

Liberty Protection Safeguards (LPS) and DoLS: *comparison table*

- **January 2022:** The Mental Capacity (Amendment) Act 2019 (the Act) which creates the Liberty Protection Safeguards received Royal Assent on 16th May 2019. The start date of the Act has been delayed and is now unlikely before 2023. Download the Act and explanatory notes at: <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 also being drawn up, however as Mr Justice Hayden, Vice President of the Court of Protection noted about another code: *‘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 information sheets on different elements of LPS and a range of training courses 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>

	DoLS	LPS	Commentary
Deprivation of liberty	Not defined	Same as DoLS	No change. The Code of Practice will contain guidance and potential examples of deprivation of liberty. The key reference point will remain the Supreme Court decision in <i>Cheshire West</i> – also referred to as the acid test.
Care and treatment and Art 8 ECHR	Not covered	Same as DoLS	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 objections).
Disorder	Mental disorder	Same as DoLS	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 so this assessment could be undertaken by various doctors unless there is already an assessment on record.
Risk	Harm to self	Same as DoLS	No change. LPS can only be used where a person presents a risk to themselves.
Place	Hospitals and care homes	Anywhere	Authorities will be able to apply LPS to any setting such as supported living, extra care, residential learning disability schools, care homes, hospitals and domestic settings. They will no longer need to apply to the Court of Protection for people outside of care homes or hospitals. In addition, all transport will be covered too.
Duty to refer cases	Care home or hospital	Absent	No specific duty to refer cases but the ‘positive’ duty under human rights law will still apply so that a state body that is aware (or ought to be aware) of a deprivation of liberty must investigate and make lawful. There is also a ‘whistle blowing’ clause.
Responsible body	Councils and Welsh Health Boards	Councils + CCGs + NHS Trusts + Welsh Health Boards	The body providing/commissioning care = the responsible body. The responsible body identifies, assesses, authorises and monitors the LPS. In England, Local Authorities will be responsible bodies for people in private hospitals (in Wales it is local health boards) and private placements in other settings. Responsible bodies will also

			have to inform the relevant inspection bodies (CQC, Ofsted, HIW, CIW or Estyn) of any new, renewed, varied or LPS authorisations that end.
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Conveyance	Not explicitly stated	Direct authority to convey	The new power will authorise arrangements including <i>'the means and manner of transport to, from or between particular places'</i> . See Schedule 1, Para 3 of the Act.
What is authorised?	A deprivation of liberty	Arrangements giving rising to a deprivation	This will include returning 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 & Art 8 ECHR above.
Assessment Time Limits	21 days (SA)	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 however, unlike DoLS there is no time period given for this assessment process.
1. Types of detention	Urgent authorisations	Life sustaining treatment or vital act	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</i> (Note: the full criteria are more complex) OR 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 and there is no time limit. <i>Clause 2</i>
2. Types of detention	Standard authorisations	Authorisation of arrangements enabling care and treatment (Schedule 1, Part 2)	
Legal criteria (assessments/conditions/statements/determinations)			
<p>The term assessment is used to indicate <i>what needs to be assessed</i> in order to make the amount of future work required more transparent for front line staff reading Edge documents and to ensure responsible bodies are properly informed in order to prepare their funding and workforce. The term <i>Assessment</i> 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 will still need to be assessed under the new amended Act <i>before</i> an LPS authorisation can be given (<i>Para 17 (and 18 or 19) MC(A) Act 2019</i>).</p> <p>Please note: front line staff including social workers, occupational therapists, nurses, doctors and others will be expected to complete the LPS assessments/legal criteria listed below. The assessments/legal criteria below 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 completed these assessments under DoLS will no longer be assessors but instead become AMCPs (see later) whose role is to review (in some cases) the assessments and determine if the legal criteria are met.</p>			
1. Lacks capacity	1. Same as DoLS	Statutory regulations are expected (2022) that will state this assessment must be completed by a registered professional such as a nurse, social worker, doctor, psychologist, occupational therapist or speech and language therapist. If an existing assessment of mental capacity by such a professional is already on file the Responsible Body may use this for the LPS if they consider it is adequate (para 21(9) MC(A) Act 2019).	

2. Mental disorder	2. Same as DoLS	A medical assessment that the person has a mental disorder is needed for LPS. The assessment may have been done from a previous authorisation or <i>'for any other purpose'</i> . If an existing assessment by a registered medical practitioner is already on file the Responsible Body may use this for the LPS if they consider it is adequate.
3. Person is or is to be detained	3. Deprivation of liberty	Not defined in the Act. The key reference point will remain the Supreme Court decision in <i>Cheshire West</i> – also referred to as the acid test. The Code of Practice will contain guidance and examples of deprivation of liberty.
4. Best interests	4. Necessary & proportionate to prevent harm to self	The new wording is very similar to the current DoLS assessment. A statutory regulation is due to be published later this year confirming this assessment must be completed by a registered professional (nurse, occupational therapist, psychologist, social worker, doctor or speech and language therapist). 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 sits.
5. Consult	5.Consultation	The Responsible Body must consult as <i>practicable or appropriate</i> : 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 18	6. Age 16	LPS applies to anyone aged 16 or over.
-	7. Objecting	Schedule 1, Part 2, Para 24 of the Act requires an assessment of whether: <i>'.. it is reasonable to believe that the cared-for person does not wish to reside in that place...'</i> or <i>'..it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place,..'</i> If either is considered to be the case, an Approved Mental Capacity Professional must undertake the pre-authorisation review (see below).
8. Eligibility	8. Excluded arrangements	The eligibility assessment under DoLS is repeated (briefly, in hospitals this asks 'could or should the Mental Health Act be used instead of LPS'). <i>Schedule 1, Part 7 of the Act</i> . There is no eligibility assessor so responsible bodies will need to consider which staff will assess this.
9. Representative	9. Appropriate person	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. At present no indication of paid appropriate persons
Authorising signatory	Pre-authorisation Reviewer	Similar to the current role of DoLS signatory. All assessments must be 'reviewed' (pre-authorisation review) by 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 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 <i>Steven Neary v Hillingdon Council</i> [2011] EWHC 1377 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	Removed but..	The government have stated that an attorney/deputy can object to the LPS arrangements (if within the scope of their authority) under the powers of the main part of the Act (See Section 6(6) Mental Capacity Act). Accordingly, this will need to be checked (assessed).

