

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

- We broadly welcome the changes to the Mental Capacity Act 2005 (MCA) Code of Practice and introduction of the Liberty Protection Safeguards (LPS).
- We believe aspects of the LPS will improve outcomes for older people and we particularly welcome the inclusion of a definition of deprivation of liberty in the draft MCA Code of Practice.
- We are deeply concerned about the problems under the Deprivation of Liberty Safeguards (DoLS), particularly the authorisation backlog and delays.
- We are concerned that the problems of the DoLS will be replicated under the LPS unless the Government ensures that Responsible Bodies are given sufficient implementation lead-in time and resources to deal with LPS demand.
- While we want the LPS to be implemented as soon as possible, we call on the Government to take into account the immense implementation challenge for local authorities in respect of the October 2023 social care charging reforms when determining the implementation date for the LPS.
- We call on the Government to ensure the DoLS framework is fully operationalised until such time the LPS come into force.
- We call on the Government to develop a policy to deal with the DoLS authorisation backlog until the LPS come into force.
- We believe the draft MCA Code of Practice could be clarified and developed in respect of LPS assessment delays.

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 119,740 DoLS applications remained uncompleted and that only 24% of applications were completed within the statutory timeframe of 21 days, with an average completion time of 148 days. It is unacceptable that older people and other adults face breaches of their human rights where DoLS authorisations are delayed or never occur.

We are also concerned by the approach taken by some local authorities to effectively not deal with certain DoLS applications. For example, a 2019 Local Government and Social Care Ombudsman complaint report found that Staffordshire County Council had *'unlawfully decided not to carry out assessments of low and medium priority Deprivation of Liberty Safeguards (DoLS) applications'*^{viii}. In 2020, the Ombudsman found that Cheshire East Council had failed to deal with over a thousand DoLS applications that it had classified as *'low and medium priority'*, with the earliest such case dating to April 2014^{ix}. We are concerned that these unacceptable approaches are not unique to the two local authorities subject to the Ombudsman's investigation and may be widespread, given the scale of the DoLS backlog.

Through Age UK's advice services, we are also aware of other circumstances where it appears that the legal requirements and principles of the DoLS are not being adhered to.

A review of call notes from our national telephone advice line service for the period May 2021 to May 2022 revealed:

- DoLS authorisations are given in some instances without consultation with those with an interest in the older person's welfare.
- instances of lack of explanation and communication about what the DoLS are. For example, family of the person lacking capacity given DoLS forms without explanation of what these relate to.
- lack of information about how to request a review of a DoLS authorisation where it is believed to be no longer appropriate.
- instances where it is perceived that the DoLS are cited to threaten those who disagree with the proposed care or treatment arrangements for the older person.

Challenges of implementing the LPS

The problems with the current deprivation of liberty arrangements strengthen the case for reform through the introduction of the LPS. However, we are concerned that, unless local authorities and other prospective Responsible Bodies are granted adequate resources and a sufficient lead-in time, the problems of DoLS will be replicated under the LPS.

We recognise that the LPS are designed to be streamlined and less onerous for Responsible Bodies to administer, for example the reduction of the six authorisation assessments under the DoLS to three under the LPS, and better integration with other legal frameworks the person may be subject to, such as the Care Act 2014. Doubtless these are aspects of the reforms that will be welcomed by local authorities and other prospective Responsible Bodies.

However, that will not be sufficient to avoid the problems of the DoLS recurring under the LPS if responsible bodies are not given sufficient time to prepare for implementation or the resources to deal with LPS demand. We call on the Government to learn the lessons of the DoLS, where older people and other adults have experienced human rights breaches in the context of the framework not being '*fully operationalised*', i.e., not fully funded, as we understand is reflected in the Government's draft Impact Assessment^x.

The Government should particularly work with local authorities in this regard. We understand that most LPS referrals will fall to the local authority as the Responsible Body, taking into account the circumstances where the local authority is the Responsible Body in the draft MCA Code^{xi}.

