

# Mental Capacity (Amendment) Bill [HL]

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SECOND  
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.**

**Schedule 1**

BARONESS FINLAY OF LLANDAFF

**14A★** Page 10, line 36, leave out from beginning of line 36 to end of line 8 on page 11

**14B** Page 10, line 40, after “manager” insert “or the person responsible for the care plan”

BARONESS JOLLY  
BARONESS THORNTON  
BARONESS MURPHY  
BARONESS MEACHER

**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.”

**Schedule 1 - continued**

BARONESS FINLAY OF LLANDAFF

- 16A★** Page 11, leave out lines 9 and 10 and insert—  
 “(1) The responsible body may authorise care home arrangements if it has provided, or nominated another body to provide, a statement confirming—”

BARONESS BARKER

BARONESS JOLLY

BARONESS FINLAY OF LLANDAFF

- 17** Page 11, line 9, after second “a” insert “written”

LORD HUNT OF KINGS HEATH

BARONESS THORNTON

- 17A** Page 11, line 10, leave out “care home manager” and insert “responsible body”

BARONESS FINLAY OF LLANDAFF

- 17B** Page 11, line 10, after “manager” insert “or the person responsible for the care plan”

BARONESS THORNTON

BARONESS MURPHY

LORD HUNT OF KINGS HEATH

BARONESS JOLLY

- 18** Page 11, line 11, leave out “18” and insert “16”

BARONESS FINLAY OF LLANDAFF

- 18A** Page 11, leave out lines 12 and 13 and insert—  
 “(b) that the liberty protection arrangements impose physical restrictions on the cared-for person,”

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,”

LORD HUNT OF KINGS HEATH

- 19A** Page 11, line 17, leave out “care home manager has carried out consultation” and insert “appropriate consultation has been carried out”

BARONESS FINLAY OF LLANDAFF

- 19B** Page 11, line 17, after “manager” insert “or the person responsible for the care plan”

- 19C★** Page 11, line 22, leave out from “that” to “paragraph” in line 23

- 19D** Page 11, line 22, after “manager” insert “or the person responsible for the care plan”

**Schedule 1 - continued**

**19E★** Page 11, line 24, leave out “is satisfied that”

**19F★** Page 11, line 25, at beginning insert “the person providing the statement”

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 FINLAY OF LLANDAFF

**21A** Page 11, line 42, at end insert “this determination is in accordance with section 2 of this Act and”

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 –

## Schedule 1 - continued

- (a) a description of the steps which have been taken to establish whether the cared-for person lacks capacity;
- (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 FINLAY OF LLANDAFF  
LORD HUNT OF KINGS HEATH

24A Page 11, leave out lines 47 and 48

24B Page 12, line 1, leave out “, in any other case”

BARONESS FINLAY OF LLANDAFF

24C Page 12, line 3, leave out “care home manager or”

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.*”

BARONESS FINLAY OF LLANDAFF

27A Page 12, line 10, at end insert—  
“15A The conditions when a restriction on the cared-for person's liberty can be authorised are when the cared-for person is subject to restrictions of a degree and intensity that—  
(a) are greater than restrictions which respected the cared-for person's rights to a private and family life before entering the place of care, and

**Schedule 1 - continued**

- (b) are not temporary as required to achieve therapeutic improvement in an acute condition of the cared-for person, or
- (c) are additional to the restriction that the cared-for person's underlying illness or disorder has imposed."

BARONESS THORNTON  
LORD HUNT OF KINGS HEATH

- 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 FINLAY OF LLANDAFF

- 28A** Page 12, line 12, at end insert " , and
- (a) protect the liberty of the cared-for person, and
  - (b) respect the wishes and feelings of the cared-for person."

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.”

BARONESS FINLAY OF LLANDAFF

- 30A** Page 12, leave out lines 13 to 18 and insert –
- “(2) The determination must be made by a registered professional who has responsibility for the care plan and has appropriate experience and knowledge to lead the care planning process for the cared-for person.”

