

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

## Report Stage briefing

### Summary

- This is a joint briefing from the Law Society, Mind and the Children and Young People's Mental Health Coalition in support of the amendment tabled by Lord Meston to insert a test for deciding how under 16s are to make decisions under the Mental Health Act, otherwise known as 'competence'.
- There is broad agreement that professionals need more clarity on how to decide a child's competence in relation to mental health decisions. For those aged 16 and over, decision making capacity is assessed in accordance with the Mental Capacity Act 2005. For those aged 16 and below, there are no statutory criteria for assessing competence.
- We consider that the test should be on the face of the Bill, not in a Code of Practice as the Government suggests. This is because the courts have made clear that codes of practice should reflect the law and cannot create law.
- The amendment explicitly limits this test to decisions made under the Bill and the Mental Health Act 1983 and is explicitly focused on the criteria with which to determine whether a child is competent.
- By providing professionals with a clear and consistent way to determine a child's competence, the amendment seeks to ensure that children aged under 16 can benefit from the reforms in the Bill as much as those aged 16 and over.
- The Bill is a crucial opportunity to provide much needed clarity on an area that to date has lacked a consistent approach.

### Purpose and scope of the amendment

The amendment put forward by Lord Meston sets out the criteria for determining whether a child is able to make the decision in question. It will only apply where the Bill requires that a child's competence is to be considered.

Importantly, the amendment is **only concerned with the question of the child's ability to decide**, not what happens once that has been determined. What happens once it is known whether the child is competent to make the decision is provided for by other parts of the Bill and/or the Mental Health Act 1983.<sup>1</sup>

The amendment also **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.

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<sup>1</sup> The current provisions of the Mental Health Act 1983 refer to competence in relation to children aged under 16 who are subject to community treatment orders ("CTOs"). For example, Part 4A refers to "Child community patients lacking competence" (section 64F).

### **Amendment – Lord Meston**

After Clause 51, 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 weigh 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 subsection (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:** This amendment inserts a test for determining a child’s ability to make decisions (competence) under the Mental Health Act.

At Committee Stage, Baroness Merron, the Minister for Patient Safety, Women’s Health and Mental Health referred to various reasons for not including a test for competence in the Bill. Instead, the Government said that the assessment of a child’s competence should be left to guidance in the Code of Practice on the Mental Health Act 1983.

However, a clear and consistent approach to assessing a child’s competence can only be achieved by including a test in the Bill. The Code is not the right place.

This is because the courts have made clear that codes of practice, such as the Mental Health Act Code, should reflect the law (set out in legislation and case law) and cannot create law.<sup>2</sup>

Moreover, the Code can only provide guidance. This means that while any departure from the Code would need to be justified, the Code cannot require professionals to assess competence in the manner suggested by the Code (section 118 of the MHA 1983 states that professionals exercising powers under this Act “shall have regard to the Code”). Accordingly, unless the test is set out in the Bill, the inconsistencies in how a child’s competence is assessed are likely to continue.

## Why is the amendment needed?

### 1. Supporting the principle of choice and autonomy

A person’s ability to decide is integral to the reforms the Mental Health 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>3</sup>

As such the Bill places greater emphasis on the views of individuals with the capacity or competence (see below) 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 at risk of being illusory in practice.

### 2. Addressing the disparity in decision making for under-16s

Including a test for competence in the Bill would address a stark disparity between children aged under 16 and those aged 16 and over.

**For those aged 16 and over**, the Bill refers to the Mental Capacity Act (MCA) 2005, which sets out a test to be applied for assessing a person’s capacity. Professionals considering the capacity of individuals aged 16 and over must do so in accordance with the MCA 2005. This means that they start with the presumption that the person has capacity, and that the person must not be treated as unable to make the decision “unless all practicable steps” to help the person to do so have been taken without success”.<sup>4</sup>

**For children aged under 16**, the Bill refers to a child’s ‘competence’ but gives no further definition of what this means. This omission puts children aged under-16 at a significant disadvantage because:

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<sup>2</sup> *An NHS Trust v Ors v Y & Anor (Rev 1)* [2018] UKSC 46 (as noted in footnote 27). See also *Re Lawson, Mottram and Hopton (appointment of personal welfare deputies) (Rev 1)* [2019] EWCOP 22, paragraph 16 in which Hayden J noted that a Code of Practice is not a statute, rather it “is an aid to the interpretation of law”.

