

LPS implementation

December 2019

Alex Ruck Keene

Barrister, 39 Essex Chambers

Wellcome Research Fellow and Visiting Lecturer King's College London

Visiting Senior Lecturer, Institute of Psychiatry, Psychology and Neuroscience, King's College London

Research Affiliate, Essex Autonomy Project, University of Essex

alex.ruckkeene@39essex.com

[@capacitylaw](#)

LPS: what's the point?

- Deprivation of liberty is everyone's business
- Moving consideration to the frontline
- It's not about the backlog

Implementation for local authorities (1)

- Responsibilities as local authority (not RB)
- To publish information about
 - Effect of authorisation, process of authorisation, assessments/determinations/consultation/pre-authorisation review/IMCAs/AP role/AMCP/right to make application to court/review/right to request a review/referral to AMCP
 - Accessible to and appropriate to the needs of cared-for persons and appropriate persons
- To make arrangements to enable IMCAs to be available to represent and support
- To make arrangements for approval of AMCPs and ensure that enough are available for their area

Implementation for local authorities (2)

- Who will LA have RB responsibilities for?
 - Independent hospitals
 - Self-funders
 - Anyone else who is not either in NHS hospital or mainly under CHC-funded arrangements

- Preparing for care home delegation

Implementation for local authorities (3)

- Who will do relevant tasks?
 - Consideration of age
 - Consideration of whether arrangements are mental health arrangements
 - Capacity assessment
 - Medical assessment
 - N&P assessment
 - Pre-authorisation review
- How much can be integrated into care planning
- Who will be your AMCPs?

Implementation for NHS hospitals (1)

- Responsibility on “hospital manager” of each NHS hospital to publish information about
 - Effect of authorisation, process of authorisation, assessments/determinations/consultation/pre-authorisation review/IMCAs/AP role/AMCP/right to make application to court/review/right to request a review/referral to AMCP
 - Accessible to and appropriate to the needs of cared-for persons and appropriate persons
 - ? Standard forms – but even so, do they need modifying for specific patient groups?

Implementation for NHS hospitals (2)

- Identification of likely patients to be subject to LPS, i.e. in circumstances amounting to deprivation of liberty
- Specific considerations:
 - Advance consent to planned operations and post-operative delirium
 - Advance consent to palliative care
 - The exception for ‘ordinary’ life-saving medical treatment: how wide does the ‘carve-out’ go:
<http://www.39essex.com/mental-capacity-guidance-note-deprivation-liberty-hospital-setting>
 - Matters for Code of Practice, but can start thinking now
- At what stages from admission to discharge will deprivation of liberty need to be considered?

Implementation for NHS hospitals (3)

- Who will do relevant tasks?
 - Consideration of age
 - Consideration of whether arrangements are mental health arrangements / clash with mental health requirements
 - Capacity assessment
 - Medical assessment
 - N&P assessment
 - Pre-authorisation review
- How much can be integrated into care planning, and at what stages from admission to discharge?
- Who will be your AMCPs?

Implementation for CCGs (1)

- Responsibility on CCGs to publish information about
 - Effect of authorisation, process of authorisation, assessments/determinations/consultation/pre-authorisation review/IMCAs/AP role/AMCP/right to make application to court/review/right to request a review/referral to AMCP
 - Accessible to and appropriate to the needs of cared-for persons and appropriate persons
 - ? Standard forms – but even so, do they need modifying for specific groups

Implementation for CCGs (2)

- Identification of likely people to be subject to LPS, i.e. in circumstances amounting to deprivation under “arrangements carried out mainly through the provision of NHS continuing healthcare under arrangements made by a clinical commissioning group”
- Specific considerations
 - Respite placements?
 - Planned admissions into hospital?

Implementation for CCGs (3)

- Who will do relevant tasks?
 - Consideration of age
 - Consideration of whether arrangements are mental health arrangements / clash with mental health requirements
 - Capacity assessment
 - Medical assessment
 - N&P assessment
 - Pre-authorisation review
- How much can be integrated into care planning?
- Who will be your AMCPs?

