The Liberty Protection Safeguards and the Draft Code of Practice: Considerations for Consultation

20th May 2022

Dr Camilla Parker QC (Hon), Legal & Policy Consultant

Just Equality

camilla@justequality.co.uk

Just Equality: Research, Training & Consultancy

1

Overview

- LPS: Background and introduction; Deprivation of Liberty
- Tiggering the LPS process; the LPS process (Part 1): Immediate steps
- The LPS Process (Part 2): Preparatory steps, Authorisation process
- AMCP; Appropriate person / IMCA
- MHA / MCA interface; Young people and the LPS
- s4B; Challenges and disputes, Monitoring and reporting)
- Next steps & close

Questions & discussion throughout, break about 11am (15 mins)

Just Equality: Research, Training & Consultancy

2

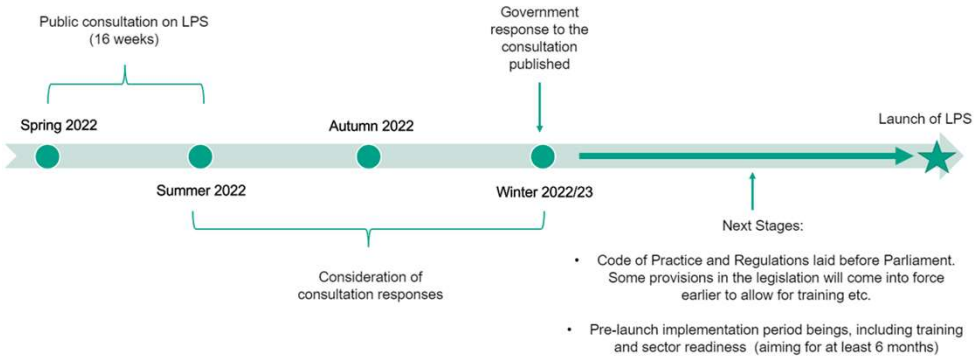
LPS: Background and Introduction

- Administrative scheme to authorise arrangements that may give rise to a deprivation of liberty of individuals aged 16 and over – in **any** setting
- Response to concerns about Deprivation of Liberty Safeguards (DoLS)
- *Changes to the MCA Code of Practice and implementation of the LPS: consultation document March 2022:* Summary of LPS
  - Designed to be more streamlined and will put the person at the centre of the decision-making process.
  - Duty to consult with the person, and those interested in their welfare, to establish the person's wishes and feelings about proposed arrangements.
  - Those who are close to the person will also be able to provide representation and support to them via a new 'Appropriate Person' role (otherwise IMCA)
  - Rights of people at the heart of the most complex cases will be considered and upheld by the new 'Approved Mental Capacity Professional' role.

Just Equality: Research, Training & Consultancy

3

LPS Milestones (DHSC March 2022)



Just Equality: Research, Training & Consultancy

4

Changes to the MCA Code of Practice and Implementation of the LPS: Consultation Document

- 25 Consultation Questions (CQs) – some themes
- **Clarity**
  - CQ20: How clear is the guidance on the LPS (up to 1000 words)
  - CQ21: seeks views on scenarios used & if new ones needed (up to 1000 words)
- **Integration with other legal frameworks**
  - "We want the LPS to be more integrated into everyday health and care planning, and to reduce the assessment burden for organisations administering the safeguards." (Gillian Keegan, Minister of State for Care and Mental Health, DHSC)
  - CQ10 seeks views on clarity of chapter 13's explanation of interface of LPS with other health can care assessments and planning (up to 300 words)
- **Implementation**
  - Questions on impact assessment; workforce & training strategy (CQs 22-24)
- **What's in, what's not**
  - CQ12 asks if agree role of care homes manager should not be implemented **but** no CQ on use of LPS in secure children's homes (instead of s25 of the Children Act 1989)

Just Equality: Research, Training & Consultancy

5

Deprivation of Liberty: Article 5 ECHR

Storck v Germany (2005)

a) the objective component of confinement in a particular restricted place for a not negligible length of time; (**the confinement question**)

b) the subjective component of lack of valid consent; and (**the lack of valid consent question**)

c) the attribution of responsibility to the State (**the State responsibility question**)

Cheshire West (2014)

- Confirmed *Storck* components a),b) & c)
- Focus on the confinement question: Lady Hale's 'acid test': **Is the person under continuous/ complete supervision and control and not be free to leave?**
- Irrelevant factors:
  - person's compliance/ lack of objection
  - relative normality of the placement
  - reason/purpose for the placement

