

Mental Capacity (Amendment) Bill [HL]

RUNNING LIST OF ALL AMENDMENTS IN COMMITTEE OF THE WHOLE HOUSE

Tabled up to and including

24 July 2018

[Sheets HL Bill 117(a) to (d)]

Schedule 1

BARONESS THORNTON

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

BARONESS TYLER OF ENFIELD
BARONESS JOLLY

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

BARONESS THORNTON

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

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

Page 11, line 26, at end insert –

- “() 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.”

After Clause 2

BARONESS THORNTON

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

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
 - (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.

After Clause 3 - continued**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

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—

After Clause 3 - continued

- (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
 - (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.””

After Clause 4

BARONESS THORNTON
LORD TOUHIG

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.”