



The Law Society

Mental Capacity Act Code of Practice

The Law Society's Comments to the Consultation

Law Reform and Legal Policy

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Introduction

The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors' profession and has a public interest role in working for reform of the law.

This response has been jointly prepared by members of the Law Society's Mental Health and Disability Committee and Wills and Equity Committee, and by members of the executive committee of the Probate Section.

We welcome the publication of this consultation and the opportunity to set out our views on the draft Mental Capacity Act Code of Practice ('the Code'). This will provide crucial guidance for solicitors who provide legal services for people who lack capacity and their family and carers, and for people who wish to plan ahead should they lose capacity in the future. We hope that the comments will be of assistance in improving the Code.

Question 1 - Does the content of Chapter 1 meet the aims set out in its introduction? If it does not suit your needs, please explain why.

The definition of mental capacity contained in paragraph 1.2 is not clearly written and needs to be rephrased. We suggest the following form of words:

"In everyday terms, a person's capacity refers to their ability to perform a given task. This could include day to day activities such as buying groceries or deciding whether to go to the doctor. In a legal context, capacity is used to refer to a person's ability in law to make a decision with legal consequences such as entering into a binding contract or a valid marriage."

Paragraphs 1.3 and 1.5 both point out that the Code is not an exhaustive guide and will be complemented by specialist information for professionals and other groups affected by the Mental Capacity Act 2005 ('the Act'). We suggest that to avoid confusion it is made clear that this information will be provided by the Department for Constitutional Affairs and is therefore different to the specialist information produced by special interest groups and professional organisations.

We believe that greater clarity is needed in Chapter 1 on the precise legal status of the Code. Paragraphs 1.9 – 1.12 explain that certain categories of people are placed under a duty 'to have regard' to the Code and they will be expected to give reasons why they have departed from it – but this fails to clarify how much weight should be given to the Code by decision makers and when departure from the Code would be justified. We believe that the Code must be followed unless there is a necessity for departure in the individual case. A clear statement to this effect would put the Code on a par with statutory guidance issued under section 7 of the Local Authority Social Services Act 1970 and emphasise that decision makers do not have freedom, having had regard to the Code, to 'take it or leave it'. The Code must also make clear that, in accordance with the *Munjaz* judgement, where a person's rights under the European Convention on Human Rights (ECHR) are engaged, the guidance in the code should be followed unless there are 'cogent' reasons to depart from it.¹ A clear statement on the legal status of the Code will help to provide transparency and predictability for decision makers, as well as for people who lack capacity and their carers.

We would also welcome further information in Chapter 1 on how the Code will be updated,

¹ R v Ashworth Hospital ex parte Munjaz [2005] UKHL 58

how often this will happen and whether this will involve full consultation with stakeholders. A clear commitment to regular revision of the Code would help to avoid a similar situation to that of the Mental Health Act 1983 Code of Practice which has not been updated since 1998 even though several parts have been rendered incorrect through judicial ruling or changes in fact since its publication.

Further information should be provided on how those people who are under a duty to have regard to the Code will be informed of any revisions. For example it will be important to ensure that attorneys, who may have limited contact with the Office of the Public Guardian (OPG), are made aware of any changes to the guidance on Lasting Powers of Attorney (LPA).

Question 2(a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 2 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We do not consider that Part 1 of this Chapter, which provides a brief overview of the main provisions of the Act, should be included in Chapter 2. Although it provides some useful background information, it is not immediately relevant to the purpose of the Chapter which is to provide guidance on how to interpret the principles of the Act. We believe that this section would be better placed in the introduction to the Code in Chapter 1.

Paragraphs 2.9 and 2.10 set out who is covered by the Act but fail to mention that the Act, and therefore the Code, applies to all persons habitually resident or present in England and Wales. Although this point is already covered in paragraph 1.4, it needs to be restated in this Chapter to ensure that people who are dipping into the Code are made aware.

In addition the following sections of Chapter 2 need to be redrafted:

- Bullet point number 7 in paragraph 2.5 is not clearly written and needs to be rephrased. We suggest the following form of words:

“Provide a statutory framework for people who have capacity and who choose to make an advance decision to refuse medical treatment.”
- Bullet point number 2 in paragraph 2.19 should be reworded because it appears to suggest that if the person is likely to regain capacity, then the decision maker must delay the decision indefinitely. We suggest the first sentence of this bullet point should be reworded as follows:

“If the person is likely to regain capacity, it may be better to wait to see if this occurs (unless the decision is urgent).”

