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Royal College of Nursing response to the Law Commission's consultation on Mental Capacity and Deprivation of Liberty

Introduction

With a membership of over 425,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.
The RCN welcomes the opportunity to respond to this consultation. We have consulted with our members and staff and recognise the current Deprivation of Liberty Safeguards (DoLS) are unfit for purpose and broadly agree that they should be replaced by a new system of protective care.

The RCN is supportive of an approach which ensures the best use of resources and recognises the complex and multi-professional nature of caring for people with both mental incapacity and fluctuating capacity. This is a positive move towards putting the wishes and feelings of individuals at the heart of care. We hope that you will find our response helpful. Please do not hesitate to make contact should you require further information or clarification of the points made.

PROVISIONAL PROPOSALS AND QUESTIONS

CHAPTER 2: ANALYSIS OF THE DEPRIVATION OF LIBERTY SAFEGUARDS

Provisional proposal 2-1: the Deprivation of Liberty Safeguards should be replaced by a new system called "protective care".

Response: The RCN agrees with the proposal that the DoLS should be replaced by a new system called "protective care".

There are clear arguments to support the development of a whole new system and the use of a new term such as 'protective care' or something similar is important to signify that this is an entirely new process. However, we recognise the concern that the term "protective" could be viewed as disempowering to the people to whom it applies and the additional concern about whether the new scheme will create additional pressures on staff working in acute trusts.

Provisional proposal 2-2: the introduction of protective care should be accompanied by a code of practice, and the UK and Welsh Government should also review the existing *Mental Capacity Act Code of Practice*.

Response: The RCN agrees with this proposal. We believe that there needs to be alignment between any new system and the Mental Capacity Act (MCA) and that a code of practice should be in place. However, we would like to make the following points:

1. In relation to the hospital scheme introducing an objection clause: we believe that this is inappropriate.

2. The RCN is concerned that there may be an expectation that 'restrictive care and treatment' can be managed within normal care planning processes. There is a risk that staff will not take on board the significance of these new requirements (as has often been the case in Continuing Health Care) resulting in the new scheme becoming merely a tick box exercise.

3. The AMCaP role incorporates so many requirements that it appears to be particularly burdensome (indeed it almost seems to involve them in care management). The Law Commission must assess whether the proposed responsibilities are feasible and practical.

CHAPTER 3: PRINCIPLES OF PROTECTIVE CARE

Question 3-1: have we identified the correct principles to underpin protective care, namely that the scheme should deliver improved outcomes, and be based in the Mental Capacity Act, non-elaborate, compliant with the European Convention on Human Rights, supportive of the UN Disability Convention, and tailored according to setting?

Response: The RCN agrees that a system that aims to deliver improved outcomes is essential and should be the primary focus. We also support the other principles identified as the right ones, in particular the need to establish a workable and simplified system. However the points made in 3.11 that a robust system needs to be developed and must not be open to interpretation are crucial. It is important to be aware of the potential workforce issues arising from the need to ensure there is sufficient expertise and skilled support available when required, and to ensure skills capacity in future workforce design.

CHAPTER 4: THE SCOPE OF THE NEW SCHEME

Provisional proposal 4-1: the scope of protective care should include hospital, care home, supported living, shared lives and domestic accommodation.

Response: The RCN agrees with this proposal but we do have some reservations. While there are clear arguments for broadening the scope of protective care beyond hospitals and care homes, the inclusion of domestic accommodation is contentious and we would need to be reassured that sufficient consideration has been given to those within the prison estate.

The need for safeguards and to prevent distress to family members was noted to us by our members, and some told us that they believe that the change in arrangements could result in increased confusion to family members. Even if careful wording in the proposed new scheme is achieved, the implementation would still be subject to interpretation. However, on balance a sensible way forward at this stage would be to have a wide scope which is inclusive of all the arrangements specified in the question so that the risks and benefits of each can be carefully considered in the drafting of the new scheme.

Question 4-2: is the definition of supported living provided under the Care Act 2015 appropriate for our scheme?

Response: The RCN agrees that this is an appropriate definition.

CHAPTER 6: SUPPORTIVE CARE

Provisional proposal 6-1: supportive care should apply where a person is living in care home, supported living or shared lives accommodation, or if a move into such accommodation is being considered.

