

NMCF Chair's Blog

March - April 2023

Lorraine Currie and Margaret Flynn

Since the beginning of the year, we have each learned a little about uncertainty, that is, the uncertainty that characterises waiting. Conversations with health and social care managers and practitioners have hinged on questions concerning the March – July 2022 consultation, “Changes to the MCA Code of Practice and implementation of the Liberty Protection Safeguards.”

Specifically, everyone has been asking:

- “When is the new Code of Practice to be published?” and
- “Is there a date for the implementation of the Liberty Protection Safeguards” (LPS)?

During March 2023, these questions were amended to,

- “Will the LPS ever be implemented”?
- “Will the MCA Code of Practice be uncoupled from the LPS Code?” This is to provide the much needed updated guidance for practitioners.

This has been a particularly consequential waiting period because the implementation of the Liberty Protection Safeguards (LPS) was due to replace the Deprivation of Liberty Safeguards (DoLS) back in October 2020. In addition, it was envisaged that the DoLS and LPS would operate in parallel for the first year to ensure the transfer and management of people subject to DoLS authorisations.

To add to the uncertainty, DoLS are anchored in the European Convention on Human Rights. This has prompted the question:

- “Will the UK government’s Bill of Rights Bill ensure that intervention which is “less restrictive of the person’s rights and freedom of action” (MCA s1 (6) is still honoured?”

When DoLS were introduced in 2009, it was anticipated that they would rarely be invoked. However, the trend has shown an increase in applications every year. Recent fact-finding, commissioned by the Association of Directors of Adult Social Services in the West Midlands and undertaken by Lorraine Currie, is illuminating.

The West Midlands area consists of 14 local authorities including the largest local authority in Western Europe and several small rural counties. Their variety provides a window through which to consider the achievements and challenges of embedding the MCA in practice. In meetings with all 14 Councils the responses regarding LPS were consistent:

- Work on LPS has largely stalled. Earlier interest, activity and priority has slipped due to waiting for an implementation date.
- Where multi agency meetings continue to be set, they are not well attended or are cancelled.
- There are issues across the board with advocacy. The impacts of the uncertainty about the date for LPS implementation include the ability to tender for advocacy services with specific reference to the LPS.
- Concerns about the Best Interests Assessor (BIA) workforce hinge on questions such as:
 - Should we train more assessors?
 - Should universities continue to offer courses?
 - For how long will BIAs be needed?
 - How are we supposed to deal with the difficulties in recruiting?
- There is such a strong sense that the risks posed by the delays in carrying out DoLS processes do not seem to be taken seriously or are vulnerable to being dismissed.
- There are very few community DoLS applications. Although there are some exceptions there is still confusion about the correct route to take.

Added to this is the growing “DoLS backlog.” Do local authorities invest in reducing it? If so, there may be credit from CQC inspectors. If they do not, a matter of extraordinary importance is revealed, that is, that a process that was confirmed as “not fit for purpose” by the House of Lords Select Committee in 2014 remains unchanged almost 10 years later. It still does not deal with the situations in which people may be deprived of their liberty, including those of 16-17 years and those in their own homes.

NHSD data reports an estimated 270,650 applications for DoLS received during 2021-22. This is an increase of 5.5% compared to the previous year. The DoLS crisis has not gone away or reduced. Many thousands await assessments and thousands die without the legal protection that they are entitled to. For example, during 2021-22, 41,365 authorisations were ‘not granted’ due to the death of the person. That means that over 41,000 people died waiting for their Article 5 rights [to liberty and security] to be protected. LPS are the solution to a Human Rights crisis but the postponed solution is not being driven either by those waiting for assessments; the numbers of 16-17 year olds building up at the Courts; or by people who are not in care homes and hospitals.

Councils and DoLS leads are asking:

- “Where do we focus our efforts?” Their work suggests that focus on making the MCA workable in practice is prioritised. However, this is being done without a revised Code of Practice; and
- “What happens in the meantime?”
- “What happens if LPS are pushed back to 2025 or beyond?”

The LPS and MCA revised Code of Practice are combined. The MCA Code is outdated and contains incorrect and misleading information. See Anna’s case highlighted by the Open

Justice Court of Protection Project and consider her experience of deprivation of liberty as an Attorney.

<https://openjusticecourtofprotection.org/2023/03/17/deprived-of-her-liberty-my-experience-of-the-court-procedure-for-my-mum/> (accessed on 6 March 2023)

Case law and practice have left the Code of Practice in their wake. Many practitioners are troubled that it continues to be used. A new Code is ready to go following revisions underway since the consultation. A pertinent question concerns the Code of Practice and the LPS:

- “If the Code of Practice remains coupled to the LPS, what happens if the publication of one is delayed?”

Regardless of the uncertainties arising from such questions, there is some excellent practice and there are some encouraging developments. These are definitely associated with heightened awareness because of the LPS proposals. Some councils:

- now have Best Interests Assessors trained within Children’s Services;
- are seeking to embed the concepts of necessity and proportionality into existing social care systems to prepare the way for LPS;
- have introduced new and updated MCA audits of practice and improved paperwork on MCA in line with case law.

So what are the take home messages for the optimists and pessimists among us?

The LPS planning and consultation has raised awareness of the deprivation of liberty and the Mental Capacity Act in its widest sense, most particularly in health settings and in children’s services.

The principles of necessity and proportionality which have been an essential part of the MCA since 2007 have long been overlooked. LPS have shone a light on these important concepts.

Councils are still being required to make a scheme which is not fit for purpose work when it doesn’t work! Numbers increase and yet funding does not. Councils are doing the impossible by processing the numbers they are processing.

On 5 April 2023, we learned from the Department of Health and Social Care the disappointing news that “the Government had taken the difficult decision to delay the implementation of the Liberty Protection Safeguards beyond the life of this Parliament...”

We are now firmly in the territory of managing risk. Although the decision could displace professionals’ enthusiasm and interest in mental capacity and LPS, their responsibilities remain considerable as they carry on carrying on, beefing up the necessity and proportionality of depriving a person of their liberty. These and the matter of legal aid provisions are – fingers crossed – topics for election manifestos. In the interim, hands up for a short term DoLS/ MCA improvement programme...