

# Mental Capacity (Amendment) Bill [HL]

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## COMMONS AMENDMENTS

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*[The page and line refer to Bill 303, the Bill as first printed for the Commons]*

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### Before Clause 1

**1** Insert the following new Clause –

**“Meaning of deprivation of liberty**

(1) After section 4 of the Mental Capacity Act 2005 insert –

**“4ZA Meaning of deprivation of liberty**

- (1) In this Act, references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the Human Rights Convention and, accordingly, a person is not deprived of liberty in any of the circumstances described in subsections (2) to (4).
  - (2) A person is not deprived of liberty in a particular place if the person is free to leave that place permanently.
  - (3) A person is not deprived of liberty in a particular place if –
    - (a) the person is not subject to continuous supervision, and
    - (b) the person is free to leave the place temporarily (even if subject to supervision while outside that place).
  - (4) A person is not deprived of liberty if –
    - (a) the arrangements alleged to give rise to the deprivation of liberty are put in place in order to give medical treatment for a physical illness or injury, and
    - (b) the same (or materially the same) arrangements would be put in place for any person receiving that treatment.
  - (5) A person is free to leave a particular place for the purposes of subsections (2) and (3) even if the person is unable to leave that place provided that if the person expressed a wish to leave the person would be enabled to do so.”
- (2) In section 64(5) of that Act (interpretation) for the words from “same” to the end substitute “meaning given by section 4ZA.””

### Clause 5

**2** Page 4, line 25, leave out subsection (9)

### Schedule 1

- 3 Page 5, line 19, leave out “if a person objects to arrangements” and insert “in certain cases”
- 4 Page 7, line 6, leave out from “Wales,” to end of line 10 and insert “the person registered, or required to be registered, under Chapter 2 of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2) in respect of the provision of a care home service, in the care home;”
- 5 Page 7, line 13, at end insert—  
     ““Education, Health and Care plan” means a plan within the meaning of section 37(2) of the Children and Families Act 2014;”
- 6 Page 7, leave out line 16
- 7 Page 7, line 17, at end insert—  
     ““independent hospital” has the meaning given by paragraph 5;”
- 8 Page 7, line 27, at end insert—  
     ““NHS hospital” has the meaning given by paragraph 5;”
- 9 Page 7, line 46, leave out “Hospital” and insert “NHS hospital and independent hospital”
- 10 Page 7, leave out line 47
- 11 Page 8, line 15, after “6” insert “(1)”
- 12 Page 8, line 16, leave out “a” and insert “an NHS”
- 13 Page 8, line 17, at end insert—  
     “(aa) if the arrangements are carried out mainly in an independent hospital in England, the responsible local authority determined in accordance with paragraph 8A;  
     (ab) if the arrangements are carried out mainly in an independent hospital in Wales, the Local Health Board for the area in which the hospital is situated;”
- 14 Page 8, line 18, leave out “paragraph (a) does not apply” and insert “none of the paragraphs (a) to (ab) applies”
- 15 Page 8, line 19, leave out from “mainly” to “that” in line 21 and insert “through—  
     (i) the provision of NHS continuing healthcare under arrangements made by a clinical commissioning group, or  
     (ii) in Wales, the provision of an equivalent to NHS continuing healthcare under arrangements made by a Local Health Board,”
- 16 Page 8, line 23, leave out “neither paragraph (a) nor paragraph (b)” and insert “none of paragraphs (a) to (b)”
- 17 Page 8, line 24, leave out “(see paragraph 9)” and insert “determined in accordance with paragraph 9”

- 18 Page 8, line 24, at end insert—
- “(2) If an independent hospital is situated in the areas of two or more Local Health Boards, it is to be regarded for the purposes of sub-paragraph (1)(ab) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.”
- 19 Page 8, line 25, after “manager” insert “, in relation to an NHS hospital,”
- 20 Page 8, line 41, at end insert—
- “(ca) if the hospital is vested in a Local Health Board, that Board.”
- 21 Page 8, line 42, leave out from beginning to end of line 10 on page 9
- 22 Page 9, line 18, at end insert—
- “8A (1) In paragraph 6(1)(aa), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if paragraph (a) does not apply and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014, the local authority meeting those needs;
  - (c) in any other case, the local authority determined in accordance with sub-paragraph (4).
- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act.
- (3) In paragraph 6(1)(aa), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if paragraph (a) does not apply and the cared-for person is being provided with accommodation under section 20 of the Children Act 1989, the local authority providing that accommodation;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, and a local authority in England is responsible under the order for the care of the cared-for person, that local authority;
  - (d) if none of paragraphs (a) to (c) applies, the local authority determined in accordance with sub-paragraph (4).
- (4) In the cases mentioned in sub-paragraphs (1)(c) and (3)(d), the “responsible local authority” is the local authority for the area in which the independent hospital mentioned in paragraph 6(1)(aa) is situated.
- (5) If an independent hospital is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.”
- 23 Page 10, leave out lines 43 to 45

