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Implementing the Mental Capacity (Amendment) Act 2019

Summary

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Summary

The Mental Capacity (Amendment) Act 2019 received Royal Assent on 16 May 2019. The Act amends the Mental Capacity Act 2005 and introduces the Liberty Protection Safeguards (LPS) - a new process for authorising deprivations of liberty for persons who lack capacity to make a particular decision. The LPS replaces the Deprivation of Liberty Safeguards (DoLS) which were introduced in 2008 as an earlier amendment to the Mental Capacity Act 2005.

Implementation of the LPS was planned to begin in April 2022 but was delayed by the coronavirus pandemic. On 17 March 2022, the Government opened a 16 week public consultation on proposed changes to the Mental Capacity Act Code of Practice, including guidance on the new LPS.

This briefing outlines the legal and policy background to the Mental Capacity (Amendment) Act 2019 and provides an overview of its the main provisions.

The briefing also includes links to relevant Department of Health and Social Care factsheets and guidance, in addition to responses to the legislation from professional bodies and special interest groups.

Further detail on the background to the reform process is available in Commons Library Briefings on the Deprivation of Liberty Safeguards (CBP8095) and the Mental Capacity (Amendment) Bill (CBP8466), as well as the Lords Library Briefing on the Mental Capacity (Amendment) Bill [HL]: Briefing for Lords stages.

1 Legal and policy background to the Mental Capacity (Amendment) Act 2019

1.1 The 'Bournewood gap'

Deprivation of Liberty Safeguards were introduced to remedy a gap in the regulation of the process for admitting compliant patients who lack mental capacity for care and treatment in hospitals and care homes. The so-called 'Bournewood gap' stemmed from the House of Lords[1] decision in the case of *In Re L* in 1997.[2]

The case involved a young autistic man with severe learning disabilities (HL) who was admitted informally to Bournewood hospital. He was not allowed to leave or have any visits from his family. He was compliant and did not object to the admission, but his carers challenged his informal detention. A majority of judges in the House of Lords decided he was not unlawfully detained. This decision led to a successful legal challenge in the European Court of Human Rights in *HL v UK.*[3] The European Court of Human Rights found that HL had been unlawfully deprived of his liberty in breach of Article 5 of the European Convention on Human Rights, which protects citizens from arbitrary deprivations of liberty.

1.2 The Deprivation of Liberty Safeguards (DoLS)

The Deprivation of Liberty Safeguards[4] were introduced by the Government in 2008 to provide protection for patients like HL by amending the Mental Capacity Act (MCA) 2005. A legal process was put in place to formally authorise a deprivation of liberty for patients who lack relevant capacity to consent to care and treatment. The safeguards are designed to ensure that someone is only deprived of their liberty when it is in their best interests and there is no other way to look after them. The DoLS framework does not apply to those under the age of 18 years.

1 The Appellate Committee of the House of Lords was the final court of appeal at that time, now the Supreme Court.
2 [1997] EWCA Civ 2879.
3 (2004) 40 EHRR 761.
4 For further detail about the DoLS see Deprivation of Liberty Safeguards, Commons Library Briefing Paper CBP-8095.

The DoLS framework requires a managing authority (ie, a hospital or care home) to identify those at risk of a deprivation of liberty and request an authorisation for the deprivation from a supervisory body (which can be a local authority, or an NHS Trust in England/local health board in Wales). The supervisory body must arrange a series of six assessments to be carried out within a 21-day period. This is known as a standard authorisation.

It is also possible under the DoLS for the managing authority to grant an urgent authorisation for a 7-day period, which is renewable once for a further period of 7 days. This may take place before the supervisory body can respond to a request for a standard authorisation.

The person must in certain cases be provided with representation and support by an Independent Mental Capacity Advocate (IMCA) and/or a family member and friend (ie, a relevant person's representative) throughout this process. The person, their relevant representative or IMCA can request a review of the deprivation at any time and can also apply to the Court of Protection to review the continued detention.

