



**Mental Capacity (Amendment) Bill**  
**Report Stage and Third Reading: Tuesday 12th February**

**Amendments 28 and 29 to Schedule 1 tabled by the Secretary of State for Health and Social care**

The Secretary of State has tabled two amendments to Schedule One relating to:

- the determination of capacity and the assessment of capacity
- the requirements of the person determining capacity and assessing capacity

***Amendment 28***

The first (Amendment 28) relates to which person which make the determination and which person will carry out the assessment.

Schedule 1, page 14, line 46, at end insert—

“(1A) The person who makes the determination need not be the same as the person who carries out the assessment.”

The explanatory statement states:

*This amendment makes it clear that a determination 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).*

***Amendment 29***

The second (Amendment 29) relates to the requirements of the person making a determination or carrying out an assessment.

Schedule 1, page 14, leave out lines 47 and 48 and insert—

“(2) The appropriate authority may by regulations make provision for requirements which must be met by a person—

- (a) making a determination, or
- (b) carrying out an assessment, under this paragraph.

(2A) Regulations under sub-paragraph (2) may make different provision—

- (a) for determinations and assessments, and
- (b) for determinations and assessments required under sub-paragraph (1)(a) and determinations and assessments required under subparagraph (1)(b).”

The explanatory statement states:

*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.*

## RCSLT briefing

These amendments will:

- allow **one person to make a determination** and a **different person to carry out an assessment**.
- provide the power to make regulations setting out **requirements which must be met for a person** to make a **determination** of capacity **or** to **carry out** an assessment. This power could relate to skills, knowledge and experience of the person carrying out the assessment.
- allow **different requirements** to be set out for a person **making a determination** compared to a person **carrying out an assessment**.

**Communication can be central to the determination of mental capacity.** Decisions regarding mental capacity will often concern people with complex communication and cognitive needs.

For this reason, **speech and language therapists have a crucial role to play.** They:

- may be best placed to assess those people's needs especially when the person in question will have challenging communication;
- are well placed to make a determination that a person does or does not lack capacity to consent to arrangements.

### Communication can be central in every aspect of mental capacity:

1. **Vulnerable people, often with communication needs, must be supported during the assessment process.** The clients will have a broad range of communication needs arising from head injury, stroke, dementia, progressive neurological conditions, learning disability and mental health problems. Speech and language therapists should be asked to support capacity assessments where the needs of their clients require specialist communication support. Improving communication support will help people to express their wishes and preferences and maximise client participation in decision-making. This also increases access to high quality assessments.
2. **Those assessing and those making determinations must understand communication needs and need to be trained to have these skills.** Too often assessors do not recognise or understand communication difficulties. It is essential that all professionals are trained in speech, language and communication. This training would support high quality assessments and decisions. It would prevent people being denied of their liberty unnecessarily.
3. **Speech and language therapists should be able to assess people and make determinations of capacity when appropriate.** As part of their daily role speech and language therapists work with people with a wide range of conditions who may lack capacity. Speech and language therapists have the skills to use appropriate language and alternative communication strategies to support a client's understanding and choice-making abilities and ensure that the decisions are in their best interests. This supports high quality assessment and decisions being made.
4. **Speech and language therapists should be able to train as Approved Mental Capacity Professionals.** Speech and language therapists have a crucial role to play in this new model given their specialist knowledge and expertise in speech, language and communication and should be able to be trained as Approved Mental Capacity Professionals. The current shortfall of available professionals needs to be addressed by extending the list of professionals able to train in this role.

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