DoLS and the new Liberty Protection Safeguards (LPS): *What stays and what changes?*

(January 2019 version)

- January 2019: during passage through the House of Lords, the government agreed a series of significant amendments to LPS. It should be noted that many of these amendments have been forced on the government after sustained criticism and lobbying from many different organisations and members of the House of Lords. Several of the amendments were highlighted in the national survey on LPS run by Edge Training and Community Care earlier this year. We are grateful to those who completed the survey as it has had a considerable impact and continues to provide a strong evidence base of practitioners' views.
- Changes since the last version of this table are marked with an *
- To download the Bill and explanatory notes go to: https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html
- Some details not in the bill (qualification for AMCP or Reviewer's) will be addressed in statutory regulations or the new Code of Practice.
- The Bill moved to the House of Commons in December. Any person or organisation is at liberty to lobby their MP if they have concerns or consider amendments should be made. This should be done as soon as possible.
- A series of resources and a full day training course on LPS are available from http://www.edgetraining.org.uk/news/ or email admin@edgetraining.org.uk for details

	DoLS	LPS	Commentary
Deprivation of liberty	Not defined	***To be defined**	21 November: the Government agreed to include a definition of deprivation of liberty in the Bill. The definition will be debated in the House of Commons (December to February). From the House of Lords debate the biggest concern appears to be about 'domestic' deprivation of liberty in the home setting with care delivered by family.
Care and treatment & Art 8 ECHR	Not covered	**Same as DoLS**	No change. LPS will authorise deprivation of liberty (Article 5) only and will not authorise care or treatment itself (this is via normal MCA rules) or interferences with private and family life (Article 8 ECHR). As with DoLS the new power cannot be used to restrict contact with family or to remove people from family (against family objections).
Disorder	Mental disorder	***Same as DoLS**	21 November: the Government agreed to drop the term 'unsound mind' originally in the Bill and revert back to 'mental disorder' as used in DoLS and the Mental Health Act. See 'Assessors' later for more information.
Risk	Harm to self only	***Same as DoLS**	21 November: the Government lost a vote in the House of Lords on this issue. This means LPS will only be used to prevent harm to the person lacking mental capacity (as long as it is proportionate). The deprivation of liberty cannot be with the aim of preventing harm to others.
Place	Hospitals and care homes	**Any where**	Authorities will be able to apply LPS to any setting and will no longer need to apply to the Court of Protection for people not in a care home or hospital. The huge number of community (domestic) cases remains (tens of thousands estimated), and authorities will need to authorise these.
Duty to refer cases	Care home or hospital	**Absent**	No specific duty to refer cases but the 'positive' duty under human rights law will still apply so that a state body aware of a deprivation of liberty must investigate and make lawful.

	DoLS	LPS	Commentary
Responsible body	Councils and Welsh Health Boards	***Councils + CCGs + Hospitals (NHS & private) + Welsh Health Boards**	The body providing/commissioning care = the Responsible Body. The Responsible Body identifies, assesses, authorises and monitors the LPS. Private hospitals are classed as their own Responsible Body. 21 November: the Government proposed that all LPS assessments in private hospitals (person objecting or not) must involve an AMCP. It should be noted however the AMCP MAY be an employee of the hospital.
What is authorised?	A deprivation of liberty in a care home or hospital	**Arrangements giving rising to a deprivation**	This will include returning people who go absent (explanatory notes para 33). Comment: any LPS assessment will need to identify the restrictions in a care plan giving rise to a deprivation of liberty and confirm they are to prevent harm to the cared for person, necessary and proportionate.
Conveyance	Not explicitly stated	**Direct authority to convey**	The new power will authorise arrangements including *'the means and manner of transport to, from or between particular places'. Schedule 1, para 2.*
Timing	Issued up to 28 days prior to start date	**No time period given**	No change. The Law Commission proposed that all authorisations should be completed before a person moved into a care home or hospital (unless an emergency) but this has not been followed.
1. Types of detention	Urgent authorisations	**Life sustaining treatment or vital act**	Where a person lacks capacity and the care provider needs to deprive them of their liberty for the *purpose of giving life-sustaining treatment or any vital act* (*any act necessary to prevent serious deterioration in the person's condition*) the deprivation of liberty will be lawful despite NOT completing the normal authorisation process if: 1. There is an *emergency (urgent need to take steps and it is not reasonably practicable to complete an authorisation).* Note: the full criteria are more complex **OR** 2. The care provider is awaiting a decision from the Court of Protection or a Responsible Body is undertaking an assessment for deprivation of liberty. Note: this does NOT just apply to hospitals. *Clause 2*
2. Types of detention	Standard authorisations	*** Authorisation of arrangements enabling care and treatment** *(Schedule 1, Part 2)* 21 November: the Government agreed that Responsible Bodies will decide who completes the assessments below. Originally if a person was in a care home the staff of the care home would undertake the assessments this has now changed. No staff with a financial conflict of interest may undertake the assessments in care homes. Further detail on conflict of interest will be in a later statutory regulation.	
Assessments/ criteria/ conditions	1. Lacks capacity	**1. Same as DoLS**	21 November: Lord O'Shaughnessy (on behalf of the government, 21 November) stated: '*Capacity assessments should be completed by a registered professional such as a nurse, social worker or occupational therapist..'*
	2. Mental disorder	**2. Same as DoLS**	The assessment remains but the role of MH assessor is removed. It will require a statement by a registered doctor. It would appear the government believes a GP record stating a person has memory problems will be enough to satisfy this assessment. There is no funding in the governments Impact Assessment to pay GPs.
	3. Person is or is to be detained	**3. *Deprivation of liberty**	21 November: the Government agreed to introduce a definition of deprivation of liberty when the Bill moves to the House of Commons. This assessment will require evidence of the restrictions leading to the deprivation of liberty.

