

CONSULTATION QUESTIONS

This consultation questionnaire sets out the consultation questions from within the relevant sections of the revised Adult Support & Protection Code of Practice.

The revised Code of Practice is a larger and more comprehensive document than the original Code and we welcome your views on any of the changes made. In particular, we would appreciate your views on the following matters.

Please insert your response to the questions in the text boxes provided.

Question 1: Chapter 3

This chapter of the Code sets out the principles of the Adult Support and Protection legislation and the definition of an adult at risk.

Does this chapter help in your understanding of the legislation and whom it applies to?

If not, what changes would you suggest?

We view that it would be more beneficial to change the legislation in order to clarify to whom it applies. In the absence of such changes being made Inverclyde CHCP agrees that clarification of the word 'unable', 'lacking the skills, means or opportunity to do something' assists understanding. However, we suggest that further clarification of the 'something' would also be of assistance. This in conjunction with taking an outcomes focussed approach and what constitutes being able to safeguard would further aid understanding and the application of the three point test.

The 'something' is to safeguard. The Oxford English Dictionary definition of 'safeguard' is 'a measure taken to protect someone or to prevent something undesirable'. Taking both definitions into account in relation to the first element of the three-point criteria would clarify that an adult at risk would be those who 'are lacking the skills, means or opportunity to take a measure(s) to protect or prevent something undesirable happening to their welfare, property, rights or other interests'.

We view that decision making around what constitutes 'being able' to safeguard should shift from process to focus on outcomes. For example, the adult at risk might have been able to alert authorities by telephoning or engineering an opportunity to get away from a situation but may not be safe/safer and may not have the personal or material resources to achieve this. Taking into account the principles of the Act, we suggest that any public body or office holder performing a function under Part 1 of the Act should afford the adult the support to achieve/secure their ongoing protection, safety and wellbeing in so far as is possible and within the context of what they are willing to accept where able/have capacity to make such decisions. We suggest that this would be consistent with a rights based approach. Adults having the right to live free from harm with the

consideration being as what support the adult requires in order for this to be achieved.

We view that the distinction being drawn between those adults who are unable and those who are unwilling to safeguard themselves also assists.

Inverclyde CHCP is not aware of any case law in respect of this legislation. We know that the legislation is human rights compliant and we require to conduct our duties in a way which would be EHCR compliant. Being unwilling and choosing not to safeguard would relate to Article 8 of the European Convention on Human Rights (ECHR) which states that everyone has 'the right to respect for private and family life, home and correspondence'.

Lord Stewart's determination of the smoking ban in the case of *Charles McCann vs. the State Hospital Board for Scotland* (as reported in *The Herald* on 28th August 2013) may assist in clarifying an adult's right to choose not to safeguard themselves.

"The fundamental right in terms of this respect of Article 8 ECHR is to have your identity, how you choose to express it and other personal, private and intimate choices whatever they may be, respected, even if your choices are harmful to yourself, morally reprehensible or laughable. If you are an adult, the state cannot interfere with your choices in the private sphere except for weighty reasons to do with the protection of others and the good of the community as a whole"

Question 2: Chapter 5

This chapter of the Code considers the principle of ensuring full regard is given to the wishes of the adult, and ensuring that the adult participates in decisions as fully as possible.

Does this chapter adequately cover the issues arising from ensuring as far as possible full participation by adults in decision making?

If not, what changes would you suggest?

Suggestions:

1. Adult at risk is referred to in this chapter as 'adult at risk', 'adult', 'person', 'service user'. Suggest deciding on one term.
2. Suggest continuing to use the term case conference rather than multi disciplinary meetings and add definition to the glossary if viewed as required. Term Case Conference may not be ideal but does suggest that the focus of the meeting is about the adult and their situation.
3. Chapter focuses on advocacy with no reference to those having Powers of Attorney or Legal Guardians and their role and responsibilities. Adults may also choose to have legal representation in terms of a solicitor.
4. Re; Carers. Should be made explicitly clear that this section pertains

- to an unpaid carer.
5. Possible further clarification required if someone in the caring role is a paid carer and also a relative. Potential within context of self directed support of individuals involved having more than one role.
 6. Point 12. Regarding multiagency meetings “attendance is facilitated”. Suggest adult is consulted regarding what would facilitate attendance. If not, appropriate reasons explained and recorded.
 7. Point 15. To add that the adult and their representative may require to be excluded from part of the meeting if the police view their inclusion might prejudice a criminal case. This should be explained to the adult and reasons recorded.
 8. Point 15. Suggest adding breach of confidentiality of other parties.
 9. Point 16. Recommend removing reference to ‘advocate’ and using term ‘advocacy worker’. This is given ‘advocate’ is most commonly associated with particular legal representation.
 10. Point 21. Suggest an alternative word be used for ‘patience’. An option might be ‘consideration’.
 11. Point 23. Reference to Appropriate Adult Schemes. Would view it useful to make it explicit that this is in the context of a criminal investigation and an advocacy worker would not be present.
 12. Point 23. Add that in the context of a criminal investigation, the police may require to consult with the Procurator Fiscal regarding the use of aids to support and enable communication and their admissibility in court.

