

From DoLS to the Liberty Protection Safeguards

Tim Spencer-Lane
March 2022

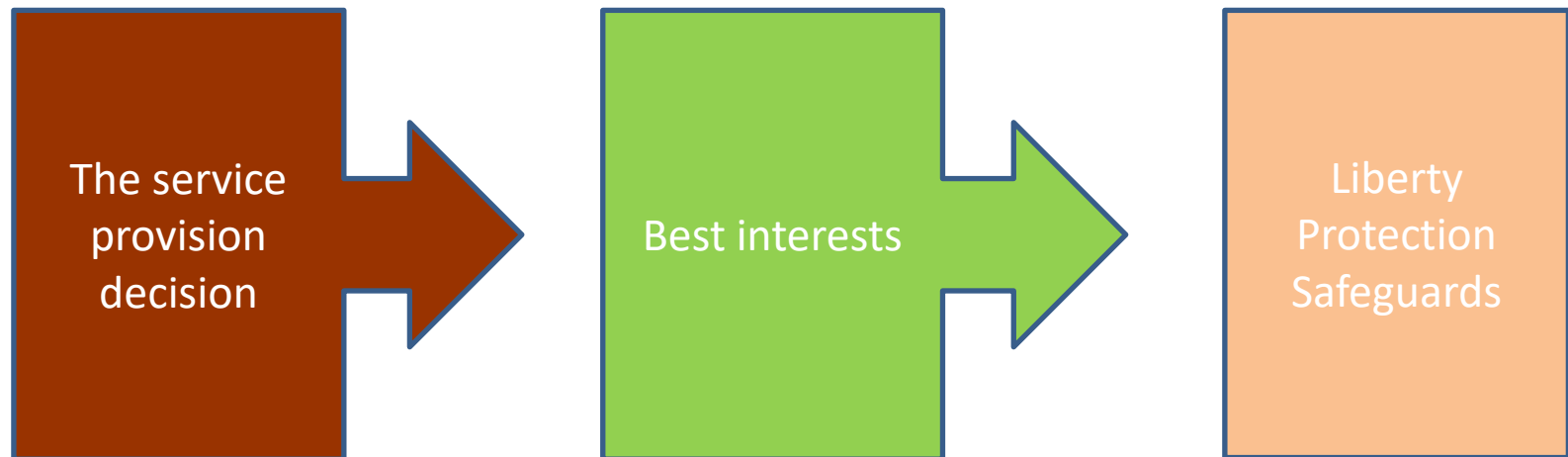
LPS basic principles

MCA Draft Code

- Deprivation of liberty is everyone's business (para 13.17)
- LPS should be streamlined with other assessment, review & planning processes (para 13.5)
- No more court authorisations except in rare circumstances (para 7.39)

The sequence of decision-making

Draft MCA Code, paras 16.81-16.86



Which arrangements does LPS apply to?

Arrangements for enabling the care or treatment of a person (aged 16+) that give rise to a deprivation of liberty

- Can be in any setting & multiple settings
- Can include means & manner of transport

Who is the responsible body?

1. If arrangements are mainly carried out in an NHS hospital, the **NHS trust or foundation trust** (or LHB in Wales)
2. If arrangements are mainly carried out in an independent hospital, a **local authority** (or LHB in Wales)
3. If arrangements are mainly via CHC, the **CCG** (or LHB in Wales)
4. Otherwise, a **local authority** (broadly, the authority meeting the person's needs or in whose area the arrangements are mainly taking place)

Responsible body disputes

Draft MCA Code 14.61-14.67

- Where there is a dispute about who is the responsible body, the draft Code sets out a process to be followed
- The responsible body that received the referral should begin the LPS process, while discussions take place, and identify a named individual to act as a point of contact
- Any costs incurred can be transferred to the correct responsible body.
- If a dispute cannot be resolved by the organisations involved, the matter may have to be resolved by a court

The referral process

Draft MCA Code 13.13-13.25

- Responsible Body should have mechanisms in place to help identify deprivation of liberty.
- All health and social care professionals, staff members & care providers have a responsibility to be aware of deprivation of liberty to arise and take appropriate action
- The 'no wrong door' principle should apply to referrals
- Referrer should be informed within five working days that the referral has been accepted.
- ADASS & DHSC are developing national referral form templates

What happens following a referral?

