

MENTAL CAPACITY (AMENDMENT) ACT 2019

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Mental Capacity (Amendment) Act 2019 (c. 18) which received Royal Assent on 16 May 2019.

- These Explanatory Notes have been prepared by the Department for Health and Social Care in order to assist the reader. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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These Explanatory Notes relate to the Mental Capacity (Amendment) Act 2019 (c. 18) which received Royal Assent on 16 May 2019

Overview of the Act

- 1 The purpose of the Mental Capacity (Amendment) Act 2019 is to reform the process under the Mental Capacity Act 2005 (“MCA”) for authorising arrangements enabling the care or treatment of people who lack capacity to consent to the arrangements, which give rise to a deprivation of their liberty.
- 2 The Act amends the MCA. In particular it inserts a new Schedule AA1. The Act is based on a Law Commission draft Bill published as part of its report *Mental Capacity and Deprivation of Liberty* (2017).¹

Policy background

- 3 In 2014 the Government asked the Law Commission to review the Deprivation of Liberty Safeguards scheme (“DoLS”) (contained in Schedules A1 and 1A to the MCA). The DoLS provide a process for authorising adults who lack capacity to consent to being accommodated in a hospital or care home for the purpose of care or treatment to be deprived of liberty if it is in their best interests and necessary to prevent harm to the person and a proportionate response to that harm.
- 4 The DoLS scheme was introduced in 2009 following the decision of the European Court of Human Rights in *HL v United Kingdom*.² This judgment identified a gap in the law, known as the “Bournemouth gap”.³ The European Court held that individuals who lacked capacity and were being deprived of liberty for the purpose of treatment under the common law, rather than under the Mental Health Act 1983, were being denied the procedural safeguards required by Article 5 of the European Convention on Human Rights. Article 5 provides that no one shall be deprived of liberty except in specific cases (one of which is the lawful detention of persons of “unsound mind”) and “in accordance with a procedure prescribed by law”.
- 5 However, the DoLS have been subject to criticism since their inception. The House of Lords Select Committee on the MCA found in its 2014 post-legislative scrutiny report that the DoLS were “frequently not used when they should be, leaving individuals without the safeguards Parliament intended” and care providers “vulnerable to legal challenge”. The Committee concluded that “the legislation is not fit for purpose” and recommended its replacement.
- 6 In 2014 the decision of the Supreme Court in the case of *Cheshire West*⁴ gave a significantly wider interpretation of deprivation of liberty than had been previously applied in the health and social care context. This increased considerably the number of people treated as being deprived of liberty, and correspondingly increased the obligations on public authorities (primarily local authorities) in connection with authorising, and providing safeguards for,

¹ <https://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty>

² [2004] ECHR 471.

³ In reference to the decision of the House of Lords in the same matter: *R v Bournemouth Community and Mental Health Trust* [1999] AC 458.

⁴ <https://www.supremecourt.uk/cases/docs/UKSC-2012-0068-judgment.pdf>

these extra deprivations of liberty.

- 7 Following *Cheshire West*, the Government asked the Law Commission to review this area of law. The Commission's final report, which included a draft Bill, called for the DoLS to be replaced as a matter of "pressing urgency" and set out a replacement scheme. The new scheme was intended to establish a proportionate and less bureaucratic means of authorising deprivation of liberty (see footnote 1).
- 8 The Government's final response to that report was published on 14 March 2018.⁵ The Government accepted that the current DoLS system should be replaced, and broadly agreed with the model set out in the Commission's draft Bill. This Act is based on the Law Commission's recommendations.

Legal background

- 9 The relevant legal background is explained in the policy background section of these Notes (see paragraphs 3 to 8 of these Notes).

