A presentation by

HILL DICKINSON

360 ASSURANCE

Liberty Protection Safeguards – update and next steps

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Housekeeping

- Please note your microphones are muted
- Turn off cameras to help us with the bandwidth
- Use the chat area to ask a question
- This session is being recorded

Programme

- 11:00 Introduction & welcome
- 11:05 Legal issues & getting ready now
- 11:20 Organisational preparedness
- 11:35 Q&A
- 12:00 Close

How are you currently feeling about LPS?

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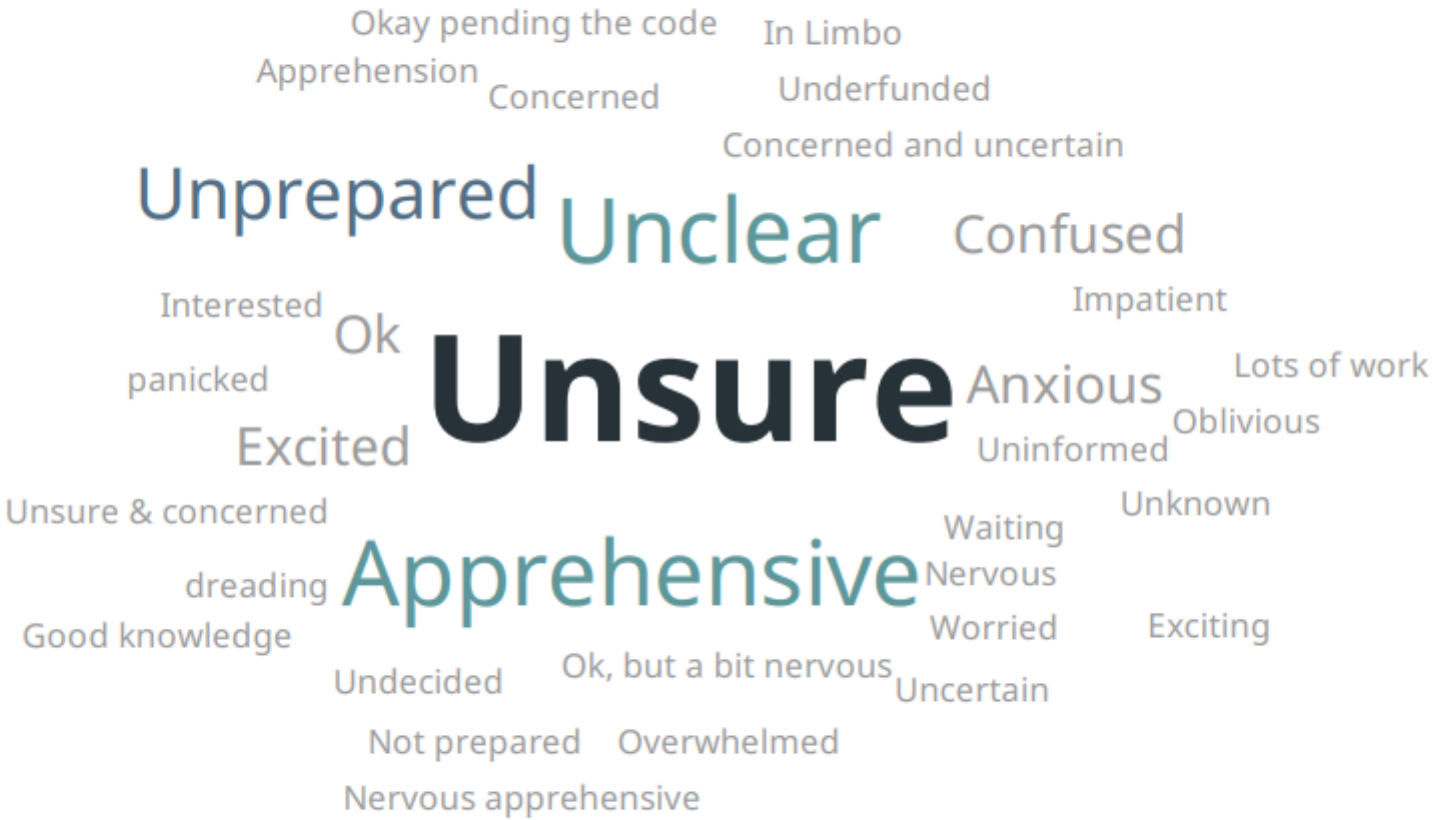

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Which aspect of LPS are you most worried about currently?

