

Adult Social Care

Liberty Protection Safeguards Guidance

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1 How the Liberty Protection Safeguards will differ from the Deprivation of Liberty Safeguards.

- The settings where the LPS will apply.
- The role of the approved mental capacity professional.

The detail of the LPS will be in the regulations and code of practice that will accompany the Mental Capacity (Amendment) Act, and which are due to be published later this year. The government has not yet announced the date on which the Mental Capacity (Amendment) Act 2019 will come into force. But it is possible that this could take place in spring 2020. The government has confirmed that for up to a year the DoLS system will run alongside the LPS to enable those who are subject to the DoLS to be transferred to the LPS in a managed way.

The new scheme can be described as being “setting neutral”; it encompasses any situation where Article 5(1) is potentially engaged. Whereas the DoLS only apply to hospitals and care homes, the LPS can be used in other settings, for instance, supported living, shared lives and private and domestic settings. The LPS are also not tied to accommodation or residence; they could be used, for example, to authorise day centre and transport arrangements.

Whereas the DoLS apply to those aged 18 and over, the LPS apply to people aged 16 and over. This brings the LPS into line with the rest of the MCA which applies to 16- and 17-year-olds (with a few exceptions). It would also mean that a court application is no longer required to authorise the deprivation of liberty of a 16- or 17-year-old who lacks the relevant capacity. There are very few differences in how the LPS applies to those aged 16 and 17, compared to those aged 18 and over.

2 RESPONSIBLE BODIES

Under the LPS, there can only be one responsible body for any authorisation that is granted. In order to identify the responsible body in any given case, the legislation creates the following hierarchy

- If the arrangements are carried out mainly in an **NHS hospital**, the responsible body is the “hospital manager” (which would in most cases be the trust that manages the hospital in England or the local health board in Wales).
- If the arrangements are carried out mainly in an **independent hospital**, the responsible body is the “responsible local authority” in England (normally the authority meeting the person’s needs or in whose area the hospital is situated) or the local health board in Wales for the area in which the hospital is situated.
- Otherwise, if the arrangements are carried out mainly through the provision of **NHS continuing healthcare**, the responsible body is the relevant clinical commissioning group in England or local health board in Wales.
- Otherwise the responsible body is the “responsible local authority” (in most cases this will be the authority that is meeting the person’s needs or in whose area the person is ordinarily resident)

3 CONDITIONS FOR LPS

The LPS provide that a responsible body may authorise arrangements if the following “authorisation conditions” are met:

- **the person lacks capacity to consent to the arrangements**
- **the person has a mental disorder within the meaning of section 1(2) of the Mental Health Act 1983; and**
- **the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person**

The relevant secretary of state and Welsh ministers are given regulation-making powers to specify who can carry out these assessments. In care home cases (where the care home manager is arranging the assessments – see below) the assessments cannot be carried out by someone with a prescribed connection to a care home.

In the case of the first two assessments (referred to as the “capacity” and “medical” assessments) the responsible body can rely on previous assessments or assessments for any other purposes, if it is reasonable to do so.

Before arrangements can be authorised, consultation must take place with the following individuals in order to ascertain the person’s wishes or feelings (unless it is not practicable or appropriate to do so):

- the person;
- anyone named by the person as someone to be consulted;
- anyone engaged in caring for the person or interested in the person’s welfare;
- any donee of a lasting power of attorney or an enduring power of attorney;
- any deputy appointed by the Court of Protection; and
- any appropriate person and any independent mental capacity advocate.

4 THE PRE-AUTHORISATION REVIEW

Once the assessments have been completed and other evidence gathered, the responsible body must in all cases arrange for a “pre-authorisation review” to be completed.

The review must be carried out by a person who is not involved in the day-to-day care or in providing any treatment to the person, and (in relevant cases) who does not have a prescribed connection with a care home.

A pre-authorisation review can be completed by either an approved mental capacity professional (AMCP) (which is a new specialist role which, broadly speaking, builds on the existing best interests assessor role – see below), or some other health or care professional (the government has said it will set out which professions can undertake this role in the statutory guidance).