⁵ <http://qna.files.parliament.uk/ws-attachments/861932/original/180314%20Response%20to%20Law%20Commission%20on%20DoLS%20-%20final.pdf>

Territorial extent and application

- 10 Section 6 sets out the territorial extent of the Act, that is, the jurisdictions in which the provisions of the Act form part of the law. The extent of the Act can be different from its application. Application is about where a provision of an Act produces a practical effect.
- 11 The Act extends and applies to England and Wales only.
- 12 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned.
- 13 The matters to which the provisions of the Act relate are not within the legislative competence of the National Assembly for Wales, and do not alter the competence of the Welsh Government except in a way that is consequential, supplementary or incidental to the subject matter of the Act.
- 14 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Act

Safeguards

Section 1: Deprivation of liberty: authorisation of arrangements enabling care and treatment

- 15 Section 1(4) inserts the new Schedule AA1 into the MCA. This Schedule contains the new administrative scheme for authorising arrangements enabling the care and treatment of persons who lack capacity to consent to those arrangements, which give rise to a deprivation of liberty (referred to in these Notes as the Liberty Protection Safeguards). It will replace Schedules A1 and 1A to the MCA, with those Schedules being repealed under paragraph 2 of Schedule 2 to the Act. More information on the contents of Schedule AA1 can be found in paragraphs 28-80 of these Notes.
- 16 Section 1(2) amends section 4A of the MCA so as to refer to the new Schedule AA1.
- 17 Subsection (3) inserts a new section 4C, “Carrying out of authorised arrangements giving rise to deprivation of liberty”. This provides a person carrying out arrangements that are authorised under Schedule AA1 with a defence to civil and criminal liability in relation to non-negligent acts done while carrying out the authorised arrangements.

Section 2: Authorisation of steps necessary for life-sustaining treatment or vital act

- 18 Section 2 amends section 4B of the MCA so as to provide express authority for a person to take steps to deprive another person of their liberty if four conditions are met (see subsections (2) to (6)). Broadly speaking, section 4B as amended gives authority to take steps to deprive a person of their liberty in three circumstances (see subsections (6) and (7)): (1) where a decision relevant to whether there is authority to deprive the person of liberty is being sought from a court; (2) where a responsible body is determining whether to authorise arrangements under Schedule AA1; or (3) in an emergency. An “emergency” is defined in subsection (9).
- 19 In each situation the person must reasonably believe that the person to be deprived of liberty lacks the capacity to consent to the steps being taken (see subsection (5)). The deprivation of liberty must also be necessary either to provide the person with life-sustaining treatment or to prevent a serious deterioration in their condition (see subsections (2) to (4)). The authority in subsection (7)(b) to deprive a person of liberty while an authorisation is being sought under Schedule AA1 takes the place, in part, of the current provision within the DoLS system for urgent authorisations.

Section 3: Powers of the court to determine questions

- 20 Section 3 inserts a new section 21ZA “Powers of court in relation to Schedule AA1” into the MCA. It replaces section 21A of the MCA, which will be repealed under paragraph 2 of Schedule 2 to the Act.
- 21 The new section 21ZA sets out the powers of the Court of Protection in relation to arrangements authorised under Schedule AA1.

Section 4: Deprivation of liberty: Code of Practice

- 22 Section 4(2) amends section 42 of the MCA to specify that guidance must be included in one or more MCA Codes of Practice about what kind of arrangements for enabling the care or treatment of a person would give rise to a deprivation of their liberty.
- 23 Section 4(3) sets out that the Lord Chancellor must review the guidance in the Codes for

people exercising functions under Schedule AA1 of the Act and a report of this review must be laid before Parliament. The first review must take place within 3 years of the subsection coming into force and subsequent reviews must take place within 5 years from when the report of the previous review was laid before Parliament.

General

Section 5: Consequential provision etc

- 24 Section 5 grants the Secretary of State a regulation making power to make provision that is consequential on any provision of the Act. This includes the power to amend, repeal or revoke primary or secondary legislation. The regulation making power must be exercised by statutory instrument. The regulations will be subject to the negative procedure (annulment in pursuance of a resolution of either House of Parliament), save where the Secretary of State proposes to make changes to primary legislation, in which case the affirmative procedure applies (where a draft of the instrument must be laid before and approved by a resolution of each House of Parliament).
- 25 Section 5(6) highlights that minor and consequential amendments are made in Schedule 2.

