

# Mental Capacity (Amendment) Bill [HL]

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COMMONS AMENDMENT IN LIEU OF A LORDS AMENDMENT, AND COMMONS  
AMENDMENTS TO A COMMONS AMENDMENT IN LIEU OF A LORDS  
AMENDMENT TO A COMMONS AMENDMENT

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*[The page and line references are to Bill 303, the bill as first printed for the Commons, unless otherwise indicated]*

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## Before Clause 1

### COMMONS AMENDMENT 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.””

LORDS AMENDMENT IN LIEU

*The Lords disagree to Commons Amendment 1 and propose Amendment 1B in lieu –*

**Before Clause 1**

**1B** 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) A person is deprived of liberty if the circumstances described in subsection (2) apply to them.
- (2) A person is deprived of liberty if they –
- (a) are subject to confinement in a particular place for more than a negligible period of time; and
  - (b) have not given valid consent to their confinement; and
  - (c) the arrangements are due to an action of a person or body responsible to the state.
- (3) For the purpose of subsection (2)(a), a person is subject to confinement where they –
- (a) are prevented from removing themselves permanently from the place in which they are required to reside, in order to live where and with whom they choose; and
  - (b) are subject to continuous supervision and control.”
- (2) In section 64(5) of that Act (interpretation) for the words from “same” to the end substitute “meaning given by section 4ZA.”

COMMONS NON-INSISTENCE, DISAGREEMENT AND AMENDMENT IN LIEU

*The Commons do not insist on Commons Amendment 1, disagree to Lords Amendment 1B but propose Amendment 1C in lieu –*

**After Clause 3**

**1C** Page 3, line 28, at end insert the following new Clause –

**“Deprivation of liberty: code of practice**

- (1) Section 42 of the Mental Capacity Act 2005 (codes of practice) is amended as follows.

- (2) After subsection (1) insert –
- “(1A) Guidance about what kinds of arrangements for enabling the care or treatment of a person fall within paragraph 2(1)(b) of Schedule AA1 must be included in the code, or one of the codes, issued under subsection (1).”
- (3) After subsection (2) insert –
- “(2A) Before the end of each review period the Lord Chancellor must –
- (a) review each code for the guidance of persons exercising functions under Schedule AA1, and
  - (b) lay a report of the review before Parliament.
- But this does not affect the Lord Chancellor’s functions under subsection (2).
- (2B) A review period is –
- (a) in relation to the first review, the period of 3 years beginning with the day on which this subsection comes into force, and
  - (b) in relation to subsequent reviews, each period of 5 years beginning with the day on which the report of the previous review was laid before Parliament.”
- (4) In subsection (3) after “preparation” insert “, review”.”

### Schedule 1

#### COMMONS AMENDMENT 25

- 25** Page 11, line 19, leave out from beginning to end of line 7 on page 12 and insert –
- 2 “13 (1) As soon as practicable after authorising arrangements, the responsible  
3 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.
- 10 (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.”

#### LORDS AMENDMENT 25A

*The Lords agree with the Commons in their Amendment 25 and propose Amendment 25A as an amendment thereto –*

**25A** Line 10, at end insert –

“(1A) A record of any decision and justification for not immediately giving a copy of the authorisation record under sub-paragraph (1) must be kept.

(1B) If a copy of the authorisation record has not been given to those specified in sub-paragraph (1) within 72 hours, there must be a review of whether the lack of information was appropriate.”

COMMONS DISAGREEMENT AND AMENDMENTS TO COMMONS AMENDMENT

*The Commons disagree to Lords Amendment 25A but propose Amendments 25B and 25C to Commons Amendment 25 in lieu –*

**25B** Line 2, leave out from “(1)” to “to” in line 3 and insert “After authorising arrangements the responsible body must, without delay, arrange for a copy of the authorisation record to be given or sent”

**25C** Line 10, at end insert –

“(1A) If the responsible body has not, within 72 hours of arrangements being authorised, arranged for a copy of the authorisation record to be given or sent to each of the persons mentioned in paragraphs (a) to (d) of sub-paragraph (1), the responsible body must review and record why not.”



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