**Department of Health and Social Care and Ministry of Justice**

**Changes to the MCA Code of Practice and Implementation of the LPS**

**Consultation Response: Wedlake Bell LLP**

Wedlake Bell LLP is a central London law firm whose history goes back over 230 years. It has 74 partners and is one of the top 100 firms in the UK on turnover.

The firm welcomes the opportunity to respond to the Department Of Health and Social Care ('**DHSC'**) and Ministry of Justice's ('**MoJ**') Changes to the MCA Code of Practice and Implementation of the LPS Consultation dated 17 March 2022 ('**the Consultation Document'**).

Wedlake Bell's response has been prepared by its Private Client team who have extensive experience of advising clients on the application and extent of the MCA. The team is ranked in the Legal 500 (Tier 3) and Chambers High Net Worth guide (Band 3) and is listed in Tier 1 as one of the 2021 eprivateclient Top Law Firms.

Any text in italics below is text lifted from the Consultation Document.

**Scope of Consultation**

The consultation concerns proposed changes to the Mental Capacity Act 2005 (MCA) Code of Practice which includes guidance on the new Liberty Protection Safeguards (LPS) system. Our comments are limited to the proposals relating to the MCA Code of Practice amendments and are therefore in response to Sections 1 **Proposed updates to the existing chapters in the Code** and Section 2 **Proposed updates to existing chapters that now include LPS guidance in the Code.**

**Code of Practice**

*The MCA was implemented alongside a Code of Practice which now requires updating for two key reasons:*

*1. the existing Code guidance needs updating in light of new legislation and case law, organisational and terminological changes, and developments in ways of working and good practice*

*2. the new LPS system means that additional guidance needs to be added to the Code.*

**Questions relevant to our practice**

**Question 4**

**Are the principles of the MCA fully explained in the revised Code?**

**Yes**

**No**

**If you responded no, please specify the relevant paragraph and what you think it should say (up to 250 words).**

**Question 5**

**Do any of the updates to the existing guidance in the Code, as listed in Section 1 and Section 2, require further expansion or revision?**

**Yes**

**No**

**If you responded yes, please specify the relevant paragraph, and what you think it should say (up to 250 words).**

The 'Quick Summary' to Chapter 4 includes the words "*If there is a proper reason to doubt that the person has capacity to make the decision, it is necessary to assess their capacity*" - the word "proper" in this context requires further expansion.

Paragraph 4.12 states that assessment of capacity should be divided into three questions. This will be new to the profession and will require careful training and implementation. More worked examples would be helpful.

Paragraph 4.83 regarding capacity assessments via video conference should also set out the risks of doing so if the assessor is not in the same room as the person being assessed.

Paragraph 8.30 on foreign LPAs requires expansion and should note that in practice financial institutions rarely accept a foreign power without the Court of Protection officially recognising it. Individuals should be encouraged to make an LPA in England and Wales to cover their affairs here in light of difficulties of foreign powers being recognised in practice.

The paragraphs on gifts seem confused, particularly 8.56 which suggests that investment in an attorney's business can be made without the Court of Protection's approval. This would be in complete conflict to the attorney's duty and requires revision.

**Question 6**

**Have there been any significant developments in case law or practice which the revised Code does not address but which you feel it needs to?**

**Yes**

**No**

**If you responded yes, please specify the relevant paragraph and what you think needs to be added (up to 250 words).**

**Question 7**

**Do you have any other comments on the proposed updates to the existing Code guidance?**

**Yes**

**No**

**If you responded yes, please specify the paragraph which your comments relate to, and your views on this (up to 500 words).**

We note and welcome in addition to the key updates listed in the Consultation, the revised wording in paragraph 2.3 to include reference to decision making being made in accordance with a person's "*wishes, values, beliefs and feelings*" .

We also note the new reference in paragraph 2.4 that "Failure to observe the principles may leave organisations vulnerable to legal challenge", a reminder to all of the importance of making decisions in a person's best interests and keeping accurate records to evidence this.

Paragraph 2.12 makes reference for the first time to **not** making a decision, an important reminder that acting in a person's best interests does not necessarily require positive action.

2.14 includes further reference to "values, beliefs, preferences and attitudes" and a reminder that the focus should be on the ability to make a decision rather than the outcome of that decision.

The steps set out in paragraphs 3.7 to 3.9 about what information should be provided to someone making a decision and in what format, can only be constructive.

We welcome the new paragraphs in chapter 4 on impairment and/or disturbance of the mind and fluctuating capacity. Furthermore the new sections covering when assessments are not possible or carried out retrospectively are interesting and helpful additions.

The statement in paragraph 5.6 that provided acts or decisions are made in the best interests of the person lacking capacity, the decision maker or carer will be protected from liability is an interesting addition. We also welcome the explanation in paragraph 5.16 that being someone's next of kin provides no legal right to make decisions on their behalf. We have experienced many cases where this assumption has been incorrectly made and so this is helpful.

Paragraph 5.63 is a useful reminder that final decisions must be based entirely on best interests, following the case of *Briggs v Briggs.*

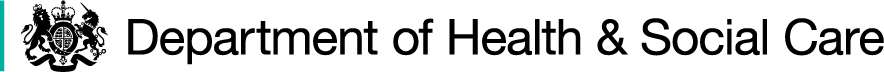
Paragraphs 5.102 to 5.111 "Recording best interests decisions" are practical and welcome additions.

The chapter relating to LPAs contains some useful additional information, such as paragraphs 8.78 to 8.81 on decisions that affect both financial and health and welfare issues, however, 8.34 should include a recommendation of legal advice on the implications of including such instructions and 8.46 is out of date given recent changes to the OPG guidance on discretionary investment management.

We disagree with the statement in paragraph 8.8 that legal or medical advice is not necessary to create an LPA "but it may be a good idea if the donor’s circumstances are complicated". As there are multiple factors to consider when making an LPA, professional advice should be encouraged in every case.

The paragraphs relating to EPAs are at the end of Chapter 8 but we think it is important to note that there are over 50,000 registered EPAs still in use and attorneys of which still require support.

AS/VLM/ATKE 7 July 2022

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# Proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards

Thank you for taking the time to respond to this consultation. Your answers have been recorded.