Response: The RCN agrees with this proposal.

Provisional proposal 6-2: supportive care should cover people who may lack capacity as a result of an impairment of, or a disturbance in the functioning of, the mind or brain, in relation to the question whether or not they should be accommodated in particular care home, supported living or shared lives accommodation for the purpose of being given particular care or treatment.

Response: The RCN agrees with this proposal.

Provisional proposal 6-3: a local authority should be required to undertake or arrange an assessment, or ensure that an appropriate assessment has taken place, where it appears that a person may be eligible for supportive care in care home, supported living or shared lives accommodation.

Response: The RCN agrees with this proposal.

Provisional proposal 6-4: the local authority must ensure that the assessor has the skills, knowledge and competence to carry out the assessment and is appropriately trained. The assessor must consult a person with expertise in relation to the condition or circumstances of the individual, where the assessor considers that the needs of the individual require them to do so.

Response: The RCN agrees with this proposal. We would suggest that appropriate checks must be in place to ensure the competence of assessors. Workforce planning will be required to balance assessors with predicted

demand. Professional development opportunities and clinical supervision must be available to allow staff to maintain competence.

Provisional proposal 6-5: local authorities should be required to keep under review the health and care arrangements for any person who falls within supportive care. This would include ensuring that a care plan and proper capacity assessments have been undertaken.

Response: The RCN agrees with this proposal. Care plans should be co-created with the person concerned and there needs to be clarity on the regularity of review.

Provisional proposal 6-6: local authorities should be required to ensure that assessments and care plans record, where appropriate, what options have been considered and the reasons for the decisions reached.

Response: The RCN agrees with this proposal. We believe that this should include a multi-agency approach

Provisional proposal 6-7: under supportive care, a person's care plan must make clear the basis on which their accommodation has been arranged.

Response: The RCN agrees with this proposal.

Question 6-8: are any changes needed to provide greater protection and certainty for people who lack capacity and their landlords in relation to tenancies?

Response: This area is more complex and vulnerable persons will potentially require additional support and protection. This does raise the question of the extent to which a landlord should be vetted to a higher level, and receive training and guidance along with regular support.

Question 6-9: what difficulties arise when landlords require tenancies to be signed by a donee or deputy, and how might these be addressed?

Response: The RCN recognises the complexity of this issue and we believe that it is necessary to clearly agree who is acting on behalf of the person and representing their best interests.

Question 6-10: should local authorities and the NHS in England ever set personal budgets for disabled people living at home by reference to the cost of meeting the person's needs in residential care?

Response: The RCN disagrees with this proposal. We believe that the individual need should be managed following assessment.

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Question 6-11: should there be a duty on local authorities and the NHS, when arranging care home, supported living or shared lives accommodation for a person who lacks capacity to decide where to live:
(1) to secure the most appropriate living arrangement for that person, which as far as possible reflects the person's wishes and feelings; and
(2) to seek the agreement of any donee of a Lasting Power of Attorney or deputy, or a declaration from the Court of Protection.

Response: The RCN agrees with this proposal.

Question 6-12: should local authorities and the NHS be required to report annually on issues relating to living arrangements and community support, such as the number of living arrangements made and how often these arrangements were inconsistent with the person's wishes and feelings?

Response: The RCN agrees with this proposal.

Provisional proposal 6-13: all registered care providers should be required to refer an individual for an assessment under the relevant protective care scheme if that person appears to meet the relevant criteria.

Response: The RCN agrees with this proposal.

Question 6-14: should the duty to make referrals for protective care be a regulatory requirement which is enforced by the Care Quality Commission, Care and Social Services Inspectorate Wales, or Healthcare Inspectorate Wales?

Response: The RCN agrees with this proposal.

CHAPTER 7: RESTRICTIVE CARE AND TREATMENT

Provisional Proposal 7-1: the restrictive care and treatment scheme should apply to people who lack decision-making capacity as a result of an impairment of, or a disturbance in the functioning of, the mind or brain.

Response: The RCN agrees with this proposal.

Provisional proposal 7-2: a person would be eligible for safeguards if: they are moving into, or living in, care home, supported living or shared lives accommodation; some form of "restrictive care and treatment" is being proposed; and the person lacks capacity to consent to the care and treatment.

