Liberty Protection Safeguards: Update and Briefing

Introduction and focus of this briefing

Caroline Dinenage, Minister for Care at the Department of Health and Social Care (DHSC) has published an open letter (which you will find *here* http://data.parliament.uk/DepositedPapers/Files/DEP2019-0635/letter_from_Caroline_Dinenage_Liberty_Protection_Safeguards.pdf) in which she outlines the progress so far with the Liberty Protection Safeguards (LPS) and what Government plans to do. Also, very importantly, her letter gives us some key dates. In this briefing, we discuss what we learn from this letter, what else we know about the process and timing of the changes to our legal framework and practice, outline some 'known unknowns' and when the sector will be fully informed, and, in a positive finale, what we can do now to prepare for the LPS.

Where we are now

The (LPS) will definitely replace the deprivation of liberty safeguards (DoLS), because the legal framework for this to happen received Royal Assent on 16 May 2019: this framework is now known as the Mental Capacity (Amendment) Act 2019. You can read this Act, which contains the LPS, *here*: http://www.legislation.gov.uk/ukpga/2019/18/pdfs/ukpga_20190018_en.pdf

A brief glance at the papers associated with this Act's bumpy passage through Parliament will show the level of disquiet caused by the original Bill. The reasons are well rehearsed: for a summary of concerns remaining in January 2019, see our evidence to the Public Bill Committee, written by Rachel Griffiths and submitted jointly by Care England, NCF, and RNHA, together with the Association for Real Change (ARC) and the Voluntary Organisations Disability Group (VODG), *here*: https://publications.parliament.uk/pa/cm201719/cmpublic/MentalCapacity/memo/MCAB24.htm

It is worth noting that some major concerns were addressed following this stage of the process, and the Act no longer contains the troubling definition of deprivation of liberty that was proposed. So we remain, as now, reliant on the summary from the UK Supreme Court in the Cheshire West case *here* https://www.supremecourt.uk/cases/docs/uksc-2012-0068-judgment.pdf for our understanding of when a person lacking capacity is deprived of their liberty.

Process and timing for Implementation

We now know that implementation of the LPS will happen on 1 October 2020. This is the date from which a DoLS authorisation cannot be given. But it won't be a 'big bang', where we all drown in a forest of paperwork in a crazy attempt to replace every DoLS authorisation instantly with an LPS one. Very sensibly, DoLS will continue in parallel with the LPS, for a year. The way it will work is this.

A DoLS authorisation can't last longer than a year; and no new ones can be given after 30 September 2020. So any DoLS authorisations that already exist on 1 October 2020 will just run on until their expiry date (unless of course there is reason to end them earlier, such as the person moving away from their care home, or regaining the capacity to make their own decisions about consenting to care or treatment). Once a DoLS authorisation has expired, if a new authority is needed to protect this person's rights, because their care plan continues to be one that deprives them of their liberty, then, we must use the LPS. This is because no new DoLS authorisation can be given. This should avoid most of the ‘bulge’ that would otherwise happen, by effectively spreading the transition over the following year.

Management of the backlogs that will exist on 1 October 2020 is a recognised issue: we have made clear representations to Government that they must not be simply transferred from the local authority DoLS teams to providers. This is still under discussion between the Department of Health and Social Care (DHSC) and stakeholders. Once the LPS system is embedded, many of the current pressures caused by DoLS will be eased. This is because, in contrast to DoLS authorisations, which cannot be extended, are location-specific, and can never be in effect for longer than a year, the LPS allows extensions, is specifically portable between different settings provided this is anticipated, and, after two initial periods of one year, can be granted for up to three years, provided the person’s condition is stable.

Local authorities are also being encouraged to go through their backlogs of DoLS applications, to weed out any that are no longer applicable: many people will have moved to live elsewhere, or regained capacity, or, or course, died. The vast majority of people subject to a DoLS authorisation are the ‘oldest old’, those over 85, and there is no reason to suppose that the demographics of applications will be markedly different from those where assessments have actually taken place. We are taking an active part in these discussions, and will share further information on how the backlogs will be addressed as soon as this is known.

There will, of course, be new providers brought into the LPS net. This is because, unlike DoLS, the LPS can be used in supported living, shared lives, and home-care settings: they also can be used to protect the rights of people aged 16 and 17, who are not eligible for DoLS. Care providers working with these groups have had no alternative, until now, to applying to the Court of Protection for authorisations, since there was no other way to protect the person’s rights and protect the provider from criminal or civil liability. There is a real advantage to the spread of LPS here, because the costs of having to apply to the Court of Protection, in worry and time as well as financially, will in most cases be bypassed in favour of a decision made locally and relatively informally. But whole new groups of providers will need to get to grips with the LPS.

Government actions leading up to implementation

The Minister’s letter reassures us that work has already begun on producing the necessary support. The required set of regulations, to outline exactly who can do what, will be published during the spring of 2020.

The code of practice will be such an essential tool for everyone involved, to help us find our way around the LPS. I’m one of many stakeholders involved in the drafting, and we all share the Minister’s

> ‘*absolute priority…to ensure the code of practice delivers on providing detailed and easy to understand guidance which will ensure the successful implementation of the new system.*’

The code of practice is likely to be put out for public consultation during the coming autumn and of course we’ll share the links so that you can have your say. Its publication, like that of the regulations, is planned for next spring, so about six months ahead of the implementation date. This will, hopefully, coincide with a full refresh of the wider code of practice to the Mental Capacity Act (MCA), which is also currently under way. The original code is now over 10 years old, and, though it’s still a really useful resource, it will benefit from updating.