Just Equality: Research, Training & Consultancy

6

Deprivation of Liberty (Chapter 12)

- Dilution of 'the acid test'? (Scenarios concluding person not under continuous supervision and control)
- Asserts there is a different approach for determining DoL in the person's own home; e.g.:
  - In determining cases such as Mrs L, you will need to consider the fact that the person is living in their own home as a relevant factor to be considered. In other words, this should be one of the factors to be considered in looking at the concrete situation of the person. (12.44)
  - When it comes to arrangements being carried out in the person's own home, the test of capacity will normally be less onerous compared to …[hospital / care home] (12.53)
  - The monitoring bodies will be responsible for monitoring and reporting the operation of the LPS in all settings including where there is no regulated activity being provided. This includes people's private homes (although most authorisations will not apply in these settings). Consultation document 3.30)
- Introduces notion of 'advance consent' (Legal basis? Workable? See also MHA 1983 White Paper)
- Medical treatment for physical health problems (Is this a true reflection of current case law?)
- CQ8 asks about clarity of guidance NOT accuracy. Additional comments not sought.
- CQ1 asks if agreement with view that RB 'should not be routinely making applications to the Court once LPS implemented'

Just Equality: Research, Training & Consultancy

7

Triggering the LPS Process (draft Code 13.7-13.26)

- RB: mechanisms in place to help identify when arrangements **may** amount to a DoL (13.13)
- Planning in advance: e.g. child living in a residential setting with arrangements amounting to a deprivation of liberty is soon to become 16 (LPS can be completed up to 28 days in advance) (13.12)
- RB must publish accessible information which sets out how to trigger the LPS process (13.21)
- Sufficient urgency on action where identify a DoL may arise? ('as soon as possible' (13.15) and 'as soon as practicable' (13.16)
- Experience and knowledge of person in RB receiving referral? (See 'Immediate tasks' (13.24))
- Timeframes:
  - from triggering the process to a decision being made as to whether to authorise the arrangements, should not exceed 21 days…In exceptional circumstances, however, this may not be possible…(13.26)
  - RB inform referrer that referral **accepted** within 5 days 'as far as practicable' (13.25)
- CQ9 asks for views on timeframes (300 words for explanation) (But note differing wording for referral: RB 'have 5 days to **acknowledge** an external referral')

Just Equality: Research, Training & Consultancy

8

The LPS Process: Eight Key Steps

Immediate tasks

1)Do the LPS apply? (Code asks whether case is suitable for the LPS)
2)Is this the correct responsible body (RB)?
3)Consider representation & support for the person

Preparatory steps

4)Assessments & Determinations (**authorisation conditions:** (i) capacity, ii) mental disorder; iii) necessary & proportionate)
5)Consultation
6)Draft authorisation record

Authorisation process

7)Pre authorisation review
8)Authorisation

Just Equality: Research, Training & Consultancy

9

Immediate Tasks (13.24)

- 'Consider whether the case is **suitable** for the LPS, or whether it would be more appropriately dealt with under a different legal framework, such as the Mental Health Act 1983':
  - What about other points e.g. "cared for person" must be aged 16+
  - Will the person receiving the referral have necessary information/expertise to decide about potential application of the MHA 1983?
- **Is this the correct RB**?
  - 'No wrong door'
  - No specific CQ on RB, CQ20 on clarity on guidance on LPS and any gaps (up to1,000 words)
- **Representation and support** (check if someone suitable to be AP or if IMCA required)
  - RB should record decisions about appointing, or not appointing, an AP/IMCA in the person's records:
  - How will this be managed within RB, what should be the timeframes for doing so?