1.3 Criticism of the DoLS

The DoLS are regarded as complex and overly bureaucratic, and there have been concerns about the operation of the process since its inception. For example, a House of Lords Select Committee on the MCA reported in 2014 that the DoLS were 'unfit for purpose' and said:

> The provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act [...] Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned.[5]

In the same year, the Supreme Court in the case of *P v Cheshire West and Cheshire Council and another; P & Q v Surrey County Council* had to decide when a person is deprived of their liberty in social care.[6] Drawing on case law from the European Court of Human Rights, the Supreme Court said a person is subject to 'confinement' when the person is objectively 'not free to leave' and 'under continuous supervision and control'. It does not matter whether the person is content or compliant. This has become known as the 'acid test' for a deprivation of liberty.

The Supreme Court decision expanded the reach of the DoLS provisions and led to a huge rise in the number of DoLS applications. Official figures indicate a sharp rise in the number of DoLS applications in the first year after the

5 Select Committee on the Mental Capacity Act 2005, Mental Capacity Act 2005: Post-legislative scrutiny, 13 March 2014, HL 139 2013-14, p. 7.

6 [2014] UKSC 19.

decision, and numbers continued to grow in the years following the decision. There was a 55% increase in DoLS applications between 2014/15 and 2016/17.[7] This created significant pressures on local authority budgets and on those who authorise deprivations of liberty, including the Court of Protection, and led to delays and a backlog of applications.[8]

1.4 The Law Commission proposals

In response to these concerns, the Government asked the Law Commission in 2014 to review the legal framework for the DoLS. The Law Commission consulted widely on potential changes to the process and published a final report and draft Bill on Mental Capacity and Deprivation of Liberty in March 2017. The Law Commission recommended introducing a new simplified scheme to replace the DoLS, as well as proposing some wider changes to the MCA around supported decision-making and best interests, how the Act relates to children, and the interface with the mental health legislation.[9]

The Parliamentary Joint Committee on Human Rights said in a report on the DoLS in June 2018 that the Law Commission's proposals "could form the basis of a better scheme for authorising deprivations of liberty, directing scrutiny to those that need it most", and urged the government to implement the scheme "urgently".[10]

1.5 The Government's response

The Government responded to both the Law Commission[11] and JCHR reports,[12] and introduced a Bill in the House of Lords on 3 July 2018. The Mental Capacity (Amendment) Bill broadly reflected the Law Commission's proposals to replace the DoLS scheme. It did not take forward the Commission's recommendations for wider reform of the MCA.

Several important changes were made in the Lords, and during the Commons Public Bill Committee stage as the Bill progressed through Parliament. In particular, the Government included a partial definition of deprivation of

7 NHS Digital, Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England), England 2016-17 National Statistics, 1 November 2017.

8 Mithran Samuel, Practitioners complete record number of DoLS cases but backlog continues to grow, Community Care, 22 November 2019.

9 Law Commission, Mental Capacity and Deprivation of Liberty, 13 March 2017.

10 Joint Committee on Human Rights, The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards, 29 June 2018, HC 890 2017-19, paragraphs 75 and 16.

11 Department of Health and Social Care, Department of Health response to the Law Commission's consultation on mental capacity and deprivation of liberty, 3 April 2018.

12 Department of Health and Social Care, The Government's Response to the Joint Committee on Human Rights 7th and 12th Reports, CP 80, 3 April 2019.

liberty in the Bill with the aim of providing clarity, and to "bring proportionality to the situation and ensure that liberty protection safeguards are appropriately applied".[13] The Law Commission had not recommended a statutory definition, saying instead that deprivation of liberty should have the same meaning as in Article 5(1) of the European Convention on Human Rights.[14] But the Joint Committee on Human Rights said it was important to include a definition to provide greater certainty about the scope of the new scheme.[15]

