

Liberty Protection Safeguards (LPS) House of Commons consultation – briefing sheet



4 January 2019: The House of Commons Public Bill Committee have an open consultation on the LPS Bill as it stands now. Any person can give their views. Full details on the consultation are here:

www.parliament.uk/business/news/2018/december/have-your-say-on-the-mental-capacity-amendment-bill/

Email comments to: scrutiny@parliament.uk (as a word document with your name, details of your profession or interest in LPS, whether you are writing in a personal capacity or on behalf of an organisation and the submission you are making is for the *Mental Capacity (Amendment) Bill*). No more than 3,000 words. Provide details of concerns or changes you think should be made to the Bill. It is important to give reasons for any changes you think should be made. Remember no MP has ever completed a DoLS assessment (that we know of), so it is helpful to explain real situations (confidential/anonymised). **The closing date is 15 January** (the Committee may sit later than this date).

The more people that write to the Committee the greater the impact so please encourage anyone you know interested in DoLS/LPS to write to them. It can be brief, bullet points. It is best to do individual submissions rather than a group.

Some suggested changes and amendments to the Bill are given below. Feel free to include any in your submission to the Committee. Some of these changes and comments are taken from the Law Society briefing to the House of Commons <https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/mental-capacity-amendment-bill-hoc-second-reading/> and others are by a group of 15 third sector organisations including Mencap, Alzheimers Society and Mind <http://www.edgetraining.org.uk/news/>. Please do not just cut and paste comments below – if you want to have an impact it needs to be in your own words providing examples and reasons for your view.

- 1. Wishes and beliefs of the person:** the original version of the Bill did not include a requirement to consult the person lacking capacity. This was amended in the House of Lords. However, the requirement to consult the person is part of a requirement to consult a long list of others interested in their welfare. **Amend the Bill:** to create a distinct separate assessment of the person's views. If they are opposed to the accommodation and/or care plan, ensure that an advocate is appointed immediately.
- 2. Approved Mental Capacity Professional (AMCP):** only people *identified* as objecting will qualify for an assessment by an AMCP (the replacement for the Best Interests Assessor role). In all other cases, the Responsible Body can choose any staff it considers appropriate to undertake the assessments (except the mental capacity and mental disorder assessments which will require professionals). **Amend the Bill:** to include additional triggers for involvement/oversight by an AMCP. For example, where family or others are unhappy with the arrangements; someone is subject to covert medication or have no family, carers or friends.
Supply of AMCPs: Local authorities are responsible for the supply of AMCPs in the Bill. This potentially presents serious issues for LAs if it means that a CCG or NHS Trust can call them to request AMCPs for pre-authorisation reviews because it has not trained its own staff to undertake the role. **Amend the Bill:** so that LAs register and approve AMCPs but supply of them rests with each Responsible Body for the LPS authorisations it requires.
- 3. Advocacy (IMCA):** if a person has no one appropriate to consult, this does not trigger a right to an advocate (unlike DoLS). Many people will not get an advocate whereas the Law Commission proposed that everyone should have an advocate (opt-out system) unless they didn't want one. **Amend the Bill:** to increase the right to advocacy. Allow an advocate to be appointed at any point if considered appropriate by the Responsible Body or an AMCP.
- 4. Care home managers:** The Bill was amended in the House of Lords with limits to staff in care homes undertaking assessments (see para 21 of the Bill). However, as it stands it is still possible that some staff in care homes will be able to undertake multiple assessments under LPS. The Care Home Manager will also be responsible for the consultation duty in para 20. **Amend the Bill:** remove all mention of care home managers from the Bill and leave it for Responsible Bodies to identify staff it considers are appropriate to undertake LPS assessments.
- 5. Renewals:** LPS allows a first renewal for up to one year and then for three years at a time. **Amend the Bill:** renewals should be for no more than one year. Three years is too long a period of time without a proper review of detention. By way of comparison, consider the shorter lengths of detention under the Mental Health Act.
- 6. Private hospitals:** under LPS, private hospitals become their own Responsible Body. This means they carry out assessments, pre-authorisation reviews and then authorise the detention. This appears to be a serious conflict of interest especially given that Winterbourne View hospital, if still open, would have been a Responsible Body. The

government have proposed that all pre-authorisation reviews in private hospitals should be undertaken by an AMCP however this fails to recognise that the AMCP can be an employee of the private hospital. **Amend the Bill:** do not allow private hospitals to become Responsible Bodies. Most people under DoLS (and LPS in future) in private hospitals will be funded by their local authority or CCG so it would be most appropriate that those funding the placement, become the Responsible Body or otherwise the local authority where the hospital is situated (with funding allocated for specific local authorities).

