

The Rt Hon Steve Barclay MP
Secretary of State
Department of Health and Social Care

14 July 2022

Dear Secretary of State

Thank you for your invitation to respond to the Government consultation on the draft Mental Capacity Act 2005 Code of Practice including the Liberty Protection Safeguards.

The British Association of Social Workers (BASW) represents over 22,000 social workers across the four countries of the UK. As you will know, social workers have specific legal duties (enshrined in a variety of laws both UK-wide and nation specific) which address a range of responsibilities relating to specific groups. In relation to adults, social workers have responsibilities in relation to the assessment and provision of social care, mental capacity, those with severe mental health problems, the safeguarding of adults and those with a disability, including those with a learning disability. In relation to children, social workers have responsibilities in relation to the safeguarding of children, the care of unaccompanied asylum-seeking children, children who are 'looked after', and adoption. The Mental Capacity (Amendment) Act 2019 brought further clarity for those aged 16 and 17 where mental capacity might be an issue. While the numbers affected here are small compared to the number of adults affected by the legislation, they are nonetheless important.

This letter sits alongside our detailed response to the consultation and addresses wider issues that relate to the Code and its implementation.

BASW welcomes the updating of the Code and the introduction of Liberty Protection Safeguards (LPS), which are intended to clarify and simplify the protection of a person's rights and ensure that they are only deprived of their liberty as a last resort.

A key concern is the definition of the 'deprivation of liberty' in Chapter 12 which appears to deviate from that which is currently laid out in case law. While we recognise that primary legislation can, and does, trump aspects of case law, here we are talking about a Code of Practice. BASW also has concerns about how this might relate to the Bill of Rights currently before Parliament. Article 5 of the Human Rights Act is fundamental to underpinning LPS.

While the role of Best Interest Assessor (BIA) has been open to a number of health and care professionals, the vast majority of current BIAs are social workers. Many of these are independent social workers, rather than being employed by a single employer. The impact assessment of the DHSC assumes 90% of Approved Mental Capacity Professionals (AMCPs) will be recruited from the existing body of BIAs. Success in implementing the Code relies on both retaining the existing workforce, maintaining their BIA accreditation until

LPS is implemented and ensuring enough new staff are appropriately accredited under LPS.

The view of the Code that AMCPs would “normally” be employed by a Responsible Body makes no sense if the Code’s implementation is depending upon existing BIAs to convert to AMCPs. Many local authorities do not employ their own BIAs and will have to turn to independent professionals when LPS is introduced. Some of our members have indicated to us that they are not willing to become employees if that is what AMCP accreditation entails, undermining the assumptions of the impact assessment.

There are also concerns that the AMCP role is heavily focused upon quality assurance and requires the AMCP to take on significant case management responsibility. This is a significant change of role and is likely to be a disincentive to existing BIAs.

On a related note, current BIAs have raised with us the problems of accessing the BIA refresher courses which are essential to allowing their continued practice. Training providers appear to be reluctant to provide any further BIA training opportunities as they know that at some point the switch to AMCP training will be made.

Taken together these three factors could result in a significant loss of existing BIAs, depleting the stock of future AMCP professionals and consequently a decrease in the number of LPS assessments undertaken.

These issues need to be reconsidered and thoroughly addressed, especially given the current context of recruitment and retention problems within social work in both England and Wales.

For that reason, a clear timetable is required for the introduction of LPS to ensure that social workers, and other professionals, currently working as BIAs are able to access the BIA refresher training that they need in order to be able to practise under the existing legal framework until the point that it is replaced by the new framework. Training providers need greater certainty to manage their provision in a way that meets current as well as future needs.

Having a clear timetable will also help to mitigate the implications of multiple changes being introduced simultaneously for the social work profession. For example, while the number of young people aged 16 and 17 affected by the LPS Code will be small, social workers in services to Children and Families will also be dealing with the SEND Review, the Independent Review of Children’s Social Care (the MacAlister Review), and the National Child Safeguarding Practice Review Panel.

One final point relates to the question of eligibility for LPS. The Mental Health Bill for revising the Mental Health Act 1983 has recently been laid before the Westminster Parliament and is due to enter pre-legislative scrutiny. The interface between the MCA legislation and the future Mental Health Bill remains unclear and this situation is not improved by parallel but separate processes of reviewing and revising the two key pieces of primary legislation. In particular, there is a lack of detail in the draft MCA Code with regard to the process of eligibility for the Safeguards, and where this would fit in the proposed assessment process. Such details need to be provided to ensure that the MCA and the MHA are used appropriately for the support and/or treatment of individuals.

We believe that effective joint working can address many of the practical issues identified. Our members have a key role to play in supporting their colleagues to implement LPS and achieving the important objectives of the new scheme.

However, our fundamental concern remains the apparent deviation of the definition of 'deprivation of liberty' in Chapter 12 from that which is currently laid out in case law. Confusion over the legal fundamentals will have a negative impact on every aspect of LPS implementation. It will lead to adverse outcomes for the people that the scheme is intended to protect, as well as the inefficient use of resources.

Finally, given that the consultation has been conducted jointly with the Department for Education and the Ministry of Justice and also with the Welsh Government, we have taken the liberty of sending a copy of the letter to all three relevant Secretaries of State and the Minister for Health and Social Services in Wales.

We would welcome the opportunity to meet with you to explore these concerns in more detail and to discuss how BASW could support the implementation of LPS so that its important objectives are achieved.

Yours sincerely, Martin Sexton

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BASW

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