LORD HUNT OF KINGS HEATH  
BARONESS THORNTON

- 30B** Page 12, leave out lines 14 and 15

BARONESS FINLAY OF LLANDAFF

- 30C★** Page 12, leave out lines 14 to 16 and insert “to the responsible body”

**Schedule 1 - continued**

LORD HUNT OF KINGS HEATH

**30D** Page 12, line 16, leave out “in any other case,”

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 FINLAY OF LLANDAFF

**32A** Page 12, line 20, at end insert “by the professional responsible for the care plan, who must supply evidence from the consultation”

LORD HUNT OF KINGS HEATH  
BARONESS THORNTON

**32B** Page 12, leave out lines 21 and 22

BARONESS FINLAY OF LLANDAFF

**32C★** Page 12, leave out lines 21 to 23 and insert “by the responsible body or a body nominated by the responsible body to carry out the consultation on its behalf”

**32D** Page 12, line 21, leave out “by” and insert “to”

LORD HUNT OF KINGS HEATH

**32E** Page 12, line 23, leave out “otherwise,”

BARONESS FINLAY OF LLANDAFF

**32F** Page 12, line 23, leave out “by” and insert “to”

**Schedule 1 - continued**

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  
 BARONESS JOLLY

- 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.”

BARONESS FINLAY OF LLANDAFF

- 36A Page 13, leave out lines 2 to 5

BARONESS BARKER  
 BARONESS JOLLY

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

LORD HUNT OF KINGS HEATH  
 BARONESS THORNTON

- 37A Page 13, line 5, at end insert –  
 “(c) in managing the care home in which the cared-for person is resident.”

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”

**Schedule 1 - continued**

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.”

BARONESS THORNTON

44A★ Page 13, line 15, at end insert “or,

- (c) the cared-for person is in an independent hospital and receiving mental health assessment or treatment.”

BARONESS BARKER  
BARONESS JOLLY

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.”

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”



**Schedule 1 - continued**

BARONESS FINLAY OF LLANDAFF  
BARONESS MEACHER

- 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”

LORD HUNT OF KINGS HEATH  
BARONESS THORNTON

- 50ZA Page 13, line 36, at end insert –  
“(c) be qualified as a medical practitioner, nurse, social worker, speech therapist, occupational therapist or other profession as may be specified in regulations.”

LORD MACKAY OF CLASHFERN  
BARONESS HOLLINS

- 50A Page 13, line 36, at end insert –

*“Clinical ethics committees*

- 20A(1) The Secretary of State must by regulations made by statutory instrument make provision for all NHS bodies to have access to a clinical ethics committee.
- (2) The main objective of a clinical ethics committee is to provide advice on clinical ethics to professionals on matters relating to Schedule AA1.
- (3) The regulations in sub-paragraph (1) must make provision for the membership, funding and constitution of the clinical ethics committee.
- (4) The regulations in sub-paragraph (1) may make provision to require certain cases to be referred to a clinical ethics committee, such as in cases where a dispute has arisen.

**Schedule 1 - continued**

- (5) The Secretary of State must review the operation of clinical ethics committees and prepare and publish a report on the outcome of the review before the end of the period of three years beginning with the day on which this paragraph comes into force.
- (6) A subsequent report must be published before the end of each period of three years beginning with the day on which the previous report was published.
- (7) The Secretary of State may arrange for some other person to carry out the whole or part of a review under this section on the Secretary of State's behalf.
- (8) The Secretary of State must lay before both Houses of Parliament the reports published under this paragraph.
- (9) A statutory instrument containing regulations under this paragraph 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 FINLAY OF LLANDAFF

50B Page 13, line 42, at end insert –

“(aa) any arrangements that are not authorised or are authorised subject to conditions,”

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.”

BARONESS HOLLINS

LORD HUNT OF KINGS HEATH

BARONESS MEACHER

53 Page 14, line 7, at end insert –

*“Rights to information and appeal*

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

**Schedule 1 - continued**

- (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;
  - (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.

**Schedule 1 - continued**

- (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.
- (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

**Schedule 1 - continued**

- (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  
BARONESS JOLLY

- 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 THORNTON

- 58A★ Page 15, line 12, leave out from “of” to end of line 14 and insert “12 months or less.”