Overlap with social care cap reforms

In terms of the implementation date for the LPS, we urge the Government to take into account the immense implementation challenge local authorities face in respect of the

Government's social care charging reforms, due to come into force in England in October 2023^{xii}. We are concerned that, if the Government chooses to implement the LPS in 2023, there is a risk local authorities will be unable to deal with the demands of this and the implementation of the charging reforms in the same year, jeopardising the successful implementation of both. As such, we believe that while the LPS should be implemented as soon as possible, this should be planned to give local authorities sufficient notice and the opportunity to make sure the reform is effective.

Implementation date

Relatedly, the Government understandably has chosen not to give a new implementation date until after it has reflected on the consultation. We are aware there have been past LPS implementation dates, most recently April 2022, which have not come to fruition, and we recognise that a reflection on the consultation responses may help the Government determine an implementation date that can be realistically achieved.

Quite rightly, the Government has acknowledged that the implementation of the LPS *'is a large reform programme and will involve big changes for the health and social care system'* relating to a *'complicated area of law and practice'*^{xiii}. We support the Government in efforts to determine an implementation date that is workable for prospective Responsible Bodies and others involved in ensuring that the LPS are successfully introduced.

That notwithstanding, we are hopeful that the Government recognise the importance of issuing a new implementation date in a timely manner. It is difficult to foresee how prospective Responsible Bodies can plan for the successful implementation of the LPS, in the context of competing priorities, such as the social care charging reforms, without a new implementation date. We welcome the Government's acknowledgement that *'more is needed to support implementation'*^{xiv} of the LPS and are hopeful that it is recognised that a new implementation date, issued in a timely manner, is an important element of that further support.

DoLS continuance and backlog

We are aware that the DoLS will remain in force until such a time that the LPS are introduced, covering deprivation of liberty arrangements in care homes and hospitals, with the Court of Protection retaining its role in authorising deprivations of liberty in other settings.

As DoLS remains in force, and will continue to apply at least in the short-term, we call on the Government to ensure it is fully operationalised – i.e. fully funded – so older people and other adults benefit from its safeguards and avoid human rights breaches through unlawful deprivations of liberty. In essence, we are calling on the Government to consider the implementation of *'Option 1'*, i.e., full operationalisation of existing deprivation of liberty arrangements, as set out in the Impact Assessment^{xv}, until such time the LPS come into force.

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 treated under the LPS when they come into force. This will clarify for the person subject to the application, those with an interest in their welfare, as well as the prospective Responsible Bodies, how the unauthorised application will be dealt with under the LPS.

If the Government intends that outstanding DoLS authorisations will become new LPS referrals, the implementation of the LPS is more likely to be successful if the backlog is reduced as much as possible prior to implementation. We believe that Responsible Bodies are more likely to be able to carry out their functions in proper compliance with the MCA if they are not encumbered with a backlog of referrals that are the legacy of the DoLS.

Draft MCA Code and delay in LPS assessment process

We believe the MCA Code would be improved by further development of what should happen in the event the Responsible Body does not complete the LPS assessment within the 21-day period cited in the draft Code^{xviii}.

We are hopeful delays will be minimal if the Government ensures Responsible Bodies are adequately resourced to deal with LPS demand and are given sufficient implementation lead-in time. However, given the prevalence of delay in the current system, we believe it would be a sensible precaution for the Code to address this in greater detail.

We note that the 21-day period for the assessment process is expressed in the following way in the draft MCA Code –

‘The assessments process, i.e. from triggering the process to a decision being made as to whether to authorise the arrangements, should not exceed 21 days. This is to ensure that the person is not left in potentially unlawful and/or unsafe arrangements, and they have access to the safeguards they are entitled to. This is important as it protects the person’s Article 5 rights. In exceptional circumstances, however, this may not be possible’^{xix}

In the first instance, we believe this could be usefully developed by an illustration of the ‘*exceptional circumstances*’ where it may not be possible for the Responsible Body to complete the assessment process within 21 days. We suggest this will improve understanding of what the Government considers reasonable in terms of the 21 day timescale being breached, giving those affected by the LPS a better sense of what they can expect from the Responsible Body in such cases.

