

# Mental Health Bill: Decision-making for under-16s

## Committee Stage briefing

### Summary

- The Mental Health Bill provides a crucial opportunity to improve care and treatment for those in mental health hospitals, particularly for those aged under 18.
- We are concerned that the Bill does not include a test to determine the ability of children aged under 16 to make decisions, in other words whether they are competent or not. Without such a test, this age group will not be able to benefit fully from the rights and safeguards included in the Bill.
- The Independent Review of the Mental Health Act 1983 noted that “there is no consistent approach to establishing competence” and therefore recommended that a statutory test for determining a child’s decision-making ability should be introduced.
- Under 16s are at a specific disadvantage in relation to the Bill. Whereas all those aged 16 and over are presumed to have the capacity to make decisions for themselves unless evidence shows otherwise (section 1 of the Mental Capacity Act (MCA) 2005), under 16s are presumed to be unable to make decisions for themselves, unless they demonstrate that they are competent to do so.
- There is also no clear and consistent approach for determining whether a child is competent. Although the concept of competence is generally understood, how to assess a child’s competence is not.
- We therefore support the amendment put forward by Lord Meston to insert a test for determining an under 16’s ability to decisions under the Mental Health Act.
- The amendment explicitly limits this test to decisions made under the Bill and under the Mental Health Act 1983 and is explicitly focused on the criteria with which to determine whether a child is competent.
- This briefing explains the purpose and scope of the amendment put forward by Lord Meston, why this amendment is needed, and our response to concerns raised about including a statutory test for determining a child’s competence. If this amendment is not accepted, we would support the amendment put forward by Baroness Tyler to undertake a review of a statutory competency test for under-16s. Whilst this amendment does not address the specific concerns we have raised in relation to the competence and the Mental Health Bill, this will go some way to supporting change in this area.

### The amendment

#### Lord Meston, Baroness Berridge

After Clause 50, insert the following new Clause -

#### **“Determination of ability to decide for persons under 16**

(1) For the purposes of this Act and the Mental Health Act 1983, a person aged under 16 (referred to in this section as a child) is able to make the relevant decision if they can—

- (a) understand the information relevant to the decision;
  - (b) retain the information;
  - (c) use or weight that information as part of the process of making the decision;
  - (d) communicate their decisions (whether by talking, using sign language or any other means).
- (2) Where a child is able to decide in accordance with paragraph (1) above, that child will be competent for the purpose of this Act.
- (3) A child is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (4) A person determining a child's ability to decide under this section must—
- (a) have due regard to Article 12 of the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 ("the Convention"), and
  - (b) must be able to show reasonable grounds for their belief that the child is or is not able to make the relevant decision.
- (5) When considered by any appropriate court or tribunal, any question whether a child is able to make the relevant decision within the meaning of this Act must be decided on the balance of probabilities."

Member's explanatory statement

**Explanatory statement:** This amendment inserts a test for determining a child's ability to make decisions (competence) under the Mental Health Act.

### **Purpose and scope of amendment**

This amendment sets out the criteria for determining whether a child is able to make the decision in question. The Bill refers to this as a child's "competence" but does not explain what this means, nor how it is assessed. The test set out in this amendment therefore seeks to fill a significant gap in the legislative framework proposed by the Bill.

The amendment is in line with the recommendation made by the Independent Review of the Mental Health Act 1983 (the Review) which noted that "there is no consistent approach to establishing competence" and therefore recommended that a statutory test for determining a child's decision-making ability should be introduced.

As noted by the Review, the term often used when considering whether a child is able to make a particular decision, is whether that child is "Gillick competent". This term is derived from the case of *Gillick v West Norfolk and Wisbech Area Health Authority* ("Gillick") in which the House of Lords held that a child aged under 16 could consent to her contraceptive treatment provided that the child has "sufficient understanding and intelligence to make the

decision". While this concept of the "Gillick competent child" is well known, there is less clarity on how to determine whether a child is competent. This question was not addressed by the House of Lords (it was not relevant to the issues being considered) and since *Gillick*, judges have adopted differing approaches when considering a child's competence.

The amendment explicitly limits this test to decisions made under the Bill and under the Mental Health Act (MHA) 1983. Accordingly, it will only apply to children who fall within the scope of this legislation.

### **The effect of the amendment: what it does and what it does not do**

Throughout the Bill reference is made to the capacity (for those aged 16 and over) or competence (for those aged under 16). However, the Bill is silent on what is meant by competence and how it should be determined.

The effect of the amendment would be that where the Bill requires consideration of a child's competence, this will be determined with reference to the statutory test set out in the amendment.

The amendment is not concerned with the consequences of concluding that a child is, or is not, competent – this is provided for in the Bill. The amendment does not affect such provisions. It simply provides the criteria with which to determine whether a child is competent.

### **Why is this amendment needed?**

A person's ability to decide is integral to the reforms this Bill seeks to introduce. One of the four key principles of the Bill is "Choice and autonomy" and the Explanatory Note to the Bill states that the reforms included in the Bill are to "Strengthen the voice of patients – with measures that aim to increase the role of the patient in decision-making regarding their care and treatment".<sup>ii</sup> As such the Bill places greater emphasis on the views of individuals with the capacity or competence to make the relevant decision, for example choosing who they would like to take on the role of the Nominated Person (clause 23 and Schedule 2) and the promotion of advance choice documents (clause 42).