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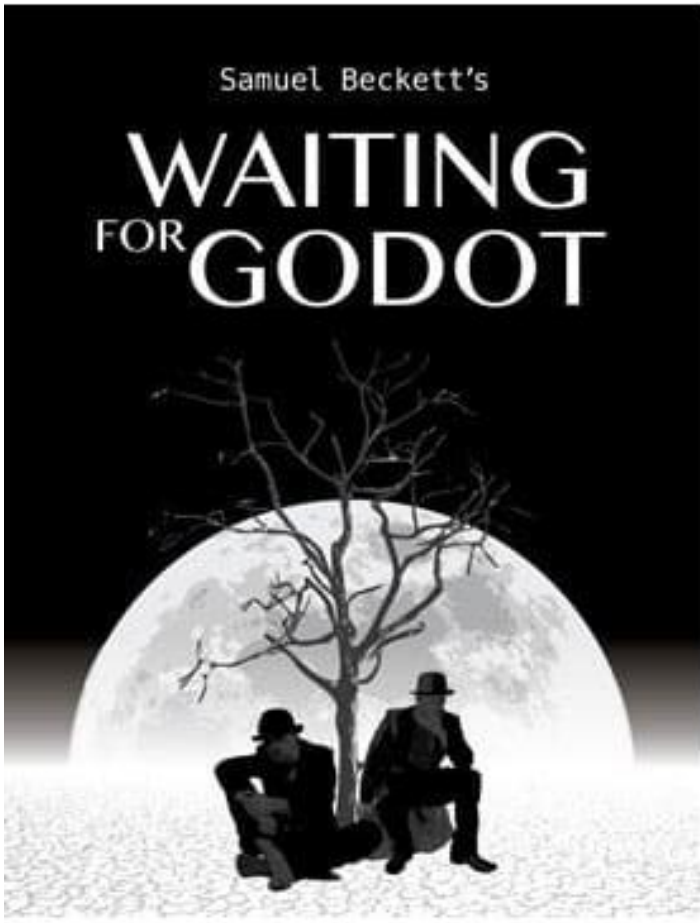
Setting the scene …

- Bournewood - 2004
- MCA - 2005 + DOLS - 2007, 2009
- Neary - 2011
- Cheshire West - 2014
- Law Commission - 2017
- Mental Capacity (Amendment) Act – 2019
- DRAFT Code of Practice & Regulations – “Spring 2021”
- Liberty Protection Safeguards Implementation (~~October 2020~~) April 2022 (?)



Now what?

- Uncertainty and delay
- But we can take stock:
  - What we don't know, and (maybe) when we'll find out;
  - What we do know about LPS;
  - What we know won't change;
  - What we can be doing now to be ready;
  - Both legal and governance perspectives

Legal issues & getting ready now

LPS - Big changes

- LPS replaces DoLS entirely (from April 2022?)
- Now applies to all (and multiple) settings
- Applies over 16
- Abolishes urgent authorisations (see new MCA s4B)
- Streamlined assessments, and built into care planning
- Longer authorisations (12 mths + 12 + 36)
- Independent scrutiny more focussed (rationed?) – AMCP only reviewing cases where P “objects”
- Spreads the burden of authorisation – esp to NHS Hospitals and CCGs

But some things stay the same

- No statutory definition – so Cheshire West prevails (and there will be guidance in the Code of Practice)
- So no reduction in the numbers – in fact will ?double?
- And CoP cases will continue – s21ZA maintains right to appeal against an LPS authorisation, and non-means tested legal aid retained
- No substantial change to the interface with MHA (but query the impact of the MHA reform proposed to exclude ASD / LD?)
- The consequences of unlawful DoL
- DoLS will continue to run in parallel for year 1 of LPS

Questions … for the Code and Regs?

- Examples of the interpretation of Cheshire West?
- Life saving medical treatment – s4B -v- Ferreira?
- Who will be qualified to carry out the 3 assessments?
- Who should carry out the pre-authorisation reviews?
- Who should sign off the authorisations?
- What level of training for each?
- What resource required – including AMCPs?
- How will we define “objection”?
- Will the care home special rules be reinstated?
- What about the DoLS backlog as at LPS implementation?