5 OBJECTIONS AND THE ROLE OF THE AMCP

If it is reasonable to believe that person does not wish to reside in, or receive care or treatment at, a particular place.

- The arrangements provide for the person to receive care or treatment mainly in an independent hospital.
- The responsible body refers the case to an AMCP and the AMCP accepts the referral.
- In deciding whether the first of these applies, the responsible body must consider the views of any “relevant person” (a person engaged in caring for the person or interested in the person’s welfare) about the wishes of the person that are brought to its attention.

The AMCP is required to:

- meet the person and consult all those listed above (if it is appropriate and practicable to do so); and
- Review the information and determine whether the authorisation conditions are met.

In cases which are not referred to an AMCP, the reviewer must:

- review the information; and
- determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

The responsible body cannot authorise arrangements unless the person carrying out the pre-authorisation review has determined that the authorisation conditions are met (in AMCP cases) or that it is reasonable for the responsible body to conclude that the authorisation conditions are met (in non-AMCP cases).

In the following cases, the pre-authorisation review must be undertaken by an AMCP:

- If it is reasonable to believe that person does not wish to reside in, or receive care or treatment at, a particular place.
- The arrangements provide for the person to receive care or treatment mainly in an independent hospital.
- The responsible body refers the case to an AMCP and the AMCP accepts the referral.

In deciding whether the first of these applies, the responsible body must consider the views of any “relevant person” (a person engaged in caring for the person or interested in the person’s welfare) about the wishes of the person that are brought to its attention.

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6 THE APPROVED MENTAL CAPACITY PROFESSIONAL

The approved mental capacity professional (AMCP) is a new role which is intended to build on the existing best interests assessor role. Local authorities are responsible for the approval of individual AMCPs and ensuring that there are sufficient numbers of AMCPs for their area. A regulation-making power allows, among other matters, the government to prescribe:

- the criteria for approval as an AMCP (such as qualifications, training or experience); and
- bodies (such as Social Work England) to approve training.

The government has confirmed its policy intention that, at a minimum, all current professions eligible to undertake the best interest assessor role will be eligible to be AMCPs (that is, approved mental health professionals, social workers, first-level nurses, occupational therapists, and chartered psychologists).

7 CARE HOME ARRANGEMENTS

If the person is aged 18 or over, and the proposed arrangements would be carried out wholly or partly in a care home, then potentially a different process could apply. In such cases, the responsible body can decide if:

- it will arrange the necessary assessments and other evidence to be provided; or
- whether the care home manager should do so.

If the care home manager is performing this role, then they are required to provide a statement to the responsible body confirming that:

- the person is aged 18 or over;
 - the arrangements give rise to a deprivation of the person's liberty (with reasons);
 - the arrangements are not mental health arrangements or requirements (see below);
 - the "authorisation conditions" are met;
 - they have carried out the required consultation (set out above), and;
 - they are satisfied (with reasons) that if it is reasonable to believe that person does not wish to reside in, or receive care or treatment at, a particular place, that neither applies, or that a decision cannot be made as to whether either applies.
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- The statement must be accompanied by:
 - a record of the assessments confirming that the authorisation conditions are met;
 - evidence of the consultation carried out,
and;
 - a draft authorisation record.

This information must be presented to the responsible body, which then decides whether to authorise arrangements based on this information (as well as other information, such as the pre-authorisation review arranged by the responsible body).

The responsible body can also decide for the care home manager to undertake the review and/or renewal processes.

8 RIGHT TO INFORMATION

All responsible bodies are subject to a general duty to publish specific information about authorisation of arrangements, which includes:

- the effect of an authorisation;
- the process for authorising arrangements;
- rights to an independent mental capacity advocate;
- the role of an appropriate person;
- the right to make an application to the Court of Protection;
- rights to reviews; and
- when cases will be considered by an AMCP.