Response: The RCN agrees with this proposal. We particularly support this in cases where there is a foreseen restriction on the persons' liberty.

Provisional proposal 7-3: restrictive care and treatment should include, but should not be limited to, any one of the following:

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(1) continuous or complete supervision and control;
(2) the person is not free to leave;
(3) the person either is not allowed, unaccompanied, to leave the premises in which placed (including only being allowed to leave with permission), or is unable, by reason of physical impairment, to leave those premises unassisted;
(4) barriers are used to limit the person to particular areas of the premises;
(5) the person's actions are controlled, whether or not within the premises, by the application of physical force, the use of restraints or (for the purpose of such control) the administering of medication – other than in emergency situations;
(6) any care and treatment that the person objects to (verbally or physically);
(7) significant restrictions over the person's diet, clothing, or contact with and access to the community and individual relatives, carers or friends (including having to ask permission from staff to visit – other than generally applied rules on matters such as visiting hours).
The Secretary of State and Welsh Ministers could add to and amend this list by secondary legislation.

Response: The RCN agrees with this proposal.

Question 7-4: should the restrictive care and treatment safeguards be available to people who lack capacity to consent to their care plan, in any of the following cases:
(1) the person is unable, by reason of physical or mental disability, to leave the premises, including:
(a) unable to leave without assistance;
(b) able to leave without assistance but doing so causes the adult significant pain, distress or anxiety;
(c) able to leave without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
(d) able to leave without assistance but takes significantly longer than would normally be expected;
(2) the person has high care needs and consequently is dependent on paid carers; and 204
(3) the person has limited ability to direct their own care or to access existing safeguards?

Response: The RCN agrees that restrictive care and treatment safeguards should be available to people who lack capacity to consent to their care plan.

Provisional proposal 7-6: the local authority should be required to ensure that an assessment for restrictive care and treatment takes place, and confirm that the restrictive care and treatment is in the person's best interests.

Response: The RCN agrees with this proposal.

Question 7-7: should the restrictive care and treatment assessment require a best interests assessment to determine whether receiving the proposed care or treatment is in a person's best interests, before deciding whether it is necessary to authorise restrictive care and treatment?

Response: The RCN agrees with this proposal.

Question 7-8: should a person be eligible for the restrictive care and treatment scheme if restrictive care and treatment is necessary in their best interests – taking into account not just the prevention of harm to the person but also the risks to others?

Response: a The RCN agrees with this proposal. However, there needs to be robust rationale and risk assessment in place when considering risks posed by the person to others.

Provisional proposal 7-9: cases involving serious medical treatment should be decided by the Court of Protection**.**

Response: The RCN agrees with this proposal. There is a need for greater clarity regarding what constitutes serious treatment.

Question 7-10: should all significant welfare issues where there is a major disagreement be required to be decided by the Court of Protection**?**

Response: The RCN agrees with this proposal.

Provisional proposal 7-11: restrictive care and treatment assessments should be referred to an "Approved Mental Capacity Professional" (currently, the best interests assessor) who would be required to arrange for the assessment to be undertaken by a person already involved in the person's care (e.g. the person's social worker or nurse) and quality assure the outcome of that assessment or oversee or facilitate the assessment; or undertake the assessment themselves.

Response: The RCN agrees with this proposal. We also believe that there must be consideration of transferable schemes of training. This is of relevance in border areas between the devolved administrations.

Provisional proposal 7-12: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) would be required to specify the duration of restrictive care and treatment, which may not exceed 12 months.

Response: The RCN agrees with this proposal.

Provisional proposal 7-13: the Secretary of State and Welsh Ministers should have powers in secondary legislation to provide for equivalent assessments, timescales for the completion of assessments and records of assessments.

Response: The RCN agrees with this proposal.

Question 7-14: what should the timescales be for the assessments under protective care and what records should be contained in the assessment?

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The RCN believes that assessments must be sensitive to the needs of the person and should not delay or over assess their delivery of care in whatever location it is required. We suggest that the care records should be transferable and accessible with sufficient information about the reasons for protective care. A care plan should be in place and the person should have a copy of it.

Provisional proposal 7-15: restrictive care and treatment should enable Approved Mental Capacity Professionals (currently, Best Interests Assessors) to use equivalent assessments where this is necessary.

