

MENTAL CAPACITY (AMENDMENT) BILL [HL]

EXPLANATORY NOTES ON COMMONS AMENDMENTS

What these notes do

These Explanatory Notes relate to the Commons amendments to the Mental Capacity (Amendment) Bill [HL] as brought from the House of Commons on 13 February 2019 (HL Bill 161).

- 1 These Explanatory Notes have been prepared by the Department of Health and Social Care in order to assist the reader of the Bill and the Commons amendments and to help inform debate on the Commons amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 2 These Explanatory Notes, like the Commons amendments themselves, refer to Bill 303, the Bill as brought from the Lords and first printed for the Commons.
- 3 These Explanatory Notes need to be read alongside the Bill and the Commons amendments. They are not, and are not intended to be, a comprehensive description of the Commons amendments.
- 4 The Commons Amendments at Committee Stage were tabled in the name of Minister of State for Care, Caroline Dinenage.
- 5 The Commons Amendments at Report Stage were tabled in the name of the Secretary of State, Matt Hancock.

Commentary on Commons Amendments

Commons Amendment to make a new Clause: a definition of a deprivation of liberty

Commons Amendment 1

- 6 The new Clause inserts 4ZA after Section 4 of the Mental Capacity Act. This gives meaning to the definition of a deprivation of liberty by referencing a deprivation of liberty according to Article 5 of the Human Rights Convention whilst prescribing circumstances, subsections (2) to (5), which if any are met, mean that someone is not being deprived of their liberty. If they are not deprived of their liberty they do not fall within the Liberty Protection Safeguards scheme.

Commons Amendment to Clause 5: Extent, commencement and short title

Commons Amendment 2

- 7 Subsection (9) is repealed to remove the privilege amendment inserted in the Lords. Parliamentary procedure requires a privilege amendment to be included when a Bill starts in the Lords and has financial implications. It is then removed in the Commons.

Commons Amendments to Schedule 1:

Commons Amendments 41, 47, 40, 42 and 3: expansion of the role of the Approved Mental Capacity Professional

- 8 Amendments 41, 40, 42 and 3 (which are consequential on 41) provide for situations other than cases of objection in which the pre-authorisation review must be completed by an Approved Mental Capacity Professional. These are that the arrangements provide for the person to receive care or treatment mainly in an independent hospital, or that the case is referred by a responsible body (and the Approved Mental Capacity Professional accepts the referral).
- 9 Amendment 47 expands the duty to refer to an Approved Mental Capacity Professional on a review. This enables certain cases to be referred where a pre-authorisation review under paragraph 21 of the new Schedule AA1 has already been carried out by an Approved Mental Capacity Professional.

Commons Amendment 4

- 10 This amends the definition of “care home manager”, in Wales, so it will be the person who is the registered service provider. This mirrors the approach taken for England.

Commons Amendments 5-10, 12-14, 16, 17, 19 and 21-23: Responsible body for independent hospitals

- 11 Amendment 12 amends paragraph 6(a) so that a hospital manager will only be the responsible body when the arrangements are being carried out mainly in an NHS hospital, and amendment 19 amends paragraph 7 to state this. Where arrangements are carried out mainly in an independent hospital, the responsible body for those arrangements will not be the hospital manager but instead the local authority in England, or the Local Health Board in Wales. Amendments 6 to 10 and 21 are consequential to these amendments.
- 12 Amendment 13 makes provision for who the responsible body will be for cases where arrangements are carried out mainly in an independent hospital in England or Wales: in England it will be the responsible local authority as determined by paragraph 8A (Amendment 22) and in Wales it will be the Local Health Board for the area in which the hospital is situated. Amendments 14, 16 and 17 are consequential on Amendment 13.
- 13 Amendment 22 makes provision as to who the responsible body will be in cases where arrangements are carried out mainly in an independent hospital in England. Amendments 5 and 23 are consequential on amendment 22.

Commons Amendment 15

- 14 This amendment makes provision for who the responsible body will be for cases where arrangements are carried out mainly in an independent hospital in England or Wales.

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Commons Amendments 20, 18 and 11

- 15 Amendment 20 makes provision that the hospital manager for an NHS hospital vested in a Local Health Board will be that Board.
- 16 Amendment 18 provides that, for the purpose of determining who is the responsible body, if a hospital is situated in the areas of two or more Local Health Boards, it should be regarded as situated in whichever of the areas the greater (or greatest) part of the hospital is situated. Amendment 11 is consequential on Amendment 18.