24 Page 11, line 18, at end insert—

- “12A(1) The following must publish information about authorisation of arrangements under this Schedule—
- (a) the hospital manager of each NHS hospital;
  - (b) each clinical commissioning group;
  - (c) each Local Health Board;
  - (d) each local authority.
- (2) The information must include information on the following matters in particular—
- (a) the effect of an authorisation;
  - (b) the process for authorising arrangements, including making or carrying out—
    - (i) assessments and determinations required under paragraphs 18 and 19;
    - (ii) consultation under paragraph 20;
    - (iii) a pre-authorisation review (see paragraphs 21 to 23);
  - (c) the circumstances in which an independent mental capacity advocate should be appointed under paragraph 39 or 40;
  - (d) the role of a person within paragraph 39(5) (an “appropriate person”) in relation to a cared-for person and the effect of there being an appropriate person;
  - (e) the circumstances in which a pre-authorisation review is to be carried out by an Approved Mental Capacity Professional under paragraph 21;
  - (f) the right to make an application to the court to exercise its jurisdiction under section 21ZA;
  - (g) reviews under paragraph 35, including—
    - (i) when a review will be carried out;
    - (ii) the rights to request a review;
    - (iii) the circumstances in which a referral may or will be made to an Approved Mental Capacity Professional.
- (3) The information must be accessible to, and appropriate to the needs of, cared-for persons and appropriate persons.
- 12B (1) Where arrangements are proposed, the responsible body must as soon as practicable take such steps as are practicable to ensure that—
- (a) the cared-for person, and
  - (b) any appropriate person in relation to the cared-for person, understands the matters mentioned in sub-paragraph (3).
- (2) If, subsequently, at any time while the arrangements are being proposed the responsible body becomes satisfied under paragraph 39(5) that a person is an appropriate person in relation to the cared-for person, the responsible body must, as soon as practicable, take such steps as are practicable to ensure that the appropriate person understands the matters mentioned in sub-paragraph (3).
- (3) Those matters are—
- (a) the nature of the arrangements, and
  - (b) the matters mentioned in paragraph 12A(2) as they apply in relation to the cared-for person’s case.

- (4) If it is not appropriate to take steps to ensure that the cared-for person or any appropriate person understands a particular matter then, to that extent, the duties in sub-paragraphs (1) and (2) do not apply.
- (5) In this paragraph “appropriate person”, in relation to a cared-for person, means a person within paragraph 39(5).”
- 25 Page 11, line 19, leave out from beginning to end of line 7 on page 12 and insert –
- “13 (1) As soon as practicable after authorising arrangements, the responsible body must ensure that a copy of the authorisation record is given to –
- (a) the cared-for person,
  - (b) any independent mental capacity advocate appointed under paragraph 39 to represent and support the cared-for person,
  - (c) any person within paragraph 39(5) in respect of the cared-for person (the “appropriate person”), and
  - (d) any independent mental capacity advocate appointed under paragraph 40 to support the appropriate person.
- (2) As soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable and appropriate, having regard to the steps taken under paragraph 12B and the length of time since they were taken, to ensure that the cared-for person and any appropriate person understands the matters mentioned in paragraph 12A(2)(a), (c), (d), (f), and (g) as they apply in relation to the cared-for person’s case.”
- 26 Page 13, line 48, at end insert –
- “(1A) The person who makes the determination need not be the same as the person who carries out the assessment.”
- 27 Page 14, leave out lines 1 and 2 and insert –
- “(2) The appropriate authority may by regulations make provision for requirements which must be met by a person –
- (a) making a determination, or
  - (b) carrying out an assessment,
- under this paragraph.
- (2A) Regulations under sub-paragraph (2) may make different provision –
- (a) for determinations and assessments, and
  - (b) for determinations and assessments required under sub-paragraph (1)(a) and determinations and assessments required under sub-paragraph (1)(b).”
- 28 Page 14, line 6, leave out “prescribed connection “and insert “connection, of a kind prescribed by regulations,”
- 29 Page 14, line 14, after “the” insert “determination or”
- 30 Page 14, line 16, after “the” insert “determination or”
- 31 Page 14, line 18, leave out “The” and insert “An”
- 32 Page 14, line 34, leave out “made on an assessment” and insert “by a person, who meets requirements prescribed by regulations made by the appropriate authority, made on an assessment by that person”
- 33 Page 14, leave out lines 40 to 46