In cases where it is not possible to complete the assessment process within 21 days, the draft MCA Code states the following in terms of the action the Responsible Body should take:

‘Where this is the case, the Responsible Body should ensure this is recorded in the person’s records and shared with the person and their Appropriate Person and/or IMCA’^{xx}

We suggest this could be strengthened by reference to other actions the Responsible Body should take, to ensure the person and their representative(s) are kept informed about the assessment process in the context of the delay. For example, the Code could state that the Responsible Body should advise the person and their Appropriate Person and/or IMCA:

- what has caused the delay
- what is being done to ensure the assessment process is completed as soon as possible
- approximately when it can be expected that the assessment process will be completed
- how any concern about potentially unlawful and/or unsafe arrangements can be raised during the period of delay

Furthermore, we suggest that greater clarity should be introduced to the Code in terms of how delay, i.e. a breach of the 21 day period, can be challenged. We are aware that the draft Code addresses challenges to the LPS process in the following terms -

‘The person and others, for example an individual or organisation on their behalf, has a right to challenge the proposed or authorised arrangements, or the manner in which the LPS process has been enacted. The Responsible Body should ensure that there are appropriate channels for individuals to raise such concerns, including through standard complaints processes. Each concern should be considered promptly, and any necessary action taken. Information about how to make a complaint should be included within the information that Responsible Bodies publish and be available through care providers’^{xxi}

It is our understanding that this could, or is meant, to cover a broad set of situations, including where there has been delay in the assessment process. The draft Code establishes that the Responsible Body should try and resolve challenges informally^{xxii}, before setting out what should happen where that is not possible:

'If the person, or the individual raising the concern, is not satisfied with the conflict resolution process or the proposed resolution, there are number of ways they can take this forward.

These include:

- making a complaint through the official complaints system of the Responsible Body. If the issue is not resolved through internal complaints procedures, it may be appropriate to make a complaint to the relevant Ombudsman.*
- raising a safeguarding concern under the local safeguarding adults or children board multi-agency safeguarding procedures (if it is believed the person is at risk of abuse or neglect).*
- requesting a review of the care and support plan or the authorised arrangements, or both.*
- making an application to the Court of Protection to challenge the authorisation, please see chapter 7 for more info^{xxiii}*

While this may be useful in terms of an overview of how challenges can be made more formally, it is not clear which route would be most appropriate if the challenge concerns delay. It does not seem appropriate, for example, for a delay to be challenged through the official complaints procedure of the Responsible Body, with a possible subsequent referral to the relevant Ombudsman, as we are aware this is a process that can take several months to complete. We believe the Code would benefit from an express reference to how delays can and should be challenged, for example through an application to the Court of Protection when it has not been possible to achieve resolution informally with the Responsible Body.

ⁱ For example, the guidance on the role of a personal welfare LPA in preparation of a care and support plan for the donor – [Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards](#), paragraph 8.66

ⁱⁱ For example, the guidance on the appointment of personal welfare deputies - *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 9.13

ⁱⁱⁱ *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 5.61-5.68

^{iv} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 5.8

^v Select Committee on the Mental Capacity Act 2005 Report, [Mental Capacity Act 2005: Post-legislative scrutiny](#)

^{vi} Law Commission, [Mental Capacity and Deprivation of Liberty](#)

^{vii} NHS Digital, [Mental Capacity Act 2005, Deprivation of Liberty Safeguards - 2020-21](#)

^{viii} Local Government and Social Care Ombudsman, [Investigation into a complaint against Staffordshire County Council \(reference number: 18 004 809\)](#), page 3

^{ix} Local Government and Social Care Ombudsman, [Cheshire East Council \(19 010 786\)](#), paragraph 57

^x Department of Health and Social Care, [LPS implementation: draft impact assessment March 2022](#), paragraph 8.1 and 8.2

^{xi} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 14.3

^{xii} HM Government, [Build Back Better: Our Plan for Health and Social Care](#)

^{xiii} [Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards](#), page 11

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- ^{xiv} *Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards*, page 11
- ^{xv} Department of Health and Social Care, *LPS implementation: draft impact assessment March 2022*, paragraph 8.2
- ^{xvi} Paragraph 8.2, page 12
- ^{xvii} *Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards*, page 4
- ^{xviii} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 13.26
- ^{xix} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 13.26
- ^{xx} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 13.26
- ^{xxi} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 24.50
- ^{xxii} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 24.53
- ^{xxiii} *Draft Mental Capacity Act 2005 Code of Practice Including the Liberty Protection Safeguards*, paragraph 24.54