Section 6: Extent, commencement and short title

- 26 Section 6 sets out that the Act extends to England and Wales only.
- 27 Section 5 (except subsection (6)) and section 6 come into force on the day the Act is passed. All other provisions of the Act will come into force on a date determined by the Secretary of State by regulations. Section 6(5) grants the Secretary of State a regulation making power to make transitional and saving provision.

Schedules

Schedule 1: Schedule to be inserted as Schedule AA1 to the Mental Capacity Act 2005

Overview

- 28 Schedule 1 inserts Schedule AA1 into the MCA. This will replace Schedules A1 and 1A to the MCA. Schedule AA1 provides for the new administrative scheme for the authorisation of arrangements enabling care or treatment of a person who lacks capacity to consent to the arrangements, which give rise to a deprivation of that person's liberty (referred to as the "Liberty Protection Safeguards"). Under Schedule AA1, a responsible body (defined in paragraph 6) will be able to authorise arrangements giving rise to a deprivation of a person's liberty in any setting.
- 29 Before a responsible body can authorise the arrangements, it must be satisfied that three authorisation conditions are met (see paragraph 13): (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person has a mental disorder; and (3) the arrangements are necessary and proportionate to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person. In all cases, a person who is not involved in the day-to-day care of, or in providing any treatment to, the person, and who does not have a prescribed connection with a care home (see paragraph 24), must carry out a pre-authorisation review to determine whether the authorisation conditions are met or whether it is reasonable for the responsible body to conclude that they are met. In certain cases (including where the person is objecting to the proposed arrangements, and where the arrangements provide for the person to receive care or treatment mainly in an independent hospital) an Approved Mental Capacity Professional (see paragraph 24(2)) must carry out the pre-authorisation review.

- 30 Once an authorisation has been given, there are a number of safeguards put in place for the person. These include regular reviews of the authorisation by the responsible body or care home manager (see paragraph 38), and the right to challenge the authorisation before the Court of Protection (under section 21ZA of the MCA, as inserted by section 3).
- 31 The effect of Part 5 is that the person may be represented and supported either by an “appropriate person” or an Independent Mental Capacity Advocate (IMCA) when an authorisation is being proposed and while an authorisation is in place.
- 32 Part 7 of Schedule AA1 sets out the interface between the Liberty Protection Safeguards scheme and the Mental Health Act 1983. Broadly speaking, patients who are detained under the Mental Health Act 1983 or who are objecting to a hospital admission for mental health treatment or an assessment, cannot be made subject to an authorisation under Schedule AA1 for the purposes of that treatment or assessment. In the community, a person could be subject to an authorisation under Schedule AA1 and a community Mental Health Act power (for example guardianship or a Community Treatment Order), so long as the authorisation does not conflict with any requirement contained in the power.

Part 1: Introductory and interpretation

- 33 Paragraph 1 describes the contents of Schedule AA1.
- 34 Paragraph 2 sets out the arrangements and the persons that are within the scope of the Schedule. Schedule AA1 applies to the arrangements for enabling the care or treatment of a “cared-for person” which give rise to a deprivation of that person’s liberty, and are not mental health arrangements under Part 7. A “cared-for person” is defined in sub-paragraph (2) as a person who is aged 16 or over, lacks capacity to consent to the arrangements and has a mental disorder.
- 35 Schedule AA1 applies to arrangements enabling care or treatment to be provided, rather than to the direct delivery of the care and treatment. The delivery of the person’s care and treatment would be governed by section 5 of the MCA. Schedule AA1 could be used to authorise arrangements which enable that care or treatment to be given.
- 36 Paragraph 2(3) provides examples of what kind of arrangements could be authorised, such as arrangements for the person to reside in and receive care or treatment at a particular place.
- 37 Paragraph 3 sets out key definitions for the purposes of Schedule AA1.
- 38 Paragraph 4 sets out the meaning of “local authority” for the purposes of Schedule AA1.
- 39 Paragraph 5 sets out the meaning of “NHS hospital” and “independent hospital”
- 40 Paragraph 6 identifies the responsible body in the case of a particular individual. The effect of paragraph 6 is that the “hospital manager” (as further defined in paragraph 7) is responsible for authorising arrangements carried out mainly in an NHS hospital. If the arrangements are being carried out mainly in an independent hospital, the responsible body will be the responsible local authority (in England) or Local Health Board (in Wales). In the case of arrangements carried out through NHS continuing health care (but not mainly in a hospital), the responsible body is the relevant clinical commissioning group (in England) or Local Health Board (in Wales). A local authority is the responsible body in all other cases, including where care is arranged by the local authority, and where care is provided to people paying for their own care (self-funders).
- 41 Paragraph 6(2) specifies that if an independent hospital is located in the area of two or more Local Health Boards, the Local Health Board in whose area the greatest part of the hospital is situated will be responsible.

