



## Falkland Islands Government – Department of Health and Social Services

### PUBLIC CONSULTATION ON PROPOSED MENTAL CAPACITY AND DEPRIVATION OF LIBERTY ORDINANCE

**Consultation topic:** This consultation asks the public and stakeholders to provide their feedback on a proposal to introduce Mental Capacity and Deprivation of Liberty legislation to the Falkland Islands.

We encourage anyone who has an interest in mental capacity, is affected by, or who knows someone who will be affected by the legislation, to respond to this consultation. This includes professionals whose role involves working with people who may be affected by the proposed legislation.

The feedback we receive during this consultation will be presented to decision-makers and will be used to refine the final policy submitted to Executive Council in 2025. A summary of the feedback received will be published as soon as possible after the consultation period closes.

**Target population:** We welcome responses from everyone who lives in the Islands, whether you live in Stanley, Camp, the outer islands, or MPC.

**Duration:** The survey will remain open for 4 weeks from 10 February to 10 March 2025. The survey should take you approximately 15 minutes to complete.

**How to respond:** There are three ways you can respond to this consultation:

- 1) The quickest and easiest way, and to help us save paper, is to complete the online survey, available at [www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance](http://www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance)
- 2) You can also download and fill in an editable pdf of the survey, available from [www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance](http://www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance) and email it back to us at [slowe.social@kemh.co.fk](mailto:slowe.social@kemh.co.fk)
- 3) If you prefer, you can complete a paper version available from the Post Office and the Social Services Department, or you can ask for one to be posted to you by contacting us by email at : [slowe.social@kemh.co.fk](mailto:slowe.social@kemh.co.fk)

Completed paper surveys can be placed in the dedicated response box in the Post Office, or can be posted to us at the contact details below.

**Enquiries:** If you have any queries about the consultation, please contact:

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## INTRODUCTION

This consultation asks the public and stakeholders to provide their feedback on a proposal to introduce a legal framework designed to protect and support people who lack the ability to make a particular decision for themselves, at a particular time.

The proposed Mental Capacity and Deprivation of Liberty Ordinance (MCO) is relevant to everybody living in the Falkland Islands. It aims to empower people to make decisions about their own lives wherever possible, and to protect their human rights while affording the greatest care and respect for them. It will allow people to plan ahead for a time when they may lack mental capacity to make their own decisions, and it will provide guidance to support people who need to make decisions on behalf of someone else.

The MCO will apply to people aged 18 and over and will be designed to cover situations where someone may be unable to make a decision for themselves as a result of illness or disability (such as a stroke or other brain injury), dementia, mental illness or a learning disability. However, it could also cover situations when you are unconscious or under the influence of drugs or alcohol.

In some circumstances it may be necessary to place restrictions on a person who lacks capacity to consent to their care and support arrangements. This may be considered a 'deprivation of liberty.' The proposed MCO will allow for deprivation of liberty to be used in instances where it is considered to be in the best interest of a person who lacks capacity to make decisions at that time.

To help us ensure that we achieve these objectives in the best and most appropriate way for the Falkland Islands community, we need to hear from as wide a range of people as possible from across the Islands - we especially want to hear from family carers and from people who may anticipate that they may engage with the MCO in the future.

You can find the full draft policy document, along with an easy-read summary leaflet, here: [www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance](http://www.falklands.gov.fk/socialservices/mental-capacity-and-deprivation-of-liberty-ordinance).

**We refer to key parts of the policy and legislation in the consultation paper. However, we recommend that you read the supporting documents in full before responding to the consultation questions.**



## **SECTION 1 – PLEASE READ THE SUPPORTING DOCUMENTS FOR MORE DETAILED INFORMATION**

**This section covers the broader points of the MCO including:**

- **The five statutory principles**
- **Clarity on who is regarded as lacking capacity**
- **Best Interest Decisions**

### **The five statutory principles**

There are five statutory principles which will underpin the values and legal requirements of the MCO. These principles will form the foundation upon which the MCO will be developed and implemented. All those involved in supporting adults who may lack capacity will be informed by and use the five principles to guide all interactions and the delivery of care and support.

The principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision
4. An act done, or decision made, under this Policy, for or on behalf of a person who lacks mental capacity, must be done, or made, in their best interest, and
5. Before an act is done, or a decision is made for or on behalf of a person who lacks mental capacity, regard must be had as to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

### **1. How satisfied are you with the five principles underpinning the proposed MCO?**

Very satisfied    Satisfied    Neither satisfied  
nor dissatisfied    Dissatisfied    Very dissatisfied

### **2. If you would like to expand on your answer, you can provide comments here:**



**Clarity on who is regarded as lacking capacity**

A person aged 18 and above will be regarded as lacking mental capacity to make a decision for themselves if they are unable to:

- understand information relevant to the decision
- retain the information relevant to the decision
- use or weigh the information relevant to a decision as part of the process of making that decision, or
- communicate the decision. Communication can be done through talking, writing, using sign language or any other means.

A person may lack capacity for a short or longer period of time, or it may fluctuate over time. It is important to note that if a person has a mental illness that falls under the Mental Health Ordinance 2010, it will not necessarily mean that such person also lacks mental capacity to make decisions.

**3. How satisfied are you with how the MCO proposes to define when a person is considered to lack the capacity to make a decision?**

Very satisfied    Satisfied    Neither satisfied nor dissatisfied    Dissatisfied    Very dissatisfied

**4. If you would like to expand on your answer, you can provide comments here:**



### **Best Interest Decisions**

The MCO proposes that when making decisions on behalf of a person who lacks the capacity to make the decision themselves, there is a need to first determine what is in the best interest of that person, by considering the following:

- their past and present views, beliefs, values and wishes, such as their moral, political and religious views
- what is written on their advance statement (if the person has prepared one)
- what is written on their advance decisions (if the person has prepared this)
- whether the person will be able to make the decision for themselves
- if they can make their own decision, when the person is likely to make the decision, and
- any other relevant important factors that are specific to the matter at hand.

**5. How satisfied are you with the approach for making best interest decisions on behalf of a person who lacks capacity?**

Very satisfied    Satisfied    Neither satisfied nor dissatisfied    Dissatisfied    Very dissatisfied

**6. If you would like to expand on your answer, you can provide comments here:**



## **SECTION 2 – PLEASE READ THE SUPPORTING DOCUMENTS FOR MORE DETAILED INFORMATION**

**This section describes the methods a person may use to plan for the future, including:**

- **Lasting Power of Attorney**
- **Deputyship**
- **Advance Decision to Refuse Treatment**
- **Independent Mental Capacity Advocates**

### **Lasting Power of Attorney**

The proposed legislation will introduce a mechanism for granting Lasting Power of Attorney (LPA). This will replace the existing Enduring Power of Attorneys (EPA) for Property and Finance. The introduction of two types of LPAs are being proposed, and a person may decide to make one or both types of LPAs:

#### **1. LPA for Property and Finance**

This would allow someone aged 18 or over, who still has capacity, to give authority to another person to make decisions on their behalf in relation to their property and financial affairs. This might include decisions relating to managing a bank or building society account; making or selling investments; paying bills; collecting benefits or a pension; or buying or selling a house or other property. A person may agree for this LPA to be used as soon as it is registered, even if they still have mental capacity, or they can choose that the LPA will only apply once they lose mental capacity.

#### **2. LPA for Health and Welfare**

This would allow a person to make decisions on behalf of a someone without capacity, in relation to their health and welfare. This might include decisions relating to the person's daily routine, for example washing, dressing, eating; medical care/ treatment; moving into a residential care or where the person should live; complaints about care and treatment of the person; or life-sustaining treatment. Under this type of LPA, decisions can only be made for a person once they lose mental capacity.

#### **7. If you have any comments about the proposal to introduce a mechanism for Lasting Power of Attorney, you can provide them here:**



### **Deputyship**

It is proposed that if an individual loses the ability to manage their own affairs and does not have either a valid LPA or EPA, then it may be necessary to appoint a Deputy to make ongoing decisions for a person who lacks mental capacity. It is proposed that two types of Deputy Orders will be introduced - the Property and Financial Affairs Deputy, and the Health and Welfare Deputy.

A Deputy would be appointed by the court, and must be a person who is at least 18 years of age and be capable of making decisions on behalf of a person who lacks capacity. A Deputy can be a close relative, friend, a solicitor or a government official.

**8. If you have any comments about the proposal to introduce a mechanism to appoint Deputies, you can provide them here:**

### **Independent Mental Capacity Advocates**

It is proposed that the Social Services Department can make arrangements to enable independent mental capacity advocates to be available to represent and support certain specified persons who lack mental capacity.