Question 2 (b) - How helpful and realistic are the scenarios contained within Chapter 2? If they are not helpful or realistic, please tell us how they can be improved.

We were concerned that the scenario in paragraph 2.15 does not make it sufficiently clear that a person who is in the early stages of a progressive illness needs to consider making an LPA straight away. The example suggests that it is only after taking a series of alternative steps, such as setting up direct debits and going shopping together, that an application for an LPA should be considered – whereas early registration would provide Mrs A with protection in the event of an unexpected and rapid deterioration in her condition. We suggest that the scenario should be adjusted to explain that an LPA has already been registered and that her son only decides to use it for complex financial affairs when her lack of capacity becomes apparent. This would still be illustrative of the presumption of capacity because Mrs A is able to manage everyday financial matters.

We suggest that the following changes need to be made to the scenario provided in paragraph 2.22.

- Most people will not understand the term ‘vascular dementia’ and it would be better to state that the woman has dementia or is confused.
- We are also not convinced that this scenario provides a clear example of when an LPA should be used. Although we welcome that an LPA has already been registered, this scenario should also make clear that alternative options have been explored such as setting up direct debits and using the principles of the Act, before the LPA is used.

Question 3 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 3 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

The final sentence of paragraph 3.43 should be amended to clarify that when a solicitor makes an assessment of their client’s capacity to give instructions, the decision to refer to a doctor should only be made where capacity is in doubt or where there is a realistic possibility of the assessment being subject to future challenge – for example an elderly testator with a warring family, where a family member is likely to want to challenge the Will in the hope of increasing their share of the property. We therefore suggest that this sentence should be reworded as follows:

“Where a legal transaction is involved, such as making a will or a power of attorney, the solicitor handling the instruction will need to assess whether the client has capacity to give instructions – this requires the solicitor to assess whether the client has the required capacity to satisfy the relevant legal test, and where there is doubt about the client’s capacity or where there is a realistic possibility of the assessment being subject to future challenge, that they would then refer to a doctor for an opinion.”

Paragraph 3.44 needs to be expanded to emphasise that the person assessing capacity should be as close to implementing the decision as possible, except in cases of doubt. A referral to a specialist, such as a psychiatrist or psychologist, to assess capacity should only be necessary where there is serious doubt as to capacity; or where the decision is complex; or where the consequences are serious.

We are concerned that the first sentence in paragraph 3.47 appears to imply that in many cases it will be “obvious” that the person lacks capacity and gives examples such as a previous diagnosis of mental illness or disability. This is inconsistent with the presumption of capacity in the Act and makes unjustified assumptions based on a person’s condition. We suggest that the first two sentences in this paragraph should be replaced with the following:

“Although it may seem obvious that there is an impairment or disturbance which could affect the person’s decision making capacity, for example there may be recognisable symptoms to indicate the recurrence of illness or the disabling effects of a head injury, any assumptions must be revisited and reviewed.”

We welcome the inclusion of paragraphs 3.51 - 3.54 which are particularly useful in clarifying when professionals should be involved in assessing capacity. It would also be helpful if a further sub heading was added to specifically cover when the court should be involved. The content of this section could include many of the bullet points provided in paragraph 3.53.

In addition the following sections of Chapter 3 need to be amended:

- In paragraph 3.49 we assume that the text is meant to read ‘perceived social skills’ rather than ‘preserved social skills.’
- The final sentence of paragraph 3.20 - which states that there are cases where a mental impairment or disturbance will “cause the person to make decisions which are inevitable, regardless of the information and his/her understanding of it” - is badly phrased. We suggest that the words “which are inevitable” should be deleted.

Question 3 - (b) How helpful and realistic are the scenarios contained within Chapter 3? If they are not helpful or realistic, please tell us how they can be improved.

We do not believe that the scenario provided in paragraph 3.10, where Mr B decides to leave a job in the city after 20 years, is a useful example of the diagnostic threshold for a finding of a lack of capacity. This instead appears to be an example of a decision which family members regard as unwise – and indeed it is not obvious why the doctor in the scenario would even consider assessing the mental capacity of Mr B. We suggest the following as an alternative scenario:

“Mrs C is 82 and has had a stroke leaving her with some impairment of her left side, affecting her mobility, dexterity and causing her to be anxious about living on her own. She remains in what has been the family home for many years. Her son suggests she sells her house and uses some of the proceeds to fund an extension to his house so that she can live with him, which will provide her with peace of mind. Her daughter is opposed to the idea as she wants her mother to keep the family home because she is concerned that loss of independence will cause her mother to deteriorate more quickly than she would otherwise do. She approaches her mother’s consultant with a view to taking action to stop the sale, but the consultant says that although she has physical impairments, causing her some anxiety, she has not suffered any mental impairment and retains capacity to make the decision.”

