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Dear John

Select Committee on the Mental Capacity Act 2005

Thank you for your letter of 9 June 2015 requesting a written update on the status of the Mental Capacity Act (MCA) Committee's recommendations. I have set out below an update on the 3 specific points you raise in your letter and enclose a table with further details of the progress made across the breadth of recommendations.

We have asked the Law Commission to conduct a fundamental review of the legislation underpinning Deprivation of Liberty Safeguarding (DoLS). On 7 July, the Law Commission published its initial proposals for the future of the system for consultation. It is vital that all those involved in and affected by DoLS contribute their views. We have agreed with the Law Commission for its work to be accelerated so that by the end of 2016 a detailed policy proposal and draft Bill will be finalised.

The recruitment of the Chair of the new national forum is underway and we hope for the successful candidate to be appointed shortly after the summer recess. The Chair will work with officials to agree the membership and composition of the forum, which we propose will meet for the first time in the autumn.

The mechanics of the new governance regime, of which the forum is a part of, will centre on stakeholder engagement. This is not only beneficial for raising awareness but key to the effective implementation of the Act. The governance of the MCA will include an implementation group which together will subsume a number of existing stakeholder or steering groups. The forum will not only bring together insights from a range of stakeholders, which will facilitate the monitoring of the implementation of the Act, it will also act as a key advocate in driving awareness and implementation forward. The MCA Implementation Group will provide Government departments and its arm length bodies the medium for coordinating the delivery of objectives.

I hope members will welcome this update and continued efforts to implement the recommendations and promote the principles of the Act. A copy of this letter will be placed in the library.

My ever

Yours

Edward

EDWARD FAULKS

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	Recommendation	Lead	Accept/ reject/ non-substantive (NS)	Action taken
1	In the first instance we recommend that the Government address as a matter of urgency the issue of low awareness among those affected, their families and carers, professionals and the wider public. (paragraph 109)	DH/ MoJ	Accept	<p>The MoJ ran an awareness campaign 'Choice not Chance' which focused on Lasting Powers of Attorneys (LPAs).</p> <p>A national MCA event is planned for late 2015.</p> <p>DH officials continue to liaise with stakeholders, such as NHS England, Association of Directors of Adult Social Services (ADASS), and the Care Provider's Alliance. The Department has launched a dedicated Twitter feed where MCA updates are regularly posted.</p> <p>DH has worked with local Health Watch England to engage the public – holding a specific event to discuss the importance of the MCA. We supported an MCA event hosted by the Chief Social Worker for Adults which brought together social workers with other professions to examine challenges of the MCA implementation.</p> <p>The Government has produced pocket-sized 'MCA Rights Cards' detailing the key components of the MCA. This is available for download from the MCA Directory http://www.scie.org.uk/mca-directory/files/2902597-DH-Z-Card-v1_0A.pdf</p>
2	We recommend the Government consider urgently the need for assessing usage of the core principles across the range of decisions affecting people lacking capacity, including in sectors such as banking and policing. (paragraph 110)	DH/ MoJ	Accept	<p>Key sources of MCA monitoring of the use of core principles include:</p> <ul style="list-style-type: none"> - Care Quality Commission (CQC) reports on individual providers, annual CQC report on Deprivation of Liberty Safeguards (DoLS) - Annual Independent Mental Capacity Advocates (IMCA) report. Most recently published in March 2015 and revealing an upward trend in number of IMCA referrals - Data from Health and Social Care Information Centre on DoLS - Applications and orders made under the MCA monitored by Her