<sup>3</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>4</sup> Mental Capacity Act 2005, section 1(3)

- Whereas all those aged 16 and over are presumed to have the capacity to make decisions for themselves unless evidence shows otherwise, 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 combination of a presumption that children aged under 16 cannot make decisions for themselves, with the lack of criteria in the Bill for assessing whether a child is "competent", will be detrimental to under 16s. Introducing a statutory test will address this disparity and ensure that that under 16s can benefit from the reforms in the Bill consistently.

### **3. Creating clarity and consistency for professionals**

The Government's view is that 'Gillick competence' is the accepted framework for determining competency for under-16s. However, there is no established test for *Gillick* competence. Inquiries considering this issue have highlighted the following concerns:

- The Joint Committee on the Draft Mental Health Bill, noted that the concept of Gillick competence is "broad" and "ambiguous" and that there are significant inconsistencies in how it is applied in practice.<sup>5</sup>
- 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.
- A similar conclusion has been reached by the Law Commission in the context of disabled children's social care. Noting that some professionals have difficulties in understanding the concept of competence and the importance of achieving clarity in this area, its proposals for reform identify the need for a statutory test to determine a child's decision-making ability.<sup>6</sup>

In Committee Stage debates, the Minister stated that the "the creation of two different tests is likely to cause further confusion and uncertainty". We disagree. Introducing a test in the Bill would provide clarity on the test to be applied where the Bill requires a child's competence to be determined. This will help, not hinder professionals. In contrast, the omission of a statutory test is more likely to cause confusion and uncertainty for practitioners tasked with considering whether a child is competent to make a particular decision.

Providing a clear test that can be applied consistently will help mental health professionals in determining whether the child is able to make the relevant decision. This includes:

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<sup>5</sup> Joint Committee on the Draft Mental Health Bill, *Draft Mental Health Bill 2022*, Report of Session 2022-23, January 2023, paragraph 216.

<sup>6</sup> Law Commission, *Disabled Children's Social Care Consultation Paper*, CP 265, October 2024, paragraph 21.25

- Clinicians who are determining which processes and safeguards to implement when a child is refusing treatment.
- Approved Mental Health Professionals (AMHPs) who must determine whether they need to appoint a nominated person on a child's behalf.
- Independent Mental Health Advocates (IMHAs) who can be asked to certify that a child has competence to appoint a nominated person

Without an amendment to the Bill, there will be no clear and consistent test for determining a child's competence. Contrary to the Government's assertion, it is not the inclusion, but the absence, of a test in the Bill that is likely to cause confusion and uncertainty.

### **About the Children and Young People's Mental Health Coalition**

The Children and Young People's Mental Health Coalition is a collaborative network of over 350 organisations and individuals dedicated to advocating for and influencing policy in relation to the mental health needs of babies, children, and young people. Our coalition consists of diverse stakeholders, including mental health organisations, youth support services, educational institutions, and concerned individuals, all united by a shared commitment to improving the well-being of children. For more information, please contact Charlotte Rainer on [charlotte.rainer@cypmhc.org.uk](mailto:charlotte.rainer@cypmhc.org.uk)

### **About the Law Society**

The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law. On behalf of the profession, we influence the legislative and regulatory environment in the public interest. Members of our specialist Mental Health and Disability Committee have extensive expertise in mental health law and include solicitors in private practice, mental health practitioners, legal academics, Tribunal judges and representatives of relevant voluntary organisations. We focus on improving law, practice, and procedures affecting individuals with mental health needs and disabilities, ensuring their rights and equality under the law. For more information, please contact Ben Lloyd at [ben.lloyd@lawsociety.org.uk](mailto:ben.lloyd@lawsociety.org.uk)

### **About Mind**

We're Mind, the mental health charity for England and Wales.

We're here to fight for mental health. For support, for respect, for you.

We change minds across England and Wales by making mental health an everyday priority. We support minds – offering help, information, advice and local services. And we connect minds. Bringing together people who care about mental health to make a difference.