Liberty Protection Safeguards

A Series of guides to explain LPS from
Steven Richards and Aasya F Mughal
the authors of The DoLS Handbook

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Liberty Protection Safeguards

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- LPS for Children’s Social Services
- Pre-Authorisation Reviewers’ Course
  Note: available once forms are confirmed
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- LPS for Care Home Staff
- LPS for Care Providers (Not Care Homes)
- LPS for Hospitals
- LPS for Clinical Commissioning Groups
- LPS for Mental Health Units

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   A useful guide to all the new terms under LPS - get to grips with the new terminology in advance and share with providers.

4. Responsible Body Assessments and Task List
   With the introduction of four responsible bodies (local authorities, Clinical Commissioning Groups, NHS Trusts and Welsh Health Boards) there will need to be careful planning in a timely way. This document assists professionals to do so.

5. DoLS v LPS Comparison Table
   A detailed table which explores the key differences and similarities between the current DoLS system and the future LPS system.

Further guidance sheets and information on both DoLS and LPS are available from www.edgetraining.org.uk

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## Liberty Protection Safeguards (LPS) – Overview

**October 2019: The Liberty Protection Safeguards (the news DoLS) are expected to come into force in October 2020.**

Information and resources on LPS are available at: [www.edgetraining.org.uk](http://www.edgetraining.org.uk)

A detailed training day on LPS is available (in-house or come to our venues). Visit [www.edgetraining.org.uk](http://www.edgetraining.org.uk) for details.

### Who:

- aged 16 and over +
- mental disorder +
- lacks mental capacity +
- they are deprived of their liberty as defined by current case law such as Cheshire West (the acid test).

### Where:

- anywhere in England and Wales. This could include hospitals, care homes, supported living, residential schools, extra care provision, shared lives and domestic settings ie a person’s own home.

### Duration:

- up to one year initially,
- renewed for a up to a further year and then renewals of up to three years.

### Rights for the person detained:

1. **Appeal to the Court of Protection**
   - The person, their appropriate person or IMCA can appeal.

2. **Appropriate Person (AP)**
   - Some people will have an appropriate person (not involved in providing care or treatment) appointed for them. Their role is to support and represent the person.

3. **Advocate (IMCA)**
   - If a person does not have an AP, they may have an IMCA instead unless they lack capacity and it is not considered in their best interests. An AP may also be supported by an IMCA.

4. **Review**
   - A review of the person’s case to check the legal criteria are still met.

### Assessors:

The responsible body (or care home) decides who will undertake the assessments. Care home managers may complete the consultation requirement. Registered professionals (nurse, social worker, OT etc) are likely to complete the mental capacity assessment and a doctor is likely to complete the medical (mental disorder) assessment. Other assessments could (at the time of writing) be completed by anyone (instructed by) the responsible body.

### Responsible Body:

If the arrangements are mainly in an NHS hospital, the NHS Trust will be the responsible body. If the arrangements are mainly through NHS continuing healthcare the CCG in England or local health board in Wales will be the responsible body. Local authorities will be the responsible body in all other cases, including private hospitals in England (in Wales local health boards are responsible for private hospital cases).

The responsible body organises the LPS assessments + undertakes the pre-authorisation review + authorises the LPS + monitors it + renews it + attends the Court of Protection for appeals (note: care home managers can be asked to organise assessments).

### Procedure:

1. **Assessments**
   - Any person considered by the Responsible Body to have the experience and knowledge needed to complete the assessments (see below).
   - Mental Capacity and Mental Disorder are likely to require professionals.

2. **Pre-authorisation review**
   - The responsible body identifies a person not involved in the ‘day to day’ care or treatment of the person to read the completed assessments below and decide if the criteria for LPS are met (there is no requirement to meet the person). If, however, the person is objecting or in a private hospital or at the responsible body’s discretion, an Approved Mental Capacity Professional (AMCP) will undertake the pre-authorisation review. An AMCP must meet the person and consult others (unless not practicable/appropriate to do so).

3. **Authorisation**
   - The responsible body authorises the LPS. No specific process is set out for this in the Act.

### What needs to be assessed and recorded?

Everything on the list below needs to be assessed and completed **before** an LPS authorisation can be given (Para 17 (and 18 or 19) MC(A) Act 2019).

