

Health and care partner **Neil Ward** and principal associate **Molly Sanghera** of Mills & Reeve discuss the Liberty Protection Safeguards consultation process and share first thoughts



Liberty Protection Safeguards consultation

what does it mean for you?

It is early days since the Department of Health and Social Care (DHSC) and Ministry of Justice launched its 16-week consultation which will remain open until 7 July. There is a lot to read and digest, with the new draft Mental Capacity Act (MCA) code of practice clocking in at a weighty 518 pages so clear your desks, grab a coffee, and start reading.

The consultation does not confirm a date for implementation, but we are provided with a broad overview as to the key milestones:

- **Summer 2022** consideration of consultation responses
- **Winter 2022/23** government response to the consultation expected, with six months of pre-launch implementation to allow for training and sector readiness prior to launch of Liberty Protection Safeguards (LPS)
- **2024** likely launch of LPS

What does the consultation cover?

The consultation covers the proposed changes to the MCA 2005 code of practice, including the much-awaited guidance on the LPS system, which will replace the Deprivation of Liberty Safeguards as well as six new regulations. LPS will apply to anyone over the age of 16.

The government are keen to canvass views on the draft code of practice and LPS regulations – and welcome real-life examples and practice, as much as possible to illustrate the code.

The Mental Capacity (Amendment) Act 2019 has already brought reform within legislation and we set out what some of the changes will be:

- Anyone can make a referral for a 'responsible body' (usually the NHS or a local authority) to consider whether an arrangement for a 'cared for person' needs to be authorised
- The cared for person must lack capacity to make decisions on the proposed arrangements and have a mental disorder for the safeguards to apply
- The responsible body is required to organise an assessment and consult with the person and their family and anyone else appropriate
- There will be a pre-authorisation review by someone not involved in the day-to-day care of the person
- Approval of arrangements is by the responsible body and will depend on them being judged as necessary and proportionate to prevent harm and proportionate to the likelihood and seriousness of harm

Responding to the consultation?

This is your opportunity to have a say and shape the MCA guidance going forward. It will also provide you with the opportunity to understand what is being proposed and start preparing, whether this is recruitment, training or re-organisation of processes; you have the opportunity to get ahead.

Getting the code of practice right

The proposed amendments to the code seek to amend chapters dealing with capacity, best interests, lasting powers of attorney and deputies, advance decisions to refuse treatment and the protections that exist for people who lack capacity to make decisions for themselves.

The code looks to amend and update existing chapters to include LPS guidance, to clarify how people should be helped to make their own decisions, the role of the Court of Protection, what the independent mental capacity advocate service is, how the MCA applies to children and young people, the relationship between the MCA and Mental Health Act and the best ways to settle disagreements and disputes about issues covered in the MCA.

The code also introduces nine new chapters covering:

Chapter 12 – *what is a deprivation of liberty (DoL)?*



Chapter 13 – what is the process for authorising arrangements under the LPS?

Chapter 14 – what is the role of the responsible body?

Chapter 15 – what is the role of the appropriate person?

Chapter 16 – what are the assessments and determinations for the LPS?

Chapter 17 – what is the consultation duty in the LPS process?

Chapter 18 – what is the role of the approved mental capacity professional?

Chapter 19 – what is Section 4B and how is it applied?

Chapter 20 – how is the LPS system monitored and reported on?

Of the above, chapters 13, 16 and 17 are of particular relevance for care home providers which we focus on here, delving into the key themes.

Chapter 13

This looks at the different stages of the process and where different organisations may get involved. The code proposes assessments should be completed within 21 days, with the responsible body acknowledging a referral within five days.

The proposals provide for better integration between health and care professionals, which complement with wider health and care reforms set out in the Health and Care Act, so that assessments can be carried out alongside care planning to avoid repetition.

For care home managers, it is now not the case that managers carry out some of the preparatory work, including commissioning the assessment. However, staff who know the individual well, will

still have a key role within the consultation process. Care home managers will be interested to read that the consultation does seek views on whether the controversial role of care home managers under the LPS should be included. The planned role would have involved care home managers arranging assessments and gathering information to determine whether their residents should be deprived of their liberty under LPS. The original plans were dropped following several concerns including conflicts of interest.

Chapter 16

The three assessments required are:

- Capacity in relation to care and residence
- Does the individual have a mental disorder
- Are the arrangements necessary to prevent harm?

Previous or equivalent assessments can be used for the LPS process, to try and streamline the process and reduce further assessments if they already exist.

Chapter 17

LPS is designed to be person-centred, and so the consultation is key to the process. The individual's wishes and feelings should be ascertained as far as practicable, and so clear documentation within the care home records may help to record the information.

The regulations

There are six new pieces of regulations which set out the training requirements and the anticipated impact of the new system.

Preparing for the new system

Currently what is regarded as a DoL is anyone who is subject to continuous care and supervision and not free to leave of their own accord. Otherwise known as the 'acid test'. However, the DHSC do not provide a statutory definition of a DoL; but chapter 12 sets out how a number of scenarios to explain what is meant by a DoL.

To enable the new scheme to be successful, it needs agencies at all levels to input into the code and regulations now. While the government does not propose to implement all changes from the Mental Capacity (Amendment) Act at this stage, this will be kept under review and further changes may well be introduced once the LPS process is embedded.

A key step to prepare is ensuring all staff training is up to date. It is important to ensure that capacity is regularly reviewed and assessed, as this is time and decision specific. Case records should have provision to record wishes and feelings, so they are clearly recorded and easy to identify.

Providers should continue to keep liaising with their relevant local authorities and clinical commissioning groups to understand what changes they will be making and who the relevant person to contact is; especially in the lead-up time to implementation.