The scenario in paragraph 3.47 should be amended to provide a clearer example of assessing borderline capacity. In this scenario, Mr E becomes confused and depressed

after he has been admitted to hospital – which appears to suggest that his decision to leave hospital and return home is a rational one. The appropriate response would therefore be a risk assessment – rather than an assessment of capacity. We suggest that the scenario should be amended to make it clear that Mr E fell and broke his leg as a direct result of deterioration in his mental health. This would raise clear doubts about his ability to understand the consequences or weigh up the risks of returning home and would justify the decision to involve relevant professionals in assessing his capacity to make this decision.

Question 4 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 4 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We believe that further information is needed in paragraph 4.17 to make it clear that when a decision needs to be made that will have significant financial implications, for example whether a property needs to be sold when an incapacitated person enters a care home, consideration of best interests can take into account financial issues. However these should not be determinative and other factors, such as health and welfare issues, must also be balanced.

We do not agree that the correct legal position is reflected in paragraph 4.26 which states that where a written statement has been made requesting life sustaining treatment, such as artificial nutrition and hydration, “wherever possible all steps should be taken to prolong life.” Doctors may not have to comply with the wishes set out in an advance statement if, in their professional judgement, the treatment would be clinically unnecessary or inappropriate and not in the person’s best interest. We therefore suggest that the second sentence should be amended to clarify that “wherever possible all reasonable steps, which are in the patient’s best interests, should be taken to prolong life.”

We are concerned that paragraph 4.42 wrongly suggests that the Act creates a specific right for family members to be consulted on a best interests decision. Section 4 (7) of the Act does not mention family members and instead refers to anyone named by the person lacking capacity or involved in their care, as well as any attorney or deputy. We suggest that the first sentence should be amended to read as follows:

“For the first time, the Mental Capacity Act establishes rights for those closest to the person who lacks capacity to be consulted on any decisions affecting the person and what might be in that person’s best interests.”

Question 4 (b) - How helpful and realistic are the scenarios contained within Chapter 4? If they are not helpful or realistic, please tell us how they can be improved.

We believe the scenario provided in paragraph 4.6 which involves a dentist deciding whether or not to remove the teeth of a young man with a learning disability, is too extreme and needs to be replaced. It also does not provide an example of a best interests determination but rather sets out how the decision would be made. We suggest that an alternative scenario should be provided, for example involving a young woman with learning disabilities who is given a contraceptive implant to minimise the risk of pregnancy and who is unable to consent to the implant because of incapacity.

The scenario in paragraph 4.13 needs further explanation to make certain that it clearly

reflects the principles of the Act. A personal welfare attorney would be required in this example to consider the least restrictive alternative, such as domiciliary care, before considering moving the donee into a care home. We suggest that an additional sentence should be added to the end of this scenario which states the following:

“The daughter must also ensure that her determination reflects the principle of the least restrictive alternative as set out at the beginning of the Act.”

We suggest that the scenario in paragraph 4.38 needs to be strengthened to make it clearer that the decision to employ an ethical investment adviser is in the young woman’s best interests. We therefore suggest that the subject of the scenario should be a young woman who was employed in a prominent position with an overseas charity – such a change would help to explain why a moral consideration may override a purely financial consideration.

The scenario in paragraph 4.46 is a very good example because it deals with a common issue of sexual relations where the capacity of one or both parties is in doubt. However the use of the term ‘male trainee’ is confusing because it could be taken to mean for example a member of staff such as a trainee social worker, rather than a fellow user of the training centre. We suggest that an alternative description is used such as ‘male service user’ or ‘client’ to avoid unnecessary ambiguity. This scenario also needs to focus more clearly on the issue of capacity – i.e. are the people involved able to consent to sexual relations or not and how can they be helped to make their own decisions and establish their own relationships – before the views of others are considered. The scenario should therefore specifically state that an assessment must be made of the young woman’s mental capacity and that a best interests determination would only be made if the young woman lacked capacity to consent to sexual relations.

We suggest that the scenario in paragraph 4.52 needs to be reworded to make it clear that if a document had been available, the doctor would still need to be satisfied that it was both valid and applicable to the circumstances and unless it was a valid advance decision then it is likely that the same decision would have been reached.