But we do already know the most important thing about DoL …

- Neary (2011)
- Esegbona -v- King's College Hospital (2019)
- Emile v Haringey (2020)

- …Is not DoL – it is to ***get the MCA right***

MCA pitfalls

- Unclear about the decision that needs to be made
- Conflation of capacity and best interests – the "protection imperative"; and risk aversion in both
- Mistaking our role (commissioner / provider – "servant not master")
- Misunderstanding the role of consultation and collaboration (with P and others) in making best interests decisions; and
- Overlooking Article 8 rights to family life

So prepare for LPS now by:

- Focus on embedding good MCA practice;
- And … using DoLS / COP applications as need be

And… As an NHS Trust:

- Scope how many cases do you typically refer to DoLS?
- How many more would there be including 16-17 year olds?
- How will those numbers be affected if patients with learning disability or autism are removed from the criteria for detention under the MHA?

As a CCG / ICS

- Focus your preparation / training on the CHC team, as CHC funding is the hook into your responsibility for any DoL
- How many CHC cases do you have?
- How many of those are for patients likely to lack capacity for decisions about their care and residence?
- How many of those are in circumstances that might amount to a DoL (per the Cheshire West definition)?
- Get them to Court now …

For both Trusts and CCGs (and LAs) (1)

- How many cases are “objecting” so as to trigger the AMCP involvement to help assess likely AMCP resource needed.
- Consider who will be doing the LPS assessments?
- Consider who will be doing the LPS pre-authorisation reviews / authorisations?
- Plan workforce and prepare a budget – based on the Impact Assessment (however imperfect)
- Prepare IT systems – there will be much more reporting and more often with LPS than DOLS.

For both Trusts and CCGs (and LAs) (2)

- Prepare to make the most of the equivalent assessments by audit of record keeping to set up easy finding and extraction of the crucial information – eg diagnosis.
- Prepare to work with the public – comms and information and public engagement – reform likely to attract attention
- Prepare to deal with any claims / liabilities that may come to attention in that review – discuss with insurers and NHS Resolution.

For the independent sector

- How many patients do you have in your care likely to lack capacity for decisions about their care and placement?
- How many of those are in circumstances that might amount to a DoL (per the Cheshire West definition)?
- What resource will you need in place for the LPS process?

For all organisations

- Make a start on preparation of policies for LPS, starting by updating the existing DoLS policies, to be finalised as the Code of Practice and Regulations come out. Don't leave it too late to make a start.
- Consider which staff, and how many, need training and to what level. Line up appropriate support and provision for this, whether external or internal.
- **Most fundamentally, focus first on the MCA**. Get this right and DoLS / LPS should not cause trouble. Invest in MCA training / refreshers, audit and support …

You are not alone: Organisational preparedness

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Who we are

- NHS hosted internal audit/independent assurance provider
- 27 NHS organisations
- Member of The Internal Audit Network (TIAN) – covers ~ 50% of NHS orgs

TIAN Promoting good governance in healthcare

- Substantive team of clinically qualified and registered staff
- Undertake reviews of consent, MCA and DoLS across our clients

- Practice and understanding are variable
- Use this time (and any further delay) to really consolidate staff knowledge + understanding of MCA and what a DoL is
- A well written step-by-step process for LPS can be followed by anyone, but the deep understanding of what it means for someone to be unable to make decisions and what constitutes a deprivation of liberty takes time and effort

Madness/Insanity = “doing the same thing over and over again and expecting different results”

Context/scale of the challenge

- In 2019/20 – 263,940 DoLS applications received by Local Authorities – England (2018/19 – 240,455)
- In 2020 – There were 2,897 applications to the CoP requesting authorisation of a DoL (down on 2019 when there were 3,404)

What we're doing

- Working with NHS orgs and their ICS Local Authority partners
- Identifying current thoughts on expected numbers, models, staffing requirements, training needs etc
- 'Benchmarking'
- Sharing ideas/options

Things to consider

- ICS role
- Ferreira judgement
- Threshold for an Re X application to CoP
- Assumptions for numbers (inc % requiring AMCP)
- Team responsible
- Banding/grade of pre-authorisations reviewers (where doesn’t require AMCP)
- Existing assessments, documentation far more explicit
- Using existing electronic patient records
- Internal data and reporting/monitoring

Has your organisation identified likely numbers of LPS applications (based on previous DoLS/Re X activity + changes eg life-sustaining treatment and 16/17 year olds)?