	4. Best interests	**4. * Necessary and Proportionate to prevent harm to self**	The new wording is very similar to the current DoLS assessment. The best interests assessment is removed as a standalone assessment, but the Government have stated that a best interests assessment will still be required as part of the wider MCA within which LPS will sit.
	5. Consult	**5. *Consultation**	21 November: the Government agreed to introduce a requirement that the person being detained is consulted(!). The Responsible Body must also consult as *practicable or appropriate*: 1. Those named by the person to consult 2. Anyone engaged in caring for them 4. Anyone interested in their welfare 3. Any power of attorney (finance or health and care) or EPA 4. Any deputy 5. Any appropriate person 6. Any IMCA concerned. The purpose is to ascertain the person's wishes or feelings in relation to the arrangements.
	6. Age 18	**6. *Age 16**	21 November: the Government have agreed to change the age from 18 to 16. As yet there is no detail on what additional assessments will be required for young people (ie the interface with parental responsibility).
	-	**7. Objecting**	Where a person is assessed as objecting to accommodation or care/treatment an Approved Mental Capacity Professional must undertake the pre-authorisation review (see below).
	8. Eligibility	**8. Excluded arrangements**	No significant change**.** Probably the most complex and criticised part of DoLS is kept (with new name). As with DoLS the key issue in hospitals is whether a person 'objects'. Technically the overlap increases as LPS now starts from age 16 rather than 18 under DoLS. *Schedule 1, para 42-54.*
	9. Representative	**9. *Appropriate person**	An assessment of whether there is an appropriate person to *support and represent* the person under LPS. The Court of Protection has already considered what *support and represent* means in the context of DoLS.
	The government have stated the Responsible Body must also confirm the arrangements are in the person's best interests and an LPA/Deputy is not objecting to the arrangements.		
	Authorising signatory	***Pre-authorisation Reviewer**	Similar to the current role of DoLS signatory. All assessments must be 'reviewed' (pre-authorisation review) by a member of staff from the Responsible Body. The Reviewer must not be involved in the day to day care of the person concerned or providing any treatment to the person concerned. If a person is objecting to the placement or care or treatment, the Reviewer must be an AMCP. The Reviewer must be satisfied it is *'reasonable for the Responsible Body to conclude the authorisation conditions are met.'* An AMCP *may* meet the person concerned and consult other people if they consider this is practical and appropriate. In all other cases (non-objecting people) the Reviewer does not meet the person and reads the papers/forms. Comment: as it stands the Reviewer could be an unqualified person who reads the assessment such as a hospital administrator. 21 November: the Government proposed that in private hospitals all pre-authorisation reviews (person objecting or not) must be carried out by an AMCP. However, the AMCP could be an employee of the hospital if the person is privately funded. This is to be debated further.
	No refusals	***Removed but..**	The government have stated that considered of an LPA or deputy refusing must still be made although not formally in the proposed legislation.