BARONESS FINLAY OF LLANDAFF

- 58B Page 15, line 15, after “has” insert “wholly or in part”
- 58C Page 15, line 32, at end insert “evidence and any other relevant”
- 58D Page 15, line 40, leave out “care home manager” and insert “registered professional responsible for the care plan”
- 58E Page 16, line 1, after “has” insert “verified that the registered professional responsible for the care plan has”
- 58F Page 16, leave out lines 13 and 14 and insert—  
“(a) the registered professional responsible for the care plan, reporting to the responsible body, or”
- 58G Page 16, line 15, leave out “, in any other case”

**Schedule 1 - continued**

**58H** Page 17, line 2, leave out “manager” and insert “registered professional responsible for the care plan”

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.”

**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.”

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.”

**61A** Page 17, line 27, at end insert “, which must include being a registered professional, with a minimum of three years clinical experience, in an area such as social work, nursing, speech and language therapy, occupational therapy or clinical psychology”

BARONESS BARKER  
BARONESS JOLLY

**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

**62A** Page 18, line 15, after “proposing” insert “, arranging”

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”

**Schedule 1 - continued**

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”

- 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”

**Schedule 1 - continued**

- 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.”  
  
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.”



**Schedule 1 - continued**

- 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.”

BARONESS FINLAY OF LLANDAFF

- 81A Page 2, line 34, after “manager” insert “or the person responsible for the care plan”

- 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 2**BARONESS 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.””

**Clause 3**LORD MACKAY OF CLASHFERN  
BARONESS HOLLINS

- 83A Page 3, line 33, at end insert—
- “21ZB Medical mediation**

**Clause 3 - continued**

- (1) The Secretary of State must by regulations made by statutory instrument make provision for medical mediation to be offered where arrangements are authorised under Schedule AA1, or are being proposed or carried out, and are not yet authorised, for the provision of serious medical treatment and a dispute has arisen.
- (2) For the purposes of subsection (1) a dispute means a disagreement between an NHS body and P, or anyone interested in his or her welfare, about the arrangements or any aspect of the care or treatment which is being enabled or would be enabled by the arrangements.
- (3) The regulations referred to in subsection (1) must provide for –
  - (a) formal notification to be issued to P, and anyone interested in his or her welfare, by an NHS body within 24 hours of reaching a determination to pursue a course of treatment with which it is reasonable to believe that P disagrees, or has not the mental capacity to consent;
  - (b) following formal notification, the right to engage a trained medical mediator within 48 hours;
  - (c) the establishment of a panel of experienced NHS professionals and ethicists who are available and willing to provide impartial second opinions about the medical and ethical considerations relevant to the care of P;
  - (d) the disclosure of all relevant medical materials, including raw data, together with any software necessary to access this data, to the mediator as soon as possible, and no later than 72 hours after issuing a formal notification;
  - (e) the confidentiality of the mediation process, which must be conducted and concluded without prejudice to prospective court proceedings; and
  - (f) the burden of the cost for both the mediator and expert assessments to be borne by the disputing NHS body, except where those opinions are sought from overseas.
- (4) No steps towards legal proceedings may be taken by either party until –
  - (a) the 48 hour period has expired and neither party has invoked the mediation process;
  - (b) the mediation process has proved unsuccessful; or
  - (c) the mediator forms the opinion, in good faith, that the dispute cannot be resolved through mediation.
- (5) Regarding subsection (3)(b) –
  - (a) the mediator may, at the request of the person or any other person with an interest in P's welfare, solicit from the panel isolated interpretations of scans or other raw data;
  - (b) members of the expert panel must present their findings within seven days of being instructed by the mediator;
  - (c) the mediator must be independent of the NHS body;
  - (d) a choice of independent medical mediators should be offered together with their full employment history and register of interests;

**Clause 3 - continued**

- (e) the mediator must be approved by both parties to the dispute; and
  - (f) the mediation period must not exceed 28 days except at the request of the mediator, and by the written permission of representatives of the disputing parties.
- (6) Nothing in subsection (4) above prevents the NHS body providing or seeking court permission to provide life-saving treatment in an emergency.
  - (7) For the purposes of subsection (5) the mediator must be presumed to be independent unless a formal or informal connection to the NHS body is evident in their employment history or register of interests.
  - (8) The Secretary of State must review the operation of the medical mediation scheme and prepare and publish a report on the outcome of the review before the end of the period of three years beginning with the day on which this section comes into force.
  - (9) A subsequent report must be published before the end of each period of three years beginning with the day on which the previous report was published.
  - (10) The Secretary of State may arrange for some other person to carry out the whole or part of a review under this section on the Secretary of State's behalf.
  - (11) The Secretary of State must lay before both Houses of Parliament the reports published under this section.
  - (12) 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."

