

Liberty Protection Safeguards – Key Facts



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- **1st September 2019:** The Mental Capacity (Amendment) Act 2019 (the Act) which creates the Liberty Protection Safeguards received Royal Assent on 16th May 2019. The Act is not expected to come into force until at least 1st October 2020 in order to give organisations time to prepare for the implementation of LPS. To download the Act and explanatory notes go to: <https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html>.
- Some details not in the Act (qualification for AMCPs, transitional arrangements) will be addressed in statutory regulations. A Code of Practice is also being drawn up, however as Mr Justice Hayden, Vice President of the Court of Protection noted recently: *'The Code of Practice is not a statute, it is an interpretive aid to the statutory framework, no more and no less.'* (Re: Lawson, Mottram and Hopton (appointment of personal welfare deputies) [2019] EWCOP 22). What is given below is the statutory framework of the Act.
- A series of resources (funding issues + DoLS & LPS comparison table + jargon buster + BIA to AMCP + LPS single page overview chart) and a full day training course on LPS are available from www.edgetraining.org.uk or email admin@edgetraining.org.uk for details.

Deprivation of liberty

LPS does not contain a definition of deprivation of liberty (just like DoLS). Therefore, the key reference point will remain the Supreme Court ruling of *Cheshire West* (the 'acid test') and other relevant case law. The new LPS Code of Practice (see below) will provide further guidance based on existing case law.

Care and treatment

LPS will authorise a deprivation of liberty but not care or treatment (just like DoLS). Care providers will still have to assess the person's mental capacity to consent to care and treatment and if they lack mental capacity, make and record best interests decisions under the Mental Capacity Act.

Detention

LPS will only authorise deprivation of liberty (just like DoLS) and not interferences in private or family life (Article 8 ECHR) such as restricting contact with family or preventing a person living with their family despite serious safeguarding concerns. Court orders would still be required in such cases where there is a dispute.

Anywhere

LPS can be used in any setting so there will be no need to apply to the court for community cases (supported living and domestic settings) as there is at present. The number of community cases is put at 50,000 by the government but this appears to be a huge underestimate and could result in LPS being chronically underfunded (just like DoLS).

Mental disorder

A person must have a mental disorder for LPS to apply (just like DoLS). Under DoLS a mental health assessor (usually a s12 doctor) completed this assessment. Under LPS the role of the mental health assessor is removed. Existing medical evidence (ie something a GP has written in accessible records) may be used. A problem will arise when no evidence of mental disorder has been recorded. This will require the responsible body (or care home) to arrange for a written statement by a doctor. Unfortunately, there is no funding allocated for this situation and the government has said in its latest impact assessment, that it expects GPs to provide this at no cost as part of their role.

Harm to self

LPS can only be used to authorise the detention of people who present a risk of harm to themselves (just like DoLS).

Responsible Body

The commissioner or funder of care will be the responsible body. This means NHS Trusts, CCGs, Welsh health boards and local authorities will all become responsible bodies. The responsible body has to organise assessments, reviews, authorisations, renewals and monitoring. For private hospitals, the Responsible Body will be a local authority.

Assessments

Please note the term assessment is used to indicate *what needs to be assessed* in order to make the amount of future work required more transparent for front line staff reading Edge documents and ensure responsible bodies are properly informed in order to prepare their funding and workforce. The term *Assessment* is not given a statutory definition under the list of definitions in para 8 of the Act. However, there are three tasks formally labelled as 'assessments' under the Act and they appear first in the list (1-3) below. Everything else on the list below still needs to be assessed under the Mental Capacity Act *before* an LPS authorisation can be given (*Para 17 (and 18 or 19) MC(A)*)

Act 2019).

1. Mental capacity (*this is likely to be completed by a professional – nurse, social worker, O/T etc*)
2. Mental disorder (*this is likely to be completed by a doctor, but it could be something written for another purpose*)
3. The deprivation of liberty is necessary and proportionate to prevent harm to the person
4. Arrangements are a deprivation of liberty
5. Consult the person and others with an interest in their welfare. The duty to consult is **not** absolute. If consultation is deemed not 'practicable or appropriate' the duty does not apply (para 20(4)). This may be undertaken by a care home manager if the person being assessed is in a care home.
6. Excluded arrangements – should or could the Mental Health Act be used instead or is there any conflict?
7. Does the person meet one of the AMCP review categories (for example, they are objecting to care or treatment)
8. Can an Appropriate Person be identified? (if not an IMCA may be appointed)
9. Age – is the person aged 16 or over? Or 18 or over in a care home?

Note: the government have stated the responsible body must also confirm the arrangements are in the person's **best interests** and consider if a health and care attorney or deputy is objecting. Caroline Dinenege, Minister of State (15 January) stated: '*Best interest decision making remains fundamental to the existing Act, within which the liberty protection safeguards will sit. Before a liberty protection safeguards authorisation is considered, it will need to be decided that the arrangements are in a person's best interests.*' Note: This will require reconsideration on renewals.