The scenario in paragraph 4.56 needs to clearly explain why the joint attorneys came to the agreement that it would be in their father’s best interests to keep the property for as long as he is able to enjoy visiting it. This does not appear to be on the face of it a conflict about the father’s best interests but rather a conflict between the son and daughter views about what should happen. It needs to be emphasised that the relevant consideration for both attorneys is what would be in their father’s best interests and in particular they must consider his past and present wishes and feelings, his beliefs and values and other relevant considerations.² We therefore suggest that the scenario should be amended to present the views of the son and daughter as different interpretations of what they believe to be the wishes of their father.

Question 5 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 5 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

Much of this Chapter will need to be updated to reflect further legislative safeguards made in response to the case of *HL v UK* (the ‘Bournewood’ judgement).³ We are however concerned by the recent announcement that the Act will be amended to introduce Bournewood safeguards and the likelihood that the new Court of Protection will be

² As set out in Section 4 (6) and (7) of the Act

³ *HL v United Kingdom* - judgment of 5 October 2004 Application no. 45508/99

responsible for authorising deprivations of liberty. There is a real danger that the extension of the Act to authorise deprivations of liberty could allow this piece of legislation to become as stigmatising as the Mental Health Act 1983. In addition, the Regulatory Impact Assessment will need to be substantially revised to take into account the additional resources that will be needed. Although the new Court of Protection will have expertise in the assessment of decision making capacity and in the determination of the best interests of people lacking capacity, it will not have the necessary expertise and experience of reviewing detention, imposing compulsory treatment or approving care plans. This would have significant resource implications both in terms of an increased number of court hearings and the judges of the new Court of Protection would require extensive training. The Code would also need to clarify how quickly such cases will be heard and whether there will be a fast track procedure to ensure that patients are given a speedy review of their detention in line with the requirements of Article 5.4 of the ECHR.

Paragraph 5.16 - which states that section 5 of the Act would allow “taking the [mentally incapacitated] person to hospital for treatment or admission (including informal admission for treatment for mental disorder)” and even if the person concerned was not compliant “such action may attract protection from liability under section 5” – needs to be expanded to clearly specify the limitations on the use of force or restraint. In particular the implications of the Bournewood judgement and we suggest the following statement:

“Section 5 does not provide authority for the use of restraint which results in the person being deprived of his or her liberty.”

We believe that paragraph 5.18 is misleading and needs to be amended. It provides a list of healthcare and treatment decisions which should continue to be brought to court, such as withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state but it fails to make reference to advance decisions. A valid and applicable advance decision would mean that such cases would not need to be brought before the court even if the decision maker believes that this would not be in the patient’s best interests – except in cases of doubt or disagreement about the existence, validity or applicability of the advance decision. We suggest that a bullet point should be added to include reference to advance decisions.

We believe that paragraph 5.32 is not sufficiently precise in setting out what action may be taken in cases of emergency. This paragraph should be amended to make sure that the law is clearly stated. We suggest the following form of words:

“There may be circumstances where it is necessary to give emergency medical treatment to save the life or prevent serious harm to a person who lacks capacity to consent to such treatment. What steps will be reasonable in such circumstances in making best interests determinations may be different to non urgent situations, for example in relation to consultation with others.”

Question 5 (b) - How helpful and realistic are the scenarios contained within Chapter 5? If they are not helpful or realistic, please tell us how they can be improved.

The scenario provided in paragraph 5.21 is not clearly written and needs to be reworded. The first two sentences contain too much information and need to be broken down - we suggest the following rewording:

“An older man with early onset dementia lives on his own and receives help from a number of different sources. He is often visited by his sister who makes sure that he remembers to eat and sometimes helps him to cook meals. In the mornings he is visited by a district nurse who helps with the dressing of a pressure sore. A friend also regularly visits him and often takes him to the park. Each of these individuals would be protected from any liability under section 5 of the Act – provided they are acting in his best interests and take reasonable steps to check if he has capacity to consent to the proposed action.”

The scenario in paragraph 5.41 is not a good example of when restraint might be ‘necessary’. In this case it is suggested that an older man with dementia could be restrained in order for the clinician to check his blood pressure. However, it is likely that being restrained would raise his man’s blood pressure and would therefore produce a misleading result. We suggest that the reference to the need to monitor blood pressure should be removed – and it is made clear that he needs blood tests to be carried out.

