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DHSC Consultation on MCA code of practice and LPS implementation - context & overview from our MCA expert, Rachel Griffiths

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1 Reason for the consultation

Government explains: 'We are consulting on the proposed changes to the Mental Capacity Act 2005 (MCA) Code of Practice, which includes guidance on the new Liberty Protection Safeguards (LPS) system. This consultation is also seeking views on the LPS regulations, which will underpin the new system.

There are two main areas of change: **the revisions proposed to the code of practice to the wider MCA**, and **the new chapters about how LPS will work in practice, added to the code**. The revisions, and reasons for them are:

(i) The main code

The existing code of practice was published in 2007 for the implementation of the MCA and has never been revised or updated. It has inevitably become more and more out of date, as legal judgements illuminated how the MCA should be put into practice, and huge changes took place within health and social care.

The current draft corrects and updates the materials, within a framework of chapter headings that are reassuringly similar to the existing one, for example

- correction of the guidance about which order to carry out the steps when assessing capacity
- updates to reflect case law, for example, recognising the seriousness of giving medicines against a person's will, or the importance of the person's wishes and feelings when thinking about their best interests.

For this reason, it is to be welcomed.

However, the draft is marred by huge numbers of typos, spelling errors, and bits of cross-referencing that don't work. This is regrettable and makes the draft code look like a 'rushed job' whereas it has been some three years in development. If you would like to give feedback to the LPS team on any of these errors, see 5 below.

(ii) Additional material to cover LPS



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There is no date yet for the implementation of LPS, though it is likely to be in autumn 2023 at the earliest. However, its future implementation means that additional guidance needs to be added to the code. The code covering the deprivation of liberty safeguards (DoLS) was a 'supplementary code' in a separate volume, produced in 2009 when DoLS came into effect; it is excellent that the LPS guidance is incorporated within the wider MCA code. This underlines that the LPS are part of the MCA and is founded in its ethos of human rights and empowerment.

Much of the LPS information is a welcome explanation of how the system will work.

For an outline account of the LPS processes, see the draft code of practice summary, chapters 12 – 22, at

<https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps/draft-mca-code-of-practice-summary>

Compared with the current DoLS system, which protects the rights only of people aged 18 and over and only in registered care homes or hospitals, LPS will apply far more widely, throughout community care services and in people's own homes, and to people aged from 16.

As promised in the legislation (Mental Capacity (Amendment) Act 2019

https://www.legislation.gov.uk/ukpga/2019/18/pdfs/ukpga_20190018_en.pdf the

authors of the draft code have a stab at defining deprivation of liberty. The definition they use is as expected, derived from the Supreme Court 'Cheshire West' judgement

<https://www.supremecourt.uk/cases/docs/uksc-2012-0068-judgment.pdf>.

However, some of the case scenarios in chapter 12 of the draft code seem hard to justify and would take many people out of the protections provided by LPS.

The important message to providers at this stage is that this draft is not yet the statutory code of practice which we all must 'have regard to', though of course, it does not have the power of law. While it is in draft, it would be dangerous to rely on any of it, particularly on these scenarios, in making decisions about whether someone is deprived of their liberty or not.

If in any doubt about whether any adult who lacks the capacity to consent to their care plan might be deprived of their liberty, consult the commissioners of the service or your local DoLS team.

2 How the consultation works: main documents

This is a joint consultation published by the Department of Health and Social Care (DHSC) and the Ministry of Justice (MoJ). The LPS will apply to people over the age of 16, so the Department for Education (DfE) has been involved in the development of this new system.

The consultation documents are here:



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<https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps>

They are discussed below but you will see there are a great number of them! The closing date for responses on the government consultation web page is **7 July**. Everyone is welcome to respond, and we encourage you to do so if you wish. Every provider of adult social care has an interest in how LPS will work, and you can answer any or all of the questions, depending on the time you have and the relevance to your setting of different areas of the consultation.

Note: ARC, Care England, NCF and RNHA are submitting a joint response on your behalf, focusing on what the proposals will mean for the sector, especially about the change from DoLS to LPS. Some consultation questions ask, 'is this clear and comprehensible?' - a simple question, perhaps of limited value – but we plan to address also the implications for different care settings, whether the detailed guidance is legally justifiable and, in particular, how the detailed LPS system as presented will be workable in adult social care.