Question 3: Chapter 6

This chapter includes new guidance on large scale inquiries. Does this provide sufficient clarity for this type of inquiry or are there additional matters you would wish considered?

Point 8 “If the risk of harm is thought to arise from an unpaid carer”. Suggest should not focus solely on unpaid carers. Other person(s) such as friends, relatives, other service etc may be source of harm and may also experience disabilities or ill health and known to services. An accurate picture of their situations should be sought where they are or have been known to services. They may also require support to alleviate risk to self and others.

Question 4: Chapter 11

This chapter is a new addition to the Code and considers a multi-agency approach. Does this provide sufficient clarity and support for your organisation in handling multi-agency assessments and practice?

Are there other matters that you consider should be included in this chapter?

We view that there is insufficient clarity in terms of the roles and responsibilities of other public and professional bodies and agencies and the interface with ASPA. We view that it would be useful to include a range

of scenarios and provide suggested good practice responses. The legislation is more readily applied to particular individual circumstances, the process followed and ultimately protective orders can be considered and used where necessary. Issues that can make an application difficult are 'poor care' situations relating to more than one person, allegations involving staff (internal/external) and interface with employment legislation and employee responsibilities, the setting of the harm e.g. hospitals, care settings, specialist knowledge and skills required of council officers across a range of possible scenarios and where protection on orders are not applicable.

Question 5: Users and Carers

The Code seeks to develop and articulate good practice as regards service user and carer involvement, particularly in chapters 5 and 16. Does it succeed in this? If not please suggest ways in which this area could be improved on.

See comments for question 2.

Question 6:

Do you consider this revised Code of Practice will enable you to carry out your professional responsibilities effectively? Please feel free to comment on any areas of the Code which you consider could be improved in any way.

1. Suggest providing definitions to differentiate between self harm/neglect and self harm/suicide. This is given there are currently two working definitions in use for self harm.
2. Remains a lack of clarity regarding the difference between 'inquiring' and 'investigating'. We view that adults at risk and others (as per section 8) require to understand the legal context and purpose of any 'conversation' with them. Inverclyde CHCPs current position is that the inquiry stage is about gathering all known and relevant information in order for a decision to be made regarding what further action is required. At the investigation stage, investigative visit(s) and interview(s) will be sought with the adult at risk and others. Where professional judgement is exercised and there is any deviation from this approach, the reasons require to be recorded.
3. Page 57. A police responsibility to organise a medical goes beyond the circumstances of a sexual assault. We suggest this is amended.
4. Page 24. Point 3. Suggest removing reference to advocate and replace with 'advocacy worker'.

Any further comments

Page 54 at paragraph 16 states that "a lack of capacity to consent to be interviewed is not an automatic bar on the adult participating in the interview process"

Page 66 at paragraph 11 states that "where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply."

Page 69 at paragraph 25 states that "where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply."

Page 75 at paragraph 15 states that "where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply."

On Page 87 at paragraph 14, the document states "where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply."

Dealing with the entries throughout the draft generally, our reading of Section 35 is that the wording of the Act does not expressly provide an exception for people who do not have capacity to consent (or refuse to consent) to various measures under the Act, which leaves Section 35 open to interpretation. Our view is, the position is not as clear cut as the draft Code of Practice suggests. As such, it is possible that in practice, the interpretation of the Scottish Ministers in the Code of Practice may not be shared by individual Sheriffs in individual cases. We consider that the best way in which to provide clarity is to amend the legislation so that such an exception is expressly provided for people who lack capacity.

Page 104-Paragraph 6 states that Adult Protection Committees must include representatives of the Council. Our reading of Section 43(2) is that is discretionary as to whether the Council nominates a representative, as the Council are expressly excluded from the mandatory obligation to nominate a representative.

Generally, we consider that a definition of "serious harm" or "seriously harmed" in the legislation, and guidance in the Code of Practice, would assist professionals involved in interpreting the legislation.