Question 6 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 6 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We are concerned that, apart from the very short section at page 88, the Code almost entirely ignores Enduring Powers of Attorney (EPA). Many EPAs will have been created before the Act comes into force and it therefore it is wrong to assume that EPAs will become of marginal importance, at least for the foreseeable future. There is a strong likelihood that many donors will choose a combination of an EPA for financial affairs and an LPA for personal welfare, and that this dual system could last for decades – people with an unregistered EPA may decide to complete a ‘homemade’ personal welfare LPA via the internet because it is less official and continue with the EPA for economic reasons or because they believe the EPA offers better protection. The Code needs to be of relevance to donors and donees of EPAs and it is not sufficient to say that detailed guidance on EPAs can be found elsewhere.⁴ We suggest that wherever appropriate, any reference in the Code to the need to consult an LPA should also include reference to an EPA. The Code should also draw out the possibility of an EPA – LPA combination, and alert readers to the fact that an EPA works quite differently from a financial LPA because it removes financial decision making from the donor.

We believe that the section on personal welfare LPAs fails to make it sufficiently clear that if the donor gives their attorney a general authority, this will cover all personal welfare and health care and medical treatment decisions unless restrictions are included. It would be useful if this section included a clear definition of personal welfare and health care decisions and in addition we suggest that the following sentence should be added to paragraph 6.12:

“A donor could include restrictions in their LPA stipulating for example that their attorney can only make decisions about their social care and not any aspect of their healthcare.”

In our response to the consultation on the forms and guidance for LPAs we argued that the existing titles need to be amended to convey the full extent of the powers involved, particularly for the lay user – and suggested the titles ‘finance and property LPA’ and ‘health and personal welfare LPA’. This would also help to make the purpose of LPAs explicit and

⁴ Paragraph 6.65

clear.

We are concerned by the final sentence of paragraph 6.32 which states that “if the LPA has been registered but not used for some time, the attorney is advised to inform the OPG when s/he begins to act under the LPA.” We believe that this provision is meaningless because once an LPA is registered the OPG will never know when, or if at all, the attorney is using the LPA. In earlier submissions prior to the passage of the Act we stated our concerns that the proposal to register LPAs at the time of creation, rather than at the time capacity was lost, would cause difficulties.

Paragraph 6.64 misleadingly suggests that an EPA can be revoked by being destroyed. We believe it is at best bad practice to allow a client to revoke an EPA simply by destruction, save in very limited circumstances – for example the solicitor is aware that the EPA has been kept for its entire life in a strongroom and no certified copies have ever been made. This paragraph needs to be amended to clarify that an EPA should generally be revoked by deed, with notice to the attorney and to anyone else (such as a bank) who has had sight of a certified copy, and that all certified copies should be collected and destroyed.

In addition we suggest the following changes to Chapter 6:

- We are concerned that the last sentence of paragraph 6.22, which suggests that banks may seek an indemnity from attorneys, will encourage restrictive practices by banking staff. We suggest that this sentence should be removed.
- Paragraph 6.48, which sets out the basic principle of the law of agency that an agent cannot delegate his/her authority, needs to be qualified because the donor of an LPA can provide suitable authority for delegation by providing for this expressly in the document.
- Paragraph 6.56 appears to suggest that it is only if the Court of Protection requires it, that an attorney is expected to keep and be constantly ready to produce correct accounts – whereas the correct legal position is that an attorney is expected to maintain detailed accounts and be able to produce them if asked to do so by the Court of Protection or OPG. We suggest that the first sentence should be deleted and replaced with the following:

“When managing someone else’s money an attorney is required to maintain detailed accounts showing income and expenditure covering all transactions carried out on the donor’s behalf and be able to produce accounts if asked to do so by the Court of Protection or the Office of the Public Guardian.”

Question 6 (b) - How helpful and realistic are the scenarios contained within Chapter 6? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 7 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 7 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We are concerned that paragraph 7.31, which states that “the court may authorise the making of gifts of the donor’s property which attorneys are not otherwise permitted to make under section 12(2)”, wrongly suggests that an attorney may ask the court for a general gift making power. We suggest that this should be rewritten to clarify that the court can only authorise particular gifts of the donor’s property, but cannot confer a general gift-making power.

Paragraph 7.22 should point out that the court can also decide that single orders may be more appropriate – even if there is a need for ongoing decision making. We also recommend that the Code should specify what the duties are of someone appointed under a single order in the same way as it does for attorneys and deputies, for instance that they have to act under the general provisions of the Act and under the specific provisions of the order. It will also need to be made clear whether the applicant has to apply to be a deputy and the court will then decide if a single order is appropriate, or whether an application can be made for a single order, and what would happen if the Court decides that a deputy is required.

Question 7 (b) - How helpful and realistic are the scenarios contained within Chapter 7? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 8 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 8 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We have no comments on this chapter.