In cases where arrangements are proposed, the responsible body must as soon as practicable take such steps as are practicable to ensure that the person and any appropriate person understands the nature of the arrangements and the information listed above. Once an authorisation is given, it is possible that a new appropriate person could be appointed. Therefore, the duty to provide this information also applies subsequently, at any time an appropriate person is appointed.

After authorising arrangements, the responsible body must, without delay, arrange for a copy of the authorisation record to be given or sent to the person, any independent mental capacity advocate, and any appropriate person. If the responsible body has not, within 72 hours, provided the authorisation record to those people, it must review and record why not. As soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable and appropriate, having regard to the steps already taken and the length of time since they were taken, to ensure that the person and any appropriate person understand the information listed above that the responsible body must publish.

9 INTERIM AND EMERGENCY DEPRIVATION OF LIBERTY

The LPS abolish the DoLS system of urgent authorisations. Instead, decision makers are given statutory authority to take steps to deprive someone of liberty when the responsible body is determining whether to authorise arrangements. The decision maker must reasonably believe that the person lacks capacity to consent to the steps being taken, and the deprivation of liberty must be necessary to:

- provide the person with life-sustaining treatment; or
- do any vital act (that is, one which is necessary to prevent a serious deterioration in the person's condition).

Apart from those cases, it would not be lawful to deprive a person of their liberty until the proposed arrangements have been authorised.

In addition, decision makers are given statutory authority to take steps to deprive someone of liberty without an authorisation in "emergency" cases where there is an urgent need to give life-sustaining treatment or do any vital act, and it is not reasonably practical to make a referral for a LPS authorisation, a Mental Health Act 1983 assessment or a court determination.

MCA 4b F14B Deprivation of liberty necessary for life-sustaining treatment etc

(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.

(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.

(3) The second condition is that the deprivation of liberty—

(a) is wholly or partly for the purpose of—

(i) giving P life-sustaining treatment, or

(ii) doing any vital act, or

(b) consists wholly or partly of—

(i) giving P life-sustaining treatment, or

(ii) doing any vital act.

(4) The third condition is that the deprivation of liberty is necessary in order to—

(a) give the life-sustaining treatment, or

(b) do the vital act.

(5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.]

10 DURATION OF THE AUTHORISATION

An authorisation can last for an initial period of up to 12 months and can be renewed for a second period of up to 12 months and thereafter for periods of up to three years. It is intended that longer term renewals are only used in the cases of those whose condition and circumstances are likely to be long term and stable.

The responsible body can at any time determine that an authorisation should cease. An authorisation also ceases to have effect if the responsible body believes or ought reasonably to suspect that any of the authorisation conditions are not met. In other words:

- the person has, or has regained, capacity to consent to the arrangements;
- the person does not have a mental disorder; or
- the arrangements are no longer necessary and proportionate.

Any authorised arrangements also cease to have effect if at any time they are not in accordance with 'mental health requirements'

11 CONDITIONS

Under the DoLS, a supervisory body may attach conditions to a standard authorisation with the aim of protecting the person's human rights and improving their outcomes; the managing authority (the care home or hospital) is required to ensure that any such conditions are complied with.

Conditions are not provided for expressly in the Mental Capacity (Amendment) Act. However, the government has confirmed that the arrangements that are authorised can be flexible and be drawn up in such a way to have a similar effect to conditions. For instance, the authorised arrangements could include express provision for enabling the person to be taken out regularly with one-to-one support, or for a review to take place by a specific date. The conditions would need to be included in the authorisation record.

12 RENEWALS

Under the DoLS, there is no ability to renew a standard authorisation; the supervisory body must arrange for a new authorisation to begin immediately after the expiry of the current authorisation. Under the LPS, a responsible body can renew an authorisation if it is satisfied that:

- the authorisation conditions continue to be met; and
- it is unlikely that there will be any significant change in the person's condition during the renewal period which would affect whether those conditions are met.

In addition, the responsible body is required to carry out consultation, as required for an authorisation (set out above), before an authorisation can be renewed.