Response: The RCN agrees with this proposal.

Provisional proposal 7-16: the new scheme should establish that the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) acts on behalf of the local authority but as an independent decision-maker. The local authority would be required to ensure that applications for protective care appear to be duly made and founded on the necessary assessment.

Response: The RCN agrees with this proposal.

Provisional proposal 7-17: the Health and Care Professions Council and Care Council for Wales should be required to set the standards for, and approve, the education, training and experience of "Approved Mental Capacity Professionals" (currently, Best Interests Assessors).

Response: The RCN disagrees with this proposal. We believe more detail about the proposal is required. The RCN believes that there is a need for consistent regulatory processes and monitoring - a nurse would not be annotated on the HCPC register but on the NMC register, therefore this proposal would need a separate register or to be an agreed role on all relevant professional registers.

Provisional proposal 7-18: the ability to practise as an "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) or Approved Mental Health Professional should be indicated on the relevant register for the health or social care professional

Response: The RCN disagrees with this proposal. We believe that more detail is required. We reiterate the point that there is a need for consistent regulatory processes and monitoring- a nurse would not be annotated on the HCPC register but on the NMC register therefore this proposal would need a separate register or agreed as a role on all relevant professional registers.

Question 7-19: should there be additional oversight of the role of the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) and a right to request an alternative assessment?

Response: The RCN agrees that this is essential.

Provisional proposal 7-20: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) should be responsible for setting conditions and making recommendations in respect of the person's care and treatment.

Response: The RCN agrees with this proposal.

Provisional proposal 7-21: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) should be given responsibility for monitoring compliance with conditions. This could be delegated to health and social care professionals who are allocated to the case, and advocates and the appropriate person would be required to report any concerns about noncompliance with conditions.

Response: The RCN partially supports this proposal, based on the condition that this would extend current roles and require enduring relationships between AMCP and the person, and further training, professional development and clinical supervision would be required.

Question 7-22: should the new scheme allow for conditions or recommendations to be made that are more restrictive of liberty than the application is asking for?

Response: The RCN does not support this point.

Question 7-23: should there be specific sanctions for a failure to comply with a condition, and if so, what should they be?

Response: The RCN does not support this point. We believe it would be difficult to identify what the nature and scope of such sanctions.

Provisional proposal 7-24: an "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) should be allocated to every person subject to the restrictive care and treatment scheme. This should not be the same professional who authorised the restrictive care and treatment.

Response: The RCN agrees with this proposal.

Provisional proposal 7-25: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) should be required to keep under review generally the person's care and treatment, and given discretion to discharge the person from the restrictive care and treatment scheme

Response: The RCN has concerns about this proposal. If the AMCP is responsible for carrying out the reviews it may lead to the capacity issues which have resulted from the experience of the implementation of both the current deprivation of liberty and continuing healthcare frameworks. Clear arrangements for delegation if the named AMCP were not available must be in place.

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Provisional proposal 7-26: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) should be able to review and vary conditions without necessarily holding a full reassessment of best interests.

Response: The RCN agrees with this proposal.

Provisional proposal 7-27: the local authority should be given general discretion to discharge the person from the restrictive care and treatment scheme. Local authorities could consider discharge themselves, or arrange for their power to be exercised by a panel or other person.

Response: The RCN agrees with this proposal.

Provisional proposal 7-28: the "Approved Mental Capacity Professional" (currently, the Best Interests Assessor) and local authority must review the care and treatment following a reasonable request by the person, a family member or carer, or an advocate or appropriate person.

Response: The RCN agrees with this proposal.

Provisional proposal 7-29: if a person who is eligible for the restrictive care and treatment scheme needs to be deprived of liberty in his or her best interests, this must be expressly authorised by the care plan

Response: The RCN agrees with this proposal.

Provisional proposal 7-30: cases of deprivation of liberty concerning those living in a family or domestic setting must be authorised by the Approved Mental Capacity Professional and subject to the same safeguards as those provided under the restrictive care and treatment scheme.

Response: The RCN agrees with this proposal.

Provisional proposal 7-31: the Approved Mental Capacity Professional (currently the Best Interests Assessor) should ensure that before a deprivation of liberty is authorised, objective medical evidence be provided by a doctor or psychologist who is independent of the detaining institution. If appropriate evidence already exists, a fresh assessment should not be required.

