discharge the functions of representing or supporting a cared-for person, including challenging decisions and facilitating a cared-for person’s involvement in relevant decisions and representing and supporting the cared-for person or an appropriate person to exercise relevant rights.”

- 80 Page 20, line 3, at end insert –
- “(5) The responsible body must keep under review whether the appropriate person is undertaking their functions.
- (6) If the responsible body finds that the appropriate person no longer fulfils the required functions, the responsible body must appoint another appropriate person or an IMCA.”

Clause 2

BARONESS MURPHY

- 81 Page 2, line 17, at end insert –
- “() Condition 1A is that the person authorising or effecting the steps which deprive P of liberty is satisfied that doing so will benefit P and that life-sustaining treatment or doing any vital act cannot reasonably be achieved without taking those steps.”

Clause 2 - continued

BARONESS FINLAY OF LLANDAFF

82★ Page 3, line 9, at end insert—

“() An authorisation under this section shall be valid for the period of seven days and may be eligible for renewal at the end of this and every subsequent seven day period up to a maximum period of 28 days beginning with the date of the first authorisation.”

After Clause 2BARONESS THORNTON
LORD HUNT OF KINGS HEATH

83 Insert the following new Clause—

“Restriction on power of attorneys and deputies

After section 29 of the Mental Capacity Act 2005 insert—

“29A Deprivation of liberty

Nothing in this Act authorises a donee of a lasting power of attorney or a deputy to consent on behalf of a person to arrangements which give rise to a deprivation of that person’s liberty.”

After Clause 3BARONESS THORNTON
LORD TOUHIG
BARONESS MURPHY
LORD HUNT OF KINGS HEATH

84 Insert the following new Clause—

“Advance consent to certain arrangements

- (1) The Mental Capacity Act 2005 is amended as follows.
- (2) After section 26 insert—

“Advance consent to arrangements giving rise to a deprivation of liberty

26A Advance consent to certain arrangements

- (1) “Arrangements” means arrangements enabling the care or treatment of a person which, if the person did not consent to those arrangements, would give rise to a deprivation of that person’s liberty.
- (2) “Advance consent” means consent given by an eligible person to specified arrangements being put in place at a later time in respect of that person.
- (3) An “eligible person” is a person aged 16 or over who has capacity to give consent to the arrangements mentioned in subsection (2).
- (4) The Secretary of State may by regulations prescribe other requirements which must be met for consent to be advance consent for the purposes of this section, including—
 - (a) the form in which advance consent must be given, and

After Clause 3 - continued

- (b) the level of detail about the arrangements which must be provided in the consent.
- (5) Advance consent comes to an end –
 - (a) at the end of the period specified by the eligible person when giving the advance consent,
 - (b) if no period is specified, at the end of such period as is prescribed in relation to arrangements of that kind in regulations made by the Secretary of State,
 - (c) if it is withdrawn at a time when the eligible person has capacity to do so, or
 - (d) if the eligible person does anything else clearly inconsistent with the advance consent remaining the person’s fixed decision.
- (6) A withdrawal of an advance consent (including a partial withdrawal) need not be in writing.

26B Effect of advance consent

- (1) If arrangements are proposed or put in place in respect of a person at a time when that person lacks the capacity to consent to them, the person will be taken to have consented to the arrangements if –
 - (a) the person has given advance consent to those arrangements, and
 - (b) that advance consent is valid.
- (2) Accordingly, if subsection (1) applies in respect of arrangements, Schedule AA1 (Deprivation of liberty: authorisation of arrangements enabling care and treatment) does not apply to those arrangements.
- (3) An advance consent is not valid if –
 - (a) it has come to an end, or
 - (b) there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of giving the advance consent and, if the person had anticipated them, would have affected the decision to give consent.
- (4) The court may make a declaration as to whether an advance consent –
 - (a) exists;
 - (b) is valid;
 - (c) has been given in respect of the particular arrangements which are proposed or have been put in place.
- (5) “Advance consent” and “arrangements” have the meaning given by section 26A.
- (6) In section 42 (codes of practice), in subsection (1), after paragraph (g) (but before the “and” following it) insert –
 - “(ga) with respect to the provisions of sections 26A and 26B (advance consent),”.

BARONESS THORNTON
LORD HUNT OF KINGS HEATH

85 Insert the following new Clause –

“Unlawful deprivation of liberty

After section 4B of the Mental Capacity Act 2005 insert –

*After Clause 3 - continued***“4C Unlawful deprivation of liberty**

- (1) This section applies where –
 - (a) arrangements are put in place by or on behalf of a private care provider enabling the care or treatment of a person,
 - (b) those arrangements give rise to a deprivation of that person’s liberty, and
 - (c) that deprivation of liberty is not authorised by –
 - (i) a provision of this Act,
 - (ii) a provision of Part 2 or 3 of the Mental Health Act, or
 - (iii) an order of a court.
- (2) The person may bring civil proceedings against the private care provider in relation to that deprivation of liberty.
- (3) It is a defence to a claim brought under subsection (2) that the private care provider reasonably believed that –
 - (a) the arrangements did not give rise to a deprivation of liberty, or
 - (b) the deprivation of liberty arising from the arrangements was authorised as mentioned in subsection (1)(c).
- (4) A “private care provider” means –
 - (a) a person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of residential accommodation, together with nursing or personal care in relation to a care home;
 - (b) a person registered, or required to be registered, under Part 2 of the Care Standards Act 2000 in respect of a care home;
 - (c) a hospital manager of an independent hospital;
 - (d) any other person prescribed for the purposes of this section by regulations made by the Secretary of State after consulting the Welsh Ministers.
- (5) A public authority for the purposes of section 6 of the Human Rights Act 1998 is not a private care provider for the purposes of this section.
- (6) In this section –
 - “care home” has the meaning given by section 3 of the Care Standards Act 2000;
 - “independent hospital” has the meaning given by paragraph 5(3) of Schedule AA1;
 - “hospital manager” has the meaning given by paragraph 7 of Schedule AA1.

