

Consultation Response

Changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards

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About this consultation

The Department of Health and Social Care and the Ministry of Justice are consulting on changes to the Mental Capacity Act 2005 Code of Practice, applying to England and Wales, including guidance on the Liberty Protection Safeguards, which are due to replace the Deprivation of Liberty Safeguards. The consultation includes draft regulations relating to the Liberty Protection Safeguards.

About Age UK

Age UK is a national charity that works with a network of partners, including Age Scotland, Age Cymru, Age NI and local Age UKs across England, to help everyone make the most of later life, whatever their circumstances. In the UK, the Charity helps more than seven million older people each year by providing advice and support. It also researches and campaigns on the issues that matter most to older people. Its work focuses on ensuring that older people: have enough money; enjoy life and feel well; receive high quality health and care; are comfortable, safe and secure at home; and feel valued and able to participate.

Key points and recommendations

Introduction

We welcome the chance to respond to this consultation, and are pleased that the Government has pursued a collaborative approach in the development of the Liberty Protection Safeguards (LPS) proposals, now set out in the draft Mental Capacity Act Code of Practice (draft MCA Code) and draft regulations. We particularly appreciate involvement in the 2019 stakeholder events as the Code in respect of the LPS was being drafted. This enabled us to put forward the views and perspectives of older people and remain informed about the nature and progress of the Government's proposals.

While our consultation response primarily concerns the LPS, we acknowledge the other aspects of the draft MCA Code that engage our work with older people. For example, we welcome important clarifications in the draft Code concerning Lasting Power of Attorneyⁱ and deputiesⁱⁱ, the role of the person's past and present wishes and feelings in best interests decisionsⁱⁱⁱ and the circumstances where the best interest principle should not apply, for example in respect of assessing and meeting needs under the Care Act 2014^{iv}.

We believe it is right that the Government has acted to revise the Code in these and other areas to reflect case law and good practice developed since the MCA came into force. We are hopeful this will enable older people, and those with MCA duties towards them, to better understand how the MCA is intended to work in practice.

Liberty Protection Safeguards

It is entirely appropriate that the Government has sought to reform deprivation of liberty arrangements in light of well-founded criticism of the Deprivation of Liberty Safeguards (DoLS) framework, for example from the House of Lords^v, on the basis of the comprehensive review and recommendations of the Law Commission^{vi}.

Reflecting on the draft MCA Code, we recognise and welcome how the LPS are designed to improve outcomes for older people and others subject to the safeguards. In particular, we welcome:

the application of the framework to all settings where an older person may receive care or treatment, which we hope will provide better access to safeguards for those receiving care or treatment outside of a care home or hospital than is the case under the current framework.

the expectation that the LPS should be integrated with other care or treatment processes the older person may be subject to, such as the Care Act 2014.

the emphasis on the person being the centre of the process, in alignment with the wider principles of the MCA.

the reduction of the number of assessments for authorisation, from six under the DoLS, to three under the LPS, which we hope will enable older people and those with an interest in their welfare to better understand the procedure and criteria for authorisation.

In addition to the above, we also welcome the inclusion of a definition of deprivation of liberty in the draft MCA Code, which Age UK called for during the time the Mental Capacity Amendment Bill was subject to the parliamentary process. We are hopeful that the inclusion of a definition will enable older people and those with an interest in their welfare, as well as those providing care or treatment, to have a better understanding of when a deprivation of liberty may arise. We recommend that the Government consults closely with those with MCA legal expertise in finalising the definition in the MCA Code.

We want the Government to succeed in implementing the LPS, as this is in the interests of older people. In this response, we principally aim to highlight areas of concern in respect of the implementation of the LPS and how this relates to existing deprivation of liberty arrangements under the DoLS framework. In essence, we call on the Government to learn the lessons of the unacceptable situation that has arisen under the existing framework and to act to ensure that the LPS operate effectively in protecting the rights of older people lacking mental capacity to consent to care or treatment arrangements.

Current DoLS problems

Age UK is deeply concerned about the problems with the current deprivation of liberty arrangements, particularly the DoLS authorisation backlog. As the Government is aware, figures published by NHS Digital, covering England for 2020-21^{vii}, show that 119,7(9)-t9d1 594Tm0 g1

The Impact Assessment states full operationalisation has the following benefits –

‘Under this option, assessments would all take place within statutory time limits, cases would be taken to Court when they should be, and referrals would be made by managing authorities when they should be... Option 1 would improve human rights outcomes, as fully funding DoLS would enable local authorities to process all cases within statutory time limits’^{xvi}

We believe this is the only acceptable position in respect of the human rights of older people and other adults until the LPS come into force.

Relatedly, we call on the Government to develop a policy to address the DoLS backlog until such a time the LPS come into force. We welcome the Government’s acknowledgement that *‘people have faced breaches of their human rights’^{xvii}* because of the backlog. It is vital, in upholding human rights, that the backlog is dealt with.

LPS and DoLS backlog

Furthermore, we believe the Government should set out how the DoLS backlog will be