Commons Amendments 24 and 25: rights to information

- 17 Amendment 24 inserts new paragraphs 12A and 12B of the new Schedule AA1 to require responsible bodies to publish information about authorisation of arrangements under the Schedule and to take steps at the outset of the authorisation process to ensure that the cared-for person and any appropriate person understand the process.
- 18 Amendment 25 amends paragraph 13 to require the responsible body to take practicable steps after arrangements have been authorised to ensure that the cared-for person and any appropriate person understand the available safeguards.

Commons Amendment 26: capacity and medical assessments

- 19 This amendment makes it clear that a determination, for capacity and medical assessments, need not be made by the same person who carries out an assessment. A person could, for example, make a determination based on an assessment carried out previously by a different person (paragraph 18(6) of the new Schedule AA1 allows for this)

Commons Amendments 27, 29-31: requirements by regulations for assessments and determinations

- 20 This amendment provides power to make regulations setting out requirements which must be met for a person to make a determination or carry out an assessment. The requirements will relate to matters such as knowledge and experience. Different requirements may be set out for a person making a determination than a person carrying out an assessment. Amendments 29 to 31 are consequential on amendment 27.

Commons Amendments 32-34, 36 and 37: necessary and proportionate determination

- 21 Amendment 32 is to make it clear that a determination required under paragraph 19 (the determination that the arrangements are necessary and proportionate) of the new Schedule AA1 must be made by the same person who carries out the assessment on which that determination is based, and that person must meet requirements set out in regulations. Amendments 33, 34, 36 and 37 are consequential to Amendment 32.

Commons Amendments 28 and 35

- 22 These amendments are to make clear that a regulation making power is being conferred for paragraph 19(4) of the new Schedule AA1. This is to prevent anyone with a connection to a care home from completing assessments or the pre-authorisation review (if the person is being cared for in a care home setting).

Commons Amendment 38

- 23 This amendment is to make it clear that consultation under paragraph 20 of the new Schedule AA1 for the purposes of renewal of authorisation under paragraph 32 of that Schedule can be by the care home manager.

Commons Amendment 39

- 24 This amendment is to make it clear that a regulation-making power is being conferred by paragraph 18(3) of the new Schedule AA1.

Commons Amendments 43 and 46

- 25 Amendment 43 is to clarify that the responsible body in relation to a cared-for person may change during the lifetime of an authorisation and, if it does, that change is to be recorded in the authorisation record. Amendment 46 requires a review to occur before the authorisation is varied, or if that is not practicable, as soon as possible afterwards.

Commons Amendment 44

- 26 Amendment 44 ensures that a review will take place on a variation under paragraph 34.

Commons Amendment 45

- 27 This provides for a duty to carry out a review in the circumstances described in the new subparagraph (5A).

Commons Amendments 48-50: raising concerns on behalf of the cared-for person

- 28 These amendments provide for an additional situation which will trigger a duty to review an authorisation. Where a duty to review arises due to the new sub-paragraph (5A) (inserted by Amendment 44) this amendment provides for a power to refer the authorisation to an Approved Mental Capacity Professional. This means that sub-paragraph (5) now allows for a relevant person to make a reasonable request for a review when they believe the person does not wish to receive care or treatment at a specified place, any time in the authorisation. This relevant person is someone engaged in caring for the person, or someone with an interest in their welfare. Amendment 50 is consequential to amendment 49.

Commons Amendments 51 and 52

- 29 This is to provide that only arrangements to enable medical treatment for mental disorder in a hospital (as opposed to medical treatment for mental disorder in any other setting) are excluded from being authorised under the new Schedule AA1.

Commons Amendment 53

- 30 This amendment ensures that if arrangements conflict with requirements, conditions or directions imposed or given under certain provisions of the Mental Health Act 1983 those arrangements cannot be authorised under the new Schedule AA1 of the Mental Capacity Act 2005. This amendment provides that arrangements which conflict with requirements, conditions or directions arising from an England and Wales enactment having the same effect as the provisions of the Mental Health Act listed in paragraph 54 also cannot be authorised under the new Schedule AA1.

Commons Amendment 54

- 31 This amendment is to make it clear that arrangements can be authorised under the new Schedule AA1 if there are no “mental health requirements” that apply in relation to the person who is to be subject to the arrangements. It is intended to add clarity to the interface between the Mental Health Act and the Mental Capacity Act.

Commons Amendment 55

- 32 This amends the regulation making power in section 36 of the Mental Capacity Act 2005 to ensure that equivalent provision can be made for Independent Mental Capacity Advocates who support an “appropriate person” under Liberty Protection Safeguards as for other advocates in the Act. It also makes other changes to that Act consequential on amendments made by Schedules 1 and 2 to the Bill.

Commons Amendment 56

- 33 This amendment is consequential on the amendments made to the Mental Capacity Act 2005 by Schedules 1 and 2 to the Bill, to ensure that Schedules 1 and 2 are compatible with the provisions of the wider Act.

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