Without an amendment to the Bill to introduce a test to determine a child's competence, for those aged under 16, these potentially positive reforms are likely to be illusory in practice. This is because whereas for adults and young people aged 16 and 17, the Bill refers to capacity as defined by the Mental Capacity Act 2005, the Bill gives no definition of competence. This omission means that under 16-year-olds are doubly disadvantaged because:

- Whereas all those aged 16 and over are presumed to have the capacity to make decisions for themselves unless evidence shows otherwise (section 1 of the Mental Capacity Act (MCA) 2005), under 16s are presumed to be unable to make decisions for themselves, unless they demonstrate that they are competent to do so.

- There is no clear and consistent approach for determining whether a child is competent. Although the concept of competence is generally understood, how to assess a child's competence is not.

The absence of criteria for assessing a child's ability to decide will create uncertainty for professionals tasked with considering whether a child is competent to make the particular decision. Given the assumption that a child is not competent to make decisions for themselves unless they demonstrate that they are able to do so, this uncertainty may lead to the conclusion that the presumption of a lack of competence has not been rebutted. The child will therefore be held to lack competence in relation to the particular decision. As a result, the additional rights and safeguards under the Bill (for example, to choose their Nominated Person) will not apply to them.

Given our concerns that without a test to determine decision making ability, children under 16 will not be able to benefit fully from the rights and safeguards included in the Bill, we support the amendment put forward by Lord Meston to insert such a test into the Bill.

### **A statutory test for a child's decision-making ability: Addressing concerns**

We are aware that various concerns have been expressed about introducing into the Bill a means of determining whether a child is able to make the decision in question (i.e. whether they are competent or not). We address these below:

- 1) **Is the MHA Code a better place for such a test?:** The Code is not the right place. Leaving this important consideration to guidance rather than legislation engenders a stark – and unjustified - difference in approach to children aged under 16 and those aged 16 and over. The Bill places great importance on the ability of both age groups to make the relevant decision. However, whereas the capacity for those aged 16 and over is determined in accordance with the Mental Capacity Act 2005, no provision is made for determining whether a child is competent. As noted above, the lack of a statutory test for children's decision-making ability places them at a significant disadvantage. Moreover, the courts have made clear that codes of practice, such as the Code of Practice to the Mental Health Act 1983, should reflect the law (set out in legislation and case law) and cannot create law.
- 2) **Is the Bill the right place for such a test given that competence has a wider application?:** Yes. It is correct that the concept of a child's 'competence' applies to many areas, not just mental health care. However, in the absence of a statutory test elsewhere, it is vital that a test is incorporated into the Bill. This is because the Bill sets out a range of areas in which the person's ability to make the decision is crucial to how the legislation operates. Not including such a test will be detrimental to the Bill's successful implementation. The inclusion of such a test would not prevent future legislation from including a test which has a more comprehensive application.
- 3) **Would introducing a test in legislation prevent a flexible approach to competence?:** No – in fact it would promote flexibility. The proposed amendment

includes a test which requires consideration of whether a particular child can make a particular decision at a particular time. It is therefore child specific and decision specific. It requires the person assessing the child's ability to decide to provide to the child, the information that is relevant to that particular decision (so the information will be dependent on the decision in question). It will be up to that person to decide what information is relevant to that decision, which will therefore be geared to the decision in question. That person will also need to consider how to explain the relevant information to that particular child, doing so in a way that is appropriate to the child's circumstances. Accordingly, flexibility is built into the amendment's proposed test.

**4) Has sufficient attention been given to the unintended consequences of such a test?:** Clearly this is an important question that requires careful consideration. However, when considering the potential consequences of introducing a test for determining a child's ability to decide it is important to draw a distinction between two questions:

- i) How to determine whether a child is able to make the decision in question?
- ii) What are the consequences of a child being found to have the ability to decide?

The amendment is directed to the first question only. It has no relevance to the second question.

- If introduced to the Bill, the amendment will simply provide the legal framework for determining whether a child is "competent". Once that is decided, the outcome to the question whether the child is, or is not, competent is set out in the Bill.

As noted above, the amendment is explicit in that it only applies to the Bill and MHA 1983. Importantly, it should also be noted that even if the test was applied in other areas (which is a matter for the courts and legislators), the test has nothing to say on the second question.

- It makes no inroads into parental decision-making powers – these would be unaffected by the amendment
- Nor would it affect the powers of the courts. For example, the courts have long established that under the inherent jurisdiction of the High Court, the wishes of a competent child, or young person with capacity, can be overridden if to do so is in the best interests of that child or young person.<sup>iii</sup>

## References

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<sup>i</sup> [1985] UKHL 7.

<sup>ii</sup> Mental Health Bill [HL] Explanatory Notes (relating to the Bill as introduced in the House of Lords on 6 November 2024) p. 7.

<sup>iii</sup> *Re X (A Child) (No. 2)* [2021] EWHC 65 (Fam), an approach confirmed by the Court of Appeal in *E & F (Minors: Blood Transfusion)* [2021] EWCA Civ 1888.