Response: The RCN supports this proposal but we would welcome further clarification on what would be considered 'appropriate evidence'. Given the fluctuating nature of some conditions, this evidence should accurately reflect current need. Consideration should also be given to clinical evidence from other members of the multi professional team for example where a nursing diagnosis or assessment has been made.

Provisional proposal 7-32: the medical assessment should confirm that the person is suffering from a disability or disorder of mind or brain and lacks capacity to consent to the proposed care and treatment**.**

Response: The RCN agrees with this proposal.

Question 7-33: should the medical assessment address other matters such as providing a second opinion on treatment already being provided or proposed?

The RCN has no comment to make.

Question 7-34: should doctors be eligible to act as Approved Mental Capacity Assessors (currently Best Interests Assessors)?

The RCN has no comment to make.

Provisional proposal 7-35: an Approved Mental Capacity Professional (currently Best Interests Assessor) should be able to authorise restrictive care and treatment in urgent cases for up to 7 days, and to extend this period once for a further 7 days, pending a full assessment

Response: The RCN agrees with this proposal. However this is a serious deprivation, and whilst we agree that this needs to be undertaken we believe that a single person should not have responsibility for authorising such a restriction. Comparative processes in the Mental Health Act have a higher threshold.

Provisional proposal 7-36: the restrictive care and treatment scheme should include powers to authorise transportation, leave, suspension and transfers. It should also enable care and treatment to be authorised in multiple settings.

Response: The RCN agrees with this proposal.

CHAPTER 8: PROTECTIVE CARE IN HOSPITAL SETTINGS AND PALLIATIVE CARE

Provisional proposal 8-1: a separate scheme should be established for hospitals and palliative care settings.

Response: The RCN agrees with this proposal. It is important to be clear that 'palliative care settings' also includes palliation in care homes and community hospitals. Responses we received from the acute sector clearly urge the scheme to be proportionate and not burdensome as it will apply to large numbers of people.

Provisional proposal 8-2: a person may be deprived of liberty for up to 28 days in a hospital setting based on the report of a registered medical practitioner. A responsible clinician must be appointed and a care plan produced. Further

authorisations for a deprivation of liberty would require the agreement of an Approved Mental Capacity Professional (currently a Best Interests Assessor).

Response: The RCN agrees with this proposal. There is a need for significant investment in Approved Mental Capacity Professionals.

Question 8-3: is the appointment of an advocate always appropriate in all hospital cases, or is there a need for an alternative safeguard (such as a second medical opinion)?

Response: The RCN believes that there may be occasions when a second opinion would be appropriate and this should not be confined to medical staff as other professions may have more appropriate understanding and relationships with the person.

CHAPTER 9: ADVOCACY AND THE RELEVANT PERSON'S REPRESENTATIVE

Provisional proposal 9-1: an independent advocate or an appropriate person must be appointed for any individual subject to protective care. The individual must consent to such support or if the individual lacks capacity to consent, it must be in their best interests to receive such support.

Response: The RCN agrees with this proposal.

Provisional proposal 9-2: the provision of advocacy should be streamlined and consolidated across the Care Act and Mental Capacity Act (in its entirety), so that Independent Mental Capacity Advocates would be replaced by a system of Care Act advocacy and appropriate persons.

Response: The RCN agrees with this proposal. We would also suggest that further work is undertaken to encourage the uptake of lasting powers of attorney and the development of advanced directives.

Question 9-3: should the appropriate person have similar rights to advocates under the Care Act to access a person's medical records?

Response: The RCN agrees with this proposal.

Question 9-4: should Independent Mental Health Advocacy be replaced by a system of Care Act advocacy and appropriate persons?

Response: The RCN is aware that there is already significant shortfall in the number of available advocates which must be addressed, particularly with regard to those who support the speech and language, cultural and spiritual needs of people where further capacity will need to be developed.

Provisional proposal 9-5: a "relevant person's representative" should be appointed for any person subject to the restrictive care and treatment scheme (or the hospital scheme) and who is being represented by an advocate. The person must consent to being represented by the representative, or if they lack capacity to consent, it must be in the person's best interests to be represented by the representative.