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				Majesty's Courts and Tribunals Service Both departments in continuous communication with key partners across the country.
3	We recommend that overall responsibility for implementation of the Mental Capacity Act be given to a single independent body. This does not remove ultimate accountability for its successful implementation from Ministers, but it would locate within a single independent body the responsibility for oversight, coordination and monitoring of implementation activity across sectors, which is currently lacking. This new responsibility could be located within a new or an existing body. The new independent body would make an annual report to Parliament on the progress of its activities. (paragraph 114)	MoJ	Partially accept	DH and MoJ ministers announced in November the intention to create a National Mental Capacity Forum. Recruitment of an independent Chair is underway with the view of holding the forum's inaugural meeting in the Autumn.
4	DH MCA Steering Group be tasked with considering in detail the composition and structure of the independent oversight body, and where this responsibility would best be located.	DH	Partially accept	The MCA Steering Group and the Ministry of Justice's MCA Strategic Group have played a key role in co-ordinating our activities over the last year. We will be merging these groups in to the MCA Implementation Group, to build an integrated programme of work greater than the sum of its parts.
5	We recommend that the standards against which the CQC inspects should explicitly incorporate compliance with the Mental Capacity Act, as a core requirement that must be met by all health and care providers. Meeting the requirements of the empowering ethos of the Act, and especially in terms of actively enabling	DH	Accept	The CQC has significantly raised the profile of the MCA in its inspection regime. The MCA is now part of a "Key Line of Inquiry" during CQC inspections. It is clear looking through the first new wave of inspection reports on social care providers (since CQC's new regime took force) that MCA compliance is now a major feature of the reporting framework. In addition:

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	supported decision-making, must be given equal status with the appropriate use of the deprivation of liberty safeguards, or their replacement provisions.			<ul style="list-style-type: none"> - All new CQC staff have been given MCA awareness training as part of their induction. - A new training programme on the MCA has been developed and is currently being delivered to all existing CQC inspectors. - CQC have provided advanced training to 100 inspectors who will become "MCA Leads" to deliver support to other inspectors. - CQC have updated their website materials, designed an e-learning package for staff and established a dedicated MCA policy team.
6	We recommend the Government work with professional regulators and the medical Royal Colleges to ensure that the Act is given a higher profile. This work should emphasise the empowering ethos of the Act, and the best interests process as set out in section 4 of the Act	DH	Accept	<p>The Academy of Medical Royal Colleges has instigated a new working group comprising representatives from other Royal Colleges. This group will be working to ensure all members on-line resources contain basic MCA information and sign-post to the more comprehensive materials available on the MCA Directory.</p> <p>Health Education England, in partnership with the Academy of Medical Royal Colleges, has been successful in making the MCA is part of the Foundation Programme Curriculum for doctors.</p>
7	We recommend that the GMC: ensure that there is leadership in psychiatry within all medical schools in order to give a higher profile to mental health; place proper emphasis on the Mental Capacity Act in its publication 'Good Medical Practice'; enhance training on the Mental Capacity Act in all post-graduate education, especially for GPs.	DH	Non-substantive	The GMC is independent of Government and so we cannot respond on their behalf. The Government is clear that the MCA is a vital part of GPs drive to provide choice and patient-centred care.
8	The proposed fourth year of training for GPs provides an opportunity to embed and enhance understanding of the Mental	DH	Accept	The Royal College of General Practitioners has been doing good work in this area. MCA training materials have been developed for GPs and practice staff and consideration is now being given for how this is

