

**Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice  
and implementation of the Liberty Protection Safeguards  
July 2022**

1. Article 39 is a small, independent charity which fights for the rights of children living in state and privately-run institutions (boarding and residential schools, children's homes, immigration detention, mental health inpatient units and prisons) in England. We run the Children and Young People's Advocates Network, which has over 360 members who work directly with children and young people in a variety of settings.
2. We have focused our response on those questions which are most concerned with the rights of children and young people who are looked after by local authorities, and children and young people's access to high-quality independent advocacy. This response was prepared after dialogue with members of our Children and Young People's Advocates Network, though it is submitted from Article 39 alone.

**QUESTION 1**

3. In relation to the deprivation of liberty of children aged 16 and 17, we strongly disagree that responsible bodies should not be routinely making applications to the Court, once the LPS is implemented.
4. When a child is looked after by a local authority (a responsible body under the Mental Capacity Act 2005, as amended), we believe it to be necessary for any deprivation of liberty under these provisions to be always considered by a court with a preference for the family court over the Court of Protection (see *A-F (Children) (No.2)*). This is to ensure effective oversight and scrutiny, both over the proposals for depriving the child of their liberty and the local authority's specific (proposed) arrangements for the child's care and protection and the fulfilment of its general welfare duty in s22 Children Act 1989 (to safeguard and promote the child's welfare).
5. Where a care order has been made in respect of a child, and the local authority has parental responsibility, there is an obvious and substantial conflict of interest in that local authority being able to authorise the child's deprivation of liberty.
6. Notwithstanding our firm view above, should the government proceed with discouraging applications to the Court, additional legal safeguards for looked after children and young people – for example a duty to ensure the involvement of a Children Act 1989 independent advocate – will be necessary to avoid significant conflict of interest between the local authority as 'corporate parent' and a responsible body able to authorise deprivation of liberty.

**QUESTION 2**

7. The guidance in the Code is very unclear in relation to looked after children and explaining the interaction between the LPS and other relevant legislation and planning for 16 and 17 year-olds. As currently drafted, it does not provide sufficient protection from local authorities using the MCA 2005 (as amended) and the LPS to (unlawfully) deprive looked after children aged 16 and 17 of their liberty. The guidance could be improved by:

- a. Amending the reference to the United Nations Convention on the Rights of the Child. As currently drafted (para 21.3), it correctly refers to the statutory framework supporting the treaty's implementation in Wales but fails to explain the obligations of public authorities in England.
- b. Additionally including a summary of the rights of children as protected by the Human Rights Act 1998 and the Equality Act 2010.
- c. Amending paragraph 21.16, relating to parental responsibility and parental consent, so that it incorporates the Supreme Court's judgment in *D (A Child)* – the Code references this in para 12.49, but not here.
- d. Including guiding principles and illustrative case studies showing when the Children Act 1989 provides greater protection to a child over the use of the MCA 2005 (as amended) and the LPS. We suggest always using names for illustrative case studies instead of Ms X and Mr Y, since this reminds the reader that the subjects of the case studies are children. (Names appear sometimes but not consistently).
- e. Amalgamating the Children Act 1989 welfare checklist (s1(3)) with the proposed best interests checklist in Chapter 5 of the revised Code, and including this in Chapter 21.
- f. Amending para 21.53 to accurately reflect the statutory role of the independent reviewing officer, which is to monitor (and challenge) the performance of the local authority not “to manage the young person’s care plan”.
- g. Amending para 21.58 in respect of (suitable) foster carers undertaking the role of an appropriate person, to reflect that many foster carers look after children in a professional capacity (which means they would not legally be able to undertake the appropriate person role). More consideration should be given to different fostering arrangements (including therapeutic fostering) and the varied needs of children in foster care, together with the potential for conflicts of interest to arise, including between the local authority and foster carers.
- h. In the context of children who are the subject of Education, Health and Care Plans, making it clear that the possibility of deprivation of liberty (under the LPS regime) being considered from Year 9 (when the child is 14) exists *only to ensure there is effective planning and collaboration between professionals and organisations*. This is not to make advance decisions that the child is to be deprived of their liberty. The same applies to looked after children who are approaching their 16<sup>th</sup> birthday. In both instances, the revised Code should consistently stress that deprivation of liberty must be necessary and proportionate *at the time*, and less restrictive options must always be considered.
- i. Removing the reference to children being detained in a secure children’s home under the MCA and LPS statutory framework. This is not provided for in the Children (Secure Accommodation) Regulations 1991, made under the Children Act 1989.
- j. Adding guidance on the different roles and functions of the appropriate person and independent advocates who specialise in the Children Act 1989, the Mental Capacity Act 2005 and the Mental Health Act 1983. We recommend that where children are looked after, there is a legal presumption that the advocacy support (under the Children Act 1989) that they are already receiving remains in place and is, if necessary, supplemented by assistance from an independent mental capacity advocate with experience in working with children and young people. This would require amendment to the draft regulations relating to independent mental capacity advocates.
- k. After the current para 21.63, inserting a list of settings where the deprivation of liberty of children aged 16 and 17 must not occur (to have statutory force, this would need to be set out in regulations). This would include caravans and holiday homes, tents, narrowboats and other vessels, and bed and breakfast and hotel accommodation (unless used genuinely for a short holiday period, which should be tightly prescribed). Further, the government must require that all settings where children are deprived of their liberty are regulated and inspected; again, this could be achieved through secondary legislation.
- l. Providing legal certainty around the permitted use of force, and approved and prohibited methods (including restrictions around the use of handcuffs and caged vehicles) during children’s journeys to and from the setting where they are to be deprived of their liberty. This would require regulations.

