

- **February 2021:** The Mental Capacity (Amendment) Act 2019 (the Act) which creates the Liberty Protection Safeguards received Royal Assent on 16th May 2019. The Act is due to come into force in April 2022. To download the Act and explanatory notes go to: <https://www.legislation.gov.uk/ukpga/2019/18/enacted>
- Some details not in the Act (qualification for AMCPs, transitional arrangements) will be addressed in statutory regulations. A Code of Practice is being written, however as Mr Justice Hayden, Vice President of the Court of Protection noted: *'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 + LPS jargon buster + BIA to AMCP + LPS single page overview chart) and online courses on LPS are available from <http://www.edgetraining.org.uk/>
- This information sheet and a series of others on LPS can be downloaded from: <https://www.bookswise.org.uk/lps>

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.

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 to arrange for a written statement by a doctor.

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 carry out other statutory duties. For private hospitals in England, the responsible body will be a local authority. In Wales it will be Health Boards. There is a separate information sheet available from Edge on the duties of Responsible Bodies under LPS.

Assessments

There are three tasks formally labelled as 'assessments' under the Act and they appear first in the list (1-3) below. In addition to these, everything else on the list below (4-9) still needs to be assessed *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)).
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

The government have also 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 2019)

Please note: front line staff including social workers, OTs, nurses, doctors and others will be expected to complete the LPS assessments/legal criteria listed above. The assessments/legal criteria will need to be evidenced on forms that will be similar to the existing DoLS form 3 as the criteria are very similar. BIAs who currently complete these assessments under DoLS will no longer be assessors but instead become AMCPs (see Pre-authorisation review). The AMCP role will be to review (in some cases) the assessments and decide if the legal criteria are met.

Care Homes

In the legislation, care home managers have a number of roles. Following lobbying by a number of groups including charities and the care home sector the DHSC has indicated that statutory regulations will suspend the role of care home managers in LPS. It should be noted that the DHSC has indicated this may only be a temporary measure. At this time, it is not known which provisions relating to care home managers will not come into force.

Young People

LPS applies from the age of 16 and can apply to any setting where a person is deprived of their liberty. This will include settings such as residential schools, children's homes and family homes (domestic).

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 assessed as not wishing to reside in their placement or not wishing to receive care or treatment at that place 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 work 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 expected in autumn 2021 will confirm which professionals are required for which assessments.

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 them and others.

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 (similar to the role of the Relevant Person's Representative under DoLS). 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.

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

Just like DoLS, the staff who assess people under LPS will need to record the evidence to show that a person meets the legal criteria. Pre-authorisation reviewers will need to read evidence that satisfies them that it is *'reasonable for the Responsible Body to conclude the authorisation conditions are met'*. Given the assessments and legal criteria listed above it is reasonable to expect the LPS forms that front line staff will have to complete will be very similar to existing DoLS assessment forms 3 and 4. Barristers at 39 Essex Chambers (July 2020, MCA report) have stated that: *'...a community DoL application (on a COPDOL11 form) already contains, in essence, all of the materials that would be required for consideration of the position under LPS.'* The COPDOL11 form is 31 pages long.

Funding

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

Code of Practice

A chapter on LPS will be contained in the new Mental Capacity Act Code of Practice which is being written by the Ministry of Justice and the DHSC. A draft version is due for consultation in spring 2021 with final publication in the winter of 2021. Although the Code is an important document it has to follow the primary legislation which is very detailed and has been available since May 2019.

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 responsible bodies (especially the NHS) will need to identify staff with the appropriate skills to undertake it.

Monitoring

The Care Quality Commission and Ofsted (England) and HIW and CIW (Wales) will have a legal duty to monitor Responsible Bodies (NHS Trust, local authorities, CCGs and Welsh Health Boards) and their use and application of the Liberty Protection Safeguards.