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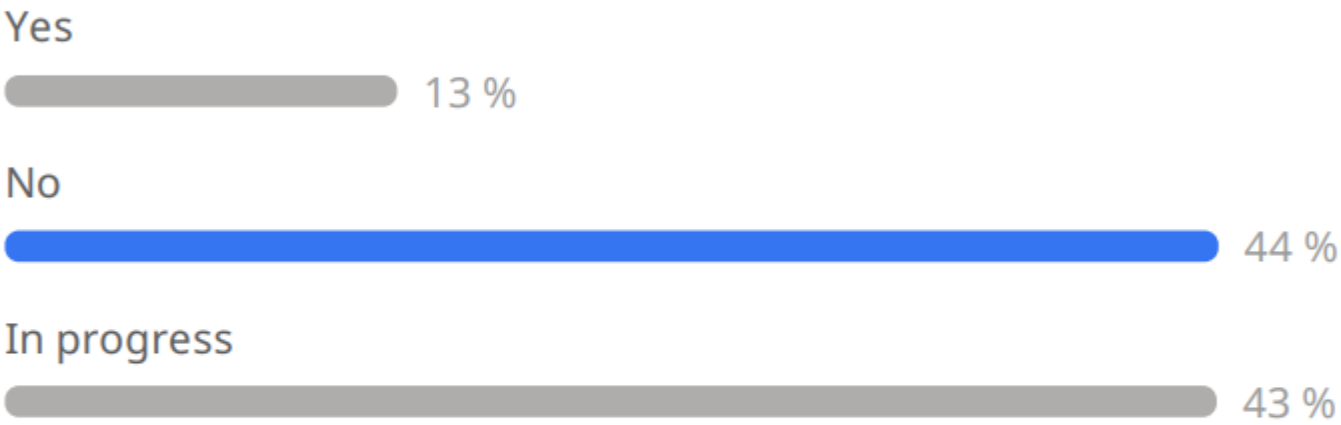

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If so, have you identified how many of these are likely to need a pre-authorisation review conducted by an AMCP ?

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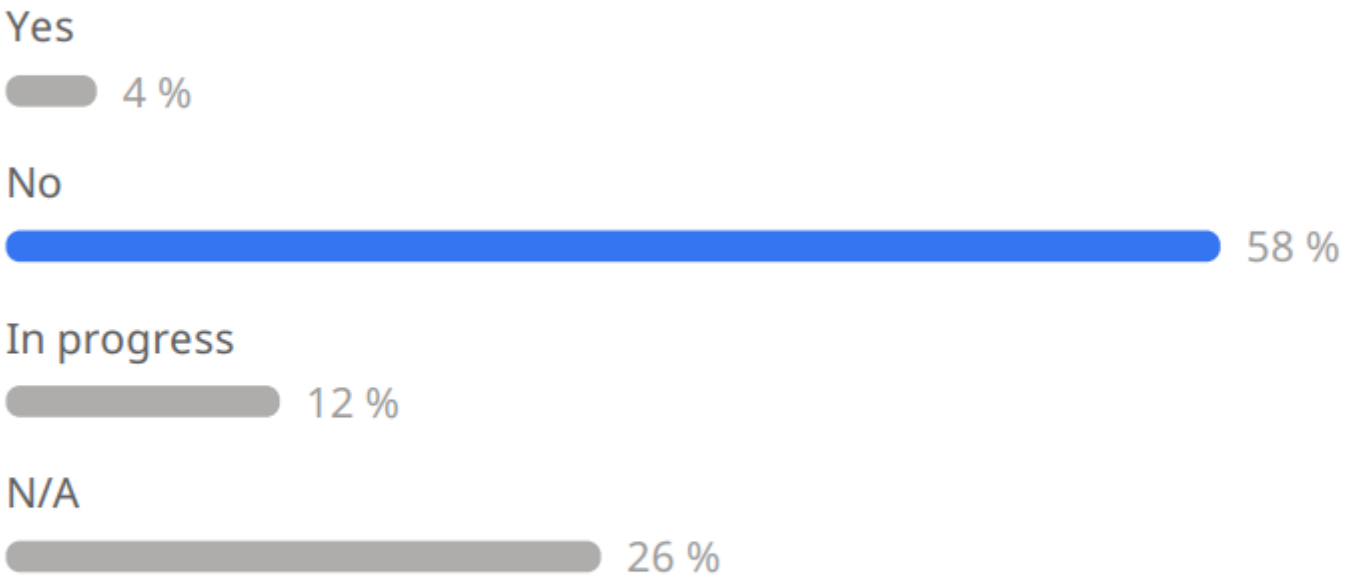