- 42 Paragraph 7 defines a “hospital manager” in relation to an NHS hospital for the purposes of paragraph 6. This is the NHS body that manages an NHS hospital or, in certain cases, the Secretary of State or Welsh Ministers.
- 43 Paragraph 8 provides that the meaning of “NHS continuing healthcare” should be construed in accordance with standing rules under section 6E of the National Health Service Act 2006.
- 44 Paragraph 9 identifies which local authority is the responsible local authority if the arrangements are being carried out mainly in an independent hospital in England. Paragraph 10 identifies which local authority is the responsible local authority for the purposes of paragraph 6(1)(e). Paragraph 10(1) defines “responsible local authority” in relation to people aged over 18, and sub-paragraph (3) defines “responsible local authority” in relation to people aged 16 and 17. For most people who fall within paragraph 6(1)(e), the responsible body will be the local authority in which the individual is ordinarily resident for social care purposes.
- 45 Paragraphs 11 and 12 define “English responsible body” and “Welsh responsible body” respectively.

Part 2: Authorisation of arrangements

- 46 Paragraph 13 sets out three authorisation conditions which must be satisfied before a responsible body may authorise arrangements. The authorisation conditions are that: (1) the person lacks capacity to consent to the arrangements; (2) the person has a mental disorder; and (3) the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person.
- 47 Paragraphs 14 and 15 require responsible bodies to publish information about authorisation of arrangements under the Schedule and to take steps at the outset of the authorisation process (where arrangements are proposed) to ensure that the cared-for person and any appropriate person understand the process.
- 48 Paragraph 16 requires, after the arrangements are authorised, the responsible body to arrange without delay for a copy of the authorisation record to be given or sent to the cared-for person and any specified representatives. If this has not been done within 72 hours, the responsible body must review and record why not.
- 49 Paragraph 17 sets out that a responsible body may authorise arrangements in accordance with paragraph 18 where the conditions in that paragraph are met. However, where the arrangements are “care home arrangements”, the responsible body can decide whether to authorise arrangements in accordance with either paragraph 18 or paragraph 19. “Care home arrangements” are defined in paragraph 3 as arrangements in relation to a person 18 or over, which are carried out wholly or partly in a care home. Both paragraph 18 and paragraph 19 set out conditions which must be satisfied before an authorisation can be given. The conditions in paragraph 19, which apply to care home arrangements, include a role for the care home manager (defined in paragraph 3). In summary, the care home manager arranges the assessments and must provide a statement to the responsible body. Paragraph 20 provides further detail of what the care home manager’s statement to the responsible body under paragraph 19(a) must contain. The requirements under paragraph 20 largely mirror those under paragraph 18.
- 50 Paragraph 21 requires a determination to be made, following a capacity and medical assessment, that the person lacks the capacity to consent to the arrangements, and has a mental disorder, for the purposes of paragraph 13(a)-(b). Sub-paragraph (2) clarifies that the person who completed the determination can be someone different from the person who completes the assessment. Sub-paragraph (3) provides a 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. Sub-paragraph (5) sets out that a person with a prescribed connection with a care home may not undertake the assessments if the authorisation is being determined in accordance with paragraph 19.