Question 8 (b) - How helpful and realistic are the scenarios contained within Chapter 8? If they are not helpful or realistic, please tell us how they can be improved.

We believe that the scenario in paragraph 8.14, involving the removal of ovaries from a woman with serious lower abdominal pain, is not a good example of an advance decision and instead explores issues relating to consent to treatment. We suggest the following alternative scenario:

“Mr L is a young man diagnosed with schizophrenia. He has been prescribed oral medication but sometimes forgets to take it. During discussions his psychiatrist suggests that he should change his medication to a depot format which would mean that he could be given an injection and would not have to remember to take tablets every day. Mr L is concerned about the pain and lack of dignity which would result from receiving an injection and prefers oral medication and therefore draws up an advance decision stating that under no circumstances should he be given an injection (although he recognises that this would not apply if he were ever detained under the Mental Health Act 1983). He asks his psychiatrist to witness it.”

Question 9 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 9 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

In its response to the consultation on the Independent Mental Capacity Advocacy Service (IMCA), the Government set out that its intention to specify in regulations circumstances in which local authorities and NHS bodies may provide an IMCA service on a discretionary basis. The updated version of Chapter 9 must set out these additional circumstances for the provision of the IMCA service – and we recommend that this must include circumstances where a local authority is proposing to make a decision in relation to a person who lacks capacity and the court has appointed as his/her deputy the Director of Social Services.

We are extremely concerned that paragraph 9.34 suggests that an unbefriended person who lacks capacity can be admitted to a care home in an emergency without the involvement of an IMCA. The Code should make it clear that the decision making body should use its discretion to provide an IMCA as soon as possible after a decision has been made in an emergency and to be able to provide good reasons for not involving an IMCA if it did not use its discretion. This paragraph should also be expanded to clarify that further safeguards would be required if the emergency admission to the care home constituted a deprivation of liberty and this should also be cross referenced to Chapter 5.

Question 9 (b) - How helpful and realistic are the scenarios contained within Chapter 9? If they are not helpful or realistic, please tell us how they can be improved.

The scenario in paragraph 9.19 needs to be revised in light of the Bournemouth judgement. For example, it is not clear from the scenario whether the young man with severe learning disabilities had the capacity to agree to an informal admission to hospital and whether hospital staff assumed extensive control over his care and treatment.

Question 10 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 10 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We have no comments on this chapter.

Question 10 (b) - How helpful and realistic are the scenarios contained within Chapter 10? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 11 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 11 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We have no comments on this chapter.

Question 11 (b) - How helpful and realistic are the scenarios contained within Chapter 11? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 12 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 12 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

The first sentence in paragraph 12.4, which states that people who are subject to the Mental Health Act 1983 (MHA) “do not necessarily lack capacity”, needs to be amended to reflect the fact that capacity is decision specific. We suggest the following form of words:

“People who are subject to the Mental Health Act 1983 may retain decision making capacity in relation to all areas of their life...”

To further explain this point, we suggest that a brief example or scenario should be provided - for example, a person with an eating disorder who has been detained under the MHA because his/her ability to make treatment decisions is impaired as a result of the mental disorder but he/she retains mental capacity.

We believe that paragraphs 12.8 and 12.9 need to be expanded to look more closely at what is meant by a deprivation of liberty and how this concept differs from the use of restraint. We accept that this cannot be a precise task and the starting point must be ‘the concrete situation’ in which the individual is placed and ‘account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’⁵ However, further guidance would be useful to help decision makers identify relevant considerations when deciding which legal framework should be used to provide care and treatment for mental disorder for people who lack capacity to consent to that care and treatment. A scenario could be included to further illustrate this issue – we suggest the following:

“A woman with advanced dementia lives alone. Her living conditions and standards of hygiene have deteriorated to the point that they are unsatisfactory – and she has refused all help from health and social services. Her treatment team have assessed her as lacking capacity to make care and treatment decisions and they suggest that she should be admitted to a care home because it is no longer safe for her to be living at home. She does not actively object to this. The treatment team have also worked closely with the woman’s family who agree that admission into a care home would be in her best interests. This is unlikely to be regarded as a deprivation of liberty and is instead likely to be seen as a restriction of liberty.”

However, in the same scenario, if the woman had been admitted to a psychiatric hospital ward (because for example there were no care home vacancies in the area) where staff assumed complete control of her care and treatment – and her family opposed this admission and had offered to look after her themselves - then this is more likely to be seen as a deprivation of liberty.”

Paragraph 12.10 needs two further points included to indicate when assessment under the MHA might be necessary. These are:

- The family or carer request an assessment under the MHA
- The person has made an advance written statement asking that he/she should be assessed under the MHA if their health deteriorates.