- Responsible Body must decide if there is a duty to appoint an IMCA or an appropriate person
- The 3 assessments should be commissioned
- Responsible body must ensure person & appropriate person understand the LPS process
- Decision makers can detain the person by relying on s.4B MCA in lieu of authorisation decision
- P can be detained to provide life sustaining treatment or prevent a serious deterioration in their condition

The 3 assessments

Capacity assessment

- person lacks capacity to consent to the arrangements

Medical assessment

- person has a mental disorder

Necessary & proportionate assessment

- necessary to prevent harm to person, & proportionate to likelihood & seriousness of such harm

Who can carry out the assessments?

Capacity assessment

Registered medical practitioner

Registered nurse

Registered occupational therapist

Registered social worker

Registered psychologist

Registered speech and language therapist

Medical assessment

Registered medical practitioner

Registered psychologist

Necessary & proportionate assessment

Registered medical practitioner

Registered nurse

Registered occupational therapist

Registered social worker

Registered psychologist

Registered speech and language therapist

Carrying out assessments

Draft MCA Code – Chapters 13 & 16

- The assessment process (ie from referral to a decision about authorisation) should not exceed 21 days
- There should be no fewer than two professionals involved in carrying out the three assessments
- The professionals carrying out the assessments should have a degree of independence from each other, eg they should not be members of the same clinical team
- No limit on use of previous assessments for capacity & medical assessments

Pre-authorisation review

No objections

- Review on the papers
- Reviewer must have applied understanding of MCA/LPS

Objection or independent hospital

- AMCP reviews the case
- meets person & consults others

Pre-authorisation reviewer cannot be involved in person's day-to-day care or providing any treatment

Who can be AMCPs?

Which professions?

