

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

(March 2019 version)

- **27 March 2019:** The Bill is in its final Parliamentary stages and all the main parts are now agreed and fixed.
- 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 AMCPs or Reviewers) will be addressed in statutory regulations or the new Code of Practice.
- A series of resources and a full day training course on LPS are available from [www.edgetraining.org.uk](http://www.edgetraining.org.uk) or email [admin@edgetraining.org.uk](mailto:admin@edgetraining.org.uk) for details

	DoLS	LPS	Commentary
<b>Deprivation of liberty</b>	Not defined	<b>Defined in LPS</b>	LPS contains a definition of deprivation of liberty. This is open to final debate at the time of writing in Parliament so the final wording is not yet known.
<b>Care and treatment &amp; Art 8 ECHR</b>	Not covered	<b>Same as DoLS</b>	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).
<b>Disorder</b>	Mental disorder	<b>Same as DoLS</b>	No change. A person must have a mental disorder as part of the criteria for LPS however there are no mental health assessors in LPS for this assessment so other evidence will be needed (GP record in care home notes).
<b>Risk</b>	Harm to self only	<b>Same as DoLS</b>	No change.
<b>Place</b>	Hospitals and care homes	<b>Anywhere</b>	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. This will include supported living and domestic settings.
<b>Duty to refer cases</b>	Care home or hospital	<b>Absent</b>	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.
<b>Responsible body</b>	Councils and Welsh Health Boards	<b>Councils + CCGs + NHS Trusts + Welsh Health Boards</b>	The body providing/commissioning care = the Responsible Body. The Responsible Body identifies, assesses, authorises and monitors the LPS. Local Authorities will be responsible bodies for people in private hospitals and private placements in other settings.
<b>What is authorised?</b>	A deprivation of liberty in a care home or hospital	<b>Arrangements giving rising to a deprivation</b>	This will include returning people who go absent (explanatory notes para 33) and transporting the person to, from or between particular places (Schedule 1, part 1, para 2(3)). It is limited to deprivation of liberty only – see Care and treatment & Art 8 ECHR above.
<b>Conveyance</b>	Not explicitly stated	<b>Direct authority to convey</b>	The new power will authorise arrangements including ' <i>the means and manner of transport to, from or between particular places</i> '. Schedule 1, para 2.

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<b>Timing</b>	Issued up to 28 days prior to start date	<b>No time period given</b>	It appears that LPS, just like DoLS, can be applied for and completed before a person moves into a placement where they are deprived of their liberty however unlike DoLS there is not time period given for this.
<b>1. Types of detention</b>	Urgent authorisations	<b>Life sustaining treatment or vital act</b>	Where a person lacks capacity and the care provider needs to deprive them of their liberty for the <i>purpose of giving life-sustaining treatment or any vital act (any act necessary to prevent serious deterioration in the person's condition)</i> the deprivation of liberty will be lawful despite NOT completing the normal authorisation process if: 1. There is an <i>emergency (urgent need to take steps and it is not reasonably practicable to complete an authorisation)</i> . Note: the full criteria are more complex <b>OR</b> 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. <i>Clause 2</i>
<b>2. Types of detention</b>	Standard authorisations	<b>Authorisation of arrangements enabling care and treatment (Schedule 1, Part 2)</b>	
<b>Assessments/ criteria/ conditions</b>	1. Lacks capacity	<b>1. Same as DoLS</b>	The government has stated this assessment should be completed by a registered professional such as a nurse, social worker or occupational therapist.
	2. Mental disorder	<b>2. Same as DoLS</b>	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	<b>3. Deprivation of liberty</b>	A statutory definition of deprivation of liberty is in LPS and is being debated in Parliament at the time of writing.
	4. Best interests	<b>4. Necessary and Proportionate to prevent harm to self</b>	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	<b>5. Consultation</b>	The Responsible Body must also consult as <i>practicable or appropriate</i> : 1. The person themselves. 2. Those named by the person to consult 3. Anyone engaged in caring for them 4. Anyone interested in their welfare 5. Any power of attorney (finance or health and care) or EPA 6. Any deputy 7. Any appropriate person 8. Any IMCA concerned. The purpose is to ascertain the person's wishes or feelings in relation to the arrangements.
	6. Age 18	<b>6. Age 16</b>	No specific recognition is given to those with parental responsibility.
	-	<b>7. Objecting</b>	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	<b>8. Excluded arrangements</b>	No significant change. Probably the most complex and criticised part of DoLS is kept (with new name). <i>Schedule 1, para 42-54.</i>
	9. Representative	<b>9. Appropriate person</b>	An assessment of whether there is an appropriate person to <i>support and represent</i> the person under LPS. The Court of Protection has already considered what <i>support and represent</i> means in the context of DoLS.
	Note: 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	<b>Pre-authorisation Reviewer</b>	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 (or it is a private hospital or at the discretion of the Responsible Body), the Reviewer must be an AMCP. The Reviewer must be satisfied it is <i>'reasonable for the Responsible Body to conclude the authorisation conditions are met.'</i> 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. Note: it is likely the Court of Protection will take the same approach to the authorisation process as under DoLS. In the case of <i>Steven Neary v Hillingdon Council [2011] EWHC 1377</i> the judge stated: <i>'The responsibilities of a supervisory body,..., require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it.'</i>
	No refusals	<b>Removed but..</b>	The government have stated that the attorney/deputy can object to the LPS arrangements under the powers of the main part of the Bill. Accordingly, this will need to be checked.
	<b>DoLS</b>	<b>LPS</b>	<b>Commentary</b>
<b>Assessors</b>	Best Interests Assessor (BIA)	<b>Approved Mental Capacity Professional (AMCP)</b> <i>Schedule 1, para 36-37</i>	Currently, professionals (BIAs) are required for all DoLS assessments. This changes so that such professionals (who will be called AMCPs) will only be required where the person is objecting to the placement or care/treatment or is in a private hospital (objecting or not) or at the discretion of the Responsible Body. An appointed AMCP undertakes the pre-authorisation review rather than the LPS assessments. The qualification for AMCPs is expected to be very similar to that of BIAs plus existing BIAs will be <i>'fast-tracked into the new role'</i> . 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	<b>Removed</b>	A medical assessment that the person has mental disorder is needed for LPS. The assessment may have been done from a previous authorisation or <i>'for any other purpose'</i> which could be a GP record.
	Authorising Signatory	<b>Pre-authorisation Reviewer</b>	See above under 'Assessments'. The Bill makes no mention of qualification or training and no statutory regulations are planned for this.