In addition, the third bullet point in paragraph 12.10 need to be revised in light of the

⁵ Guzzardi v Italy Judgment of 6 November 1980) para 92.

judgement given in *Storck v Germany* that if the decision maker is assuming complete control over the treatment of a person who lacks capacity, for example they are making decisions about administering psychiatric medication or ECT, this would be considered a deprivation of liberty.⁶

Paragraphs 12.11 – 12.14 will need to be updated to take into account the Government's intention to abolish supervised after care under section 25A of the MHA and replace it with Supervised Community Treatment. In particular the Code will need to consider the practical difficulty that some practitioners may feel unable to invoke MHA powers for compulsion that does not amount to detention, when the Act also provides powers to impose restrictions upon liberty to the same end. This is especially so given the requirement in the MHA to use the least restriction necessary⁷ and only use the MHA where no other authority exists⁸ We consider that the Code should be revised to cover these issues and provide scenarios.

We welcome the statement in paragraph 12.30 that deputies or attorneys with relevant authority will be able to exercise patients' rights under the MHA, as well as the rights of the nearest relative. This would however require amendments to be made to both the MHA and the Act. The Government is asked to clarify whether it intends to amend existing legislation to give deputies and attorneys these additional powers.

In addition the following sections of Chapter 12 need to be amended:

- The first bullet point in paragraph 12.2 and the fourth bullet point in paragraph 12.6 need to be amended to make clear that the MHA defines the circumstances in which mentally disordered people can be detained in hospital for "assessment and/or treatment."
- The second bullet point in paragraph 12.6 needs to be rephrased to clarify that treatment can be provided for a physical condition under the MHA as long as it is 'ancillary' to the mental disorder – for example it could include surgical treatment for the physical consequences of self harm.⁹
- The third bullet point in paragraph 12.6 should be amended to clarify that if detention is deemed necessary there is a power and not a duty to use the MHA.

Question 12 (b) - How helpful and realistic are the scenarios contained within Chapter 12? If they are not helpful or realistic, please tell us how they can be improved.

The scenario in paragraph 12.10 is misleading because if the consultant has assessed Mr. O and formulated a care plan, it is likely that he will be recommending a section 3 MHA application. However, if the nearest relative objects this could not proceed. We suggest that it is made clear that Mr O's relatives do not object to the care plan that has been proposed. This scenario should also make clear that it is not ultimately the consultant's decision whether Mr O should be detained under the MHA, but that this decision will be made by an Approved Social Worker following an assessment by a second doctor.

⁶ Judgement of 16 June 2005

⁷ Section 1.1 Code of Practice MHA 1983

⁸ Section 13(2) MHA

⁹ R v Croydon [1995] 1 All ER 683.

Question 13 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 13 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We welcome the statement in paragraph 13.10 that the OPG may itself investigate cases of financial abuse on the part of a deputy or attorney. However we are concerned that this is not extended to personal welfare LPAs and seek clarification from the Government as to why this is the case. We also seek a commitment from the Government that sufficient resources will be made available to ensure that the OPG is able to carry out this role. The Code should also provide an explanation of how the OPG might deal with complaints about attorneys or deputies - for instance how far they would investigate the case themselves or whether they would work closely with the local adult protection team.

Question 13 (b) - How helpful and realistic are the scenarios contained within Chapter 13? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 14 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 14 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We welcome the statement in paragraph 14.33 that the OPG should be contacted when disagreements arise about the financial affairs of a person who lacks capacity and that the OPG will in such cases provide advice and guidance. We seek a commitment from the Government that sufficient resources will be made available to ensure that the OPG is able to carry out this role.

We suggest that paragraph 14.40 needs an additional sentence to clarify that funding may be available for a litigation friend to instruct a solicitor on behalf of the person unable to give instructions.

Question 14 (b) - How helpful and realistic are the scenarios contained within Chapter 14? If they are not helpful or realistic, please tell us how they can be improved.

We have no specific comments on the scenarios in this chapter.

Question 15 (a) - Having particular regard to the practical situations in which you may apply it, please consider if Chapter 15 meets the aims set out in its introduction. If it does not suit your needs, please explain why.

We welcome the statement in paragraph 15.10 that donors acting under an LPA are entitled to ask for information as if they are “stepping into the shoes” of the person who lacks capacity, as long as the attorneys are acting within the scope of their authority. We are however unclear about the precise legal authority for this statement and suggest that the relevant case law or statute should be included as a footnote.

