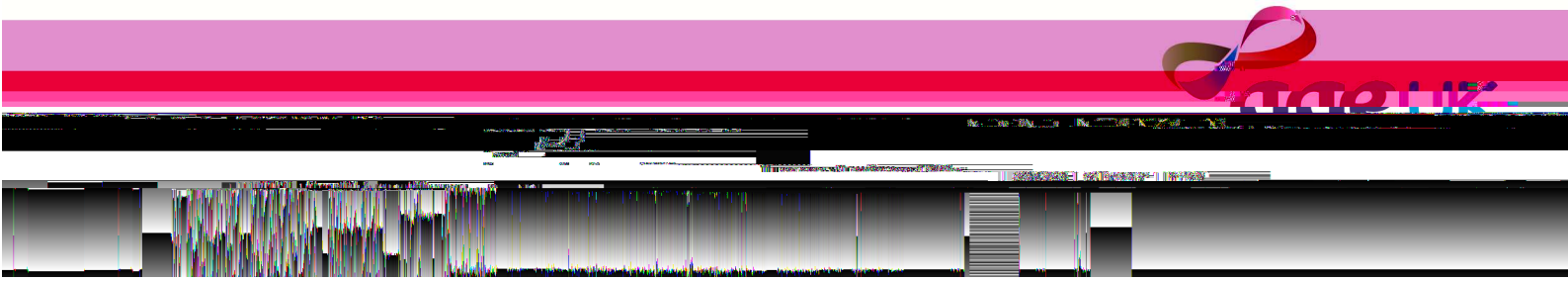

Consultation Response

Mental Capacity and Deprivation of Liberty: a consultation paper

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Katherine Hill (katherine.hill@ageuk.org.uk)

Age UK
Tavis House
1-6 Tavistock Square
London WC1H 9NA
T 0800 169 80 80 **F**

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About this consultation

Mental Capacity and Deprivation of Liberty: A Consultation Paper considers how the law in England and Wales should regulate deprivations of liberty involving people who lack capacity to consent to their care and treatment arrangements.

The current Deprivation of Liberty Safeguards (DoLS) have been subject to considerable criticism ever since their introduction. In March 2014 two events inflicted significant damage. First, the House of Lords post legislative scrutiny committee on the Mental Capacity Act (MCA) published a report which, amongst other matters, concluded that the DoLS were not 'fit for purpose' and proposed their replacement. A few days later, a Supreme Court judgment (known as *Cheshire West*) widened the definition of deprivation of liberty to a considerable extent. The effect has been to significantly damage the public image of the DoLS and the regime has struggled to cope with the increased number of cases. As a result of these events the Government asked the Law Commission to undertake this review of the DoLS.

We welcome the opportunity to feed our views into this consultation process and in our response have grouped comments under the chapter headings set out in the consultation document, highlighting where we have made responses to the specific questions posed.

KEY POINTS AND RECOMMENDATIONS

- The starting point for reform

- The difficulty of identifying ‘less restrictive’ options to residential care because of the funding restrictions within the social care sector is a major barrier to improving the current system. We recommend granting the courts the power to veto arrangements that are manifestly not in a person’s best interests.
- We support the proposal for a separate scheme tailored to hospital and palliative care settings. It is imperative that the level of bureaucracy required to comply remains proportionate to the positive benefits that the safeguards can offer.
- The proposed scheme positions access to advocacy as a key safeguard, with an advocate being instructed for all those subject to protective care. While we strongly support this it seems doubtful that current services would be able to meet additional demand without significant additional resources.
- We are sympathetic to the proposed recommendation that any restrictive treatment and care decisions should initially be challengeable in a specialist tribunal, rather than in the Court of Protection.
- We support the proposal to amend the MCA to give greater weight to an individual’s wishes and feelings in a best interest decision, as a welcome step towards the goal of a workable system of supported decision making.
- The current situation in which all those who die while subject to the DoLS have to have their death investigated by the Coroner is causing distress to families. We support the proposal to amend the Criminal Justice Act 2009 to provide that inquests are only necessary into deaths of people where the coroner is satisfied that they were deprived of their liberty at the time of the death and that there is a duty under article 2 to investigate the circumstances of the death.

INTRODUCTION

Age UK is the country's largest charity dedicated to helping everyone make the most of later life. We believe in a world where everyone can love later life and we work every day to achieve this. We help more than five million people every year, providing support, companionship and advice for older people who need it most.

Age UK believes that the starting point for reform of the Deprivation of Liberty Safeguards (DoLS) must be to maximise the enjoyment of human rights for those who are deemed to lack capacity. In the 21st century we ought to view the need to deprive someone of their liberty because their mental capacity is impaired as an extremely serious matter and indeed one that can only be sanctioned as matter of last resort. We certainly should not be accepting care and treatment that amounts to deprivation of liberty as a norm.

A fundamental concern for Age UK is that the proposals to replace the DoLS must not be discriminatory on any grounds including that of age or disability. Older people are more likely than younger people to be subject to an application for deprivation of liberty. The Care Quality Commission’s most recent monitoring report showed that in 2013/14, the rate of applications for people aged 85 and over was far higher than those for people aged 18

of reform is to simplify the process. While there may be theoretical advantages to the supportive care scheme in terms of securing greater compliance with the MCA, this could perhaps be better achieved through other means, such as a greater focus on this area within monitoring and inspection regimes.

Question 7-7 asks whether the restrictive care and treatment assessment should first require a best interests assessment to determine if receiving the proposed care or treatment is in a person's best interests, before deciding whether it is necessary to authorise restrictive care and treatment. We agree that this is a more logical process and provides greater scope for consideration of the potential impact of a decision on someone's human rights in the round, rather than immediately focusing in on their article 5 right.

Question 7-19 asks whether there should be additional oversight of the role of the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) and a right to request an alternative assessment. As set out in the consultation document the role of the Approved Mental Capacity Professional (AMCP) would be to act as an independent decision-maker on behalf of the local authority (LA), with the LA required to ensure that assessments are 'duly made'. In our view this 'light-touch' approach to supervision of the AMCP role is insufficient, particularly given the wide variation in the quality of current best interests assessments. We have received worrying reports that the quality of assessments has fallen as the numbers being requested post *Cheshire West* have risen.

CHAPTER 8: PROTECTIVE CARE IN HOSPITAL SETTINGS AND PALLIATIVE CARE

Overall we support the proposal for a separate scheme tailored to hospital and palliative care settings. As the paper acknowledges there is often limited time available for decision making in these circumstances and it is essential that the scheme allows professionals to act quickly and flexibly, particularly in the context of end of life care. It is imperative that the level of bureaucracy required to comply with the sch xt o

difficult to access. It therefore seems doubtful th

It is worth noting that the line between capacity to make a decision and ‘wishes and feelings’ is in many ways an artificial one. There will be situations where a person is assessed not have capacity to make a decision based on their ability to retain and weigh complex information but does have capacity to make a decision about how they wish to live their life. For example someone who does not wish to move into a residential care home might not have the capacity to understand fully the consequences of not doing so but will have capacity to decide they want to remain in their own home. In such cases the individual’s capacity to make decisions they can make is often overridden, and the desire to remain in their own home relegated to the status of a ‘wish or feeling’.

CHAPTER 15: OTHER ISSUES

Questions 15-7 and 15-8 concern the current law on the reporting of deaths to the coroners. They ask whether it is satisfactory and if the coroners should have a power to release the deceased’s body for burial or cremation before the conclusion of an investigation or inquest.