4D Section 4C: proceedings and remedies

- (1) Proceedings under section 4C may be brought in the county court or the High Court.
- (2) Alternatively, if a decision as respects any other issue concerning the person bringing the proceedings is being sought from a court, proceedings under section 4C may be brought in the same court.
- (3) The proceedings must be brought before the end of –
 - (a) the period of one year beginning with the date on which the arrangements were first put in place, or

After Clause 3 - continued

- (b) such longer period as the court hearing the proceedings considers equitable having regard to all the circumstances.
- (4) In determining the amount of any award of damages on a claim under section 4C a court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the European Convention on Human Rights.””

BARONESS JOLLY
 BARONESS BARKER
 BARONESS TYLER OF ENFIELD

86★ Insert the following new Clause—

“Requirements before commencement

- (1) Before all provisions of this Act other than those which come into force on its passing can come into force, the requirements under subsection (2) must be met.
- (2) The requirements are as follows—
- (a) the Secretary of State must publish an updated code of practice giving guidance for decisions made under the Mental Capacity Act 2005, including the provisions of the Mental Capacity Act 2005 that are amended by this Act; and
- (b) the Secretary of State must publish a response to the Independent Review of the Mental Health Act, chaired by Professor Sir Simon Wessely.
- (3) The Secretary of State must lay a copy of the publications required by subsection (2) before both Houses of Parliament.”

BARONESS JOLLY
 BARONESS BARKER

87★ Insert the following new Clause—

“Review

- (1) The Secretary of State must undertake a review of the provisions in this Act, and produce a report of its findings.
- (2) The review under subsection (1) must make reference to—
- (a) whether the provisions in this Act have successfully improved the process in the Mental Capacity Act 2005 for authorising arrangements enabling the care or treatment of people who lack capacity to consent to the arrangements; and
- (b) whether action needs to be taken to ensure that the process referred to in paragraph (2)(a) is further improved in relation to the deprivation of liberty.
- (3) The Secretary of State must lay a copy of the report before both Houses of Parliament within one year from the day that this Act comes into force.”

Clause 4

BARONESS TYLER OF ENFIELD

88★ Page 4, line 5, leave out subsections (4) and (5) and insert –

- “(4) Regulations under this Act may not be made unless a draft of the statutory instrument containing them has been laid before and approved by a resolution of each House of Parliament.
- (5) Before laying a draft statutory instrument under this Act before either House of Parliament, the Secretary of State must consult such persons as the Secretary of State considers appropriate.”

After Clause 4

BARONESS THORNTON
LORD TOUHIG
LORD HUNT OF KINGS HEATH

89 Insert the following new Clause –

“Compatibility with European Convention on Human Rights

So far as it is possible to do so, all provisions under this Act must be read and given effect in a way which is compatible with Article 5 (Right to liberty and security) of the European Convention on Human Rights.”

BARONESS JOLLY

90 Insert the following new Clause –

“Training for care home managers

- (1) The Secretary of State must by regulations made by statutory instrument require local authorities to provide training for all care home managers who may be required to make a statement under paragraph 13 of Schedule AA1 to the Mental Capacity Act 2005.
- (2) The regulations may prescribe which bodies are to provide the training under subsection (1), and the assessment to be used for participants to complete the training.
- (3) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

BARONESS HOLLINS

91 Insert the following new Clause –

“Training strategy

- (1) The Secretary of State must publish a training strategy to aid the effective implementation of this Act within six months of its passing.
- (2) In preparing the strategy under subsection (1) the Secretary of State must have regard to –
- (a) the initial and ongoing training of all those on whom duties and responsibilities fall,

After Clause 4 - continued

- (b) how vulnerable individuals and their families might be involved in delivering training to those on whom duties and responsibilities fall, and
- (c) how such a training programme will be effectively resourced.”

LORD TOUHIG
BARONESS TYLER OF ENFIELD

92 Insert the following new Clause—

“Report to Parliament

- (1) The Secretary of State must commission two independent reports on the operation of deprivation of liberty as set out in this Act and its impact on those to whom it applies and their families.
- (2) The first report under subsection (1) must be laid before both Houses of Parliament within two years beginning with the date on which this Act comes into force and the second report must be laid after the period of four years beginning with the day on which the first report was laid.”

Clause 5

BARONESS JOLLY
BARONESS BARKER
BARONESS TYLER OF ENFIELD

93 Page 4, line 14, after the first “section,” insert “section (*Requirements before commencement*)”

94★ Page 4, line 20, at end insert—

“provided that the requirements under section (*Requirements before commencement*)(2) of this Act have been met.”

Mental Capacity (Amendment) Bill [HL]

MARSHALLED
LIST OF AMENDMENTS
TO BE MOVED
IN COMMITTEE OF THE WHOLE HOUSE

3 September 2018