1. Does the person **lack mental capacity** to consent to the arrangements?
2. Does the person have a **mental disorder**?
3. Are the arrangements **necessary and proportionate** to prevent harm to the person?
4. Are the arrangements (restrictions) a **deprivation of their liberty**?
5. Is the person **aged 16 or over**? (aged 18 or over in care homes)
6. Could or should the **Mental Health Act** be used instead or is there any conflict with the Mental Health Act?
7. Have the person and those interested in the person’s welfare/caring for them + others been consulted + what did they say?
8. Do they meet the legal criteria for an AMCP pre-authorisation review?
9. Is there an **Appropriate Person** who will ‘represent and support’ the person and/or does the case meet the criteria for an IMCA?

A pre authorisation review must be carried out in all cases AND a draft authorisation record prepared. The government have stated the arrangements under LPS must also be in the person’s best interests and an LPA/Deputy (personal welfare) can object to the arrangements.

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## Liberty Protection Safeguards – Key Facts

**www.edgetraining.org.uk**

1. **1st October 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](https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html).

2. 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.

3. 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](http://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 it’s 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)
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 (18+ if the care home is commissioning the assessments- see below)

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 Dinenage, 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. They can also be asked to commission assessments to send to the responsible body

Young People
LPS applies from the age of 16 upwards. 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
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 may 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](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.
## Liberty Protection Safeguards (LPS)
### Responsible Body Assessments & Task list

- **August 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](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](http://www.edgetraining.org.uk) or email admin@edgetraining.org.uk for details.

If you will be a Responsible Body (NHS Trust, CCG, Health Board, Local authority) under the Liberty Protection Safeguards, this list will help you to plan ahead in advance of the implementation date. The tasks listed below will not necessarily be carried out in the order given.

**Please note** we are using the term assessment below to indicate what needs to be assessed. We do this with the intention of making the work involved more transparent for front line staff, advocates and lawyers reading Edge documents and to make it easier to understand for staff transitioning from DoLS to LPS.

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/completed under the Mental Capacity Act before an LPS authorisation can be given *(Para 17 (and 18 or 19) MC(A) Act 2019).*

### Assessments

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<tr>
<th>Task</th>
<th>Description</th>
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<tbody>
<tr>
<td>1. Mental capacity assessment</td>
<td>An assessment of the person’s mental capacity to consent to the arrangements. Any professional on behalf of the Responsible Body can complete this assessment and pre-existing assessments (for another purpose) can, at the discretion of the Responsible Body, be used. <em>(Para 21(1)(a) MC(A) Act 2019).</em> [DoLS also requires this assessment]</td>
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<tr>
<td>2. Medical assessment (mental disorder)</td>
<td>An assessment to check whether the person has a mental disorder (the definition of mental disorder is the same as under DoLS and is taken from Section 1 Mental Health Act 1983). It is expected that any registered medical practitioner could complete this assessment plus any pre-existing statement of mental disorder by a medical practitioner could be used at the discretion of the Responsible Body. <em>(Para 21(1)(b) MC(A) Act 2019).</em> [DoLS also requires this assessment]</td>
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<tr>
<td>3. Necessary and proportionate assessment</td>
<td>This will establish whether the arrangements are necessary to prevent harm to the person and proportionate to the likelihood and seriousness of that harm. <em>(Para 22(1) MC(A) Act 2019).</em> [DoLS also requires this assessment]</td>
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<tr>
<td>4. Deprivation of liberty assessment</td>
<td>Are the arrangements (not limited to just one setting) a deprivation of liberty? This will require an assessment of whether the restrictions the person is subject to meet the acid test as defined by the Supreme Court in <em>Cheshire West</em>. There will be exceptions as there are at present for example, in relation to intensive care (<em>Ferreira</em>). This assessment may be more challenging in domestic settings in terms of identifying and weighing up all the restrictions present. <em>(Para 2(1)(b) MC(A) Act 2019).</em> [DoLS also requires this assessment]</td>
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<tr>
<td>5. Age assessment (16+)</td>
<td>LPS can apply to anyone aged 16 upwards. In a small number of cases for example, young people from abroad, evidencing this may be particularly important to ensure there is no unlawful deprivation of liberty. <em>(Para 2(2)(a) and para 20(1)(a).</em> [DoLS also requires this assessment]</td>
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### 6. Excluded arrangements assessment