It would be helpful if there was an explanation in the Code or the LPA guidance that an attorney would have a right of access to sensitive personal information as if they were the

donor under the principles of agency law. This goes beyond the current law which limits information to third parties to relevant information to make a decision.¹⁰

Question 15 (b) - How helpful and realistic is the scenario contained within Chapter 15? If it is not helpful or realistic, please tell us how it can be improved.

We have no specific comments on the scenario in this chapter.

Question 16 - How effective is the overall style and format of the Code, (including the contents page, references and annex)? Will it suit your needs and if not, please explain why?

We consider that in places the Code is too wordy. It is frequently difficult to follow and may be particularly so for lay readers. We therefore strongly recommend that it be reviewed by a Plain English expert.

We recognise that the overall style of the Code must cater to a wide audience including professionals and lay people. This means that some of the information contained in the Code relates to good practice and advice, while other parts refer to guidance that professionals must have regard to. We believe that it is essential that the Code clearly differentiates between these different types of information and in particular that professionals are able to easily identify which sections of the Code they are expected to follow. We therefore suggest that any guidance in the Code should be highlighted and set out in bold.

The checklists provided at the end of chapters are generally helpful and effective and we believe that they should be included at the start of chapters to provide an 'executive summary'. This would provide a quick reference point and would help people to decide whether a specific chapter of the Code is relevant to their needs. This should be included in all chapters of the Code.

Chapter 1 clearly sets out that the scenarios included in the Code are intended to help illustrate what is meant in the main text and should not be taken as templates for decisions that need to be made in similar situations. This is an important disclaimer that people reading the Code will need to be aware of. However, this is likely to be missed by many people who will be dipping into sections of the Code rather than reading it as a whole. We therefore suggest that this statement need to be referred to – perhaps at the start of every chapter - throughout the Code.

The Code includes several footnotes consisting of case law references but no further explanation is provided about the decisions reached in these judgements.¹¹ We are concerned that non lawyers will not necessarily be aware of these cases and that it would be better to have a brief explanation of the case alongside the reference or at the end of the relevant chapter and an indication of where the case can be accessed in full.

¹⁰ S v Plymouth City Council and C (EWCA Civ388 2002)

¹¹ For example on page 20 the footnote states that undue influence in relation to consent to medical treatment was considered in Re T (Adult: Refusal of Treatment) [1992] 4 All ER 649, 662 but no explanation is provided of what that particular case says about undue influence. Similarly paragraph 3.55 refers to circumstances when disclosure of information is permitted in the absence of consent but the merely footnote lists two relevant cases (W v Egdeall and others [1990] 1 All ER 835 and S v Plymouth Council [2002] EXCA Civ 388) without providing further information about the decisions in these cases.

We also suggest that in places the text of the Code would benefit from the inclusion of margin notes to set out the relevant sections of law. For example in paragraph 2.7 the final sentence which sets out sections 27-29 and 62 of the Act could be included as a margin note to help simplify the text. Similarly paragraph 2.8 could be removed and included as a margin note. This style has proved to be effective in other Codes of Practice – such as the Disability Rights Commission Code of Practice on the Equality Duty.

We believe that greater consistency of style and format is needed in the Code in relation to the following areas:

- There is no consistency in the text in the way that reference is made to specific sections of the Act. In places it is clearly stated that this is a section 'of the Act' but in other places this is not made clear and it is merely stated that this is a 'section'.¹² This can be confusing, especially for lay people, who may be unclear whether the term 'section' refers to a paragraph of the Code or a section of the Act. We suggest that greater consistency is needed and that the Code should always refer to a 'section of the Act.'
- More consistency is also needed in the use of sub headings in italics. In some places the use of italics appears to indicate subheadings¹³ but in other places it is used for main headings.¹⁴ We suggest that the use of headings in italic should be consistent throughout the Code.

We believe the appendix of the Code should include the following:

- A full copy of the Act - the Code makes frequent reference to different sections of the Act and this would allow people to look up the exact relevant part of the legislation.
- A list and an explanation of the abbreviations used in the Code.
- An effective index system should also be included.
- We note that the Law Society has not been included in the list of relevant organisations in Annex A. We suggest that the Law Society should be included because solicitors will play a crucial role in the effective operation of the Act.

¹² For example paragraphs 1.8 and 1.9 refer to section 43 without clarifying whether this is a section 'of the Act' (although in the previous paragraph 'the Act' is referred to). While in paragraph 3.12 there is reference to 'a section' – even though the Act has not been mentioned for some time.

¹³ For example paragraph 3.64

¹⁴ For example paragraph 3.57