**9. If you have any comments about the proposal to introduce Independent Mental Capacity Advocates, you can provide them here:**



**Advance Decision to Refuse Treatment (ADRT)**

It is proposed that the MCO will introduce the ability for people to make an Advance Decision to Refuse Treatment (ADRT). An ADRT is a legally binding decision that allows a person aged 18 and above, while still having capacity, to refuse specific medical treatment for a time in the future when they may lack capacity to consent to refuse the treatment.

**10. If you have any comments about the proposal to introduce a mechanism to enable someone to provide an Advance Decision to Refuse Treatment, you can provide them here:**

**Excluded Decisions**

It is proposed that certain decisions relating to voting and family relationships will be excluded from being made on behalf of a person. These include voting at an election for any public office, or at a referendum; consenting to marriage or a civil partnership; consenting to have sexual relations; consenting to a decree of divorce being granted or a dissolution order being made in relation to a civil partnership.

**11. If you have any comments about the proposal to introduce a mechanism to exclude certain decisions being made on behalf of someone else, you can provide them here:**





**12. In general, how satisfied are you with the proposed approaches for how a person can plan for decision-making, should they lose capacity in the future?**

- Very satisfied    Satisfied    Neither satisfied nor dissatisfied    Dissatisfied    Very dissatisfied

**13. If you have any concerns about the proposed mechanisms, or if you would like to expand on your answer, you can provide comments here:**



### **SECTION 3 – PLEASE READ THE SUPPORTING DOCUMENTS FOR MORE DETAILED INFORMATION**

**This section describes the legal mechanisms contained within the MCO including:**

- **Court of Protection**
- **Codes of Practice**
- **Office of the Public Guardian**
- **Offences and Penalties**

#### **Court of Protection**

It is proposed to establish a Court of Protection - a specialised court that would sit under the Supreme Court. The Court of Protection would protect people who lack mental capacity through the following:

- deciding whether a person has the mental capacity to make a particular decision that will affect that person
- appointing Deputies to make ongoing decisions for people who lack mental capacity
- removing Deputies or Attorneys who have not carried or are not able to carry out their role
- giving certain people permission to make decisions on behalf of someone else who lacks mental capacity
- handling urgent or emergency applications where a decision must be made on behalf of someone else without delay
- making decisions about registration of an Enduring Power of Attorney (EPA)
- considering the validity and/or any objections to the registration of EPAs and LPAs
- considering applications to make statutory wills or gifts
- deciding whether an advance decision is valid, and
- making decisions about when a person can be deprived of their liberty under the legislation.

**14. If you have any comments about the proposal to establish a Court of Protection, you can provide them here:**



### **Code of Practice**

A Code of Practice will be drafted alongside the legislation. This would provide practical guidance explaining how the MCO operates on a day-to-day basis, and would provide examples of best practice for carers and practitioners.

**15. If you have any comments about the proposal to introduce a Code of Practice for carers and practitioners, you can provide them here:**

### **Office of the Public Guardian (OPG)**

It is proposed to establish the Office of the Public Guardian (OPG) to carry out the legal functions of the MCO. The OPG would help people in the Falkland Islands to stay in control of decisions about their health and finance, and would make important decisions for others who cannot decide for themselves. The OPG would do this by:

- helping people plan for someone to make decisions for them, should they become unable to do so because they do not have mental capacity
- supporting people to make decisions for those that do not have the ability to decide for themselves.

**16. If you have any comments about the proposal to establish an Office of the Public Guardian, you can provide them here:**



### **Offences and Penalties**

The proposed MCO legislation will further outline the offences and penalties that apply in instances where people who are given powers under that legislation to care for, or make decisions on behalf of, people who lack capacity; and are found to have mistreated and/or neglected the person who lacks capacity. It is proposed that on conviction, the person found guilty would be sentenced to imprisonment for a term not exceeding 5 years, or a fine, or both.

**17. If you have any comments about offences and penalties under the MCO, you can provide them here:**

**18. In general, how satisfied are you with the proposed legal mechanisms under the MCO, that are described above?**

- Very satisfied    Satisfied    Neither satisfied nor dissatisfied    Dissatisfied    Very dissatisfied

**19. If you have any concerns about the proposed mechanisms, or if you would like to expand on your answer, you can provide comments here:**



#### **SECTION 4 – PLEASE READ THE SUPPORTING DOCUMENTS FOR MORE DETAILED INFORMATION**

**This section covers deprivation of liberty, including the implementation of Deprivation of Liberty Safeguards (DoLS).**

##### **Deprivation of Liberty**

Deprivation of liberty is a very serious matter and should not happen unless absolutely necessary, and in the best interest of the person concerned. The proposed legislation would bring the Deprivation of Liberty Policy and Safeguards into law, thus preventing unlawful deprivation of liberty from occurring.