- 51 Paragraph 21(8) permits a responsible body or care home manager in making determinations or submitting a statement for that purpose to rely upon assessments carried out previously, including those prepared for another purpose, so long as it is reasonable to do so. Sub-paragraph (9) sets out the factors that the responsible body or care home manager must have regard to when considering whether it is reasonable to rely upon an existing assessment. The intention is that an existing assessment can be relied on, provided that it gives a reliable indication of the person's current situation.
- 52 Paragraph 22 requires a determination to be made that the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person, for the purposes of paragraph 13(c). If the arrangements are care home arrangements being authorised in accordance with paragraph 19, the assessment must not be carried out by a person who has a prescribed connection with a care home (sub-paragraph (3)).
- 53 Paragraph 23 sets out who the responsible body or care home manager must consult in order for arrangements to be authorised under Schedule AA1. Sub-paragraph (3) sets out that the main purpose of the consultation is to ascertain the person's wishes and feelings in relation to the arrangements. Sub-paragraph (4) sets out that this duty to consult only applies to the extent that it is practicable and appropriate to do so.
- 54 Paragraph 24 sets out the process for the pre-authorisation review, which must be arranged by the responsible body and carried out in all cases. This provides the degree of independence as required by case law arising from Article 5 of the ECHR. Sub-paragraph (1) excludes people involved in the day-to-day care or treatment of the person or someone who has a prescribed connection with a care home from carrying out the pre-authorisation review (see paragraph 18(e) and 19(d)). Sub-paragraph (2) sets out that the review must be carried out by an Approved Mental Capacity Professional where it is reasonable to believe that the person does not wish to reside or receive care or treatment in the place provided for by the arrangements, and sub paragraph (3) provides that the views of any relevant person must be considered in making that determination. Sub paragraph (2) also sets out that the review must be carried out by an Approved Mental Capacity Professional where the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or the case is referred by the responsible body to an Approved Mental Capacity Professional and that person accepts the referral.
- 55 Paragraph 25 sets out that the Approved Mental Capacity Professional must review the information relied on by the responsible body and determine whether the conditions in paragraph 13(a) to (c) have been met. Sub-paragraph (2) sets out that the Approved Mental Capacity Professional must meet with the person if it is appropriate and practicable to do so. The Approved Mental Capacity Professional must also consult with any person listed in paragraph 23(2) and take any other action so far as they consider appropriate in order to make the determination.
- 56 Paragraph 26 requires that where the pre-authorisation review is not carried out by an Approved Mental Capacity Professional, the person carrying out the review must review the information relied on by the responsible body and determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

- 57 Paragraph 27 sets out what must be contained within an authorisation record. Subparagraph (3) provides that where a draft authorisation record has been prepared in accordance with paragraph 18(g) or 20(2)(b)(iii), that draft record becomes the authorisation record and that it supersedes any earlier authorisation record. The authorisation record specifies all arrangements authorised for the person; it is intended that, where different types of arrangements have been included in the authorisation, the record can travel with them between different settings.