Registered nurse

Registered social worker

Registered psychologist

Registered speech and
language therapist

Registered occupational
therapist

Additional requirements

2 years PQE

Completed specialist training

Necessary skills to analyse
complex evidence etc

Knowledge of best practice

Required criminal record
certificates

Appropriate indemnity

Approved Mental Capacity Professionals

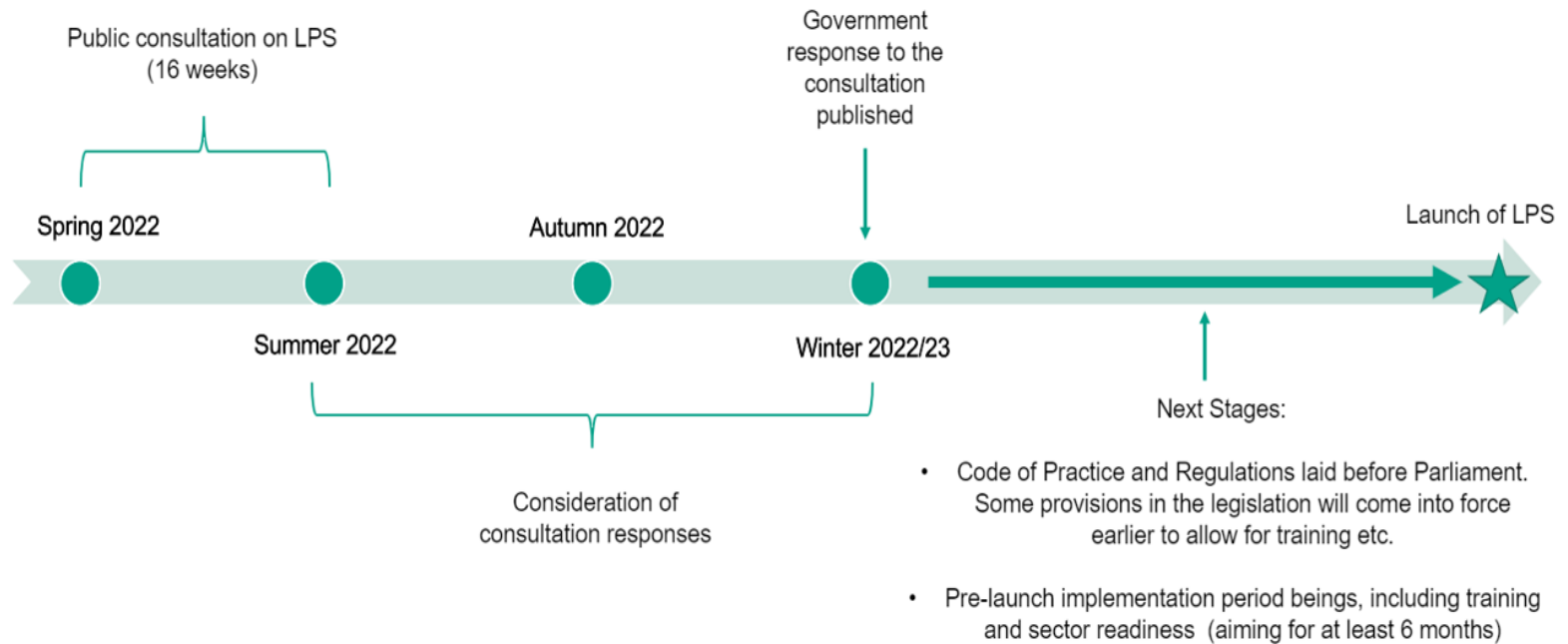
Draft MCA Code - Chapter 18

- Responsible bodies should not refer cases directly to an individual AMCP
- Instead, there should be an AMCP team that considers referrals & decides who carries out pre-authorisation reviews
- AMCP role includes safeguarding, making recommendations, drafting the authorisation record & placing conditions on the authorisation
- Approved by one local authority at a time – which undertakes annual performance review

Key safeguards

- rights to regular **reviews**
- rights to **IMCA or appropriate person**
- rights of legal challenge to the **Court of Protection**
- duty on **CQC & Ofsted** to monitor & report on the LPS

LPS timetable



The meaning of deprivation of liberty

Draft MCA Code - Chapter 12

- Freedom to leave means freedom to leave permanently
- ‘Constant supervision and control’: the person not being able to choose to do the things they want & not being left alone for significant periods of the day
- If a person is living at home, the acid test should be nuanced
- Advance consent: person with capacity can consent in advance to arrangements that would otherwise amount to deprivation of liberty
- Deprivation of liberty will not arise if any medical treatment for a physical disorder is being provided which is materially the same as that provided to a person without a mental disorder (that this is the case in any setting)

Transitional arrangements

Commencement & transitional regulations

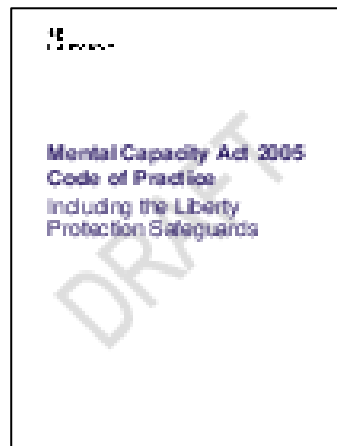
- No new DoLS after the start date – *all new cases will fall under LPS*
- After day 1, existing DoLS will continue until they expire (inc urgent authorisations)
- For 1 year, LPS/DoLS scheme run concurrently
- Court of Protection cases (eg 'Re X') will need to be transferred to a responsible body

Other law reform developments

- Health & Care Bill proposes to abolish CCGs & replace with integrated care boards (ICBs)
- Mental Health Bill due to be introduced in this Parliament
- Introduction of a cap on care costs in Oct 2023

Open consultation: Changes to the MCA Code of Practice and implementation of the LPS

<https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps>
[Quick guide to the Liberty Protection Safeguards](#)



My contact details

t.spencer-lane@sgul.kingston.ac.uk

Thank you for listening