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	Capacity Act with this group of practitioners. We recommend that the Government supports the proposal in light of the vital role which GPs play in providing health care in the community.			rolled out to a wide audience.
9	We recommend that the Government, and subsequently the independent oversight body, work with the Association of Directors of Adult Social Services and NHS England to encourage wider use of commissioning as a tool for ensuring compliance.	DH	Accept	NHS England has delivered a series of nationwide "Commissioning for Compliance" workshops to bring NHS professionals and commissioners together to understand how commissioning practices can embed the MCA. The Government is pleased that NHS England has amended the NHS Standard Contract to include reference to the MCA. Every Clinical Commissioning Group (CCG) is required to have a designated MCA lead who can help support the commissioning process to ensure its compliance with the MCA.
10	We recommend that the 'refresh' of the NHS Mandate in 2014 include requirements explicitly connected to the implementation of the Mental Capacity Act, based on evidence of good practice gathered from Clinical Commissioning Groups.	DH	Accept	The Chief Social Worker for Adults has launched a new 'Knowledge and Skills Statement' and the MCA is a core part of this statement.
11	We further recommend that NHS England and ADASS take steps to ensure that the empowering ethos of the Mental Capacity Act is understood and given visibility within commissioning, even where this may appear to conflict with the safeguarding agenda.	DH	Accept	
12	We recommend that, in the first instance, the Mental Capacity Act Steering Group give consideration to how the specific information needs of the different groups	DH	Accept	The Government commissioned the Social Care Institute of Excellence (SCIE) to perform a national call for MCA materials. The new "MCA Directory" was launched on-line on 26 February. It contains all manner of MCA materials – toolkits, guidance, leaflets – s

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	affected by the Act can best be met.			
13	We recommend that the Government undertake a comprehensive review of the DoLS legislation with a view to replacing it with provisions that are compatible in style and ethos with the Mental Capacity Act. The model of widespread consultation which preceded the Mental Capacity Act itself should be followed, with adequate time allowed for effective Parliamentary scrutiny.	DH	Accept	<p>The Supreme Court judgment in Cheshire West has meant that significantly more individuals are now considered to be deprived of their liberty than under previous practice. As a result use of the safeguards is now considerably greater than when the House of Lords Select Committee looked at this matter. There has been a significant large rise in the number of DoLS applications received since the judgement – 13,000 in 2013/14 and over 113,000 in 2014/15.</p> <p>The Government has initiated a fundamental review of the DoLS legislation by the Law Commission. They published their detailed proposals on 7th July 2015 for a four month consultation period. The new scheme they propose covers community settings (e.g. supported living) as well as care homes and hospitals. We have agreed an acceleration to this work so that the Law Commission's work will complete by end 2016 when they shall present the Government with draft legislation.</p> <p>In the short term, we have taken steps to simplify the existing process as much as possible.</p> <ul style="list-style-type: none"> - We funded a review of the existing DoLS forms by ADASS which resulted in a reduction in the number of forms from 32 to 13. This will reduce the bureaucratic burden on providers and LAs. - We requested comprehensive guidance as to what constitutes a deprivation of liberty from the Law Society which was published in March 2015.
14	We further recommend that the independent body with responsibility for oversight and coordination of implementation of the Mental Capacity Act develop a comprehensive implementation action plan to accompany new legislation, in consultation with professionals, individuals, families and unpaid carers.	MoJ/DH	Accept	
15	We recommend that replacement legislative provisions make a clear link to the principles of the Mental Capacity Act to ensure consistency with the empowering ethos of the Act as a whole.	MoJ/DH	Accept	

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16	We recommend that replacement legislative provisions and associated forms be drafted in clear and simple terms, to ensure they can be understood and applied effectively by professionals, individuals, families and carers.	MoJ/DH	Accept	<ul style="list-style-type: none"> - We have also issued DoLS guidance notes that have been received by the field - A new streamlined court process together with new court forms for DoLS cases were introduced in November by the Court of Protection. - On the 16 June 2015 the Court of Appeal issued their judgement on the Re:X judgement (which set out the basis for the Re:X process). The appeal was dismissed on grounds of jurisdiction but included obiter observations regarding the representation of P (the person lacking capacity). We are currently reviewing the current streamlined process in light of the Court of Appeal's decision.
17	Better understanding of the purpose behind the safeguards is urgently required, and we recommend that achieving this can be made a priority by the independent oversight body.	DH	Accept	
18	We recommend that the Government consider how the role of the Relevant Person's Representative could be strengthened in replacement legislative provisions to provide an effective safeguard.	DH	Accept	
19	We recommend that effective oversight of any future supervisory body function be provided for in the replacement provisions for the Deprivation of Liberty Safeguards.	DH	Accept	
20	We recommend that replacement legislative provisions extend to those accommodated in supported living arrangements	DH	Accept	