Response: The RCN supports this proposal.

Provisional proposal 9-6: where there is no suitable person to be appointed as the representative, the person should be supported by an advocate or appropriate person.

Response: The RCN agrees with this proposal.

Provisional proposal 9-7: the Approved Mental Capacity Professional (currently Best Interests Assessor) should have discretion to appoint a representative where the person is being supported by an appropriate person.

Response: The RCN agrees with this proposal.

Provisional proposal 9-8: the Approved Mental Capacity Professional (currently best interests assessor) should be required to monitor the relevant person's representative and ensure they are maintaining contact with the person.

Response: The RCN agrees with this proposal.

Question 9-9: does the role of relevant person's representative need any additional powers?

Response: The RCN does not think that the role needs additional powers.

Consultation question 9-10: should people always where possible be provided with an advocate and a relevant person's representative, and could these roles be streamlined?

Response: The RCN believes that a streamlined approach is helpful but the role must be proportionate to the person's needs.

CHAPTER 10: THE MENTAL HEALTH ACT INTERFACE

Provisional proposal 10-1: the Mental Health Act should be amended to establish a formal process for the admission of people who lack capacity and who are not objecting to their care and treatment. The safeguards provided would include an independent advocate, a requirement for a second medical opinion for certain treatments and rights to appeal to the mental health tribunal. The Mental Capacity Act (and our new scheme) could not be used to authorise the hospital admission of incapacitated people who require treatment for mental disorder.

Response: The RCN agrees with this proposal.

CHAPTER 11: RIGHT TO APPEAL

Provisional proposal 11-1: there should be a right to apply to the First-tier Tribunal to review cases under our restrictive care and treatment scheme (and in respect of the hospital scheme), with a further right of appeal.

Response: The RCN has no comment to make.

Provisional proposal 11-2: an appeal against the decision of the First-tier Tribunal should lie on points of law in all cases and on law and fact where the issues raised are of particular significance to the person concerned.

Response: The RCN has no comment to make.

Question 11-3: which types of cases might be considered generally to be of "particular significance to the person concerned" for the purposes of the right to appeal against the decision of the First-tier Tribunal?

Response: The RCN has no comment to make.

Provisional proposal 11-4: local authorities should be required to refer people subject to the restrictive care and treatment scheme (or the hospital scheme) to the First-tier Tribunal if there has been no application made to the tribunal within a specified period of time.

Response: The RCN has no comment to make.

Question 11-5: in cases where there has been no application made to the First tier Tribunal, what should be the specified period of time after which an automatic referral should be made?

Response: The RCN has no comment to make.

Question 11-6: how might the First-tier Tribunal secure greater efficiencies – for example, should paper reviews or single member tribunals be used for relatively straightforward cases?

Response: The RCN has no comment to make.

Question 11-7: what particular difficulties arise in court cases that raise both public and private law issues, and can changes to the law help to address these difficulties?

Response: The RCN has no comment to make.

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Question 11-8: should protective care provide for greater use of mediation and, if so, at what stage?

Response: The RCN has no comment to make.

Question 11-9: what are the key issues for legal aid as a result of our reforms?

Response: The RCN has no comment to make.

CHAPTER 12: SUPPORTED DECISION-MAKING AND BEST INTERESTS

Provisional proposal 12-1: a new legal process should be established under which a person can appoint a supporter in order to assist them with decision making. The supporter must be able, willing and suitable to perform this role. The Approved Mental Capacity Professional (currently best interests assessor) would be given the power to displace the supporter if necessary (subject to a right of appeal).

Response: The RCN agrees with this proposal.

Provisional proposal 12-2: section 4 of the Mental Capacity Act should be amended to establish that decision-makers should begin with the assumption that the person's past and present wishes and feelings should be determinative of the best interests decision.

Response: The RCN agrees with this proposal.

CHAPTER 13: ADVANCE DECISION-MAKING

Provisional proposal 13-1: the ability to consent to a future deprivation of liberty should be given statutory recognition. The advance consent would apply as long as the person has made an informed decision and the circumstances do not then change materially.

Response: The RCN agrees with this proposal. As discussed in the consultation document there is evidence that advance decision making can be used to good effect and that extending this under the new scheme in the proposed conditions could be advantageous.

