



# Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the 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 deprive an individual of their liberty, in order to safeguard them and to protect them from harm<sup>1 2</sup>. It is critical, however, that such decisions are made with the utmost care and attention<sup>3</sup>. Appropriate checks and balances must be in place to ensure rigorous decision-making and 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. Significant numbers of older people have been subject to the existing 'deprivation of liberty' (DOLs) safeguards because of illnesses like dementia, which often effect cognition and decision-making capacity, especially in the later stages<sup>4</sup>.

The Commissioner is therefore pleased to respond to this consultation on the UKs Government's Code of Practice for the Mental Capacity Act 2005 (including the Liberty Protection Safeguards). The Commissioner will also be submitting a separate consultation response to the Welsh Government's draft regulations for implementing LPS in Wales.

## Comments on the Code of Practice

The Commissioner acknowledges the ways within which elements of the Code of Practice, offer important protections for older people. The Act and Code places high value on an

For further information, please contact:  
Andrea Cooper, Safeguarding Lead:  
03442 640 670 // [Andrea.Cooper@olderpeople.wales](mailto:Andrea.Cooper@olderpeople.wales)

individual's right to self-determination. Research suggests that many older people have been denied the right to self-determination and to participate in decision-making about their own lives and futures. It is sometimes incorrectly assumed that because of their age, older people are unable to meaningfully contribute to decision-making processes<sup>5</sup> It is important to recognise that even with more progressed dementia, many older people can contribute to decisions around their lives and care, when provided with the right assistance and support.

Positively, the Code of Practice details the kinds of practical steps to be taken to help individuals make their own decisions, if possible. The Code emphasises the need for practitioners to provide information with care and consideration, and to take account of the specific needs and circumstances of individuals (whether, for example, individuals are likely to be better able to understand information at certain times of the day).

In situations where an individual is unable to meaningfully contribute to decision-making outcomes (despite efforts to facilitate their participation), the Code emphasises the need for 'best interest decision-making', which promotes positive risk-taking and which "recognises the importance of psychological and emotional needs, as well as physical and promotes choice and autonomy for the individual"<sup>6</sup>. Any decision made on behalf of another person must, of course, be as least restrictive as possible in terms of its impacts upon an individual's rights and freedoms.

### **The 'Liberty Protection Safeguards':**

The Code highlights the importance of advocacy and consultation. It is noted that assessors and advocates have a duty to consult with those closest to (and perhaps caring for), an individual in potential need of an authorisation. These conversations are extremely important. The family and close friends of an older person are often in possession of the kinds of "relational knowledge"<sup>7</sup>, critical to the provision of meaningful 'person-centred' care. The Code states that it is now possible for such 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 the undertaking of these roles and responsibilities. The provision of advocacy support to family members when undertaking such roles, is extremely important. Many family members functioning in the capacity of 'unpaid carers', experience difficulty in navigating the often complex 'systems' surrounding the provision of care to older people<sup>8</sup>. Relationships are critical to people feeling sufficiently 'safe' to say what they really think and feel<sup>9</sup>. As relationships with advocates are developed, older people and their families are more likely to articulate their concerns and to receive the help and support they need.

The Commissioner has concerns, however, regarding the potential availability of sufficient advocacy services. Working in relationship-focused ways is potentially time consuming and hence resource intensive. Whilst the extensions to the IMCA role are welcomed, older people and those taking on the "appropriate person" role will not receive the help they need without attention to resources. In ensuring the successful implementation of LPS, attention must also be paid to ensuring enough Approved Mental Capacity Professionals (AMCPs),

where additional input is needed around ‘best interest’ decisions. 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 are therefore better able to contribute to competent decision-making outcomes.<sup>10</sup>

There are also 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 within a busy hospital environment and could potentially cause distressing delays in the overall LPS process.

The Liberty Protection Safeguards extend the safeguards to people within the community as well as care home or hospital settings<sup>11</sup>. Many older people with illnesses like dementia, live at home<sup>12</sup> 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.

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 practitioners are provided with adequate and qualitatively robust<sup>13</sup> training, to assist them to undertake their LPS-related roles and responsibilities. Training must also be culturally sensitive, to ensure that assessors understand the ways within which decision-making processes and outcomes are potentially shaped and impacted by different cultural perspectives.

