Liberty Protection Safeguards (LPS): update on the implementation plan

Summary
Plans and processes are now under way nationally to produce a code of practice and regulations to support LPS by spring 2020 ahead of LPS implementation in October 2020. Deprivation of liberty safeguards (DoLS) authorisations cannot be given from that date, but existing authorisations will, where appropriate, continue to their expiry date. Hence there will be no initial bulge, and the period of time running two somewhat different systems will be a short as possible. By October 2021 no DoLS authorisations will exist, and only LPS will be in use.
Training and implementation resources are being worked on by DHSC and groups of stakeholders. These will start being made available probably in early autumn, followed by a public consultation on the code of practice, with the aim of having materials, both those that are generally useful and those targeted at specific groups of stakeholders, available in spring 2020.

Background
The liberty protection safeguards (LPS) were brought into law in May by the Mental Capacity (Amendment) Act 2019. They will replace the deprivation of liberty safeguards (DoLS) as the framework to protect the rights of people aged 16 and above who need to be deprived of their liberty, in their best interests, to be given essential care or treatment, but who lack capacity to consent to the restrictive care plan that is necessary.
Human rights law, and indeed basic principles of fairness, must apply to those vulnerable people who are deprived of their liberty because they lack mental capacity to understand their needs to be kept safe by being given the care or treatment they need. LPS, like DoLS, will do this by ensuring that decisions to restrict someone's freedom are never made for staff convenience, or to punish the person, or when the proposed restrictions are not both necessary and proportionate. Again in a similar way to DoLS, LPS will enable the person, or someone acting on their behalf, to challenge any aspect of the deprivation of liberty authorisation in the Court of Protection.
LPS are designed to be less bureaucratic than DoLS, more flexible, and more focused on the happiness and well-being of the person at the heart of the process. They are in many ways simpler:

- an LPS authorisation can often travel with the person, rather than, like DoLS, being setting-specific
- it can cover travel to, or between, care and treatment settings
- it can be renewed if nothing in the person's circumstances has changed, whereas the DoLS system always requires a completely new authorisation
- after the first two annual renewals, unlike DoLS, an LPS authorisation can, again in a stable situation, be renewed for up to three years at a time
- under LPS the same system of authorisation applies to any setting, including supported living, shared lives, and people's own homes, while DoLS can only be used in care homes and hospitals
- LPS applies to users of health and care services aged from 16 upwards, whereas DoLS only applies once people reach 18.

Overview
An indicative implementation date has been set which means that the earliest date on which LPS will come into effect is 1 October 2020. At this stage we can see no reason why this date should not be met.

Transitional plans

For the first year of LPS implementation, any existing DoLS authorisations will remain in effect until their set expiry date, subject of course to any change in the person's circumstances that would mean it needs to be ended earlier. This will prevent an initial tsunami of new processes that people will not by then be entirely familiar with. No new DoLS authorisations can be given after (probably) 30 September 2020.

The rule with DoLS authorisations is that they can be granted for any period up to one year. Many are granted for shorter periods, perhaps in the expectation that the person is likely to regain capacity to make their own decisions about care or treatment, or because it is envisaged that the person is shortly likely to move, say, from a hospital to a care home.

Hence the number of DoLS authorisations in existence is likely to dwindle quite rapidly. When they end, they must be replaced using the more flexible and simpler new LPS system.

The Department of Health and Social Care (DHSC) implementation team has started workstreams concentrating on different elements of LPS, with the intention of starting fairly soon to put out initial familiarisation and briefing bulletins. These workstreams are:

- Code of practice
- Monitoring and oversight
- Transition planning
- Workforce development
- Court of Protection issues
- 16 and17 year olds (a complex area, due to the variety of possible legal frameworks that might be appropriate)

As well as the transition planning, we are involved in:

<u>code of practice development</u>: this is running in parallel to a complete refresh of the wider Mental Capacity Act (MCA) code of practice. It is envisaged that the end product will be a single code, including all the information required for the various providers, settings and agencies to implement LPS.

<u>Workforce development:</u> this will coordinate the production of a range of information, resource material and training programmes, targeted at the various stakeholders.

Indicative timescales for outputs

<u>Code of practice consultations</u>

A 'decent draft' will be produced by the end of September. This is the one for us to circulate and collect internal, confidential comments: we had thought this stage would happen earlier in the summer, but the co-production process, though well worthwhile, has caused some delays. It is likely that it will be accompanied by pro-forma asking for feedback, together with the opportunity to suggest topics that are not already covered, and/or suggestions for practical improvement.

Following this private consultation exercise, the code will be re-drafted to take account of the feedback, before going out to public consultation, probably to take place over three months from December to February.

Following further re-drafting, the code of practice must be laid in Parliament for 40 days ahead of its publication: this is because it is statutory in its remit. Assuming a publication date of, say, 1 May 2020, it will therefore probably be laid (so effectively have attained its final form) by around 23 March.

As explained above, the aspiration is, as strongly advocated by Care England in February 2019, for a single code to cover the LPS as well as the wider MCA: this unity was described by the implementation lead as an 'absolute aim'. This will help avoid a presumption, that has bedevilled DoLS, that somehow DoLS is not part of the MCA. The later implementation date – it had originally been quoted as 1 April

2020 – has lessened the rushed feeling, and it is certain that the code will benefit from a more thoughtful approach and more measured consultation.

Regulatory Impact Assessment

For some months now the DHSC has assured the sector that a new, revised impact assessment was being drafted: we took the opportunity afforded by this, to reinforce messages we had already shared with the Department about the inaccuracy of the assumptions contained in earlier versions of this document, primarily the assertions that there were no training needs for care home managers to carry out their new roles under LPS, other than a half-day 'familiarisation.' Recently, there still being no sign of this essential tool for planning and implementation, we again advocated for the new burdens on care home managers to be explicitly recognised and addressed in the forthcoming impact assessment. We now learn that (partly due to staff changes within the team) the impact assessment is expected in September and are looking for any further opportunities to ensure that it is realistic in its assumptions.

Regulations

DHSC is currently working on drafting the regulations. As with the code of practice, the aspiration is to lay these in Parliament ahead of publication in 'spring 2020.' As well as the usual, necessary regulations covering commencement and relationship with other laws, they are currently planned to cover:

- Transitional arrangements
- Criteria for who can carry out assessments and make determinations about them
- What is meant by 'prescribed connections' to a care home
- Criteria for who can carry out the new role of Approved Mental Capacity Professional (AMCP)
- Training requirements for AMCPs
- Reporting and monitoring.

Helpfully, the implementation team has professed willingness to share their early thinking, which is generally based on policy decisions or arises from the wide-ranging Parliamentary discussions on LPS.

Conclusion

It is heartening to see that, despite some staff changes, the implementation team is working towards a coherent assemblance of support, resources and training for all sectors of health and social care. In particular, their evident willingness to listen to a range of viewpoints can only be a good sign. Further information will be shared as it becomes available, as will links to all relevant training materials and other resources.

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