The Lords and Commons disagreed about the drafting of the definition. The definition proposed by the Government in a new clause 1 at Public Bill Committee stage was opposed and does not appear in the final statute. The Opposition called for the Government to withdraw the clause as it was not clear how the new definition would relate to case law and it was "not sufficiently clear as to be useful".[16] Accordingly, the Opposition urged the Government to consult more widely on the definition to ensure it had broad support.[17] The Government removed the definition from the Bill and said guidance on the meaning of deprivation of liberty would instead be included in Codes of Practice under the Act.[18]

The Bill was given Royal Assent in May 2019. Helen Whatley MP, Minister of State for Care, made a written statement in Parliament on 16 July 2020 indicating the new provisions would be implemented in April 2022 after consultation on new guidance in the Code of Practice and associated regulations.[19]

The Department of Health and Social Care set out the provisional timetable for implementation in a LPS newsletter (PDF) published in September 2020. However, a letter from the Department of Health and Social Care to the LPS steering group in December 2021 confirmed a delay to implementation owing to the impact of the coronavirus pandemic.

On 17 March 2022, the Government opened a public consultation on proposed changes to the Mental Capacity Act Code of Practice, including guidance on the new LPS. The consultation closes on 17 July 2022. A new target date for implementation has not been announced at this point.

13 Mental Capacity (Amendment) Bill Deb, 22 January 2019, c209.
14 Law Commission, Mental Capacity and Deprivation of Liberty (Law Com No 237) (PDF), 2017, HC1079.
15 Joint Committee on Human Rights, Legislative Scrutiny: Mental Capacity Amendment) Bill (PDF), 26 October 2018, HC 1662 2017-19.
16 Mental Capacity (Amendment) Bill Deb, 22 January 2019, c212.
17 Ibid., c214.
18 HL Deb 24 April 2019 vol 797 c613
19 HCWS 377, 16 July 2020.

2 The Mental Capacity (Amendment) Act 2019

Section 1(4) of the Mental Capacity (Amendment) Act inserts a new Schedule AA1 into the MCA setting out a new process for authorising a deprivation of liberty. The new provisions are commonly referred to as the Liberty Protection Safeguards (LPS), although this terminology is not used in the new Act. There is no provision for an urgent authorisation, instead a new interim deprivation of liberty power is introduced.

Unlike the DoLS, the LPS are setting neutral, which means they can apply in any setting and have been extended beyond care homes and hospitals to include domestic settings, such as supported living and a person's own home and family home.

The LPS are also wider in scope as they extend to younger age groups ie, those aged 16 and over in England and Wales, whereas DoLS only apply to those aged 18 and over.

The DHSC LPS factsheet says LPS could apply to autistic people, and persons with a learning disability or dementia, among others, who lack relevant decision-making capacity.[20]

2.1 Responsible body

Deprivations will be authorised by a 'responsible body' for a maximum period of 12 months initially, up to a maximum period of three years. The deprivation must be renewed annually within that maximum period.

The DHSC LPS factsheet says in most cases, a local authority or NHS Trust (or a local health board in Wales) will be the responsible body, and anyone can make a referral to that body, either via email or an online form.[21]

20 Department of Health and Social Care, Liberty Protection Safeguards: overview of the process, 3 August 2021

21 Ibid.

2.2 Authorisation conditions

For the responsible body to authorise any deprivation of liberty it must be clear that all the 'authorisation conditions' listed below are met:

- The person lacks the capacity to consent to the care arrangements; and
- The person has a mental disorder, within the meaning of section 1(2) of the Mental Health Act 1983; and
- The arrangements are necessary to prevent harm to the cared-for person and proportionate to the likelihood and seriousness of that harm.[22]

2.3 The 3-assessment process

The responsible body must authorise three assessments required for the authorisation, which are:

- The capacity assessment and determination; and
- The medical assessment and determination; and
- The necessary and proportionate assessment and determination.[23]

2.4 Consultation

The assessment process must involve the responsible body consulting with the person and others (such as a family member or someone else close to that person, including any attorney,[24] court-appointed deputy or Independent Mental Capacity Advocate – see 2.8 below), as far as is practicable and appropriate, to understand what the person's feelings and wishes are.