Part 3: Duration, renewal, variation and review of authorisation

- 58 Paragraph 28 sets out when an authorisation has effect. This is either immediately or from a later date specified by the responsible body, which can be no later than 28 days later.
- 59 Paragraph 29 sets out when an authorisation ceases to have effect. This is either at the end of period of 12 months or at the end of a shorter period determined by the responsible body (see sub-paragraphs 1). Sub-paragraph (2) provides that if the authorisation is renewed under paragraph 29, the authorisation ceases to have effect at the end of the renewal period. The responsible body may at any time determine that the authorisation ceases to have effect from any earlier day (sub-paragraph (3)). An authorisation will cease to have effect if at any time the responsible body believes or ought reasonably to suspect that any of the conditions for the authorisation are not met (sub-paragraph (4)). An authorisation will also cease to have effect in relation to any arrangements so far as they are not in accordance with mental health requirements (sub-paragraph (5)).
- 60 In the event that an authorisation ceases to have effect (in whole or in part) under paragraph 29(4) or (5), paragraph 30 requires the responsible body to take reasonable steps to notify any person who is likely to be carrying out the arrangements that the arrangements are no longer authorised. Paragraph 31 further specifies that where an authorisation ceases to have effect under paragraph 29(4) or (5), the arrangements are to be treated as authorised for the purposes of section 4C of the MCA unless the person carrying out the arrangements knew or ought to have known that the arrangements were no longer authorised, any of the conditions were not met or the arrangements were not in accordance with mental health conditions.
- 61 Paragraph 32(1) sets out the renewal period for authorisations. It allows a first renewal for up to 12 months, and subsequent renewals for up to three years at a time. Paragraph 33 sets out that a responsible body may renew an authorisation in accordance with paragraph 34 where the conditions in that paragraph are met. However, where the arrangements are “care home arrangements”, the responsible body can decide whether to renew the authorisation in accordance with either paragraph 34 or paragraph 35.
- 62 Paragraph 34(a)(ii) requires that the responsible body must be satisfied that it is unlikely that there will be any significant change in the person’s condition during the renewal period which would affect whether the authorisation conditions are met under paragraph 13). This is to ensure that longer-term renewals are only used in the case of persons whose condition and circumstances are likely to be long-term and stable. The responsible body must also carry out consultation in accordance with paragraph 23.
- 63 Paragraph 35(a) sets out that for care home arrangements being renewed in accordance with paragraph 35, the care home manager must provide the responsible body with a statement (see paragraph 36) before the authorisation can be renewed. The requirements for the statement under paragraph 36 largely mirror the requirements under paragraph 34. The statement must confirm that the authorisation conditions (see paragraph 13) continue to be met and that it is unlikely that there will be any significant change in the person’s condition during the renewal period which would affect whether the authorisation conditions would be met. The care home manager must also provide the responsible body with evidence that they

have consulted in accordance with paragraph 23. The responsible body may renew the authorisation in reliance on that statement.

- 64 Paragraph 37 permits the responsible body to vary an authorisation where consultation in accordance with paragraph 23 has taken place and it is reasonable to make the variation. This will give responsible bodies some ability to make variations but only in limited circumstances. A review must be held before the variation, or if it is not practicable or appropriate to do so, as soon as practicable afterwards (paragraph 35(3)(a) and (4)).
- 65 Paragraph 38(2) requires a responsible body to specify a programme of regular reviews. The review must be carried out by a reviewer, who is defined under sub-paragraph (1) as the responsible body. In relation to care home arrangements, the responsible body can also decide that the care home manager will be the reviewer.
- 66 Paragraph 38(3) provides that the reviewer must review an authorisation if any of the conditions specified apply, including: on a variation under paragraph 37; if a reasonable request is made by a someone with an interest in the arrangements; if the person becomes subject to mental health arrangements or different Mental Health Act requirements; or in some cases where the person objects to the arrangements and the pre-authorisation review was not carried out by an Approved Mental Capacity Professional. A review will also be triggered where there is a significant change in the person's condition or circumstances.
- 67 Paragraph 38(4) requires that a review under sub-paragraph (3)(a) must be carried out before an authorisation is varied or, if that is not practicable or appropriate, as soon as practicable afterwards.
- 68 Sub-paragraphs (5) and (10) require a referral to an Approved Mental Capacity Professional in circumstances where the reviewer becomes aware that a case now calls for such a referral (for example in cases where the person subsequently objects to the arrangements).
- 69 Sub-paragraphs (7) and (8) set out that a review can be triggered if an objection has been raised on behalf of the person by someone who is engaged with caring for the cared-for person or a person who has an interest in the cared-for person's welfare, and the cared-for person makes a reasonable request.
- 70 Sub-paragraph (11) provides, where sub-paragraph (7) applies, for the reviewer to refer the case to an Approved Mental Capacity Professional. If the Approved Mental Capacity Professional accepts the referral, they will determine whether the authorization conditions are met.
- 71 Sub-paragraph (12) sets out what the Approved Mental Capacity Professional must do when a case is referred to them for review.