Broadly, this asks whether the person could or should be detained under the Mental Health Act rather than LPS? This is likely to be particularly challenging to assess on in-patient mental health wards in relation to whether a patient is objecting to admission or care and treatment for mental disorder. Less frequently, this will also have to be checked in the community for mental health patients (lacking capacity) on s17 leave, Community Treatment Orders, Guardianship and Conditional Discharge to ensure there is no conflict between the two Acts. *Part 7 MC(A) Act 2019.* [DoLS has an equivalent assessment called Eligibility]

### 7. Consultation

A requirement to consult with (if practicable and appropriate) up to nine categories of people: 1. the cared for person 2. anyone named by them 3. caring for them 4. interested in their welfare 5. Attorney under a LPA 6. Attorney under an EPA 7. Deputy 8. appropriate person 9. IMCA. This would include recording what they said. Present consultation requirements under DoLS and the Mental Health Act have shown how important it can be to do this and record it properly especially in light of Article 8 ECHR and the case of London Borough of Hillingdon v Steven Neary [2011] EWHC 1377 (COP) where poor consultation (and recording of it) partly lead to an unlawful deprivation of liberty. *Para 23 MC(A) Act 2019.* [DoLS has an equivalent assessment to consult as part of the best interests assessment]

### 8. Objecting (AMCP criteria)

An assessment of whether the cared-for person does not wish to reside at the place they are being detained in or does not wish to receive care or treatment at that place. If either are true, an Approved Mental Capacity Professional (AMCP) must be appointed by the Responsible Body to complete the pre-authorisation review. Note: in addition, all cases in private hospitals require an AMCP for pre-authorisation reviews and Responsible Bodies also have an ability to refer any other case to an AMCP for pre-authorisation review. If none of the above apply the pre-authorisation review can be undertaken by any person not involved in the day to day care of the cared-for person. *Para 24-26 MC(A) Act 2019.* Note: in future LPS appeals, a person may argue they were denied their right to the independent AMCP review because their objections were not properly identified.

### 9. Appropriate person assessment and/or IMCA

A person under LPS should (although this is not absolute) have an Appropriate Person appointed to represent and support them whilst under LPS. If one cannot be identified an advocate (IMCA) should be appointed. The assessments include. 1 Suitability Assessment: Is there a person suitable to represent and support the cared-for person? If no: 2. Mental Capacity Assessment: Do they have mental capacity to ask for an IMCA? 3. Best Interests Assessment: If they lack mental capacity, assess whether an IMCA is in the person’s best interests. IMCAs may also be appointed to support the Appropriate Person. *Part 5 MC (A) Act 2019.* [DoLS has a similar assessment for appointing Relevant Person’s Representatives and IMCAs]

### Further tasks/assessments

**a) Lasting Power of Attorney and Deputy objections**

In the Mental Capacity (Amendment) Act, the consultation requirement does not appear to lead to any further action if the person objects. However, if the consultee is an Attorney or Deputy for personal welfare, under the main Mental Capacity Act, they can object to any part of the arrangements ie covert medication (*Section 6(6) MCA 2005*).

Also note, responsibilities under Article 8 ECHR when interfering in private and family life (see *Neary and SR v A Local Authority 2018*). Frontline staff will need to undertake routine checks to ensure the validity of the LPA/Deputy’s registration though the Office of the Public Guardian (Form OPG100) before an LPS is authorised.

**b) Best Interests Assessment**

During debates in Parliament, the government stated that a best interests decision must be in place for the cared-for person. The government presumed this would already be completed by front line staff before placement decisions were made. However, those Responsible Bodies with a high percentage of ‘self funders’ will need to think carefully to
ensure this is assessed and recorded before the LPS is authorised (*Section 4 MCA 2005*).

c) **Advocacy (IMCA)**

If no appropriate person can be identified (see assessment 9 above) then an advocate should be appointed. The appointment criteria are: 1 Reasonable steps: should be taken to appoint an IMCA to represent and support the person. 2 Mental capacity assessment: does the person have mental capacity to request support from an IMCA (note: decision specific) and makes this request? 3 Best interests assessment: if not, is it in the person’s best interests to receive representation and support from an IMCA. Note: the Appropriate Person can have an IMCA appointed for them (see 9 above). *(Part 5 MC(A) Act 2019)*

d) **Pre-authorisation review**

Responsible Bodies must arrange for a pre-authorisation review of the LPS assessments (and other legal criteria) to be undertaken before they can authorise the LPS. This will require Responsible Bodies to decide which level of staff it permits to undertake such work *(Para 24-26 MC(A) Act 2019)* [under DoLS the equivalent role is the DoLS authorising signatory although LPS creates two levels – pre-authorisation and authorisation].