Care Homes

Care home managers can undertake the consultation for LPS and also the renewal statement (see duration) used for renewing LPS and LPS reviews.

Young People

LPS applies from the age of 16 upwards (except care homes). LPS gives no recognition or specific authority to people with parental responsibility and does not guarantee they will all be seen by an AMCP.

Pre-authorisation review

Non-AMCP Reviewer: After the assessments have been completed for LPS they are reviewed (pre-authorisation review). The reviewer can be any person from the responsible body not involved in the day-to-day care or treatment of the person. The Act does not require them to meet the person but they will have to read the assessments (just like a DoLS signatory now).

AMCP Review: If a person is objecting to care or the placement or is in a private hospital, the review must be undertaken by an Approved Mental Capacity Professional (AMCP) who must meet the person and consult others if it appears *appropriate and practicable* to do so. In addition, responsible bodies have the discretion of referring any case to an AMCP for the pre-authorisation review. Note: it is likely the Court of Protection will take the same approach to the authorisation process as under DoLS. This was clearly stated by the judge in the case of *Steven Neary v Hillingdon Council* [2011] EWHC 1377: '*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.*' (LPS changes the term from Supervisory body to Responsible body but the responsibilities remain).

Assessors

Under LPS, the majority of assessments required to authorise detention can be carried out by any member of staff of an NHS Trust, CCG, Welsh health board or local authority. It remains open to question whether (apart from the mental capacity and mental disorder assessments) they need to be registered professionals. Regulations are expected.

Appeals

If a person appeals against LPS, it will go to the Court of Protection (just like DoLS). The responsible body (NHS Trust, CCG, Health Board or LA) authorising the deprivation of liberty are taken to court for appeals. 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 case stated: '*..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 any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases.*' Case of: *CB v Medway Council* [2019] EWCOP 5

Duration

LPS can last for up to 1 year initially and then be renewed for up to another year and then for up to 3 years at a time. Renewals can, at the discretion of the responsible body, be paper based only with no direct re-assessment of the

person apart from a duty to consult the person and others. For people in care homes, the renewal assessment can be undertaken by the care home manager which is then considered by the responsible body without any direct assessment or visits by the responsible body or its staff. They have to confirm that nothing has changed and nothing is likely to change. Plus they have carried out consultation with relevant people.

Appropriate Person

Some people, not all, will have an appropriate person (family etc) appointed by the responsible body whose role is to support and represent the person. They cannot be engaged in providing care or treatment for the person in a professional capacity. If an appropriate person cannot be identified, an advocate will be appointed by the responsible body. Unlike the role of the Representative (RPR) under DoLS, there is no statutory duty to maintain contact with the person.

Advocacy (IMCA)

If an appropriate person cannot be identified, then an advocate will be appointed by the responsible body unless it is considered an advocate would not be in the person's best interests. The right to advocacy is less than under DoLS partly because the duty to appoint is not absolute.

Duty to inform the person of their rights under LPS

The Responsible Body has a duty to provide information to the person and others about their rights under LPS and also to give them a copy of the LPS authorisation.

Forms

LPS will need forms (just like DoLS) to show all the necessary assessments have been completed and for the pre-authorisation reviewer to confirm all the legal criteria have been met on behalf of the responsible body.

Funding

Government estimates for the cost of LPS are based on a series of highly questionable estimates including the total number of LPS assessments per year and the rate of appeal under LPS. Just like DoLS it appears that LPS will be under funded, putting pressure on responsible bodies to meet their legal duties.

For example, in relation to training to carry out the statutory assessments required there is funding for only 20% of staff (actually 20% of qualified social workers and doctors) and that consists of £23.19 per person. This means there is **no funding** allocated for 80% of social workers to have any training. Barbara Keeley, MP (22 January 2019, House of Commons debate) also noted: '*... the Government's impact assessment took the cost of administration of the current DoLS system from the Law Commission's impact assessment, but then inexplicably halved the cost to £155 to account for the fact that it would be less intensive than under DoLS at present. Will the Minister explain how the calculation in the impact assessment was arrived at?*' The financial estimates are available in the DHSC impact assessment: <https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html>

A detailed breakdown of funding problems is provided on a separate guide to LPS by Edge.

Code of Practice

A statutory Code of Practice for LPS is currently being written by the Department of Health and Social Care and a draft version will be open for consultation later this year before being published.

Mental Health Act and Mental Capacity Act interaction

LPS has the same overlap with the Mental Health Act as DoLS. Under DoLS there is the Eligibility Assessment, and this is simply re-named for LPS and becomes 'Excluded Arrangements'. At its simplest level, this means on mental health wards, a person who lacks mental capacity and is not objecting could be detained under either LPS or the Mental Health Act. This assessment can be complicated and with no official 'Excluded Arrangements' assessor under LPS, responsible bodies (especially the NHS) will need to give some thought to who will have the appropriate skills to undertake this assessment.