	DoLS	LPS	Commentary
Assessors	Best Interests Assessor (BIA)	***Approved Mental Capacity Professional (AMCP)** *Schedule 1, para 36-37*	Currently, professionals (BIAs) are required for all DoLS assessments. This changes so that such professionals (now called AMCPs) will only be required where the person is objecting to the placement or care/treatment and they then undertake the pre-authorisation review rather than the LPS assessments. 27 November: the role of the AMCP is expected to be expanded further and the Government will introduce amendments in the House of Commons. Regulations will (as with DoLS) give detail on qualification and training required for AMCPs. The Dept of Health & Social Care memorandum for LPS states: *'it is expected'* for England an AMCP will be an AMHP, social worker, nurse, occupational therapist or psychologist with 2 years post registration experience and has completed an approved AMCP course and *'it is expected'* that existing BIAs will be *'fast-tracked into the new role'*. Wales (as now) will have its own regulations. Note: local authorities will be responsible for the approval of AMCPs for themselves, NHS Trusts and CCGs.
	Mental Health Assessor	**Removed**	A medical assessment that the person has mental disorder is needed for LPS. The assessment may have been done from a previous authorisation or *'for any other purpose'* which could be a GP record.
	Authorising Signatory	**Pre-authorisation Reviewer**	See above under 'Assessments'. The bill makes no mention of qualification or training and no statutory regulations are planned for this.
Duration/ renewals	One year periods	**Renewable for Up to: 1 year + 1 year then 3 years**	LPS can be renewed. Comment: renewals can be paper based with NO direct re-assessment of the person if the Responsible Body *'is satisfied that the authorisation conditions continue to be met and it is unlikely that there will be any significant change in the person's condition during the period which would affect whether those conditions are met'* AND the Responsible Body has consulted others. *Schedule 1, paras 29-33*
Appeals	Court of Protection	**Same as DoLS**	No change. No automatic referrals after extended detention compared to the Mental Health Act. See funding issues later. *Clause 3.*
Reviews	Yes	**Yes**	Under DoLS, reviews were carried out by professional assessors this will not be the case with LPS. All authorised LPS must contain a 'programme of regular reviews'. The Responsible Body will decide which staff undertake reviews. The lack of detail on reviews means they may be a limited safeguard. *Schedule 1, para 35.*
Advocacy (IMCA)	Yes	***Yes**	21 November: the government agreed that where no appropriate person can be identified, the Responsible Body will appoint an advocate (IMCA) unless it would not be in their best interests. The right to advocacy remains less than under DoLS. For example, if a person has no one appropriate to consult during the assessment this does not trigger a right to an advocate (as it would under DoLS).
Conditions	Conditions	**Conditions**	27 November: the Government indicated that conditions could still be attached to the LPS authorisation although they did not agree that a clause should be added to the Bill to say this.

	DoLS	LPS	Commentary
Additional support	Relevant Persons Representative	***Appropriate person**	An appropriate person may be identified by the Responsible Body who is satisfied they would *represent and support* the person and are not engaged in providing care or treatment for them in a professional capacity. Not everyone will have an appropriate person. An appropriate person with capacity can request an advocate to support them. Comment: Under DoLS the person had a duty to maintain contact but this is absent from LPS. *Schedule 1, para 39(5).* 21 November: the government agreed that if no appropriate person can be identified then an advocate (IMCA) will be appointed unless it is considered not to be in the person's best interests.
Information on rights	Yes	*** Yes**	27 November: a duty to inform the person, the appropriate person and/or advocate of their rights under LPS was introduced despite government opposition (the government lost a vote in the House of Lords).
Code of Practice	Yes	**Yes**	A statutory Code of Practice for LPS will be produced. It appears that as before, this will be separate to the main MCA Code of Practice which is itself going to be revised.
Forms	Not statutory, but used in practice	**Same as DoLS**	The criteria confirming detention will need to be recorded clearly for the Reviewer to be satisfied it is *'reasonable for the Responsible Body to conclude the authorisation conditions are met.'* This is particularly important given appeals will continue to go to the Court of Protection and questions may be asked of the Reviewer.
Equivalent assessments	Yes (but limited)	**Yes**	Re-use of existing assessments multiple times where no change has occurred. Also, similar assessments carried out for other purposes (Care Act etc) could be included but will need to meet the criteria of LPS.
Inspection	CQC	**Same as DoLS**	CQC only has a duty to monitor and report on DoLS but no direct enforcement powers and this is repeated again in LPS. *Schedule 1, para 41.*