Resources, training and guidance

A new system is inevitably worrying; the Government is aware of this. The DHSC is already planning the support that the whole of health and social care will need, throughout England and Wales, when providing services to people aged 16 and over. As well as the regulations and the new code of practice, the Minister's letter outlines that Government 'is taking forward a range of activity to prepare for implementation… working closely with key delivery partners and stakeholders.'

Translated into more everyday, practical language, this means that the DHSC plans shortly to publish some initial information about the LPS, intended to help getting ready for the new system, which the Implementation Team will make publicly available. They are also planning additional sector-specific support and guidance, and training for new roles such as that of Approved Mental Capacity Professional, which is based on the DoLS best interests assessor (BIA) role.

And, importantly, the DHSC is currently working on a revised Impact Assessment, to give us a handle on the costs and scope of the necessary preparation for transition, of enabling learning for everyone who will be involved with it, and of 'business as usual' working within the LPS in the future. We advise you all to wait for the new Impact Assessment before beginning to plan in practical terms for this change from DoLS to LPS. It's likely that the Impact Assessment will be far more detailed and comprehensive than the two earlier versions, and we hope it will also be more realistically attuned to the prospective costs for providers, particularly those in care homes. We have no date for this, but it should be with us very soon, hopefully this summer, giving us a clear year to engage with the practicalities of the switch, from a position of knowledge.

Much is yet to be clarified about LPS. Until we have the Regulations, we simply don't know who can carry out the various assessments; until we have the code of practice, we can't know how various parts of the Act will be interpreted. For example, the rigid (but in practice un-met) time scales of DoLS will vanish, and there will be no explicit time-scales for the various responsible bodies to carry out the assessments. It is likely that guidance in the code will clarify what is 'reasonable' in various situations. The code will certainly be essential in explaining when it will be reasonable for a local authority responsible body to expect the manager of a care home to collect together the relevant assessments. Most importantly, we cannot possibly begin to plan until we see the framework and the detail of the expected Impact Assessment, which, we hope, will take account of the analysis of the error-strewn earlier versions, which we have shared with the authors at DHSC.

What providers can be doing now

It is certainly advisable for all providers of adult social care who are not already doing so, to collect assessments of capacity to make various decisions (perhaps done by social workers or doctors), in particular about the capacity to decide where to live, or make decisions about whether to consent to or refuse treatment or care interventions. Also, collect any assessments and diagnosis of a mental disorder, such as dementia, learning disability or brain disorders caused by organic illness or injury.

In DoLS, you cannot in general re-use assessments, but LPS is far more person-centred and in many ways less bureaucratic. Any relevant assessments of capacity or of a mental disorder, perhaps made as part of deciding where someone lacking capacity should live, or during a hospital admission, will be re-usable, providing they are still relevant.

In many cases, a person's condition improves, so an assessment cannot be global ('she lacks capacity') or assumed to last forever. Capacity is both time and decision specific, asking 'can this person make *this* decision at the time it needs to be made?' However, a person's condition may be fairly stable, in which case these assessments will be crucial evidence for the LPS process.

Ensure the MCA is integral to practice

The arguments in Parliament clarified that the LPS are to be seen, and used, as an integral part of the wider Mental Capacity Act (MCA). Decisions about working with adults who might lack capacity for certain decisions at the time they need to be made must be made in accordance with the MCA. It ensures person-centred practice, reassures the Care Quality Commission (CQC) that you are practising lawfully: if a provider is found in serious or persistent breach of the MCA it is impossible for their rating to be other than 'requires improvement.' It gives protection from liability to health and social care staff when they make decisions and carry out care or treatment for someone lacking capacity to consent to what is proposed. Get in the habit of auditing care plans against the five statutory principles of the MCA *here* https://www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpga_20050009_en.pdf , for example checking whether a person's capacity can be enhanced to make their own decision about something, or whether you can come up with a less restrictive option for any action that might limit someone's freedoms.

Anyone working with such adults is also legally bound to 'have regard' to the code of practice to the MCA *here* https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice . This is currently being updated, but the original code is still useful for understanding what the MCA looks like in practice. Additional free resources, funded by Government are available from the Social Care Institute of Excellence (SCIE), which hosts a set of resource material in the Mental Capacity Act (MCA) Directory *here* https://www.scie.org.uk/mca-directory/ We know that things go wrong in health and care services when the MCA is poorly understood. Ignorance of the MCA leads both to disproportionate restraint and, at the other extreme, to a failure to recognise when a person really does need protection, for example to prevent them crossing busy roads without understanding the risks, or to give essential personal care that they don't realise they need. It will be far easier to implement LPS within settings where the code of practice is a familiar tool, and where senior staff model using it to ensure that decisions are being made in the right way.

Conclusion

On balance, this letter is to be welcomed. It calms down the natural pessimists among us, by making the implementation date later than it might have been; this gives us more time to prepare. It makes clear that Government is being proactive in developing the necessary resources to enable the LPS to work in practice. Best of all, perhaps, it highlights that they are planning, and hopefully identifying the funding for, the wide range of training and support that will allow the LPS to fulfil their most essential function, that of protecting the rights of people who lack capacity in England and Wales, when they need the support of health or social care.

As you know, we played a pivotal part in changing and amending the extremely unsatisfactory Bill that we were presented with last summer. Our role now is to do our best to make the LPS work as well as they possibly can. To achieve that, we will continue to engage positively, with Government and our fellow stakeholders, in the ongoing consultations and developments of the code and Regulations. We will send further briefings when we have more information.

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21 June 2019