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

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*DoLS* | Not defined | Same as DoLS | Mental disorder |
| 
*LPS* | Same as DoLS | Same as DoLS | Same as DoLS |

**Commentary**

- A series of resources (including 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.
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**Why choose LPS over DoLS?**

- Not defined
- Not defined
- Not defined

**DoLS**

- A series of resources (including 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.
- A series of resources (including 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.
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**DoLS and the new Liberty Protection Safeguards (LPS): What stays and what changes?**

- A series of resources (including 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.
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### DoLS vs. LPS - Commentaries

<table>
<thead>
<tr>
<th>What is authorised?</th>
<th>Arrangements giving rise to a deprivation of liberty</th>
</tr>
</thead>
<tbody>
<tr>
<td>A deprivation of liberty</td>
<td>This will include: retaining people who go absent and transporting the person to, from or between particular places. It is limited to deprivation of liberty only – see Care and Treatment &amp; Art 8 ECHR above.</td>
</tr>
</tbody>
</table>

#### Time Limits

<table>
<thead>
<tr>
<th>Arrangements/conditions/statement/determination</th>
<th>Legal criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>LPS</td>
<td>Definition of deprivation</td>
</tr>
<tr>
<td>DOLS</td>
<td>Necessary and proportionate to prevent harm to self</td>
</tr>
</tbody>
</table>

#### Types of detention

<table>
<thead>
<tr>
<th>Types of detention</th>
<th>Legal criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urgent authorisations</td>
<td>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).</td>
</tr>
<tr>
<td>Standard authorisations</td>
<td>A medical assessment that the person has a mental disorder is needed for LPS. The assessment may have been done from a previous occupational therapist.</td>
</tr>
</tbody>
</table>

#### Assessment

<table>
<thead>
<tr>
<th>Assessment of arrangements enabling care and treatment (Schedule 1, Part 2)</th>
<th>Applicable to DOLS and LPS</th>
</tr>
</thead>
<tbody>
<tr>
<td>This does NOT just apply to hospitals and there is no time limit. Clause 2</td>
<td>Legal criteria</td>
</tr>
<tr>
<td>There is no requirement to have a responsible body or undertakers as part of the deprivation process.</td>
<td>Definition of deprivation</td>
</tr>
<tr>
<td>OR 2. The care provider is maintaining a deprivation of liberty.</td>
<td>Definition of deprivation</td>
</tr>
<tr>
<td>Note: the deprivation of liberty will be unlawful where a NO DEPRIVATION condition is met.</td>
<td>Legal criteria</td>
</tr>
</tbody>
</table>

#### Legal criteria

<table>
<thead>
<tr>
<th>Legal criteria</th>
<th>Definition of deprivation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chair</td>
<td>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.</td>
</tr>
<tr>
<td>MLPA</td>
<td>Necessary and proportionate to prevent harm to self</td>
</tr>
</tbody>
</table>

#### Notes

- **DoLS** are similar to the current DoLS assessment. The best interests assessment is removed as a standalone assessment. The new wording is very similar to the current DoLS, authorisation will still be required as part of the wider MCA within which LPS sits.
- **LPS** are similar to the current DoLS, authorisation will still be required as part of the wider MCA within which LPS sits.

#### Legal definition

**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 of definitions: 

1. *Lacks capacity*  
   - 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*  
   - A medical assessment that the person has a mental disorder is needed for LPS. The assessment may have been done from a previous occupational therapist.
3. *Person is or is to be detained*  
   - Not defined in the Act. The Code of Practice will contain guidance and examples of deprivation of liberty. The key reference point will remain the Supreme Court decision in *Cheshire West* – also referred to as the acid test.