Funding Gaps

(quotes and figures are taken from the DHSC impact assessment that goes with the Bill)

1. Applications per year	*'..we estimate that **304,132** applications will be received and completed **per year.'*** **Comment:** the significance of this 'estimate' is enormous. If it is wrong the whole of LPS is underfunded for LAs, CCGs, NHS Trusts. 1. At the moment the number of DoLS applications is over 232,000 per year (England 227k and Wales approx. 15k) and has been growing every year. 2. Community cases - this was put at 50,000 several years ago but many authorities say it is more when considering the 'acid test' and including assistive technology etc.
2. Appeals to the Court	*'The Law Commission estimate that 1% of DoLS applications will end in an appeal to the Court of Protection. We assume, by introducing this new role (AMCP) that the number of appeals to the Court of Protection will reduce to **0.5%** of applications.'* **Comment:** this estimate is counter to all facts and the AMCP is a lesser role than that of the BIA so there is no reason to think they will lead to less appeals. It leaves Responsible Bodies underfunded for future appeals but halving the appeal rate does save the government £52 million! In addition, the % of appeals has been increasing each year.

3. Responsible Bodies admin costs	£155 per assessment – half the figure given for DoLS because: *'..it will be less intensive than under DoLS at present'* **Comment:** no evidence or good foundation for stating the assessment will be 'less intensive'. Also compare to the Mental Health Act admin which is approximately 1 WTE administrator for every 50 people detained.
4. Training	*'The total cost of doctor and social worker training is comprised of the unit cost of doctor and social worker training* ***(£23.19)…*** *The number of doctors and social workers needing training is calculated as* ***10% of the number of doctors and social workers****.'* **Comment:** this equates to a half day training course for the nine statutory assessments for a limited number of staff.
5. Objecting	Funding for AMCPs is based on the 'guestimate' that 25% of people will be found to be objecting. There is no proper research on this and as LPS is designed to be completed close to when a person first moves into care it may be much higher.
6. Mental disorder	If a Responsible Body cannot find medical evidence of mental disorder in care records it has access to, it will need to request one from a GP or other doctor however there is no funding allocated for this in LPS. There is no research on the % of cases where this may be the case.

Liberty Protection Safeguards (LPS) procedure

(Schedule 1, Part 2, Mental Capacity (Amendment) Bill)

1. Assessment

The person*:*

1. Lacks mental capacity
2. Has a mental disorder
3. Is aged 16+
4. The restrictions are a deprivation of liberty
5. The restrictions leading to the deprivation of liberty are necessary & proportionate to prevent harm to them
6. Are they objecting to the placement or care?
7. Consult the person and others
8. Confirm the person is not excluded (Mental Health Act interface assessment)
9. An Appropriate Person is available (or IMCA)

(The government have stated the Responsible Body must also confirm the arrangements are in the person's best interests and an LPA/Deputy is not objecting to the arrangements).

Carried out by:

Any person considered appropriate by the Responsible Body (NHS Trust, private hospital, CCG, Health Board or Local Authority). The majority of the assessments do not need to be a carried out by a professional. Lord O'Shaughnessy (on behalf of the government, 21 November) stated: '*Capacity assessments should be completed by a registered professional such as a nurse, social worker or occupational therapist, and medical assessments must be completed by a physician. We will set out in the code of practice the experience and knowledge that we would expect to see for those undertaking assessments.'*

2. Pre-authorisation Review

The Responsible Body reviews the information above to determine whether it is reasonable to conclude the criteria/conditions are met.

Carried out on behalf of the Responsible Body by:

1. Someone not involved in the day to day care of the person or providing treatment to them (this could be an AMCP or any other member of staff). They do NOT have to meet the person directly.
   OR
2. If the person is objecting, an AMCP. They must meet the person and consult others unless it is not appropriate and practicable to do so.

3. Authorisation

The Responsible Body *may* authorise the LPS if it is satisfied the criteria are met and a pre-authorisation review has taken place.

Carried out by Responsible Body. No detail on profession or qualification so it could be anyone considered appropriate by the Responsible Body.