Browne Jacobson

Liberty Protection Safeguards – It's out: MCA LPS Consultation

Following on from the first webinar in the Liberty Protection Safeguards ("LPS") series delivered by Mark Barnett and Chris Stark, the key points below from the webinar are summarised below.

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Following on from the first webinar in the Liberty Protection Safeguards ("LPS") series delivered by Mark Barnett and Chris Stark, the key points below from the webinar are summarised below. Two follow up webinars are also coming up on 24 May 2022 & 23 June 2022**.**

The Liberty Protection Safeguards were introduced in the Mental Capacity (Amendment) Act 2019 and will replace the current Deprivation of Liberty Safeguards (DoLS) system. The aim of the LPS framework is to deliver improved outcomes for people who are or who need to be deprived of their liberty. The new Safeguards have been designed to put the rights and wishes of those people at the centre of all decision-making on deprivation of liberty. They will apply to people aged 16 and above who are or who need to be deprived of their liberty in order to enable their care or treatment and lack the mental capacity to consent to their arrangements.

The LPS were originally due to be implemented in October 2020. This was put back to April 2022 due to the pandemic. The government have since announced a further delay and we are awaiting confirmation of the final commencement date. It is our understanding that the LPS will likely be implemented in October 2023, or 2024.

The Draft Code of Practice and accompanying Regulations providing a lot more of the detail have now been published for consultation and so we are a step closer to the new framework being introduced. This article summarises some of the main proposed changes and themes that the government are seeking views on.

The consultation to the proposals, giving you an opportunity to engage and shape the new LPS process, closes on **7 July 2022**. We will be putting together a response to the consultation and will be sending out a short survey to our clients to seek their views on some of the key proposals (see the link at the bottom of this article if you would like to contribute to our response).

Proposed changes to the existing chapters in The Code of Practice:

Chapter 4: How the Act defines a person lacking MCA and how this is assessed

- As a starting point, it is presumed that a person has capacity to make a decision, however, there is a duty to assess capacity where there is a "proper reason" to doubt a person's capacity.
- The first test for capacity is a person's ability to understand, retain and weigh up the relevant information.
- As a starting point you should consider the following questions (Chapter 4.12)
  - Is the person able to make the decision?
  - If they are unable, is there an impairment or disturbance in the functioning of the mind or brain? This does not need to be a formal diagnosis, but there must be a proper basis for establishing a disturbance.
  - Is the person's inability to make the decision because of the impairment?

— If fluctuating capacity is an issue, then decisions can be delayed to a time when P has capacity to make a decision. Repeated decisions can be considered with a longer-term view and proceed on the basis that the person lacks capacity if they can only make a decision about these repeated (serious) matters during limited timeframes.
— As for Executive Dysfunction the Code states that there needs to be clear evidence of a repeated mismatch in these cases and it is unlikely that a person can be deemed to lack capacity based on the conclusion of a single assessment.

Chapter 5: How to act in a person's best interests

- There has been an increased emphasis to consider the wishes and feelings of P when considering best interests. The Code also sets out that more serious decisions (including moves to long term accommodation and contact restrictions etc.) will require more detailed records of best interest decisions.

Chapter 6: How the Act protects people who provide care and treatment to someone lacking capacity to consent

- Outlines the protections available when someone reasonably believes a person lacks capacity for a particular decision and does what is reasonable, proportionate and in their best interests.
- It is not possible to use the LPS to limit contact and the Court of Protection must be used in these cases.
- The Court of Protection must be involved where there is an end of life decision that is finely balanced or there is a difference of opinion. It must also be used in treatment cases where there is a serious interference with a person's human rights.

Chapter 11: The Role of Advance Decisions to Refuse Treatment ("ADRT")

- Confirms that the right to make an ADRT is only applicable to adults over 18. The draft provides additional commentary re the right to access the Court of Protection to resolve questions about capacity to make an ADRT, refuse treatment and whether an ADRT is valid and applicable.

Proposed updates to the existing chapters that now include LPS guidance in the Code:

Chapter 3: Supporting people to make decisions and keeping people at the centre

- Added emphasis on how to go about helping people to make decisions themselves, and the caution of undue influence.
- Duty to provide information to P in an accessible way with guidance at 3.26 on how to frame questions under the LPS to capture P's wishes and feelings.

Chapter 7: the role of the Court of Protection under the Act but also for LPS

- Sets out the declarations the Court of Protection can and cannot make.
- Everyone who is under arrangements amounting to a deprivation of liberty has access to the same safeguards to their Article 5 rights. Authorising the arrangements should no longer be the role of the Court of Protection, except in rare circumstances.

Chapter 10: IMCAs, including under LPS

- Confirms when to appoint an IMCA, including when there is no Appropriate Person or if P has the capacity to make the appointment and they request this. Guidance is given on what the role of the IMCA is in the assessment process and after an authorisation has been made.

Chapter 21: the parts of the Act that apply to 16-17 including LPS

- The Mental Capacity Act ("MCA") applies to most people over the age of 16 and LPS will also apply to people over the age of 16.
- Where a 16-17-year-old lacks capacity, either the MCA or the Children Act with parental responsibility can be used. Either of the avenues can be chosen, however it must be clear which one is being used.
- Confirms additionally that 16 and 17 year olds do not have an absolute right to refuse treatment and that PR cannot be used to consent to a DoL.