#### Legal criteria

- **Best interests**
- **Necessary and proportionate to prevent harm to self**
- **Life-sustaining or vital act**

#### Key Terms

- **Best interests**
- **Necessary and proportionate**
- **Life-sustaining or vital act**
- **Harm to self**
- **Deprivation**
- **Assessment**
- **Statement**
- **Determinations**

#### Time Limits

- **LPS** – 21 days (SA)
- **DOLS** – No time period given, LPS, just like DOLS, can be applied for and completed before a person moves into a placement where they are deprived of their liberty.
### 5. Consult

The Responsible Body must consult as practicable or appropriate:

1. The person
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 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

#### 6. Age 16

LPS applies to anyone aged 16 or over.

The person must be 18+ if the care home are asked to commission assessments.

#### 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

The eligibility assessment under DoLS is repeated (briefly, in hospitals this asks 'could or should the Mental Health Act be used instead of LPS').

Schedule 1, Part 7 of the Act.

There is no eligibility assessor so responsible bodies will need to consider which staff will assess this.

#### 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 representation' means in the context of DoLS. An LPS-appointed representative (as a member of the Court of Protection) will not count as an appropriate person.

### Pre-authorisation Review

#### Appraiser

- Mental Health
- Approved Mental Capacity Professional (AMCP)

#### Pre-authorisation Reviewer

- Responsible Body professional
- NOT the responsible body professional
- NOT a team member who has produced the report
- NOT the mental health assessor
- NOT a person involved in the care of the person

The reviewer must not be involved in the day to day care of the person concerned or providing any treatment to the person concerned.

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 reads the papers/forms and there is no requirement in the Act to meet the person.

Note: it is likely the Court of Protection will take the same approach to the authorisation and scrutiny process as under DoLS. In the case of Steven Neary v Hillingdon Council [2011] EWHC 1377 the judge stated: '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.'

### Authorising Signatory

- Refer to above under 'Assessment'

### Assessors

- Best Interests Assessor (BIA)
- Approved Mental Capacity Professional (AMCP)

Currently, independent 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 initial LPS assessments. The qualification for AMCPs is expected to be very similar to that of BIAs plus existing BIAs will be fast-tracked into the approved AMCP network.

An appointed AMCP is in charge of the hospital (of not or if the direction of the responsible body). An expert assessment is required (other than where the direction is 'deeming' or if the person is objecting to the placement or arrangements). An appointed AMCP will be able to conduct any other assessments required by the Responsible Body. An appointed AMCP must be released from any duty to provide treatment to the person. The appointed AMCP must be sent a copy of any other reports and forms and there is no need to contact any other professionals if they consider this is unnecessary.

Similar to the current role of BIA signatories, all assessments must be reviewed (pre-authorisation review) by the appointed AMCP.

### Mental Health Assessor

Removed

A medical assessment of whether the person has a mental disorder is needed for LPS. The assessment may have been done from a previous authorisation or 'for any other purpose' which could be DoLS or any other legislation.

### No Refusals

Removed

The government have stated that any attorney/deputy can object to the LPS arrangements (within the scope of their authority). Under the powers of the main part of the Act (reg.63) Mental Capacity (deputy) can, accordingly, this will need to be checked (assessed).
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<th><strong>DoLS</strong></th>
<th><strong>LPS</strong></th>
<th><strong>Commentary</strong></th>
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<td><strong>Inspection</strong></td>
<td>The CQC has a duty to monitor and report on LPS but no direct enforcement powers.</td>
<td></td>
</tr>
<tr>
<td><strong>Duration/renewals</strong></td>
<td>One year for up to 3 years then renewable for up to 3 years</td>
<td></td>
</tr>
<tr>
<td><strong>Appeals</strong></td>
<td>No change. The rigorous approach to appeals taken by the Court of Protection can be expected to continue.</td>
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<td><strong>Advocacy</strong></td>
<td>Where no appropriate person can be identified, the Responsible Body may appoint an advocate (IMCA). The right to advocacy is less than under DoLS.</td>
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<td><strong>Additional support</strong></td>
<td>All LPS authorisations must contain a programme of regular reviews. The Responsible Body with whom the decision has been made must inform the person, the appropriate person and/or advocate of their rights and to give them a copy of the LPS authorisation record.</td>
<td></td>
</tr>
<tr>
<td><strong>Conditions</strong></td>
<td>The Government indicated that conditions could still be attached to LPS authorisations in the final record, but they do not appear in the Act as a separate clause. Further, the term ‘condition’ will be used in several other ways in the new Act. The government indicated that conditions could still be attached to LPS authorisations in the final record, but they do not appear in the Act as a separate clause. Further, the term ‘condition’ will be used in several other ways in the new Act.</td>
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<td><strong>Forms</strong></td>
<td>Just like DoLS, the staff who assess people under LPS will need to report the evidence to another body, and the evidence and any additional information will need to reach the Responsible Body to consider the application for renewal.</td>
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<td><strong>Review</strong></td>
<td>A statutory duty to review LPS is being written for publication prior to LPS coming into force.</td>
<td></td>
</tr>
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<td><strong>Rights</strong></td>
<td>A duty on the Responsible Body to inform the person, the Appropriate Person and/or advocate of their rights and to give them a copy of the LPS authorisation record.</td>
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<td><strong>Supportive</strong></td>
<td>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. The right to advocacy is less than under DoLS.</td>
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<td><strong>Person</strong></td>
<td>Everyone will have an appropriate person. If an appropriate person is not identified by the Responsible Body, the person will be identified by the Responsible Body. 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.</td>
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DoLS Resources available from: www.edgetraining.org.uk
(all free to access)

