

- **29th April 2019:** the final Parliamentary stage of the LPS Bill was completed on 24 April. LPS may receive Royal Assent (become law) in the next few weeks however there will then be a delay to the start of the legislation to allow for organisations (particularly NHS Trusts and CCGs) to get ready for the new process. LPS could be expected to start mid 2020.
- **All of the key parts and processes of LPS are now complete and will not change. They are outlined below.**
- To download the Bill and other documents go to: <https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html>
- A series of resources and a full day training course on LPS (hosted by Edge or delivered in house) are available from www.edgetraining.org.uk/news/ 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* – also referred to as the acid test and other relevant case law. The new LPS Code of Practice (see below) will provide guidance based on existing case law on when a person may be considered to be deprived of their liberty.

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 confirmed by a doctor (just like DoLS). Under DoLS a mental health assessor completed this assessment. Under LPS the role of the mental health assessor is removed so that any existing evidence from a doctor (something a GP has written in accessible records) can 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 its 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, 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

LPS requires at least 9 separate assessments to be completed and recorded (evidenced) prior to the responsible body carrying out its pre-authorisation review. It remains open to question whether assessments 3-9 can be completed by unqualified staff (non-registered professionals) and future guidance will confirm this or not. The assessments are:

1. Mental capacity (*this must be completed by a professional – nurse, social worker, O/T etc*)
2. Mental disorder (*this must be completed by a doctor, but it could be something written for another purpose*)
3. Arrangements are a deprivation of liberty
4. The deprivation of liberty is necessary and proportionate to prevent harm to the person

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 assessment 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?

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 assessment for LPS and also the renewal statement (see duration) used for renewing LPS and LPS reviews.

Young People

LPS applies from the age of 16 upwards (except care homes). 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

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. They do not meet the person but simply read the assessments (just like a DoLS signatory now). If a person is objecting to care or the placement or 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, 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.

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 appeal 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 the person and others. 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, but 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 DoLS, there is no statutory duty to maintain contact with the person.

Advocacy (IMCA)

If an appropriate person cannot be identified, then an advocate will 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.

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 (a half day course). This means there is **no funding** allocated for 80% of social workers to have any training. The Department of Health & Social Care (DHSC) have also engineered a saving of £50 million by presuming the appeal rate under LPS compared to DoLS will halve from 1% to 0.5%. This is despite there being no statistical or research evidence for such a claim. Barbara Keeley, MP (22 January*) 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>

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 DHSC and a draft version will be open for consultation later this year before being published when LPS comes into force.

Mental Health Act and Mental Capacity Act interaction

LPS has the same overlap with the Mental Health Act that DoLS has. Under DoLS there is the Eligibility Assessment, and this is simply re-named for LPS and becomes the Excluded Arrangements assessment. 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 eligibility assessor under LPS, responsible bodies will need to give some thought to who will have the appropriate skills to undertake this assessment.