When a person who lacks capacity to make decisions is being cared for or is receiving treatment, there might be instances where there is a need to place restrictions on that person to protect them from harm. This may amount to deprivation of liberty, and it is proposed that it would apply in the following circumstances:

- the person is subject to a high level of supervision, and is not free to leave the premises
- frequent use of sedation/medication to control behaviour of a person
- regular use of physical restraint to control the behaviour of a person
- the person concerned objects verbally or physically to the restriction and/or restraint
- objections from family and/or friends to the person's restriction or restraint
- the person is confined to a particular part of the establishment in which they are being cared for, or
- possible challenge to the restriction and restraint being proposed to the Court of Protection or a letter of complaint in relation to the person's restriction or restraint.

**20. If you have any comments about the proposals in relation to deprivation of liberty, you can provide them here:**



### **Deprivation of Liberty Safeguards (DoLS)**

The proposed legislation will ensure that any decision to deprive someone of their liberty, where the person lacks capacity to consent, is only made following a defined process and in consultation with specific authorities.

DoLS would not apply if the person was detained under the Mental Health Ordinance 2010.

Deprivation of liberty is distinct from any detention under the Mental Health Ordinance, because that detention applies to the care and treatment of a person with a mental disorder.

It is proposed that two types of DoLS authorisations will be introduced:

#### **1. Urgent authorisation**

An Urgent DoLS authorisation can be used if a person urgently needs to be deprived of their liberty before they have had a full assessment. It would last up to 7 days and would initially be granted by the hospital or care home where the person is being cared for. If needed, urgent authorisations could be extended for a further 7 days. When using an urgent authorisation, a request for a standard authorisation should also be made. An urgent authorisation should only be made when there is a reasonable belief that a standard authorisation would be granted.

#### **2. Standard authorisation**

In all other circumstances, a standard DoLS authorisation should be requested. Social Services in collaboration with the Emotional Wellbeing Service then has 21 days to carry out assessments to ensure that the deprivation of liberty is appropriate. Standard authorisations should be reviewed regularly and can last up to 12 months.

For both the standard and urgent authorisations the assessors will consider whether the following conditions are met:

- whether the person has reached 18 years of age
- whether the person has a mental disorder recognised under the Mental Health Ordinance
- whether the person lacks mental capacity in relation to their being in a hospital or care home
- whether the restrictions will deprive the person of their liberty
- whether it is a proportionate response necessary to prevent harm to the person
- whether the person meets the eligibility requirements to be deprived of their liberty
- whether there is an advance decision to refuse treatment
- whether the person who holds an LPA for Health and Welfare agrees with a DoLS authorisation



**21. If you have any comments about the proposals in relation to deprivation of liberty safeguards, you can provide them here:**

**22. In general, how satisfied are you with how deprivation of liberty, and deprivation of liberty safeguards, are dealt with under the MCO?**

- Very satisfied    Satisfied    Neither satisfied nor dissatisfied    Dissatisfied    Very dissatisfied

**23. If you would like to expand on your answer, you can provide comments here:**



## INFORMATION ABOUT YOU

### 24. Please select the statement below that applies to you:

- I'm responding to this survey as a member of the public
- I'm responding to this survey as a family member of someone for whom the legislation may be Relevant now or in the future
- I'm responding to this survey as a professional whose role may involve working with people who may lack capacity to make some decisions
- Other, please specify:

### 25. How long have you lived in the Falkland Islands?

- Less than 1 year                       11 – 20 years
- 1 – 5 years                                 More than 20 years
- 6 – 10 years

### 26. Where do you spend most of your time living?

- Stanley                                       An outer island
- East Falkland                               MPC
- West Falkland

Other, please specify: \_\_\_\_\_

### 27. What age group are you?

- 16 – 18                                       36 – 45                                       Over 65
- 19 – 25                                       46 – 55
- 26 – 35                                       56 – 65

**Thank you for taking part in this consultation.**

If you are happy to be contacted in relation to your responses,  
please provide your contact details below:

Name: \_\_\_\_\_

Email address: \_\_\_\_\_

Phone number: \_\_\_\_\_