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Liberty Protection Safeguards: full update

30 April 2021

The Liberty Protection Safeguards (LPS) implementation date has been moved to April 2022, but a lot will need to happen before the Deprivation of Liberty Safeguards (DoLS) are swept away. We now have the updated Impact Assessment, but watch out for the consultation on the draft Code of Practice and the draft Regulations, all coming in 2021. We will be producing more detail and training over the coming months, once more detail is available.

By way of reminder LPS will be used to authorise the proportionate and necessary deprivation of liberty for people aged 16 and above (whereas DOLS only apply to those aged 18 or over) who lack the mental capacity to consent to their care arrangements.

The aim of the new scheme is to spread responsibility across hospitals, Clinical Commissioning Groups (CCGs) and social care so as to share the administrative burden, whilst also building the LPS process into the care planning procedure itself. There are proposals to use similar but simplified assessments to the current system but with independent authorisation (by an Approved Mental Capacity Practitioner) largely limited to those cases where P objects to the arrangements (whereas currently a Best Interest Assessor is involved in all cases). Some concerns have been raised that the LPS appear to weaken important safeguards for P and are a pale imitation of the Law Commission proposals. Whatever the reality, implementation will come around quickly and planning will be key.

This article is not intended to be a detailed summary of the history and proposals but rather summarises key updates we have received from DHSC in their fact sheets. These fact sheets can be found here.

Summary of Changes

LPS will be extended to those cover those aged 16 or over, those residing in domestic settings and in supported living arrangements. We will also see the introduction of Approved Mental Capacity Practitioners (AMCP) and urgent authorisations abolished.

The DHSC updates also provide the following details:

- **Making a referral** – a 'responsible body' will be the organisation authorising the arrangements which will CCG's and NHS trusts as well as Local Authorities. However, anyone will be able to make a referral where they consider that authorisation may be needed. This can be made by email or using official forms.
- **Representation** – after a referral has been made, the responsible body will be required to take steps to appoint an IMCA unless there is a family member or someone appropriate to represent the person. LPS will involve an explicit duty to consult those caring for the person and an opportunity for a family member or someone else close to the person, to represent them as an 'appropriate person'.
- **Assessments** – three assessments will form the basis of authorising an LPS:
- a capacity assessment
- a medical assessment to determine where a person has a mental disorder
- a "necessary and proportionate" assessment to confirm the safeguards are necessary to prevent harm to the person and proportionate to the likelihood and seriousness of that harm.

The DHSC have suggested 'it will be easier to use existing valid assessments, where reasonable and appropriate' – we expect the necessary and proportionate assessment will need to be recent, however.

- **Pre-authorisation review** – following these three assessments, a review will be required to be completed by someone not involved in the day to day care of P (but who can work at the same organisation).

LPS will also require an approved mental capacity professional (AMCP) to consider the case if there is reason to believe a person is objecting to the arrangements or the care is in an independent hospital. Responsible bodies can also refer to an AMCP where appropriate.

- **Authorisation** – after this review has been carried out and the deprivation of liberty of P has been found to meet the required criteria, the responsible body will be able to authorise the deprivation of liberty under the safeguards for a period of up to 12 months, after which it will be possible to renew the period of detention for a further 12 months. Thereafter, it will be possible to renew this for a further period of up to 36 months, if appropriate. The Code of Practice will provide further detail on the appropriateness or otherwise of renewals.
- **Copy of authorisation** – if an LPS is granted, P, the IMCA or appropriate person should be provided with a copy within 72 hours.
- **Reviews** – the responsible body will be required to specify and carry out ongoing regular reviews. If the person deprived of their liberty, their family or an IMCA wish to challenge the authorisation, they will be able to apply to the Court of Protection as now (s.21ZA).

Whilst not included in the fact sheets, LPS also allow for portability and variability, so that where appropriate the authorisation will follow the person rather than being specific to their current location. The rather controversial elements of care home manager involvement have also been dropped for April 2022 implementation.

Further fact sheets are expected, and a forthcoming draft Code of Practice and Regulations will offer more detailed information on how LPS will operate in practice. We will be seeking views of all around this time and should you wish to share your views on the plans or require specific training on the latest developments, please get in touch.

The top tier Court of Protection team regularly advise public and independent sector health and social care clients in all matters relating to the Mental Capacity Act, DoLS and have a particular expertise in the interplay with the Mental Health Act.

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