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21	We consider that a 'new Bournemouth gap' has been inadvertently created by the attempt to prevent overlap with the Mental Health Act 1983. We recommend that replacement legislative provisions close this gap	DH	We do not consider that there is a 'new Bournemouth gap'	If necessary the inherent jurisdiction of the High Court could provide any further authorisation that may be required to deprive a patient detained under the Mental Health Act of their liberty for medical treatment unrelated to the patient's mental disorder. Given the small number of cases in which this will arrive, we do not propose to introduce legislative amendments. We have, however, included a chapter in the updated Mental Health code of practice that explained the interaction between MHA and MCA (including DoLS).
22	We recommend that local authorities use their discretionary powers to appoint IMCAs more widely than is currently the case. To support this, we recommend the Government issue guidance to local authorities and health service commissioners about the benefits of wider and earlier use of IMCA services. We believe the costs of greater IMCA involvement should be balanced against the resources required in lengthy disputes or ultimately in legislation	DH	Accept	IMCAs continue to provide support across the country for those individuals who may lack capacity. The Department of Health's annual report of the IMCA service made a number of recommendations including on the need to raise awareness of the role of IMCAs among clinicians and the need for clear policy on when to refer individuals, party to a safeguarding investigation, to an IMCA. The report also provided a continuing professional development framework to help IMCAs to gain the skills necessary to perform their role to a high standard.
23	Given the importance of the role of IMCAs in the lives of vulnerable adults we believe that the role requires further professionalization to ensure consistency of service. This should be achieved through national standards and mandatory training in the Mental Capacity Act and the role of the IMCA within that. We recommend that responsibility for such standards and training be undertaken by the independent oversight body which we recommend in	DH	Accept	

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	chapter 4, enabling peer support and consistency between IMCA services.			
24	We recommend that the Government consider the establishment of a form of self-referral for IMCA services to prevent the damaging delay that occurred in the case of Steven Neary.	DH	Accept	
25	<p>Recommendation 25: We recommend that the Government, working with the independent oversight body recommended in chapter 4, and the Office of the Public Guardian:</p> <ul style="list-style-type: none"> • address the poor levels of understanding of LPAs among professional groups, especially in the health and social care sector, paying specific attention to the status of Lasting Powers of Attorney in decision-making; • consider how best to ensure that information concerning registered Lasting Powers of Attorney can be shared between public bodies, and where appropriate with private sector bodies such as banks and utilities; • issue guidance to local authorities that their new responsibilities for provision of information in relation to care contained in the Care Bill should include information on 	MoJ	Accept	<p>The Office of the Public Guardian (OPG) continues to work with groups in the health and social care sector to raise levels of understanding of Lasting Power of Attorneys (LPAs). It is working closely with the financial services sector to help ensure that customers with LPAs receive the service they should. This includes sharing information and customer feedback, developing guidance and education materials and working to encourage consistency when operating accounts managed by third parties.</p> <p>OPG has conducted quantitative research to understand where customers use LPAs, and Court Orders measuring their experience. OPG is using this information to target direct engagement with care homes, NHS, and CQC as examples</p> <p>OPG has developed an e-learning for banks which was published on the Social Care Institute for Excellence website in early 2015. Working with partner organisations, OPG is now developing a suite of e-learning packages to educate front line practitioners on how power of attorney and deputyship works. This will include the health and social care sector.</p> <p>It has worked with the Alzheimer's Society to produce guidance '<i>Accessing and Sharing Information</i>' -aimed at carers which was launched in February 2015 to clarify data sharing legislation</p>