Just Equality: Research, Training & Consultancy

10

Preparatory Steps: Assessment and Determinations (A&Ds)

- For RB to determine whether authorisation conditions met: A&Ds required for i) capacity; ii) mental disorder; iii) necessary and proportionate; Code suggests:
  - Combine with other assessments (12.28-13.29)
  - Use previous assessment (capacity/mental disorder)- List of points RB should consider (16.40)
  - But note: Appropriateness of relying on previous or equivalent assessment considered at pre-authorisation review (16.42) – if not appropriate, authorisation conditions not met
- **Conflicts** (16.9) e.g. those carrying out A&D 'should not be members of the same team who work together for clinical purposes on a routine basis' e.g. 'should not routinely work on the same ward.'
- CQ13 seeks views on clarity of Ch16 on use of previous and equivalent assessments (300 words)
- **Who can undertake A&Ds?** Regulations on eligibility e.g. knowledge of MCA 2005; which professionals can undertake capacity/ mental disorder/ necessary and proportionate A&Ds
- **But** others without such qualifications may 'assist' in the assessments (13.29) and could be asked by the professional responsible for the A&D 'to carry out some or all of the elements of that assessment and determination on their behalf' (but that professional remains legally accountable for A&D (16.13).
- CQ 18: asks whether the regs 'enable the right professionals to carry out' A&Ds

Just Equality: Research, Training & Consultancy

11

Preparatory Steps: Assessment and Determinations (2)

- **Consultation**
  - 17.26 If the person lacks the relevant mental capacity to understand the proposed arrangements, or is unable to express their wishes and feelings, individual carrying out the consultation may need to frame the consultation differently.
- No CQs on consultation (Chapter 17)
- **Draft authorisation record**
- Points that this must be specified include 'The conditions for the authorisation' (e.g. contact arrangements) (13.37)
- But 'conditions for authorisation' not specified in the Act (see para 27)
- 13.92 'Reviews are a process by which the Responsible Body considers whether the deprivation of liberty should continue, and whether the arrangements are still appropriate. However, there may be some occasions when reviews are required to assess certain specific issues, such as whether the conditions are still appropriate and being complied with.'
- Is this referring to authorisation conditions or conditions for authorisation?!

Just Equality: Research, Training & Consultancy

12

Authorisation Process (Stage 1: Pre-Authorisation Review (PAR))

- **Non- AMCP**
- (13.44) Individual carrying out PAR not need to be a health or social care professional but should have an applied understanding of MCA 2005 & LPS process. Who in mind here?
- (13.48) Same individual should never carry out all 3 roles (assessment, PAR, authorisation); also unlikely to be appropriate for the same individual to carry out A&D and PAR. However, it may be appropriate for the individual carrying out PAR to also give the final authorisation.
- **AMCP**
- RB should not refer cases directly to an individual AMCP; should be an AMCP team that considers referrals and decides who carries out PARs (13.50)
- **Clarity of guidance?** If the person does not have a mental disorder, or they do not lack the relevant capacity, then LPS is not the correct framework for their care or treatment arrangements. An alternative framework may be more appropriate, such as the Care Act 2014 … (13.61)

Just Equality: Research, Training & Consultancy

13

Authorisation Process (Stage 2: Final Authorisation)

- **Same person can undertake PAR and authorise the arrangements on behalf of RB** (13.63-13.64)
  - 'must be able to show a degree of separation between the roles…act independently when carrying out the [PAR] and as the [RB] when authorising.
  - 'Whilst the same individual can carry out both roles, they must be able to differentiate their decisions at each stage in order for the two processes to remain impartial of each other. For example, if at [PAR stage, the individual determined it was reasonable for the [RB] to conclude that the authorisation conditions are met, when they are considering an authorisation , then they must consider from the [RB]'s perspective whether there is sufficient justification to give the authorisation.'
- **RB decides not to authorise the arrangements** (13.67)
  - '…it may decide to take further actions. These may include urgently requesting a review of a best interests decision about care and treatment, or initiating a safeguarding enquiry.'
- CQ11 asks to rate clarity of guidance on authorisation, reviews and renewals (300 words)

Just Equality: Research, Training & Consultancy

14

Approved Mental Capacity Professionals (AMCPs)

- **AMCP team**: differing models of teams suggested: 'Whichever approach is adopted, a senior manager or practitioner should be appointed with overall responsibility for matters such as the conduct, performance and allocation of AMCPs to cases. There should also be established a central duty system for AMCP referrals, including out of hours referrals.' (18.11)
- CQ 14 seeks suggestions on how AMCP team could be improved (300 words)
- **AMCP and final authorisation** (13.52-13.53)
  - Code envisages the AMCP may carry out PAR and give final authorisation, acting on behalf of RB (but AMCP can refuse to do so)
  - AMCP 'should not be the individual considering the authorisation in particularly complex cases. Additional scrutiny from another individual ahead of authorising might be particularly beneficial for the complex cases that AMCPs typically consider.'
- CQ17 asks whether AMCPs will achieve an adequate number of trained AMCPs with required skills and knowledge (300 words)