Provisional proposal 13-2: the restrictive care and treatment scheme and the hospital scheme would not apply in cases where they would conflict with a valid decision of a donee or advance decision.

Response: The RCN agrees with this proposal.

Question 13-3: how (if at all) should the law promote greater use of advance decision-making?

Response: The RCN believes that it is important to raise awareness of advance decision making with the public, but making it a statutory duty for health professionals does not support patient autonomy. There would also be a risk that rather than allowing for meaningful dialogue between a practitioner and the patient, it could be reduced to a simple box ticking exercise in completing documentation.

CHAPTER 14: REGULATION AND MONITORING

Provisional proposal 14-1: the Care Quality Commission, Care and Social Services Inspectorate Wales and Healthcare Inspectorate Wales should be required to monitor and report on compliance with the restrictive care and treatment scheme and the hospital scheme.

Response: The RCN supports the proposal that the CQC and relevant counterparts in Wales be required to monitor and report on compliance with the restrictive care and treatment scheme and the hospital scheme.

Question 14-2: how might the new legal framework encourage greater joint working between the various health and social care bodies and regulatory schemes and alternative forms of regulation?

Response: The RCN has no comment to make on this matter.

Question 14-3: is greater regulatory oversight needed of individual decision makers and local authorities and the NHS for the purposes of protective care?

Response: The RCN recognises that protective care affects people at their most vulnerable so it is important that individuals and their families can be confident that it is being delivered appropriately by staff with the right level of training, skills and competence and that greater regulatory oversight could help to ensure this.

As this relates to both registered nurses and social workers the RCN believes it is crucial that all training for the roles involved in delivering protective care, and most notably any training devolved to the Health and Care Professions Council – the regulator of social workers, is compliant with the Nursing and Midwifery's (NMC) requirements and the NMC Code.

CHAPTER 15: OTHER ISSUES

Provisional proposal 15-1: protective care should apply to persons aged 16 and over.

Response: The RCN agrees with the proposition that there is a requirement for the law to be changed and for the recognition that a one-size-fits all approach is not appropriate. We are supportive of the principles of protective care, while

ensuring meaningful safeguards for vulnerable individuals who lack capacity, including those who are 16 or 17 years of age

Question 15-2: is the concept of the zone of parental responsibility appropriate in practice when applied to 16 and 17 year olds who lack capacity?

Response: The RCN believes that the concept of the zone of parental responsibility is appropriate in practice for 16 and 17 year olds who lack capacity.

Question 15-3: what are the current difficulties that arise when identifying the supervisory body for the purposes of the DoLS? Are there any current areas that could be usefully clarified under the new scheme?

Response: The RCN believes that there needs to be a streamlined and easily accessible contact, and that this must include an out of hours provision.

Question 15-4: is a fast track determination scheme needed for cases where a person is deprived of liberty and there is a dispute over the person's ordinary residence?

Response: The RCN believes that his is needed to ensure prompt resolution of disputes.

Question 15-5: should a new criminal offence of unlawful deprivation of liberty be introduced?

The RCN has no comment to make on this matter.

Provisional proposal 15-6: the Criminal Justice Act 2009 should be amended to provide that inquests are only necessary into deaths of people subject to the restrictive care and treatment scheme where the coroner is satisfied that they were deprived of their liberty at the time of their death and that there is a duty under article 2 to investigate the circumstances of that individual's death.

Response: The RCN agrees with this proposal. We believe that it is important to resolve the current difficult situation causing distress to the bereaved.

Question 15-7: should coroners have a power to release the deceased's body for burial or cremation before the conclusion of an investigation or inquest?

Response: The RCN supports this suggestion.

Question 15-8: is the current law on the reporting of deaths to the coroners satisfactory?

The RCN has no comment to make.

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Question 15-9: should people be charged for their accommodation when they are being deprived of liberty in their best interests – and are there any realistic ways of dealing with the resource consequences if they are not charged?

The RCN has no comment to make.

Question 15-10: does the law concerning foreign detention orders cause difficulties in practice?

The RCN has no comment to make.

Question 15-11: what difficulties arise when a person needs to be deprived of liberty and has been placed by a local authority in England or Wales into residential care in a different UK country?

The RCN has no comment to make.

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