Comisiynydd Pobl Hŷn Cymru
Older People's Commissioner for Wales

Draft Regulations for Wales: Liberty Protection Safeguards

July 2022

Introduction

The role of the independent Older People's Commissioner for Wales is to protect and promote the rights of older people living in Wales. The Commissioner routinely scrutinises those policies and practices, with the potential to impact the rights of older people.

It is recognised that arrangements must sometimes be made to restrict an individual's liberty, in order to safeguard them and to protect them from harm [1] [2]. At the same time, however, such decisions must be made with the utmost care and attention [3]. It is critical that processes are in place to ensure rigorous decision-making and to maintain adherence to the principles of 'least restrictive practice'.

Those who lack the capacity to consent to their care and treatment, are often amongst the most vulnerable in society. There is no doubt that significant numbers of older people have been subject to the existing 'deprivation of liberty' safeguards, because of illnesses like dementia. Whilst dementia is not an exclusively age-related condition, the potential for an individual developing dementia increases with age [4]. In later stages of the illness, cognition and decision-making capacity are often affected; meaning that considerations of facilitated decision-making and 'best interests' then arise [5]. The Commissioner is therefore pleased to respond to this consultation on the 'Draft Regulations for Wales: Liberty Protection Safeguards' (LPS).

General Comments:

The Commissioner acknowledges the ways within which elements of the amended Code of Practice and the regulations for implementing LPS in Wales, offer important potential protections for older people. Both the Code and the regulations, place high value on an individual's right to self-determination. Research suggests that many older people have been denied the right to self-determination and have been denied opportunities to participate in decision-making about their own lives and futures. It is sometimes incorrectly

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assumed that because of their age, older people are unable to contribute meaningfully to decision-making processes[6]. It is important to recognise, however, that many older people (including those with more progressed dementia), can contribute to decisions around their lives and care, if they are provided with the right assistance and support.

Positively, the regulations highlight the importance of consultation and advocacy. It is noted that assessors and advocates have a duty to consult both with the person potentially subject to LPS and with those closest to (and perhaps caring for), an individual in potential need of an authorisation. Conversations with unpaid carers (whether family or close friends), are extremely important. These people, often possess the kinds of biographical and "relational knowledge" [7], critical to the provision of meaningful 'person-centred' care for older people. The regulations state that it is now possible for family members to take on a formal "appropriate person" role and in some situations, to be supported by an Independent Mental Capacity Advocate (IMCA) in undertaking these roles and responsibilities. The provision of advocacy support to family members when undertaking such roles, is extremely important. Previous reviews have shown that some families have found the 'Deprivation of Liberty' (DOLs) process both "distressing and confusing" [8]. Many family members functioning in the capacity of 'unpaid carers', have trouble navigating the often complex 'systems' surrounding the provision of health and social care to older people and are therefore likely to appreciate someone to help and to guide through the system [9]. It is also positive that reference is made to the need for the ongoing IMCA role with individuals and families. The provision of care is not a one-off 'event but is an ongoing process; within which an individual's needs and capabilities are liable to change over time [10]. It is within the context of consistent relationships that advocates are more likely to develop a holistic understanding of the needs of individuals and families and that older people and their families are more likely to feel sufficiently 'safe' to say what they really think and feel [11], and to therefore receive the help and support that they need.

Nevertheless, the Commissioner has concerns regarding the availability of sufficient advocates (both IMCAs and 'Approved Mental Capacity Professionals' (AMCPs)). Without sufficient IMCAs and AMCPs, it will be impossible to ensure that older people and their families are able to contribute to decision-making processes in meaningful ways. Consideration must also be given to Welsh language issues in relation to the availability of advocates and LPS assessors. At times where individuals must make challenging and potentially distressing decisions, they may prefer to converse in Welsh if that is their 'first language'. The availability of appropriate numbers of Welsh speaking advocates, must therefore be considered as a part of this process. The availability of adequate GPs with the skills to undertake medical assessments in respect of LPS, will also be critical to ensuring the smooth running of the process, as will assurances of adequate numbers of competent and confident LPS assessors.

To ensure objectivity and fairness, the Code requires that assessments are undertaken by more than one assessor. Whilst the Commissioner appreciates the reasoning behind this requirement, there must be sufficient LPS assessors to ensure that relationship-based approaches to practise are not undermined. Here, understanding is seen as derived in the context of consistent and ongoing discursive relationships, where practitioners are able to understand the individual circumstances of older people and their families and to therefore better contribute to competent decision-making outcomes. [12]

It is important to recognise that there are likely to be practical issues encountered in terms of ensuring the separation and distinctiveness of assessors. Within a hospital, for example, there may be a need to enlist assessors from other hospital wards to ensure that elements of the assessment are undertaken by someone not involved in an individual's 'hands on' care'. This is likely to be challenging in a busy hospital environment and could potentially cause distressing delays in the overall LPS process.