- DoLS case law summary sheet 2016-19
  Provides a summary of key case law over the last two years in relation to DoLS. Updated monthly.
- DoLS rights leaflet
  A leaflet for individuals, family and DoLS Representatives explaining the rights of people under DoLS.
- Mental Health Act or DoLS chart
  Which Act to use and why explained with statutory and Code of Practice references.
- Medicines and liberty – more than just antipsychotics
  An article providing information on the use of medication to manage behaviour by Dr Clive Bowman.
- DoLS films
  Two short animated films on DoLS applications and rights for people under DoLS

  Go to www.edgetraining.org.uk and click on ‘News’

MCA resources available from www.bookwise.org.uk
(all free to access)

- Best interests assessment: form for health and social care staff to record the assessment
- Mental capacity assessment: form for health and social care staff to record the assessment
- Lasting powers of attorney or deputies: guidance sheet for health and social care staff to confirm whether an attorney or deputy is valid and has authority
- Advance decisions to refuse treatment (ADRT): briefing sheet
- Advance decisions to refuse treatment (ADRT) or lasting powers of attorney: comparison tool

  All of the above are available from www.bookwise.org.uk/mentalcapacityact

Case law
www.mentalhealthlaw.co.uk

Community Care Inform
For Local Authority subscribers- has an MCA and DoLS portal with a range of resources and materials.

Resources on the MCA by Edge Directors:

Mental Capacity and Tenancy Agreements: Common Mistakes Local Authorities Make Aasya F Mughal

Resources to Resolve Your Mental Capacity and DoLS Practice Issues Steven Richards (Co Author)
Keep In Touch with us!

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- Follow us on Twitter: @edgetraining1

**Edge Training Events 2019-20**

**Edge Events at our CENTRAL LONDON venue: **NEW DATES !**

- The Liberty Protection Safeguards – 22nd Nov + new dates coming soon!
- BIA Legal Update Annual Refresher - 7th Oct, 8th Nov, 16th Dec
- Level 3 Safeguarding - TBC
- Understanding the Court of Protection – TBC
- AMHP Legal Update - 7th Oct
- Mental Health Act & Mental Capacity Act Interface - 14th Oct
- BIA Report Writing – 8th Nov
- Self Neglect & the Mental Capacity Act – 11th Nov
- Unconscious Bias (race, equality and discrimination in social and healthcare settings) – 18th Nov
- DoLS Authorised Signatories – 18th Nov
- DoL in Children and Young People - 25th Nov
- Hoarding and the Law – 29th Nov
- DoLS Mental Health Assessors Annual Refresher –2nd Dec
- MCA and Tenancy Agreements - 16th Dec
- Sexual relations, contraception, marriage and restricting contact : Article 8 and the Mental Capacity Act – 29th Nov
- Transforming care : Community legal frameworks for people with learning disabilities -15th Nov 2019
- MHA Administration- two day course- TBC

**Edge Events at our venue in MANCHESTER**

- The Liberty Protection Safeguards - 18th Oct

**Edge Conferences at our Central London venue:**

- Liberty Protection Safeguards Conference – Spring 2021
- Annual 2019 AMHP Conference – 6th Dec 2019

**Ways to Book:**

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