

A presentation by

HILL DICKINSON

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ASSURANCE

# Liberty Protection Safeguards – update and next steps

# Programme

- 14:00 Welcome
- 14:05 LPS Code of Practice
  - » (Mis) Defining a DoL – Ben Troke
  - » “Advance consent” - Amy Clarke
  - » s4B / Ferreira – Emma Pollard
  - » Practical problems – Joanna Crichton
  - » Getting ready – beyond the consultation – Elaine Dower
- 15:00 Q&A
- 15:30 Close

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# (Mis) Defining a DoL?

Ben Troke  
Partner, Leeds

# Definition of DoL (?)

- Statutory v Cheshire West – illustrated (?) by case studies
- Advance consent; s4B / Ferreira
- Own home – a lower bar for consent; and no option = No DoL
- **Continuous** (or constant) supervision and control, so
  - Free run of a house you're locked in = No DoL
  - Checked on less than every 30 minutes = No DoL
  - Staff are not in all the communal areas / your bedroom all the time = No DoL
  - Able to go out mid-morning, but must be back by 9pm = No DoL
  - “Allowed to go out by herself” for 30/60 when permitted = No DoL
  - Ample time to spend as she wishes, oriented in her home = No DoL
- Hard to reconcile with the case law (and Code cannot change the law)
- Better to use actual case law
- NB – trigger is a “risk of being DoL” (see para 13.8 / 13.13)

# Narrowing the goalposts?

- Impact Assessment (para 23.5):  
*“The proposed definition for a deprivation of liberty, as set out in the Code, is also likely to impact the number of applications per year. The exact impact is difficult to quantify at present, however, we will aim to provide an estimation for the final assessment”.*
- Michelle Dyson, Director-General of Adult Social care, evidence to the Joint Committee on Human Rights (18 May 2022):  
*“...**We are looking at a new definition of what should constitute a deprivation of liberty.** We have consulted on that and we will see what comes back from our consultation...”*

Advance Consent

Amy Clarke

Senior Associate, Manchester



# Advance Consent

What does Chapter 12 say:

- Applies to age 16 +
- No limit on types of setting
- Arrangements must be particularised
- Ability to consent is decision specific
- Evidence must be provided (almost like an ADRT)
- “Get out clause”
- No “entitlement” to certain care/treatment
- Court of Protection has powers to declare whether an advance consent exists/is valid/applicable
- Role of LPA – LPA can consent to the “admission” and P can consent to the DOL

# Advance Consent

## Questions/concerns:

- Brought in through “Code” rather than legislation
- Does it overstretch the concept?
- Can a person appreciate the nature and period of restrictions to which they would be under?
- Will this create concern around access to safeguards?
- What will the take up be? Will it be like ADRT’s?
- How will it be recorded/kept?
- Who will be responsible for communicating it across settings?

s4B, Urgent DoLS and Ferreira

Emma Pollard  
Senior Associate, London

# S4B/Urgent DOLS and Ferreira

- Can only use S4B in exceptional circumstances
- 4 conditions:
  1. Consist of or for purpose of giving life sustaining treatment (LST) or carrying out a vital act (VA)
  2. Necessary in order to give LST or carry out VA
  3. P lacks capacity to consent
  4. One of the following:
    - Relevant decision being sought from court
    - Responsible Body determining whether to authorise under LPS
    - There is an emergency
- To be (a deprivation of liberty that needs to meet S4B conditions), or not to be (a deprivation of liberty at all as per Ferreira), that is the question!

# How S4B works in practice

- *“in very limited circumstances and should not be used on a routine basis”*
- Not continuous or ongoing power
- Cannot use once LPS authorisation in place
- Cannot use if advance decision in place
  
- Need to tell the responsible body (and P’s appropriate person or IMCA) within 72 hours of first time S4B used and if being used frequently
- *Processes in place to flag when first used / being used frequently?*
- If used frequently then Responsible Body to prioritise authorisation decision
  
- Keep record of decision to include:
  - Reasons for deciding conditions are met
  - Reasons for steps taken to deprive P i.e. the vital act / life sustaining treatment required
  - Precise steps that have been taken
- *Prepare template form for use of S4B?*

# Practical considerations

Joanna Crichton  
Legal Director, Liverpool

# Practical considerations

- Who can carry out the assessments?
  - The additional requirements
  - What about the medical assessment?
- Who can complete the pre authorisation review and give final sign off?
- Timing of LPS and NHS Continuing healthcare funding assessment

# Beyond the consultation – getting ready now

Elaine Dower  
360 Assurance



# Beyond the consultation

The detail provided by the consultation documents does not change the overall process

Suggestions for collaboration:

- AMCPs (CoP 13.50 identifies an “AMCP team”, as does 18.11)
- Pre-authorisation reviewers (non-AMCPs)
- Admin team (inc IMCA referrals)
- Database
- Training provision

# Beyond the consultation

- What are you doing in collaboration...
  - As a full ICS/ICP (including both local authorities and health responsible bodies)?
  - Just between local authorities?
  - Just between NHS responsible bodies?
  - Just between NHS providers?
- Therefore, what do you need to do within your organisation?

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# Questions

## 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.
- Contact us at [LPS@Hilldickinson.com](mailto:LPS@Hilldickinson.com)
- [elaine.dower@nhs.net](mailto:elaine.dower@nhs.net) / 07342 081522

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