The LPS extend the safeguards to people within the community as well as care home or hospital settings [13]. Many older people with illnesses like dementia, live at home"[14] and might potentially benefit from 'best interest' type assessments, which help determine the efficacy of their existing care and support. It is not clear, however, how these individuals will be identified if they are not receiving formal care and support services within their home environment. Clarification is needed as to what point front-line practitioners (like GPs), might 'trigger' a LPS assessment, when becoming aware of an individual's informal care arrangements.

The regulations highlight the training needed, across relevant groups, for the undertaking of LPS related roles and responsibilities. Assessing mental capacity and engaging in processes of facilitated and best interest decision-making, are often complex from a practitioner perspective. For this reason, it is critical that training is adequate and qualitatively robust [15]. Training must also be culturally sensitive. Wales is a small country, but it is also culturally diverse [16]. Practitioners must therefore understand the ways in which, different cultural perspectives might impact upon and shape decision-making processes and outcomes.

As a part of their training, practitioners must also be encouraged to speak to older people and their families about 'Advanced Decision Making' and 'Advanced Care Planning' processes. Increasing numbers of older people in Wales do not have children or close family to act as an 'appropriate person' and to relay their wishes and preferences [17]. It is important that individuals are given opportunities to state their preferences around possible future care, at a point where they are able to do so. These perspectives must be recorded and documented, to inform later care planning processes.

The Commissioner has wider concerns around the complexity of the definition of LPS, within the amended Code of Practice and regarding the potential 'removal' of certain

individuals from the LPS process (e.g. Liberty Protection Safeguards are not necessarily required, when an individual is receiving treatment for a physical condition in a hospital setting). The Commissioner also has concerns that monitoring via technology for example, is somehow considered less of a deprivation of liberty than continuous monitoring by another person. These issues are raised in a separate consultation response on the UK Government's Code of Practice.

Question 4: Do you agree that the draft Regulations relating to financial interest provide the necessary safeguards for the cared-for person?

The Commissioner strongly endorses the decision that care home providers and those with other financial interests in the care of the older person, should not be in a position of making authorisation. Were these persons to undertake an active role in LPS determinations, there would be an inevitable conflict of interest; with the potential that fairness and objectivity in the best interest of the cared-for person, would then be compromised.

Question 11: Do you agree that the draft Regulations on monitoring and reporting are clear and sufficient

Monitoring and reporting can be a safeguard in and of itself and it is critical that Welsh Government has an awareness of the ways within which the LPS is being implemented in its transition period. However, if we are to truly understand the impacts of LPS, then monitoring and evaluation needs to go beyond performance indicators and matrices and needs to appreciate the lived experiences of LPS, from the perspectives of those subject to authorisation. To ensure that we understand the impacts of LPS within Wales, monitoring bodies must ensure that they speak to and consult with those people subject to LPS authorisations and to those closest to them,

Question 12: Where an authorised arrangement is being carried out in a private dwelling or in a part of a premises used as a private dwelling, a monitoring body must seek permission prior to visiting. Also, a monitoring body will seek consent from the cared-for person before meeting with them. If a cared-for person does not have capacity to consent then a best interests decision will need to be taken about such a meeting. This may include the monitoring bodies. Do you agree the consent-based approach we are proposing to monitoring and reporting reflects people's rights and provides adequate safeguards?

It is recognised that the LPS covers a wider range of settings than just hospitals and care homes. There is much research on the importance of home to older people; with home seen as a place of identity and belonging [18]. The Commissioner strongly believes that it is right that consent is therefore sought by monitoring bodies, before entering the home of an older person. It is recognised that there are occasions where consent may not be given and

that at such times, a best interest decision may need to be made, contrary to the expressed wishes of an older person. Such situations demand that practitioners work with the highest levels of sensitivity and respect, and it is important that practitioners are given the time and space to build relationships with, and to provide such older people with appropriate levels of reassurance and support.

It is critical that Welsh Government considers the extended time and additional resources needed for the effective implementation of LPS within Wales. The level of resource to ensure the effective implementation of LPS, must be accurately reflected within the relevant impact assessments.

The LPS process provides a critical means of safeguarding the rights of those who lack the capacity to consent to their care and treatment and we trust that the comments made within this consultation, will be valuable in shaping its subsequent amendment and implementation. Please do not hesitate to contact us, should you wish to discuss this response in further detail.

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The Older People's Commissioner for Wales

The Older People's Commissioner for Wales protects and promotes the rights of older people throughout Wales, scrutinising and influencing a wide range of policy and practice to improve their lives. She provides help and support directly to older people through her casework team and works to empower older people and ensure that their voices are heard and acted upon. The Commissioner's role is underpinned by a set of unique legal powers to support her in reviewing the work of public bodies and holding them to account when necessary.

The Commissioner is taking action to end ageism and age discrimination, stop the abuse of older people and enable everyone to age well.

The Commissioner wants Wales to be the best place in the world to grow older.

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