Implementation for care homes

- Identification of those likely to be subject to LPS, i.e. in circumstances amounting to deprivation of liberty
- Who will be your Responsible Body
 - LA: if so, which one?
 - CCC
- If you're a care home manager, what do you need to do to be able make these statements:
 - that the cared-for person is aged 18 or over,
 - that the arrangements give rise to a deprivation of the cared-for person's liberty,
 - that the arrangements are not mental health arrangements/clashing with mental health requirements.
 - that capacity, medical and N&P determinations have been made (by the right people doing the assessments without 'prescribed connections')
 - that you have carried out consultation, and
 - about whether it is reasonable to believe that the person does / does not wish to live in the care home / receive care and treatment in the care home, or do not know
- And to be able to prepare a draft authorisation record

Implementation for independent hospitals (1)

- Identification of likely patients to be subject to LPS, i.e. in circumstances amounting to deprivation of liberty
- Not just psychiatric hospitals – physical health hospitals as well
- The position of hospices
- Specific considerations:
 - Advance consent to planned operations and post-operative delirium
 - Advance consent to palliative care
 - The exception for ‘ordinary’ life-saving medical treatment: how wide does the ‘carve-out’ go: <http://www.39essex.com/mental-capacity-guidance-note-deprivation-liberty-hospital-setting>
 - Matters for Code of Practice, but can start thinking now
- At what stages from admission to discharge will deprivation of liberty need to be considered?

Implementation for independent hospitals (2)

- Identification of likely patients to be subject to LPS, i.e. in circumstances amounting to deprivation of liberty
- Not just psychiatric hospitals – physical health hospitals and hospices as well
- Which LA will be your RB?
- How much work can you do (including re the draft authorisation record) before you send to AMCP?

Monitoring

- Precise arrangements for monitoring to be set down in regulations and Code of Practice but anticipate CQC will be lead in England (query in relation to 16/17 year olds and role of Ofsted) – both systemic and provider-specific
- **Remember:** Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 13
 - *Service users must be protected from abuse and improper treatment in accordance with this regulation.*
 - *A service user must not be deprived of their liberty for the purpose of receiving care or treatment without lawful authority.*
- Likely to be similar reporting requirements as in current reporting regulations (CQC (Registration) Regulations 2009, para 18)
- Transition arrangements in first year – DoLS to run alongside LPS so will be need to comply with both reporting regimes
- TBC – power of CQC to enter private homes to monitor arrangements...

Tying LPS to the MCA

- The MCA comes first
- How well do you know the MCA?
- How well do your staff know the MCA?
- How well do your partners know the MCA (the Mrs Jones test)?
- What can you do to improve their knowledge?



Things to keep an eye on

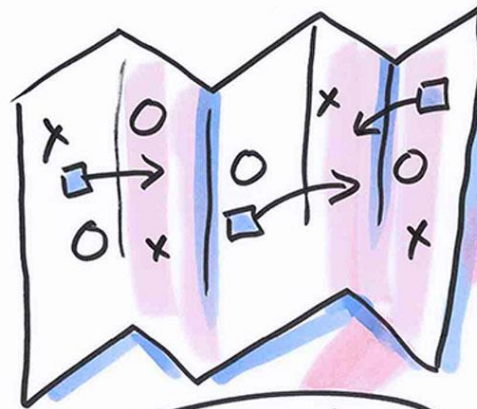
- Case-law:
 - e.g. parental responsibility and 16/17 year olds – the *Re D* case
 - Is Steven Neary deprived of his liberty?
- DHSC fact sheets
- Implementation plans – national and sector-specific
- Code of Practice – MCA and LPS
- Regulations
- <http://www.mentalcapacitylawandpolicy.org.uk/resources-2/liberty-protection-safeguards-resources/>

Things to do whilst we wait

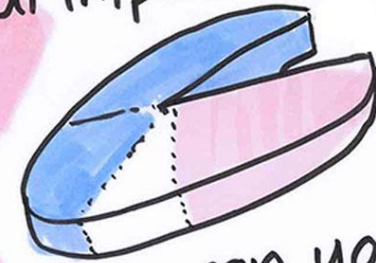
- Local impact assessments
- Sharing expertise
- Planning to share personnel
- Identifying sources of advocacy

Liberty Protection
Safeguards

16x  setting neutral  more agencies



carry out
Local Impact Assessments



coordinate
discussions

how can you
share resources
across agencies

drawn by Cara Holland
@GraphicChange
graphicchange.com

Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- www.mentalhealthlaw.co.uk
- <http://www.scie.org.uk/mca-directory/>
- <https://www.mentalcapacitylawandpolicy.org.uk/resources-2/liberty-protection-safeguards-resources/>
- www.courtofprotectionhandbook.com

@capacitylaw

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