Once the consultation and assessments have been carried out, a pre-authorisation review will be completed to enable the responsible body to decide whether to authorise the arrangements. If, having reviewed all the evidence, the responsible body decides to make an authorisation, it can take effect immediately or within 28 days of being issued.

22 Ibid.

23 Department of Health and Social Care, Liberty Protection Safeguards: criteria for authorisation, 3 August 2021.

24 This would be an attorney acting under a health and welfare power of attorney, as authorised under the provisions of the MCA.

2.5 Deprivation of Liberty

There is no statutory definition of a deprivation of liberty in the Act. Consequently, the current 'acid test' developed by the Supreme Court in the case of *Cheshire West* (outlined in 1.3 above) will still apply. This means a deprivation of liberty occurs when a person is objectively 'not free to leave' and 'under continuous supervision and control'.

2.6 Appropriate person

The Act has created a new role for an 'appropriate person' to provide representation and support for the cared-for person during the LPS authorisation process and throughout the period of any authorisation. This role effectively replaces the person's representative in the DoLS process. The appropriate person is described in the DHSC LPS Factsheet as a "key role in securing the person's wishes and feelings about their care, treatment and support."[25] The Government envisages the role will usually by fulfilled by a family member or a volunteer from a third-sector organisation.

The appropriate person will be able to apply to the Court of Protection to challenge the authorisation and may need to provide support to the cared-for person during the court process.

2.7 Approved Mental Capacity Professional (AMCP)

A new professional role is also created by the Act, namely the Approved Mental Capacity Professional (AMCP). The AMCP is based on the current Best Interest Assessor role under the DoLS and the role is described in the DHSC LPS Factsheet as a "new, specialist role providing enhanced oversight for those people who need it most".[26] Most AMCPs will be independent, trained, and registered professionals and will normally be employed by a local authority, NHS Trust, local health board or clinical commissioning group.

AMCPs will be required to carry out the pre-authorisation review if the cared-for person is objecting to the proposed arrangements in the following ways:

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25 Department of Health and Social Care, Liberty Protection Safeguards: the appropriate person and independent mental capacity advocates, 3 August 2021

26 Department of Health and Social Care, Liberty Protection Safeguards: the approved mental capacity professional role, 3 August 2021

- The arrangements provide for the cared-for person to reside in a particular place and it's reasonable to believe that the cared-for person does not wish to reside in that place.
- The arrangements provide for the cared-for person to receive care or treatment at a particular place, and it's reasonable to believe that the cared-for person does not wish to receive care or treatment at that place.
- The arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or the case is referred by the Responsible Body to an AMCP and that individual accepts the referral.[27]

The AMCP should consult the cared-for person as well as those close to the person during the review process to determine their wishes and feelings.

2.8 Independent Mental Capacity Advocate (IMCA)

IMCAs were introduced in the MCA to support patients who are unable to make decisions for themselves. IMCAs are trained and experienced to provide support to the cared-for person throughout the LPS process. They are described in the DHSC LPS factsheet on the appropriate person and IMCAs as "a vital safeguard to the person's human rights throughout the assessment process and duration of any authorisation given".[28] In broad terms, there is a presumption that an IMCA will be appointed by the responsible body to represent and support the cared-for person, unless it would not be in the person's best interests.

2.9 Authorisations for life-saving treatment or a 'vital act'

The DHSC LPS factsheet on life sustaining treatment or vital acts provides that, in exceptional cases, it may be necessary to take steps which deprive a person of their liberty before a formal authorisation decision has been made by a responsible body or court.[29] Exceptional circumstances are defined in the Act as those when it is necessary to carry out life-sustaining treatment or a 'vital act'. A vital act is where there is a reasonable belief that it is necessary to prevent a serious deterioration in the person's condition.

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27 Ibid.