**After Clause 3**

BARONESS 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.

**After Clause 3 - continued**

- (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
  - (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),”.

*After Clause 3 - continued*

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 –

**“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.

**After Clause 3 - continued**

- (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
  - (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

*After Clause 3 - continued*

- (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.”

## LORD HUNT OF KINGS HEATH

87A Insert the following new Clause—

**“Requirements before commencement**

Before any of the provisions of this Act other than those which come into force on its passing can come into force, the Secretary of State must commission separate independent reports on the following matters—

- (a) the introduction of a statutory definition for “unsound mind”, in the context of a deprivation of liberty, which clarifies the application of the Supreme Court’s acid test for confinement and is based upon consultation with health and social care professionals;
- (b) how to formalise the arrangements for giving advance consent for a deprivation of liberty, how to ensure that any authorised arrangements put in place respect any stipulations the cared-for person has made about his or her future care, and how to ensure that proper records are kept;
- (c) a strategy for enhancing access to, and funding towards, independent mental capacity advocates;
- (d) whether a statutory duty should be placed upon appropriate persons or independent mental capacity advocates to make appeals on behalf of cared-for persons in cases where a cared-for person objects to the arrangements authorised under this Act or where the arrangements are unusually intrusive, and whether a statutory duty should be placed on a responsible body to refer a case to appeal where appropriate persons or independent mental capacity advocates have failed to do so;
- (e) how to support cared-for persons to participate in court proceedings relating to any arrangements under this Act;
- (f) the establishment of a tribunal with powers to consider cases relating to the authorisation of arrangements under this Act;
- (g) the availability of legal aid for all eligible persons challenging the authorisation of arrangements depriving them of liberty under this Act;
- (h) evaluating different proposals to replace the term “unsound mind” in the Code of Practice; and
- (i) setting out the short- and long-term cost implications of implementing the provisions of this Act for local authorities, the courts and the health service and evaluating different proposals to meet those costs.”

87B★ Insert the following new Clause—

**“Duties of the Care Quality Commission**

- (1) The Health and Social Care Act 2008 is amended as follows.

**After Clause 3 - continued**

- (2) In section 4 (matters to which the Commission must have regard), after subsection (1)(g) insert—
- “(h) the operation of the procedures which authorise arrangements giving rise to deprivation of liberty under the Mental Capacity Act 2005, as amended by the Mental Capacity (Amendment) Act 2018.
- (1A) In performing its functions under subsection (1)(h), the Care Quality Commission must monitor the following—
- (a) the use of emergency measures under section 4B of the Mental Capacity Act 2005;
  - (b) the quality of evidence provided to meet the authorisation conditions under paragraph 11 of Schedule AA1 to the Mental Capacity Act 2005;
  - (c) the quality of assessments made under paragraph 15 of Schedule AA1 to the Mental Capacity Act 2005;
  - (d) the quality of determinations that the authorised arrangements are necessary and proportionate under paragraph 11 of Schedule AA1 to the Mental Capacity Act 2005;
  - (e) the evidence of skills, knowledge and expertise of those providing evidence in relation to deprivation of liberty safeguards under the Mental Capacity Act 2005;
  - (f) the availability of a conflict of interests register for those authorising arrangements under section 4B of, and paragraph 12 of Schedule AA1 to, the Mental Capacity Act 2005;
  - (g) the extent to which independent corroboration of consultation in accordance with paragraph 17 of Schedule AA1 to the Mental Capacity Act 2005 is being carried out;
  - (h) the extent to which there are independent checks being made as to whether cared-for persons, including residents of care homes, are objecting to authorised arrangements in relation to deprivation of liberty safeguards under the Mental Capacity Act 2005;
  - (j) the extent to which there are independent checks being made as to whether the authorisation of arrangements is compatible with the mental health legislation.”

**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  
BARONESS JOLLY

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  
BARONESS MEACHER

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,
  - (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.”

**After Clause 4 - continued**

LORD TOUHIG  
BARONESS TYLER OF ENFIELD  
BARONESS JOLLY

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]

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

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*11 October 2018*

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