Most importantly, the Commissioner has concerns regarding the definition of ‘LPS’ as stated within the Code of Practice. The interpretation of what constitutes LPS within the illustrative ‘casework’ scenarios, appears to differ in important ways, from ‘deprivation of liberty’ as understood within the former DOLs process. The result is that some people who would have probably received an authorisation under DOLs, would now potentially be excluded from LPS considerations. Concerns are particularly highlighted regarding the fact that individuals who are receiving treatment for a physical / medical condition in hospital, would not now necessarily be considered as requiring a LPS authorisation. This is

concerning and must be revisited to ensure that many potentially vulnerable people, are not denied access to safeguarding processes that would ensure practitioner accountability and uphold their rights and liberties.

The Commissioner is also concerned that monitoring via technological means, is somehow considered less of a deprivation of liberty than monitoring in person. It is important to recognise that when people do *not* have capacity issues, monitoring via technology could be considered 'controlling and coercive behaviour'. Whilst there may be times where such monitoring is necessary to reduce the risk of a person coming to harm and could enhance someone's ability to live independently, it is critical that such arrangements are implemented with the utmost care and attention. Further clarification and detailed guidance is needed in relation to technological monitoring (when and in what situations, LPS might apply).

The Code of Practice and the LPS process provide a critical means of safeguarding the rights of those who lack the capacity to consent to their care and treatment. We trust that the comments made within this consultation are valuable in shaping their 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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- <sup>1</sup> Burrows, C. 2019. Deprivation of Liberty: A Balancing Act, Part One. *Nursing and Residential Care* 21 (10), pp. 579-581.
- <sup>2</sup> McSorley, A. 2020. Deprivation of Liberty Safeguards. *InnovAIT* 13(1), pp. 53-58.
- <sup>3</sup> Burrows, C. 2019. Deprivation of Liberty: A Balancing Act, Part One. *Nursing and Residential Care* 21 (10), pp. 579-581.
- <sup>4</sup> Toot, S., Swinson, T., Devine, M. Challis, D. and Orrell, M. 2017. Causes of nursing home placement for older people with dementia: a systematic review and meta analysis. *Intergenerational Psychogeriatrics* 29(2), pp. 195-208.
- <sup>5</sup> Sherwin, S. and Winsby, M. 2010. A relational perspective on autonomy for older adults residing in care homes. *Health Expectations* 14 (2), pp. 182-190.
- <sup>6</sup> Titterton, M. 2005. *Risk and Risk Taking in Health and Social Welfare*. London: Jessica Kingsley.
- <sup>7</sup> Dewar, B. and Nolan, M. 2013. Caring about caring: Developing a model to implement compassionate, relationship-centred care in an older peoples' care setting. *International Journal of Nursing Studies* 50(9), pp. 1247-1258.
- <sup>8</sup> Phillips, J. and Waterson, J. 2002. Care management and social work: A case study of the role of social work in hospital discharge to residential and nursing home care. *European Journal of Social Work* 5(2), pp. 171-186.
- <sup>9</sup> Trevithick, P. 2014. Humanising managerialism: reclaiming emotional reasoning, intuition, the relationship and knowledge and skills in social work. *Journal of Social Work Practice* 28(3), pp. 287-311.
- <sup>10</sup> Trevithick, P. 2014. Humanising managerialism: reclaiming emotional reasoning, intuition, the relationship and knowledge and skills in social work. *Journal of Social Work Practice* 28(3), pp. 287-311.
- <sup>11</sup> Dwyner, S. 2010. The deprivation of liberty safeguards and people with dementia: implications for social workers. *British Journal of Social* (40), pp. 1503-1516.
- <sup>12</sup> Dwyner, S. 2010. The deprivation of liberty safeguards and people with dementia: implications for social workers. *British Journal of Social* (40), pp. 1503-1516.
- <sup>13</sup> Mackenzie, J. and Wilkinson, K. 2020. *Assessing Mental Capacity (A Handbook to Guide Professionals from Basic to Advanced Practice)*. London: Routledge.

# 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.**

## How to contact the Commissioner:

Older People's Commissioner for Wales  
Cambrian Buildings  
Mount Stuart Square  
Cardiff  
CF10 5FL

Phone: 03442 640 670

Email: [ask@olderpeoplewales.com](mailto:ask@olderpeoplewales.com)

Website: [www.olderpeoplewales.com](http://www.olderpeoplewales.com)

Twitter: [@talkolderpeople](https://twitter.com/talkolderpeople)