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	<p>Lasting Powers of Attorney;</p> <ul style="list-style-type: none"> consider how attorneys and deputies faced with non-compliance by public bodies or private companies can be supported in the absence of specific sanctions; review the apparent anomalies in the current arrangements with regard to successive replacement attorneys, and the status in England of Scottish Powers of Attorney. (paragraph 192) 			<p>OPG has piloted initiatives across local authorities and safeguarding boards to promote Lasting Powers of Attorney (LPA). This concept is referred to as "LPA Champions".</p> <p>OPG has contributed to the Department of Health led guidance for facilitating access to independent information and advice, aimed at supporting local authorities to meet their Care Act responsibilities.</p> <p>OPG is progressing with the development of an online register that will make responding easier for members of the public and promote safeguarding by providing more direct access for trusted professionals. This is something that must be developed taking all proper caution to ensure data is protected.</p> <p>OPG continue to address the individual issues experienced by customers with public bodies or private companies.</p> <p>We have scoped out the work to be undertaken in relation to the recognition of Scottish Powers of Attorney and have produced advice for ministers.</p>
27	We recommend the Government consider increasing the staff complement of authorised officers, following consultation with the Court of Protection, to achieve a significant reduction in the time taken to deal with non-contentious property and financial affairs cases. (paragraph 210)	MoJ	Accept	As reported in the Government response, HM Courts and Tribunal Service is committed to increasing the staff complement of the Court of Protection. One full time and one part time Authorised Court Officer have been recruited. Eleven additional court staff have also been recruited and are now in post.
28	We also recommend that the Government consider as a matter of urgency the updating of the Rules of the Court, as recommended by the ad hoc Rules Committee and, as necessary, in light of subsequent changes. (paragraph 211)	MoJ	Accept	A Court of Protection Rule Committee has been established and a first tranche of amended Court of Protection rules have come into force on 1 July 2015. The Secretary of State has agreed for the work of the Ad-hoc Court of Protection Rule Committee to continue.
29	We recommend that the Government	MoJ	If we can, accept	The Court of Protection pages on Gov.uk have been revamped so that

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	consider enabling the Court to address the needs of its audiences either by giving it greater control of the information provided on www.gov.uk or by enabling the Court to have a dedicated website. (paragraph 219)			information about the court is more readily accessible for users. This work was led by officials in the Court of Protection, with input from MoJ officials.
30	We are persuaded that mediation would be beneficial in many more cases prior to initiating proceedings in the Court of Protection. We recommend that consideration be given to making mediation a pre-requisite for launching proceedings, especially in cases concerning property and financial affairs where the costs fall to P. (paragraph 232)	MoJ	Accept	While we do not agree that mediation should be a pre- requisite in Court of Protection cases as this should be approached voluntarily by the parties in order to be effective and in other instances could delay important cases reaching court, we have considered the types of cases where mediation may be of benefit. Cases involving disagreement between family members of 'P' (the person lacking capacity), (usually involving one or more attorneys of a Lasting Power of Attorney, (LPA), or a Court appointed Deputy) over a decision required for P's best interests may be suitable for mediation. Funding for any mediation service will be an issue. A report is being produced which will be published shortly.
31	We recommend that the Government, and in future the independent oversight body, provide clearer guidance to public authorities regarding which disputes under the Act must be proactively referred to the Court by local authorities. This should include situations in which it is the person who is alleged to lack capacity who disagrees with the proposed course of action. Efforts must be made to disseminate this guidance to families and carers as well as to local authorities. (paragraph 237)	MoJ	Accept	This will be considered as part of the second tranche of work undertaken by the Court of Protection Rule Committee in amending rules and practice directions, which has now commenced. Rule changes in the second tranche are likely to require consultation.
32	We note the pressures on legal aid, but we are concerned by the inconsistent provision of non-means tested legal aid for cases	MoJ	Partially accept	Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, civil legal aid is available in relation to matters arising under the Mental Capacity Act 2005. This includes funding for legal