28 Department of Health and Social Care, Liberty Protection Safeguards: the appropriate person and independent mental capacity advocates, 3 August 2021

29 Department of Health and Social Care, Liberty Protection Safeguards: deprivation of liberty and authorisation of steps necessary for life-sustaining treatment or vital acts (section 4b), 3 August 2021

In these circumstances, there are four conditions to be met (set out in a new section 4B inserted in the MCA) to deprive the person of their liberty:

1. The steps consist of, or are for the purpose of, giving life-sustaining treatment to the person or for doing any vital act.
2. The steps are necessary to give the life-sustaining treatment or carry out the vital act.
3. There is a reasonable belief that the person lacks capacity to consent to the steps.
4. An authorisation to deprive someone of their liberty is being sought from the responsible body under the LPS, or a relevant decision is being sought from the court, or there is an emergency.[30]

2.10 Review and renewal process

The authorisation must be reviewed regularly by the responsible body with access provided to an IMCA or appropriate person to represent and support the cared-for person throughout the authorisation period.

The responsible body can renew an authorisation at any time, but it must consult with the cared-for person and other relevant individuals (including an IMCA) before doing so, to ascertain whether the person's wishes for their care and treatment have changed.

The authorisation can end at any time if the responsible body determines that it should, or if the responsible body believes, or ought reasonably to suspect, that any of the authorisation conditions are not met. That means it will end if one of the following conditions is met:

- The cared-for person has capacity, or has regained capacity, to consent to the arrangements.
- The cared-for person no longer has a mental disorder.
- The arrangements are no longer necessary and proportionate.[31]

2.11 Challenging the authorisation at the Court of Protection

The new LPS authorisation process will be overseen by the Court of Protection which has jurisdiction over these matters to hear appeals and disputes.

30 Ibid.

31 Department of Health and Social Care, Liberty Protection Safeguards: authorisations, renewals and reviews, 3 August 2021

Where an LPS authorisation is in place, the cared-for person, their appropriate person or IMCA, or anyone else can apply to challenge the arrangements at the Court of Protection under section 21ZA of the MCA. The Court of Protection has power to uphold, vary or terminate the authorisation.

Non-means-tested Legal Aid will be available for cases brought to the Court of Protection in these circumstances.

In some cases, the responsible body may need to make an application to the Court of Protection, for example, if for some reason the cared-for person should have taken their case to court but it did not happen.

3 The Code of Practice and regulations

Section 4(2) of the Act amends section 42 of the MCA to specify that guidance must be included in one or more Codes of Practice about what kind of arrangements for enabling the care or treatment of a person would give rise to a deprivation of liberty.

Section 4(3) of the Act provides that the Lord Chancellor must review the guidance in the Codes and a report of this review must be laid before Parliament. The first review must take place within three years of coming into force, and subsequent reviews must take place thereafter every five years.

3.1 Consultation on changes to the MCA Code of Practice and draft LPS regulations

On 17 March 2022, the Government launched a 16-week consultation on proposed changes to the MCA Code of Practice, which includes guidance on the new LPS system. The consultation is also seeking views on the LPS regulations which will underpin the new system.

The MCA Code of Practice requires updating for two reasons:

- In the light of new case law and legislation, organisational and terminological changes, and developments in ways of working and good practice; and
- The new LPS system means that additional guidance needs to be added to the Code.[32]

The Government is producing "one overarching Code of Practice to ensure the principles of the MCA are firmly embedded in the LPS from its introduction."[33]

This is a joint consultation published by the Department of Health and Social Care and the Ministry of Justice. As the LPS will apply to people over the age of 16, the Department for Education has also been involved in development of the new system.

32 Department of Health and Social Care and Ministry of Justice, Changes to the MCA Code of Practice and implementation of the LPS (accessed 10 May 2022)

33 Department of Health and Social Care and Ministry of Justice, Changes to the MCA Code of Practice and implementation of the LPS: consultation document, 17 March 2022.

The Government has published 6 documents to help the sector prepare for implementation. They are not subject to formal consultation, but the Government is welcoming feedback as part of the consultation process. These include financial and equalities impact assessments of the LPS; workforce training and strategy; and the Minimum Data Set for monitoring of the LPS.