7. 16 and 17 year old: LPS will cover 16-17 years olds but at present, there are no additional safeguards in the Bill for this group. Under the current system these cases are referred to a judge; the young person is legally represented and the authority of those with parental responsibility is fully considered. **Amend the Bill:** to ensure those under 18 have additional rights and that if those with parental responsibility object, this leads to a Court of Protection hearing. Ensure that LPS is consistent with and does not provide less rights for young people than those under the Children Act.

8. Conditions: under DoLS, conditions can be attached, and research shows they are highly thought of by practitioners. However, there are no conditions in the LPS Bill. The government has said they could be added to the final authorisation record but if the legal basis for conditions are not in the Bill itself, this could be problematic. **Amend the Bill:** add conditions directly into the Bill.

9. Professional assessments: there is NO requirement to use professionals for any of the assessments under LPS. The government has promised that regulations or the new Code of Practice will state that the assessment of mental capacity must be completed by a professional (social worker, nurse, OT etc) and the mental disorder assessment by a doctor. However, professionals are NOT required for the crucial and complex assessments of identifying the restrictions in a care plan; whether they constitute a deprivation of liberty and the assessment of whether the restrictions are necessary and proportionate. **Amend the Bill:** to state that registered professionals must complete the assessment of whether the person is deprived of their liberty and that it is necessary and proportionate.

10. Funding: the government's financial impact assessment for funding LPS appears inadequate on numerous points which could result in key elements of LPS being underfunded (just like DoLS).

- Community DoL cases – the estimate for the number of community LPS cases is too low (based on an old and untested figure)
- The % of people who object and qualify for an AMCP review – appears too low given that LPS should be done quickly when a person is admitted to a care home and therefore is more likely to be objecting.
- The % of IMCAs when no Appropriate Person identified – this figure is too low given DoLS case law that the person must be someone who will appeal if the person is objecting.
- Training estimate – only 10% of doctors and social workers are estimated to need a half day training course.
- Appeals estimate – the appeal rate under DoLS is 1% and rising. The government estimates this will fall to 0.5% under LPS. This prediction is unfounded, but it 'saves' the government £52 million!
- Mental disorder – there is no money allocated for when a Responsible Body cannot find evidence of a record of mental disorder written by a Dr in a person's care records. An LPS cannot be completed without this evidence so the Responsible Body will need to arrange for a doctor to complete this.

Amend the Bill: the Bill itself will not include clauses relating to funding but MPs need to understand the significance of inadequate funding so the new law does not lead to a backlog and/or poor quality assessments.

11. Code of Practice: the Bill is very brief and the government have promised that more detail on the duties and protection under LPS will be given in the Code of Practice. The problem is that there is no draft of the Code to review and Codes are not open to scrutiny or consultation in the same way as a Bill (legislation).

12. Appropriate Person (AP): replaces representatives but their appointment is less rigorous than under DoLS for example, there is no statutory requirement to maintain contact. This could mean that many may not appeal when they should (note the DoLS case law). **Amend the Bill:** place a duty on the Responsible Body that it must be satisfied the person appointed as AP will appeal when appropriate and the Responsible Body must ensure (monitor) the AP to ensure they fulfil their statutory duties.

13. Inadequate consultation and speed of Bill: both Lords and MPs have complained about the government pushing the Bill through Parliament too quickly for proper detailed consideration and consultation. The House of Commons consultation reflects this as it was opened just before Christmas for a short period of time. The Commons are due to consider a definition of deprivation of liberty but there does not appear to be any proper consultation method for practitioners to be involved in what is central to the very point of LPS.