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	concerning a deprivation of liberty, including those where there is a dispute over whether a deprivation is taking place. We cannot see a justification for such inconsistency and we recommend that the gap in protection that it creates be remedied as a matter of urgency. (paragraph 249)			representation in proceedings in the Court of Protection under section 21A of the 2005 Act. Legal aid is available without a means test in some types of case under the Mental Capacity Act and with a means test in other types of case. A merits test also applies in all cases. We are carefully considering the operational and financial impacts of both the <i>Cheshire West</i> ruling and the judgment in <i>Re X and ors</i> before taking any decisions in relation to the legal aid means test in these type of cases.
33	We recommend that the Government reconsider the provision of resources to the Official Solicitor, with a view to determining whether some cases merit the same unconditional support as is currently afforded to medical treatment decisions. (paragraph 251)	MoJ	Accept	Frequent discussions continue to be held with the Official Solicitor to discuss resource provision.
34	We further recommend that the Government review the policy underlying the availability of legal aid for those who lack the mental capacity to litigate and therefore cannot represent themselves. For such people, denial of legal aid may result in having no access to Court. No-one who is found to lack the mental capacity to litigate should be denied access to Court solely because they do not have the means to pay for representation. (paragraph 252)	MoJ	Accept in principle, but resource implications	Since the production of the Committee's report a number of issues have arisen in relation to those who lack the capacity to litigate and who should represent them. This issue not only affects Court of Protection cases, but also cases in the Family Court. The Government agreed an exceptional case funding (ECF) scheme to provide an avenue for funding those cases that would normally be out of scope for funding, in order to ensure we meet our obligations in relation to legal aid under ECHR as well as those rights to legal aid that are directly enforceable under EU law. We recognise that the capability of the applicant to present their case effectively – would have particular relevance to children and those lacking capacity under the Mental Capacity Act 2005. We were

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				concerned to ensure that caseworkers properly considered the particular circumstances of their situation and, to that end, included two specific sections in the legal aid Guidance (paragraphs 24 and 25) that addressed some of the questions that would be of particular relevance when assessing the overarching question.
35	We recommend that the Government initiate a review of whether the offence in section 44 of the Act meets the test of legal certainty; and if it does not, to bring forward new legislative provisions. The results of this review should be published within 12 months of publication of our Report. (paragraph 309)	MoJ	Accept	MoJ has worked with the police, CPS and others to consider the use of the s44 offence, and to identify any barriers to its use. This work has concluded that the offence does meet the test of legal certainty, and figures published in 2014 show an increase in prosecutions brought under the Act. A report of this review will be published shortly.
36	We recommend as a matter of urgency that the Government take steps to establish regular and dedicated monitoring of implementation of the Act, and that this should include all the sectors across which the Act applies. (paragraph 35)	DH/ MoJ	Accept	This continues to be a challenge. Organisations concerned with implementation of the MCA such as CQC and the Local Government Association have implemented reporting and inspection systems which will assist with monitoring. This coupled with the forthcoming formation of the National Mental Capacity Forum will assist Government in monitoring implementation of the Act.
37	We recommend that the independent body with overall responsibility for implementation of the Act, be given responsibility for ensuring such monitoring takes place. (paragraph 36)	DH/ MoJ	NS	
38	We recommend that the Government introduce a robust method for measuring public and professional attitudes to issues of capacity, in order to be able effectively to measure any change in the prevailing culture. Ideally, benchmarking of this sort would have taken place prior to	DH/ MoJ	Accept in part	

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	the implementation of the Act, but there would still be benefits in starting such activity now. This would be a key task for the independent body to be given overall responsibility for the Act. (paragraph 39)			
39	We recommend that, no more than 12 months after publication of this Report, the Liaison Committee seek evidence from the Government on the actions they have taken in response to the two key recommendations made in the summary of this report. (paragraph 22)	DH/ MoJ	Accept	The Government's letter updating on these key recommendations accompanies this table.