The Government recognises that "without adequate time to prepare, implementation will not be a success."[34] Accordingly, it plans to publish further guidance, support implementation networks and develop national training products on the LPS for a wide range of audiences.[35]

Draft LPS Regulations

The Government is consulting on six sets of draft regulations to underpin the new LPS system. When enacted, four sets of these regulations will apply to England only, and two will apply to England and Wales. The Welsh Government is consulting separately on certain aspects of the LPS design in Wales.[36]

In addition to general provisions on commencement and transitional arrangements in England and Wales, there are detailed regulations on the role of Independent Mental Capacity Advocate, and training and approval for Approved Mental Capacity Professionals in England, as well as on the Monitoring and Reporting arrangements for the LPS.

Changes to the Mental Capacity Act Code of Practice

The meaning of deprivation of liberty

Chapter 12 of the draft Code explains the definition of a deprivation of liberty for the purposes of the LPS. Following court judgments, a deprivation of liberty has three parts:

- The person is confined in a restricted space for a non-negligible period of time (the objective element);
- The person has not validly consented to the confinement (the subjective element); and
- The state is responsible for the confinement.

The draft Code provides guidance on the relevant factors in assessing whether there is a confinement. In accordance with human rights law, this will require consideration of a whole range of criteria, including the type, duration and effects of the measure/s.[37]

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34 Ibid., p. 9.

35 Ibid., p. 11.

36 See Liberty protection safeguards | GOV.WALES

37 *Guzzardi v Italy* (1980) 3 EHRR 333 (App No 7367/76) at [92].

The LPS process

Chapter 13 provides guidance on each step of the LPS process and Chapter 16 describes the three assessments and determinations required by the LPS. The draft Code says the LPS process should normally be triggered when a staff member has a reasonable belief that any health or care arrangements may amount to a deprivation of liberty because they are clearly very restrictive, and the person lacks relevant mental capacity.[38] It also says a Responsible Body (more detail on this body is in Chapter 14) should have mechanisms in place to help identify when arrangements amount to a deprivation of liberty. Paragraph 13.17 makes it clear that all health and social care professionals, staff members and care providers have a responsibility to be aware of the potential for a deprivation of liberty to arise and to make an LPS referral.[39]

Court of Protection

The draft Code describes the role of the Court of Protection and says the court should not be involved in LPS authorisations except in 'rare' circumstances.[40]

Approved Mental Capacity Professional

Chapter 18 includes detailed guidance on the Approved Mental Capacity Professional (AMCP) role. It is a specialist role providing enhanced oversight and local authorities have a statutory duty to make arrangements for approving individuals to practice as AMCPs and to ensure there are enough AMCPs available for their area. The Code sets out the criteria for referral and the responsibilities of the AMCP once the referral has been accepted.

Independent Mental Capacity Advocate

The draft Code includes guidance on the IMCA role, in particular about the circumstances where the Act requires an IMCA, who can fulfil the role and how the IMCA should be appointed. Chapter 10 describes how IMCAs play a key role in representing and supporting the person throughout the LPS process and while an authorisation is in place. In some cases, IMCAs will also support the person's Appropriate Person to represent and support the person, as set out in Chapter 15 of the draft Code.

Changes to existing chapters in the Code of Practice

Defining and assessing capacity

Chapter 4 of the Code sets out the difference between considering and assessing a person's capacity. Although it should be assumed that someone

38 HM Government, Draft Mental Capacity Act 2005 Code of Practice, including the Liberty Protection Safeguards, 17 March 2022, para 13.8.

39 Ibid., para 13.17

40 Ibid., para. 7.39.

has capacity, failing to consider whether they might not have capacity can also cause them harm.[41]

The draft Code changes the order of the existing two-stage capacity test, so that assessors must first question whether the person is able to make the decision, and if not, whether this is caused by an impairment or disturbance in the functioning of their mind or brain.[42] Guidance is also given on scenarios where a person gives coherent answers to questions about their decision, but their actions do not match this, or there is fluctuating capacity.[43]

Chapter 4 also covers remote assessments and retrospective assessments.