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Is there any consideration being given to an 'LPS hub' model within your county where AMCPs (and/or IMCAs) might sit at a system level for utilisation by the various responsible bodies working within the system?

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For new responsible bodies (ie NHS orgs), have you started any recruitment yet for individuals who will undertake the review of assessments and/or authorisation and/or AMCPs?

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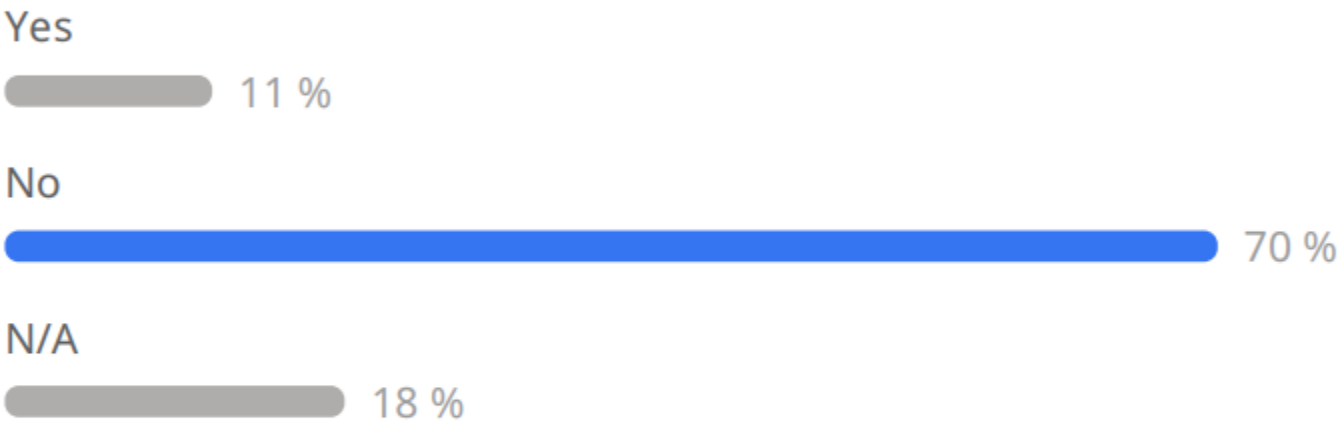

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Our next steps

- Generic training videos – MCA, best interests, restrictions, definition of mental disorder, Article 5 – what is a DoL?
- K+U assessment/quiz (for post-training)
- Database
- Template policies/flowcharts/checklists/forms
- Audit tools (MCA, as well as specifically LPS)
- Information leaflets for patients/'appropriate persons'/families/carers
- Template internal assurance and risk escalation report

Want to get involved?

- Via your TIAN internal audit manager
- Via email: elaine.dower@nhs.net
- Via phone: 07342 081522

Q&A

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How are you currently feeling about LPS?

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How we can help

- Strategic board level briefings
- Support to develop and implement new policies
- Bespoke training for all levels of involvement in LPS
- Preparation of key supporting documentation
- Full service support with challenges to LPS authorisations.
- Ongoing updates: save the date, 7 October 2021, 11am

- Contact us at LPS@Hilldickinson.com

About the firm

- An international commercial law firm
- More than 850 people, including 185 partners and legal directors
- Offices in the UK, mainland Europe and Asia
- Over 200 years of heritage
- Full-service offering
- Specialists in a wide range of market sectors
- Comprehensive corporate responsibility programme of activity

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