

[The Mental Capacity \(Amendment\) Bill](#) was approved by Parliament on 24 April 2019, meaning it will become law shortly, when it receives Royal Assent.

The legislation provides for the repeal of the Deprivation of Liberty Safeguards (DoLS) contained in the Mental Capacity Act 2005 (MCA), and their replacement with a new scheme called the Liberty Protection Safeguards (LPS)

The LPS establishes a process for authorising arrangements enabling care or treatment which give rise to a deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights (ECHR), where the person lacks capacity to consent to the arrangements. It also provides for safeguards to be delivered to people subject to the scheme.

Highlights from the parliamentary debate on the bill

- [DoLS replacement bill approved by Parliament with Liberty Protection Safeguards due to come into force in 2020](#)
- [Lords approves DoLS replacement bill following significant changes to boost safeguards for those detained](#)

The government is currently working on the LPS code of practice, which it has committed to publish for public consultation later this year. A number of regulations will also need to be drafted before the legislation can be implemented.

The government has not yet announced the date on which the legislation 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 subject to DoLS to be transferred to LPS in a managed way.

What is the meaning of deprivation of liberty?

The legislation does not define deprivation of liberty. Instead, it retains section 64(5) of the MCA, which provides that references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the ECHR. This means that the meaning of deprivation of liberty will continue to be led by case law, such as *Cheshire West* and the decisions of the European Court of Human Rights.

It also amends section 42 of the MCA to require that the code of practice under LPS must include guidance about what kinds of arrangements would give rise to a deprivation of liberty. This guidance must be reviewed within three years of the legislation coming into force and then subsequently every five years.

What types of arrangements can be authorised and for whom?

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. Authorisations can also be given for arrangements being carried out in more than one setting.

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.

Who is the responsible body?

The LPS replace the “supervisory body” under the DoLS with the “responsible body”, as the agency charged with authorising the arrangements that give rise to a deprivation of liberty.

There can only be one responsible body for any authorisation that is granted, identifiable through the following hierarchy:

- if the arrangements are carried out mainly in an **NHS hospital**, the responsible body is the “hospital manager” (in most cases, 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 health care**, the responsible body is the relevant clinical commissioning group in England or local health board in Wales; and
- **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).

What are the criteria for an authorisation?

Under LPS, 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.

In the case of the assessments for the first two criteria (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.

In addition, before authorising arrangements, the responsible body must:

- be satisfied that any duty to appoint an appropriate person or independent mental capacity advocate has been complied with; and
- have arranged a pre-authorisation review which has been completed.

The pre-authorisation review

This is intended to provide the degree of independence required by Article 5 of the ECHR. The review must be carried out by a person who is not involved in the day-to-day care or providing any treatment to the person, and (in relevant cases) 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), 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). The AMCP is a new role which is intended to build upon the existing best interests assessor role. **Local authorities** are responsible for the approval of individual AMCPs and ensuring there are sufficient numbers of AMCPs for their area. A regulation-making power allows, amongst 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.

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; or
- 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 with the person and consult all those listed above as requiring consultation (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).

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 he or she is 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 (see 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.

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.

The effect and duration of an authorisation

An authorisation can have effect immediately, or up to 28 days later. An authorisation does not provide a general authority to deprive a person of their liberty; instead, those carrying out the arrangements are provided with a defence to civil or criminal liability.

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 persons 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 requirements of a community power under the Mental Health Act 1983, such as guardianship or a community treatment order, to which the person is also subject.

Renewals and reviews

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 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.

The responsible body is required to carry out consultation before an authorisation can be renewed.

The responsible body must specify a programme of regular reviews of authorisations. 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.

Appointment of an independent mental capacity advocate (IMCA)

Under the LPS the responsible body is required to take reasonable steps to appoint an 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.

Rights of legal challenge

Under 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.

The Mental Health Act 1983 (MHA) interface

To a large degree, the LPS seek to maintain the existing interface between the DoLS and the MHA. Broadly speaking, it provides that the LPS cannot be used to authorise “mental health arrangements”, which are defined as arrangements for the assessment or medical treatment of mental disorder in hospital where:

- the person is detained in hospital under the MHA, or
- where an application for detention in hospital under the MHA could be made and the person objects (and a donee of a lasting power of attorney or a court - appointed deputy has not consented on the person’s behalf).