	DoLS	LPS	Commentary
<b>Duration/renewals</b>	One year periods	<b>Renewable for up to: 1 year + 1 year then 3 years</b>	LPS authorisations are renewable. Renewals will be paper based with no direct re-assessment of the person if the Responsible Body <i>'is satisfied that the authorisation conditions continue to be met and it is unlikely that there will be any significant change in the cared-for person's condition during the renewal period which would affect whether those conditions are met'</i> AND the Responsible Body (or care home manager) has consulted others.
<b>Appeals</b>	Court of Protection	<b>Same as DoLS</b>	No change. The rigorous approach to appeals taken by the Court of Protection can be expected to continue under LPS as a person is being deprived of their liberty. Mr Justice Hayden in a recent appeal stated: <i>'..what is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage <b>any</b> circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases.'</i> Case of: CB v Medway Council [2019] EWCOP 5
<b>Reviews</b>	Yes	<b>Yes</b>	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 (including care home managers) may undertake reviews. <i>Schedule 1, para 35.</i>
<b>Advocacy (IMCA)</b>	Yes	<b>Yes</b>	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 is less than under DoLS.
<b>Additional support</b>	Relevant Persons Representative	<b>Appropriate Person</b> <i>Schedule 1, para 39(5).</i>	An appropriate person may be identified by the Responsible Body who is satisfied they would <i>represent and support</i> 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.
<b>Conditions</b>	Conditions	<b>Removed</b>	The Government indicated that conditions could still be attached to LPS authorisations in the final record but they do not appear in the Bill (legislation) itself.
<b>Information on rights</b>	Yes	<b>Yes</b>	A duty on the Responsible Body to inform the person, the appropriate person and/or advocate of their rights.
<b>Code of Practice</b>	Yes	<b>Yes</b>	A statutory Code of Practice for LPS is being written now and a draft will be open for consultation later this year.
<b>Forms</b>	Yes	<b>Same as DoLS</b>	The criteria confirming detention will need to be recorded clearly for the Reviewer to be satisfied it is <i>'reasonable for the Responsible Body to conclude the authorisation conditions are met.'</i>
<b>Equivalent assessments</b>	Yes (but limited)	<b>Yes</b>	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.
<b>Inspection</b>	CQC	<b>Same as DoLS</b>	CQC only has a duty to monitor and report on DoLS but no direct enforcement powers and this is repeated.