Chapter 22: The interface with the Mental health Act ("MHA") and the link with LPS

- Guidance is given on Guardianship at 22.11- 22.17.
- The chapter also provides updates on how to choose between the MHA or MCA, taking into account AM v SLAM [2013].

Chapter 24: Resolving disputes and how these are managed by the Court, including challenges to LPS

- The importance of the right of challenge to LPS is highlighted in this chapter. It provides information on how disputes can be resolved and how to access solicitors.

New Chapters which contain LPS Guidance in the Code:

Chapter 12: What is a deprivation of liberty?

- There is no statutory definition of a deprivation of liberty however there are 3 elements to a DOL:

1. The objective element - confined in a restricted space for a non-negligible period of time
2. Subjective element – no valid consent
3. State imputability – the state is responsible for the confinement

- Is the person under continuous / constant supervision and control and not free to leave?
  - Being 'free to leave' should not be conflated with an 'ability to leave' - just because a person is not objecting does not mean they are free to leave.
  - □ Continuous supervision and control = P not being left alone for significant periods of the day and not being allowed to make decisions about their own life.

Chapter 13: Process for Authorising arrangements

- Anyone can trigger the process for authorisation and they may need to carry out LPS assessments and reviews alongside P's main health or care and support plan process.
- The Responsible Body will need to arrange assessments and determinations on whether:
  - P has relevant mental capacity to consent to the arrangements;
  - P has a mental disorder;
  - The arrangements are necessary to prevent harm and proportionate in relation to the likelihood and seriousness of harm to the person.

Chapter 14: The Role of the Responsible Body

- There can only be one Responsible Body for any authorisation and the identification of the Responsible Body varies according to where the arrangements are being carried out. This can include an NHS Trust, a CCG or a Local Authority depending on where the arrangements are 'mainly' (for the majority of the time) taking place.
- If a referral is made to the wrong organisation, they should pass on the referral to the correct organisation (the "no wrong door" principle).

Chapter 15: The Role of the Appropriate Person

- The Appropriate person should be able to understand the LPS process and provide representation and support for P throughout the LPS process.

- It is for the Responsible Body to determine if there is a suitable Appropriate Person. If there is no-one suitable the Responsible Body must appoint an IMCA. To consider if there is a suitable Appropriate Person, the responsible Body must consider:
  - If the individual has the satisfactory skills relevant for carrying out the role;
  - If the person has any relevant experience to perform the role;
  - If P has a preference where there is more than one suitable individual; and
  - If P appears to trust and feel comfortable with the proposed Appropriate Person.
- P must consent to the individual being appointed or their appointment should be in their best interests.

Chapter 16: What are the Assessments and Determinations for the LPS

- The LPS can be renewed without further assessments if the Responsible Body is satisfied that the authorisation conditions are still met and it is that unlikely that there will be any significant change in a person's condition.
- No fewer than 2 professionals should carry out the 3 assessments and each should have an element of independence from one another.

Chapter 17: Consultation duty in the LPS

- A meaningful consultation should be had with P, and any person interested in their welfare by the Responsible Body when:
  - The assessment process of initial authorisation is being completed;
  - A variation is being considered; and
  - When an assessment is being renewed.
- Where a necessary and proportionate assessment and determination is being carried out, the Responsible Body should ask the professional carrying out the assessment and determination to also carry out the consultation.
- The consultation should be recorded, and the records should include: who was consulted, what was asked, responses to questions, if anyone was unavailable and why and the overall conclusion of P's wishes and feelings.
  - Consultation is 'an important part of the LPS process' and must be carried out during the initial authorisation and when renewal is being considered.

Chapter 18: The Role of the Approved Mental Capacity Professional ("AMCP")

- This AMCP becomes involved when P objects to a placement, an independent hospital is involved or the case is referred.
- The role of an AMCP is to:
  - Review assessments and consultation;
  - Meet with person and anyone consulted and take further action they deem necessary;
  - Advise RB whether or not the authorisation conditions are met; and
  - Carry out reviews where it then becomes clear that the person objects.

Chapter 19: What is section 4B and how is it applied

- Section 4B is used for 'urgent authorisations'. For an urgent authorisation to be considered there are 4 conditions:

1. The steps are consistent with or for purpose of giving a life-sustaining treatment or carrying out a vital act;
2. The steps are necessary (and proportionate) in order to give life-sustaining treatment or carry out a vital act;
3. The decision maker believes P lacks capacity to consent to the steps being taken;
4. A relevant decision is being sought from the court, a Responsible Boby is determining whether to authorise arrangements under the LPS, or there is an emergency.
    5. An urgent authorisation is unlawful unless it is for the purpose of giving life-saving treatment or carrying out a vital act.
    6. A vital act means any act which the individual doing it reasonably believes to be necessary to prevent a serious deterioration in the person's condition.

Chapter 20: Monitoring and reporting on the LPS

- There is a duty to monitor and report on the operation of the LPS
- In England the Relevant Body must notify:
  - The CQC for adults, and
  - Ofsted for 16-17 year olds.
- In Wales the Relevant Body must notify the Health Inspectorate Wales and Care Inspectorate Wales

We hope that the webinar and summary article have been helpful, and we encourage you to submit your views on the proposals to the consultation which closes on 7 July 2022.

Browne Jacobson LLP will be submitting a response to the consultation. If you or your organisation would like to contribute to that, or have any questions, please do not hesitate to contact Mark or Chris on the e-mail addresses set out below.

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