- 34 Page 15, line 2, leave out from “16,” to “by” in line 3 on page 15 and insert “a determination may not be made”
- 35 Page 15, line 4, leave out “prescribed connection” and insert “connection, of a kind prescribed by regulations,”
- 36 Page 15, line 9, leave out “assessment” and insert “determination”
- 37 Page 15, line 11, leave out “assessment” and insert “determination”
- 38 Page 15, line 15, leave out from second “arrangements” to end of line 16 and insert “and –
- (i) authorisation is being determined under paragraph 16, or
  - (ii) renewal is being determined under paragraph 32,
- (a) by”
- 39 Page 16, line 1, leave out “prescribed connection” and insert “connection, of a kind prescribed by regulations,”
- 40 Page 16, line 8, leave out “or”
- 41 Page 16, line 12, at end insert –
- “(c) the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or
  - (d) the case is referred by the responsible body to an Approved Mental Capacity Professional and that person accepts the referral.”
- 42 Page 16, line 31, leave out “(whether or not paragraph 21(2) applies)”
- 43 Page 17, line 5, after “being” insert “, and the responsible body for the time being,”
- 44 Page 19 leave out line 43 and insert –
- “(a) on a variation under paragraph 34;”
- 45 Page 20, line 5, after “(4)” insert “or (5A)”
- 46 Page 20, line 8, at end insert –
- “(3A) A review under sub-paragraph (3)(a) must be carried out before the authorisation is varied or, if that is not practicable or appropriate, as soon as practicable afterwards.”
- 47 Page 20, line 16, leave out from “paragraph” to end of line 17 and insert “21 –
- (i) was not by an Approved Mental Capacity Professional, or
  - (ii) was by an Approved Mental Capacity Professional solely because paragraph 21(2)(c) or (d) applied.”
- 48 Page 20, line 24, at end insert –
- “(5A) This sub-paragraph applies where sub-paragraph (4) does not apply and –
  - (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,
  - (b) a relevant person informs the reviewer or (if the reviewer is not the responsible body) the responsible body that they believe that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and

- (c) the relevant person makes a reasonable request to the person informed under paragraph (b) for a review to be carried out.
- (5B) In sub-paragraph (5A) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person’s welfare.”
- 49 Page 20, line 30, at end insert –
- “(7A) On any review where sub-paragraph (5A) applies, the reviewer or (if the reviewer is not the responsible body) the responsible body may refer the authorisation to an Approved Mental Capacity Professional and, if the Approved Mental Capacity Professional accepts the referral, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.”
- 50 Page 20, line 31, after “determination” insert “mentioned in sub-paragraph (7) or (7A)”
- 51 Page 24, line 3, at end insert “in a hospital”
- 52 Page 24, line 10, at end insert “in a hospital”
- 53 Page 27, line 16, at end insert –
- “(g) anything which has the same effect as something within any of paragraphs (a) to (f), under another England and Wales enactment.”
- 54 Page 27, line 16, at end insert –
- “(1A) And, for the purposes of this Schedule, arrangements which relate to a person are “not in accordance with mental health requirements” if the person is subject to mental health requirements and the arrangements are not in accordance with them.”

## Schedule 2

- 55 Page 28, line 22, at end insert –
- “3A (1) Section 36 (functions of independent mental capacity advocates) is amended as follows.
- (2) In subsection (2)(a) leave out “(“P”) so that P” and insert “or support so that that person”.
- (3) In subsection (2)(c) leave out “P’s wishes and feelings” and insert “the wishes and feelings of the person the advocate has been instructed to represent (“P”)”.
- (4) After subsection (2)(d) insert –
- “(da) in the case of an advocate instructed to support an appropriate person where paragraph 40 of Schedule AA1 applies, supporting that person to ascertain –
- (i) what the wishes and feelings of the cared-for person who that appropriate person represents and supports would be likely to be and the beliefs and values that would be likely to influence the cared-for person;

- (ii) what alternative courses of action are available in relation to the cared-for person who that appropriate person represents and supports;”.
- 3B (1) Section 38 (provision of accommodation by NHS body) is amended as follows.
  - (2) For subsection (2A) substitute—
    - “(2A) And this section does not apply if—
      - (a) an independent mental capacity advocate is appointed under paragraph 39 of Schedule AA1 to represent and support P, and
      - (b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the hospital or care home referred to in this section.”
    - (3) In subsection (3), in the opening words, after “arrangements” insert “mentioned in subsection (1)”.
    - (4) Omit subsection (10).
- 3C (1) Section 39 (provision of accommodation by local authority) is amended as follows.
  - (2) For subsection (3A) substitute—
    - “(3A) And this section does not apply if—
      - (a) an independent mental capacity advocate is appointed under paragraph 39 of Schedule AA1 to represent and support P, and
      - (b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the residential accommodation referred to in this section.”
    - (3) In subsection (4), in the opening words, after “arrangements” insert “mentioned in subsection (1)”.
    - (4) Omit subsection (7).”

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Page 28, line 23, at end insert—

- “4A In section 40 (exceptions)—
  - (a) in subsection (1), for “, 39(4) or (5), 39A(3), 39C(3) or 39D(2)” substitute “or 39(4) or (5)”;
    - (b) omit subsection (2).”





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*13th February 2019*

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