Just Equality: Research, Training & Consultancy

15

Appropriate Person (AP)/ IMCA

- No CQ on the role of the AP
- **When is an AP not suitable?**
  - 15.5 (attorney or deputy is directly involved in the arrangements amounting to a deprivation of liberty);
  - 15.21 (AP must not be someone who would financially benefit from the person being deprived of their liberty in a specific location e.g. family member would financially benefit from the sale of the person's home if they were to move into a care home where they would be deprived of their liberty)
  - 15.22 (if a person is being placed into a setting that is not their usual home and the potential AP agrees with the arrangements or the potential AP is involved in providing care that includes significant restraint, the RB should exercise caution when considering their suitability for the role.)
- **Age of AP** – 16 years + (? no age limit in Act) (15.14)
- No CQ on the guidance on IMCAs
- CQ on IMCA regs asks whether the IMCA regulations 'allow or IMCAs to carry out their full functions effectively under the LPS' (300 words)

Just Equality: Research, Training & Consultancy

16

MHA / MCA Interface (Chapter 22)

- No specific CQ on this chapter
- Presentation (typos etc)
- Inaccuracies/ lack of clarity – see e.g. scenario of Ms F (on a community treatment order)
  - 'Ms F has recently shown resistance to the injection, and the community team have assessed Ms F's best interests and have decided that she is likely to require restraint beyond that provided for under the MCA. .Therefore she is recalled to hospital and eventually receives the injection under the authority of the MHA.'
  - **But:** Treatment for mental disorder for someone on a CTO and not recalled to hospital is Part 4A of the MHA 1983 not the MCA 2005!

Just Equality: Research, Training & Consultancy

17

Young People and the LPS (Chapter 21)

- '…asking a lot of the children's workforce…this will not be an easy and straightforward transition…' (Will Quince, Minister for Children and Families, Department for Education)
- CQ2 asks for rating on clarity of Code at explaining the interaction between the LPS and other relevant legislation and planning for 16 and 17 year olds
- General point: greater clarity needed on interplay of MCA 2005 with other legal frameworks, in particular those relating to looked after children and young people with EHC Plans
- 21.55 'In a very limited number of circumstances, a young person may be placed in a secure children's home and require and LPS authorisation for their arrangements during their stay.' (Watering down of safeguards)
- ? Specific guidance needed on appointment of parents as AP v role of IMCA
- Looked after children and potential conflicts:
  - 21.77 'If the local authority has parental responsibility for the young person, it should be mindful of potential conflicts of interest between this and its role as the Responsible Body. It may need to take steps, such as ensuring that separate individuals from different functions within the local authority undertake the different roles, to minimise any actual or perceived conflicts of interest. This should be considered on a case by cases basis.'

Just Equality: Research, Training & Consultancy

18

Section 4B MCA 2005 (Chapter 19)

- 'The legal authority provided by section 4B only applies to the steps needed for the life-sustaining treatment or vital act in question. It is not a 'continuous' or 'ongoing' power….If a further vital act is required and the person needs to be restrained, the decision maker must make a new decision about whether the steps are authorised under the terms of section 4B, and this should be documented separately from earlier applications of the power'
- 19.32 'Beyond the initial application of 4B, decision makers do not need to inform the Responsible Body every time the power is relied upon. However, in some circumstances, the decision maker may consider it important to inform the Responsible Body that 4B has been used. For example, if steps under the authority of section 4B were being used a significant number of times within a short time period or the act of restraint was significant. The decision maker may also consider other reasons to inform the Responsible Body, such as when it would be in the best interests of the person. The decision maker may wish to seek legal advice on such matters as appropriate, such as when involved in legal proceedings.'
- CQ15 asks whether the RB should be notified every time section 4B is relied upon (300 words)

19

Additional Points

- **Challenges and Disputes**
  - CQ3 seeks rating on guidance in chapter 3 on how challenges to LPS can be made
  - No CQ on chapter 14 (role of the Responsible Body (RB))
  - Chapter 14 includes guidance on how to seek to resolve question on which is the correct RB (14.61-14.67)
    - greater clarity needed on how disputes are resolved? (14.61-14.67)
- **Monitoring and Reporting**
  - CQ16 asks to what extent chapter 20 and the Monitoring and Reporting Regulations help the monitoring bodies deliver effective oversight of the LPS (300 words)

20