

Liberty Protection Safeguards (LPS)

Responsible Body assessments and task list



- **January 2022:** The Mental Capacity (Amendment) Act 2019 (the Act) which creates the Liberty Protection Safeguards received Royal Assent on 16th May 2019. The Act is now unlikely to start until 2023. 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 drafted, 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, short film and LPS training courses (hosted by Edge or delivered in-house) are available from www.edgetraining.org.uk or email admin@edgetraining.org.uk for details.
- This information sheet and a series of others on LPS can be downloaded from: <https://www.bookswise.org.uk/lps>

If you will be working on LPS implementation for a Responsible Body (NHS Trust, CCG/ICS, 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

1. Mental capacity assessment	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. <i>Para 21(1)(a) MC(A) Act 2019</i> . [DoLS also requires this assessment]
2. Medical assessment (mental disorder)	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. <i>Para 21(1)(b) MC(A) Act 2019</i> . [DoLS also requires this assessment]
3. Necessary and proportionate assessment	This will establish whether the arrangements are necessary to prevent harm to the person and proportionate to the likelihood and seriousness of that harm. <i>Para 22(1) MC(A) Act 2019</i> . [DoLS also requires this assessment]
4. Deprivation of liberty assessment	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 <i>Cheshire West</i> . There will be exceptions as there are at present for example, in relation to intensive care (<i>Ferreira</i>). This assessment may be more challenging in domestic settings in terms of identifying and weighing up all the restrictions present. <i>Para 2(1) (b) MC(A) Act 2019</i> . [DoLS also requires this assessment]
5. Age assessment (16+)	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. <i>Para 2(2)(a) and para 20(1)(a)</i> . [DoLS also requires this assessment].
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 mental capacity) on s17 leave, Community Treatment Orders, Guardianship and Conditional Discharge to ensure there is no conflict between the two Acts. <i>Part 7 MC(A) Act 2019</i> . [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 <i>London Borough of Hillingdon v Steven Neary [2011] EWHC 1377 (COP)</i> where poor consultation (and poor recording of it) partly lead to an unlawful deprivation of liberty. <i>Para 23 MC(A) Act 2019</i> . [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. <i>Para 24-26 MC(A) Act 2019</i> . 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. <i>Part 5 MC (A) Act 2019</i> . [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 (<i>Section 6(6) MCA 2005</i>). Also note, responsibilities under Article 8 ECHR when interfering in private and family life (see <i>Neary</i> above and <i>SR v A Local Authority 2018</i>). 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’ privately placed by families where a LPS referral is made <i>after</i> admission, will need to think carefully to ensure this is assessed and recorded before the LPS is authorised (<i>Section 4 MCA 2005</i>).
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). <i>Part 5 MC(A) Act 2019</i>
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 (<i>Para 24-26 MC(A) Act 2019</i>) [under DoLS the equivalent role is the DoLS authorising signatory although LPS creates two levels – pre-authorisation and authorisation]

Statutory duties

Rights to information	Responsible bodies have extensive duties to publish information on LPS and take steps to ensure the cared-for person and appropriate person understand their rights when LPS is being proposed and also after an LPS has been authorised. The information must be accessible and appropriate to the needs of the cared-for person and appropriate person. <i>Para 14 MC(A) Act 2019</i>
Authorisation Record	Responsible Bodies (depending on the circumstances) have a duty to prepare a draft authorisation record prior to final authorisation of an LPS. It must include key information about the terms of the deprivation of liberty such as reviews. <i>Para 27 MC(A) Act 2019</i>
Sending the Authorisation Record	Responsible Bodies have a duty to send the final LPS authorisation record to the cared-for person, IMCA and/or Appropriate Person. <i>Para 16 MC(A) Act 2019</i>
Approval and supply of AMCPs	Local authorities are responsible for the <i>approval</i> and sufficient <i>availability</i> of AMCPs in their area (enough to cover NHS Trusts, CCG/ICS and Health Boards). <i>Para 39 MC(A) Act 2019</i>
Reporting duties	The CQC, Ofsted, HIW, CIW and Estyn will require notification of all new and varied and authorisations.
Statistics	The National Office of Statistics (NHS Digital) in England will require Responsible Bodies to provide quarterly or annual statistics on the use of LPS as is done for DoLS now by the Supervisory Body.
CQC & Ofsted HIW & CIW & Estyn	The inspectorate bodies with responsibility to monitor LPS will require information and records for certain LPS cases, particularly those in the community in unregistered places.
Children’s social services	We have produced a separate information sheet for children’s social services that considers the impact of LPS for Ofsted inspections of services.

Discretionary powers/decisions

Conditions	The government refused to add a legal clause on conditions (as they are known under DoLS) but stated that Responsible Bodies could write them in the final LPS authorisation record anyway, which can include ‘any other information’ (Para 27(2)) MC(A) Act 2019). The Code will hopefully provide more guidance on this. Note: Confusingly for current DoLS staff, the new Act talks about ‘authorisation conditions’ which means something different (see our LPS jargon buster).
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Care Home Managers	<p>The law currently states that where the cared-for person is living in a care home, Responsible Bodies have a discretionary power to request care home managers to:</p> <ol style="list-style-type: none"> 1. Arrange the assessments for an LPS and produce a statement ready for a pre-authorisation review by the Responsible Body 2. Produce a statement that the conditions are met for the renewal of an existing LPS for approval by the Responsible Body 3. Carry out the consultation requirement- see Assessments number 7 above. 4. Undertake Reviews of the LPS <p>In response to lobbying by charities and the care home sector the DHSC have announced that the role of care managers will be suspended by statutory regulations due to be published in 2022. The DHSC have not indicated exactly which elements of the role will be suspended. Further, DHSC has indicated that this may be a temporary measure and the role could be re-instated at a later date.</p>
Duration	<p>The Responsible Body is able to decide what time period applies to each authorised LPS within a maximum duration of 12 months initially and then up to a further 12 months and thereafter, up to three years at a time.</p>