In cases concerning care home arrangements, the responsible body can decide if:

- it will arrange the necessary assessments and other evidence to be provided for the purposes of the renewal; or
- whether the care home manager should do so.

If it is the care home manager, they must provide the responsible body with a statement confirming the criteria required to be met in care home cases (as set out above) are satisfied, and undertake consultation (and provide the responsible body with evidence of this). The responsible body can then decide whether to renew the authorisation based on this evidence.

13 PORTIBILITY

A significant problem with the current DoLS has been that an authorisation is rigidly tied to one setting; if a person needs to be moved into new accommodation (even temporarily) a fresh authorisation must be sought. Under the LPS, arrangements can be authorised which apply in different settings. For example, arrangements could be authorised to enable a person to be deprived of their liberty at home and also during regular planned respite care in a nursing home.

The responsible body can vary an authorisation that is currently in place. However, a variation can only be made if consultation has been carried out and it is reasonable to make the variation. The government has made it clear that variation would only be reasonable in limited circumstances; a new authorisation would be needed in the case of new and unforeseen circumstances.

14 REVIEWS

The responsible body must specify a programme of regular reviews that must be carried out. This must be set out in the person's authorisation record and could include the fixed dates or prescribed intervals for reviews.

A review must also be carried out:

- Before an authorisation is varied, or if that is not practicable or appropriate, as soon as practicable afterwards.
- If a reasonable request is made by a person with an interest in the arrangements.
- If the person becomes subject to mental health arrangements or requirements.
- If (in any other case) there has been a significant change in the person's condition or circumstances.

“The reviewer” is the responsible body unless, in relation to care home arrangements, the responsible body decides the care home manager should be the reviewer.

In some cases, the person would not have objected to their arrangements when the authorisation was given (and therefore an AMCP did not review the case), but by the time of the review it is clear that they do not wish to reside in or receive treatment at the specified place. In such cases a review must take place and the reviewer must also refer the case to an AMCP to decide if the authorisation conditions are met (after they have reviewed the authorisation, met the person and carried out the necessary consultation).

Also, a review must be carried out if a “relevant person” (a person engaged in caring for the cared-for person or a person interested in the cared-for person's welfare) informs the reviewer (or the responsible body if the reviewer is a care home manager) that the person does not wish to reside in or receive treatment at the specified place, and the relevant person makes a reasonable request for a review. In such cases the reviewer (or the responsible body if the reviewer is a care home manager) must refer the case to an AMCP to decide if the authorisation conditions are met (after they have reviewed the authorisation, met the person and carried out the necessary consultation).

15 INDEPENDENT MENTAL CAPACITY ADVOCATE

Under the LPS the responsible body is required to take reasonable steps to appoint an independent mental capacity advocate (IMCA) if:

- the person has capacity to consent to the appointment and makes a request, or
- the person lacks capacity to consent, unless the responsible body is satisfied that being represented and supported by an IMCA would not be in the person's best interests.

The duty, however, does not apply if there is an "appropriate person" to represent and support the person. In most cases, this will be a family member or friend of the person. An appropriate person must consent to this role and cannot be someone who is engaged in providing care or treatment to the person in a professional capacity or for remuneration. In addition, the person themselves must consent to the appointment of the appropriate person, or if the person lacks capacity to do so, the responsible body must be satisfied that the appointment is in the person's best interests. The appropriate person has a right to IMCA support.

The duty to appoint an IMCA or appropriate person applies from the point at which arrangements are being proposed and lasts throughout the assessment period and any authorisation

16 RIGHTS OF LEGAL CHALLENGE

Under the LPS the right of legal challenge is to the Court of Protection. Applications can be made by the person and others without the permission of the court. The court can determine any question relating to whether the LPS apply to the arrangements, whether the authorisation conditions are met, the duration of the authorisation and what the authorisation relates to. In doing so, the court can make an order varying or terminating the authorisation or directing the responsible body to vary the authorisation.