- m. In relation to deprivation of liberty in different settings (current para 21.68), decision-makers should be required to consider why arrangements in one particular setting allow the child to enjoy physical and psychological freedom, but not in another. Where arrangements in one setting do not necessitate any deprivation of liberty, these should be emulated elsewhere wherever possible.

## **QUESTION 8**

8. Chapter 12 is somewhat unclear presently in explaining the meaning of deprivation of liberty for practitioners, as applied to children aged 16 and 17. We recommend the paragraphs starting at 12.45 are included much earlier in this Chapter, so that readers are clear that the text applies to children aged 16 and 17 as well as to adults.
9. We strongly recommend that the Code addresses the power differentials between children and adults, and how practitioners must be alert to coercion and confinement operating implicitly. It is not our experience that approaches operate with little difference between adults and children (as is stated in para 12.45); it would be more accurate to state that the way deprivation of liberty can be manifested is often similar to how it is applied to adults in positions of vulnerability and powerlessness.
10. The 'Sophia' case study in para 12.45 is potentially misleading in stating that she is not deprived of her liberty when she attends a 'respite service' (the preferred terminology is 'short breaks'). It seems to us that Sophia is confined, in that she is under continuous supervision and control and not free to leave.
11. The Code would be significantly improved, and provide greater protection for children aged 16 and 17, were it to set out a number of examples of children's experiences of being confined in a restricted space without their consent, which amounts to deprivation of liberty. It is not uncommon for independent advocates for looked after children and young people to find that the child or young person's circumstances amount to deprivation of liberty without legal authorisation (that is, the child is being confined unlawfully).
12. It is imperative that the Code emphasises the responsibility of advocates (and other professionals) to question and challenge arrangements which may amount to unlawful deprivation of liberty.

## **QUESTION 9**

13. We strongly recommend 'Clarifying whether there is, or should be, a Children Act 1989 independent advocate assisting the child or young person' in the actions required by a responsible body.

## **CHAPTER 15**

14. There is no specific consultation question on the role of the appropriate person, as set out in the draft revised Code. We strongly recommend clear and specific guidance on the role of the appropriate person vis-à-vis an independent advocate.
15. Where children are looked after by a local authority, and are already receiving information and help from a Children Act 1989 independent advocate, the presumption must be that this advocate remains involved in the child's life.
16. We fear that independent advocacy could be bypassed through the use of an appropriate person, and believe the Code and the IMCA draft regulations could be amended to avoid this (without conflicting with the 2019 amendments to the Mental Capacity Act 2005).

17. Further, the Code should stress that Children Act 1989 independent advocates work exclusively for the child or young person, whereas the independent mental capacity advocate works for the child or young person *and has a statutory duty to support the appropriate person*. This raises an inevitable potential conflict of interest, which does not exist for the Children Act 1989 advocate, and therefore adds weight to the presumption that looked after children should continue to receive assistance from their Children Act 1989 advocate.
18. We recommend para 15.3 is amended to provide for financial support – covering expenses and loss of earnings for example – for volunteers who undertake the appropriate person role.

## QUESTION 19

19. The IMCA Regulations do not allow for independent mental capacity advocates to carry out their full functions effectively under the LPS. We strongly recommend the Regulations are amended to include:
  - a. A requirement on independent mental capacity advocates to establish whether the child is already receiving information and help from an independent advocate, with a presumption that where a child is looked after by a local authority the Children Act 1989 advocate is supported, not replaced, by the IMCA. (Article 39 has published information on children’s right to advocacy in various settings which can be accessed here: <https://article39.org.uk/rights-to-advocacy>).
  - b. A requirement in new paragraph (9) to, as far as practicable, assist the person to understand their rights in relation to any proposed deprivation of liberty, and the steps that may be taken by them to seek to end the deprivation of liberty.
  - c. A requirement in new paragraph (9) to, as far as practicable, assist the person to understand their rights while they are deprived of their liberty.
  - d. A requirement in new paragraph (11) that the independent mental capacity advocate supports the appropriate person “assisting P as far as practicable to participate in any decision relating to the arrangements or proposed arrangements” only so far as this is consistent with the child’s best interests, which includes their wishes and feelings where these have been ascertained.
20. We strongly recommend specific guidance in the Code about what may and may not constitute a ‘vital act’ (section 4B Mental Capacity Act 2005, as amended) in respect of children aged 16 and 17.
21. Further, in para 19.2, we strongly recommend that the responsible body is notified every time section 4B is relied upon for every child aged 16 and 17 and every care experienced adult under the age of 25. This would align with child welfare and leaving care legislation and procedures, and reflect the significant vulnerabilities of care experienced children and adults particularly in relation to past trauma associated with child abuse and violence (making the use of force potentially retraumatising).

## CHAPTER 23

22. There is no specific consultation question on protection from abuse and neglect. We strongly recommend that the Code much earlier addresses the needs and rights of children, particularly the local authority’s duty to take action to safeguard and promote the welfare of children who have suffered, or are suspected of suffering, significant harm (s47 Children Act 1989) together with the duties of all professionals and organisations as set out in Working Together to Safeguard Children (reference to the 1989 Act and this statutory guidance currently appears five pages into this Chapter).
23. Further, the role of Children Act 1989 advocates should be included in this chapter; currently advocacy in respect of safeguarding only appears in relation to adults (para 23.12).