Part 4: Approved Mental Capacity Professionals

- 72 Paragraph 39 requires each local authority to make arrangements for the approval of persons to act as Approved Mental Capacity Professionals. Each local authority is also required to make arrangements to ensure that there are sufficient numbers of persons approved as Approved Mental Capacity Professionals for its area.
- 73 Paragraph 40 enables the Secretary of State and Welsh Ministers to prescribe in regulations the criteria for approval as an Approved Mental Capacity Professional, matters which a local authority must or may take into account when deciding whether or not to approve a person as an Approved Mental Capacity Professional, and provide for a prescribed body to approve training for Approved Mental Capacity Professionals. Sub-paragraph (2) provides that the regulations may include criteria relating to qualifications, training or experience.

- 74 Sub-paragraph (3) provides that if the regulations made by the Secretary of State under paragraph 40(1) provide for Social Work England to approve the training for Approved Mental Capacity Professionals, then the regulations may grant Social Work England the power to charge fees for approval.

Part 5: Appointment of IMCA

- 75 The effect of paragraphs 41 to 43 of Schedule AA1 is that from the point that arrangements are proposed under the Schedule to the point when the authorisation comes to an end, if the relevant criteria apply, the person must be represented and supported either by an “appropriate person” (see paragraph 42(5)) or an Independent Mental Capacity Advocate (“IMCA”).
- 76 A responsible body must take all reasonable steps to appoint an IMCA if either of paragraph 42(2) or (3) apply, unless there is an appropriate person who would be suitable to represent and support the person, who consents to being appointed and is not engaged in providing care or treatment to the person in a professional role (sub-paragraph (5)). Sub-paragraph (2) applies if the person has capacity to consent to being represented by an IMCA, and makes a request for one. Sub-paragraph (3) applies if the person lacks the capacity to consent, unless the responsible body is satisfied that the appointment of an IMCA would not be in the person’s best interests. Paragraph 43 sets out the circumstances in which the appropriate person must themselves be provided with an IMCA.

Part 6: Monitoring and reporting

- 77 Paragraph 44 gives the Secretary of State and Welsh Ministers regulation-making powers to make provision for monitoring and reporting on the operation of Schedule AA1. The regulations could prescribe one or more body to undertake this function. The regulations could also confer authority to visit places where arrangements authorised under Schedule AA1 are carried out, to meet with persons and to require the disclosure of information.

Part 7: Excluded arrangements: mental health

- 78 Paragraphs 45 to 57 set out that Schedule AA1 cannot be used to authorise “mental health arrangements” (paragraphs 45(a) and 46 to 56) or where arrangements that would be not in accordance with any mental health requirements (paragraphs 45(b) and 57). These provisions are intended to replicate to a large extent the current effect of Schedule 1A to the MCA.
- 79 Paragraphs 45(a), 47 and 53 provide that patients detained under the Mental Health Act 1983 cannot be made subject to an authorisation under Schedule AA1 for the purpose of mental health assessment or treatment in hospital. Paragraph 50 also sets out that where an individual who could be detained under the Mental Health Act and objects (and a Court appointed deputy or donee of a Lasting Power of Attorney has not consented), they cannot be made subject to an authorisation under Schedule AA1 for the purpose of mental health assessment or treatment in hospital.
- 80 Paragraph 45(b) read together with paragraph 57 permits individuals who are not detained under the Mental Health Act but are living in the community and subject to requirements imposed under the Mental Health Act, to be subject to an authorisation under Schedule AA1 so long as the authorised arrangements are in accordance with those mental health requirements. For example, where a person is subject to guardianship under the Mental Health Act, an authorisation could not be granted under Schedule AA1 which provided for a person to reside in a different place to that specified by the guardian.

Schedule 2: Minor and consequential amendments

Part 1: Amendments to the Mental Capacity Act 2005

- 81 Part 1 of Schedule 2 to the Act makes a number of minor and consequential amendments to the MCA.

Part 2: Amendments to other legislation

- 82 Part 2 of Schedule 2 to the Act makes minor and consequential amendments to other legislation.