Best interests

The new draft Code emphasises that making a decision in a person's best interest should only be considered as an option after all practicable steps have been taken to support the person to make it themselves.[44]

Chapter 5 includes guidance on who should be the 'decision maker' in best interest decisions and the importance of considering not only a person's best medical interests, but their social, cultural and psychological interests as well.[45] The process of making a best interests decision should start with identifying the options that are actually available to the person[46] and proceed with their wishes and feelings in mind. Clear justification will be required in any instance where the decision is not one that the person would have made.[47] Advance statements, advance care plans and future care plans may all be used to inform future best interests decisions.[48]

Chapter 5 also sets out guidance on recording best interests decisions and exceptions to the best interests principle, when making decisions under other legislative frameworks that include their own processes, such as the Care Act 2014. [49]

Protection for people providing care and treatment

Chapter 6 of the Code sets out new guidance on decisions to restrict a person's contact with others, making payments for goods and services, and when the court should be asked to make a decision about a person's healthcare or treatment.[50]

41 HM Government, Draft Mental Capacity Act 2005 Code of Practice, including the Liberty Protection Safeguards, 17 March 2022, para 4.6.
42 Ibid., paras 4.12 and 4.20-4.21.
43 Ibid., paras 4.38 and 4.51-4.57.
44 Ibid., para 5.1.
45 Ibid., paras 5.15-5.23 and para 5.10.
46 Ibid., paras 5.24-5.26.
47 Ibid., para 5.68.
48 Ibid., paras 5.77 and 5.95-5.96.
49 Ibid., paras 5.102-5.111 and 5.8.
50 Ibid., paras 6.20-6.22, 6.86-6.91 and 6.32-6.37.

Chapter 8 of the new draft Code sets out new guidance on Lasting Powers of Attorney, including the decisions an attorney can make.[51] Further information on this subject can be found in the Library briefing paper on Powers of attorney and other decision-making powers.

Court of Protection

Chapter 9 clarifies the role of deputies appointed by the Court of Protection to make decisions on behalf of a person who lacks capacity and the role of the Office of the Public Guardian in supervising deputies.[52] Further guidance concerning the sharing of information between professionals and others, including for research purposes, has been added to chapters 25 and 26 of the Code.[53]

Chapter 11, which covers advance decisions to refuse treatment, incudes clarification on the requirement to apply to the Court of Protection in cases of doubt about an advance decision to refuse treatment.[54]

51 Ibid., chapter 8.
52 Ibid., chapter 9.
53 Ibid., chapters 25-26.
54 Ibid., paras 11.62 and 11.78-11.81

4 Reactions to the new law

Several professional and special interest groups published their reactions to the new law, these are available via the links below:

- Age Concern, Protecting older people's precious right to liberty (20 January 2020)
- British Association of Social Work, Liberty Protection Safeguards (LPS) implementation Delay (22 July 2020)
- British Institute of Human Rights, Campaigning on the Mental Capacity (Amendment) Act 2019
- MIND, More work to be done as Mental Capacity (Amendment) Bill becomes law (16 May 2019)
- Royal College of Psychiatrists, The Mental Capacity (Amendment) Bill: an update (26 April 2019)
- Social Care Institute for Excellence, From DoLS to LPS: An important time for mental capacity (16 March 2021)
- The Law Society, Mental Capacity (Amendment) Act 2019 (2 October 2019)

5 Further information

Explanatory Notes on the Mental Capacity (Amendment) Act 2019.

Department of Health and Social Care factsheets on aspects of the LPS process.

Department of Health and Social Care Changes to the MCA Code of Practice and implementation of the LPS.

Department of Health and Social Care Changes to the law and guidance about making your own decisions (easy read).

Department of Health and Social Care national plans for workforce training and readiness.

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