(i) Wales

The MCA applies in England and Wales, but some aspects of its application are devolved in Wales. The Welsh Government is also consulting separately on its LPS regulations and a separate Impact Assessment for Wales. If you work in, or engage with, the Welsh health and social care system, you might consider responding to the Welsh Government consultations: <https://gov.wales/liberty-protection-safeguards>.

(ii) LPS regulations

The government is also consulting on 6 sets of draft regulations which will underpin the new system. When enacted, 4 of these sets of regulations would apply in England only. The remaining 2 sets of regulations would apply to both England and Wales. The regulations are mainly about who can carry out the different assessments, and who will monitor and regulate the system. In general, there are parallels with how DoLS work now: assessors will be registered health and care professionals, with no conflict of interest regarding a specific person or setting, and CQC will be the monitoring body for England, as now.

Separately, the Welsh Government has published 4 sets of regulations which would apply in Wales (see links to separate Welsh consultations, above). Again, the system will appear broadly similar to DoLS in Wales. For example, the existing separation in supervisory bodies for health and social care, which disappeared in England in 2013, has continued in Wales and will also apply to Welsh LPS implementation.

3 Further implementation documents



A number of further documents are to help the sector prepare for implementation are included on the consultation page. These products are not subject to formal consultation, but they welcome feedback as part of the consultation process. These are:

- impact assessment – this constitutes the government’s assessment of the financial impact of LPS, including the Code and regulations, as proposed for consultation

Note that the joint response by ARC, Care England, NCF and RNHA will address the accuracy of the impact assessment and its implications for adult social care

- LPS workforce and training strategy – this covers:
 - workforce planning
 - the learning, development and training on offer
 - what different organisations and sectors can do now to begin preparing for LPS

The joint response will assess these documents and feed back our views to government. It is comforting to note that training materials and resources will be made available free of charge ahead of the implementation of LPS, whenever that should be (probably autumn of 2023 at the earliest).

- LPS training framework – which makes recommendations about subject areas that LPS training should cover
- LPS National Minimum Data Set – which will be used to standardise the collection and submission of notification data that is sent to the monitoring bodies and NHS Digital
- equalities impact assessment – which assesses the potential equality impact of the design of LPS overall, including the Mental Capacity (Amendment) Act 2019, the LPS regulations and the Code

4 Feedback on spelling errors etc. in draft code

The government does want feedback on the many careless mistakes littering the text. However, they do not want this to be given on the consultation feedback page as part of the formal consultation. If you wish to tell them of any errors you have noticed, you can email the LPS Implementation Team at DHSC directly at <mailto:lps.cop@dhsc.gov.uk>

5 What can providers do now in readiness for LPS?

This consultation process is a useful reminder in itself that the MCA is the essential framework for providing services to anyone aged 16 and over who might lack capacity to consent to any aspect of their care or treatment. This is especially vital when people are subject to intense restrictions on their freedom, which might amount to a deprivation of liberty.



While DoLS only apply in registered care homes and hospitals, and for people aged 18 or over, it has never been lawful to deprive anyone over 16 of their liberty in any setting, without lawful authority. For community settings or young people, that has meant going to court: LPS will certainly be cheaper overall and a less stressful way to protect people's rights. **LPS intends to be more intuitive, more inclusive, and less bureaucratic than DoLS. Among the functions of our planned joint response is to remind government of the importance of meeting this objective.**

Five tips for readiness

- Stay up to date: bookmark the DHSC LPS page for factsheets and information <https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets>
- Assessments can be re-used for LPS if they are still accurate, unlike DoLS. Save assessments of capacity or mental disorder, for example, diagnoses of learning disabilities or dementia, as long as they remain relevant
- Check any restriction of someone's freedom against the test that will come in with LPS: is this restriction **necessary** to prevent harm to the person, and **proportionate** to the risk (likelihood) of that harm and how serious it would be to that person?
- Record how you are working within the MCA principles and how you are always looking for less restrictive ways to meet people's needs: see the existing statutory code: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf
- Look out for local LPS implementation networks that will be set up nearer the time

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