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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 <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. Final details of qualification requirements are due to be published in statutory regulations during 2022.
	Mental Health Assessor	Removed	A medical assessment that the person has a 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	Pre-authorisation Reviewer	See above under 'Assessments'. The Act makes no mention of qualification or training (same as DoLS).
Inspection	CQC + HIW + CIW	Same as DoLS	The CQC, HIW, CIW, Ofsted and Estyn will have a duty to monitor and report on LPS. LAs, NHS Trusts and CCGs (Responsible Bodies) will be responsible for informing these inspectorate bodies of any new, renewed, varied or LPS authorisations that end. Because LPS can apply to any place (supported living, domestic/home settings) the inspectorate bodies will be given new powers to visit people under LPS in non-registered places. Final details will be contained in statutory regulations due in 2022.
Duration/renewals	One year periods	Up to 1 year, then renewable for up to 1 more year then renewable for periods of up to 3 years	LPS authorisations are renewable. A Responsible Body can renew an LPS if it: <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 has consulted the person and others.
Appeals	Court of Protection	Same as DoLS	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>'Scepticism and 'doubt' [about the prospects of success of a home care package] is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty.'</i> CB v Medway Council [2019] EWCOP 5
Reviews	Yes	Yes	All LPS authorisations must contain a 'programme of regular reviews'. In addition there are separate 'responsive' reviews which can be triggered at the request of families, care providers and where the person's circumstances change. The Responsible Body decides which staff may undertake reviews. <i>See Schedule 1 para 38(1)</i> of the Act
Advocacy (IMCA)	Yes	Yes	Where no appropriate person can be identified, the Responsible Body may appoint an advocate (IMCA). The right to advocacy is less than under DoLS.

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Additional support	Relevant Persons Representative	Appropriate Person	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. Under DoLS the person had a statutory duty to maintain contact, but this is absent from the Act.
Conditions	Conditions	Statutory clause removed	Although the term ‘condition’ is used in the Act, it does not have the same meaning as under DoLS. There is no equivalent in LPS to DoLS conditions. 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. The Act only says: <i>An authorisation record may include any other information.</i> ’ (Para 27(2) of the Act)
Information on rights	Yes	Yes	An ongoing 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. As there are no Managing Authorities in LPS the duty to inform people of their rights moves to Responsible Bodies.
Code of Practice	Yes	Yes	A new Code of Practice for the Mental Capacity Act which will include LPS. It is due to be published for consultation in 2022 with final publication later in the year. It is important to note that the Code is secondary to the legislation and must follow it. The legislation was completed in May 2019 and provides extensive information on the structure, assessments and operation of LPS. Despite the importance of statutory Codes of Practice, Mr Justice Hayden, Vice President of the Court of Protection noted about another code: <i>‘The Code of Practice is not a statute, it is an interpretive aid to the statutory framework, no more and no less.</i> ’ (Re: Lawson, Mottram and Hopton (appointment of personal welfare deputies) [2019] EWCOP 22).
Forms	Yes	Not confirmed yet but expected	Just like DoLS the staff who assess people under LPS will need to record the evidence a person meets the legal criteria and pre-authorisation reviewers will need to read something that satisfies them that it is <i>‘reasonable for the Responsible Body to conclude the authorisation conditions are met.’</i> This will be a challenging task if the evidence is not collated for them to read. Given the assessments and legal criteria listed above it is reasonable to expect the LPS forms that front line staff will have to complete to be very similar to existing DoLS assessment forms, in particular Form 3.
Equivalent assessments	Yes (but limited)	Yes	Re-use of existing assessments where <i>no change has occurred</i> is allowed but will need to meet the criteria of LPS. In relation to the assessment of mental capacity, if a Responsible Body wants to use a pre-existing assessment it must ‘determine’ whether ‘it is reasonable to rely’ on the assessment. To do so a ‘Relevant Person’ at the Responsible Body must have regard to—(a) the length of time since the assessment was carried out; (b) the purpose for which the assessment was carried out; (c) whether there has been a change in the cared-for person’s condition that is likely to affect the determination made on the assessment.’ (para 21(9) of the Act)
Whistle blowing	No	Yes	A specific clause allowing family and carers to whistle-blow and trigger an LPS review.