Related documents

83 The following documents are relevant to the Act and can be read at the stated locations:

- Law Commission report: Mental Capacity and Deprivation of Liberty, Law Com No 372, (2017), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/lc372_mental_capacity.pdf
- Mental Capacity (Amendment) Bill: JCHR memorandum (2018), available at: <https://publications.parliament.uk/pa/bills/2018.07.03%20-%20JCHR%20memo%20-to%20committee.pdf>
- Mental Capacity (Amendment) Bill: Impact assessment (2018), available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>
- Mental Capacity (Amendment) Bill: Delegated powers memorandum (2018), available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/18117-DPM.pdf>
- Report of the House of Lords Select Committee on the Mental Capacity Act 2005 (2014), available at: <https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>

Annex A – Territorial extent and application in the United Kingdom

| Provision | Extends to E & W and applies to England? | Extends to E & W and applies to Wales? | Extends and applies to Scotland? | Extends and applies to Northern Ireland? |
|------------|--|--|----------------------------------|--|
| Section 1 | Yes | Yes | No | No |
| Section 2 | Yes | Yes | No | No |
| Section 3 | Yes | Yes | No | No |
| Section 4 | Yes | Yes | No | No |
| Section 5 | Yes | Yes | No | No |
| Section 6 | Yes | Yes | No | No |
| Schedule 1 | Yes | Yes | No | No |
| Schedule 2 | Yes | Yes | No | No |

Annex B – Hansard References

84 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

| Stage | Date | Hansard Reference |
|---|------------------|--|
| <i>House of Commons</i> | | |
| Introduction | 11 December 2018 | |
| Second Reading | 18 December 2018 | Vol. [651] Col. [726] |
| Public Bill Committee | 15 January 2019 | Col. [1] |
| Report and Third Reading | 12 February 2019 | Vol. [654] Col. [792] |
| <i>House of Lords</i> | | |
| Introduction | 3 July 2018 | Vol. [792] |
| Second Reading | 16 July 2018 | Vol. [792] Col. [1059] |
| Grand Committee | 5 September 2018 | Vol. [792] Col. [1810] |
| Report | 21 November 2018 | Vol. [794] Col. [249] |
| Third Reading | 11 December 2018 | Vol. [794] Col. [1423] |
| Lords Consideration of Commons Amendments | 26 February 2019 | Vol. [796] Col. [102] |
| Commons Consideration of Lords Amendments | 2 April 2019 | Vol. [657] Col. [963] |
| Lords Consideration of Commons Amendments | 24 April 2019 | Vol. [797] Col. [612] |
| Royal Assent | 16 May 2019 | House of Commons Vol. [660] Col. [367] |
| | | House of Lords Vol. [660] Col. [367] |

These Explanatory Notes relate to the Mental Capacity (Amendment) Act 2019 (c. 18) which received Royal Assent on 16 May 2019

Annex C – Progress of Act Table

85 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Act through Parliament.

| Section of the Act | Bill as Introduced in the Lords | Bill as amended in Committee in the Lords | Bill as amended on Report in the Lords | Bill as introduced in the Commons | Bill as amended in Committee in the Commons |
|---------------------------|--|--|---|--|--|
| Section 1 | Clause 1 | Clause 1 | Clause 1 | Clause 1 | Clause 2 |
| Section 2 | Clause 2 | Clause 2 | Clause 2 | Clause 2 | Clause 3 |
| Section 3 | Clause 3 | Clause 3 | Clause 3 | Clause 3 | Clause 4 |
| Section 4 | | | | | |
| Section 5 | Clause 4 | Clause 4 | Clause 4 | Clause 4 | Clause 5 |
| Section 6 | Clause 5 | Clause 5 | Clause 5 | Clause 5 | Clause 6 |
| Schedule 1 | Schedule 1 | Schedule 1 | Schedule 1 | Schedule 1 | Schedule 1 |
| Schedule 2 | Schedule 2 | Schedule 2 | Schedule 2 | Schedule 2 | Schedule 2 |

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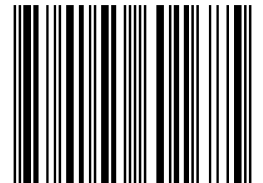
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