
EDGE
Liberty Protection Safeguards
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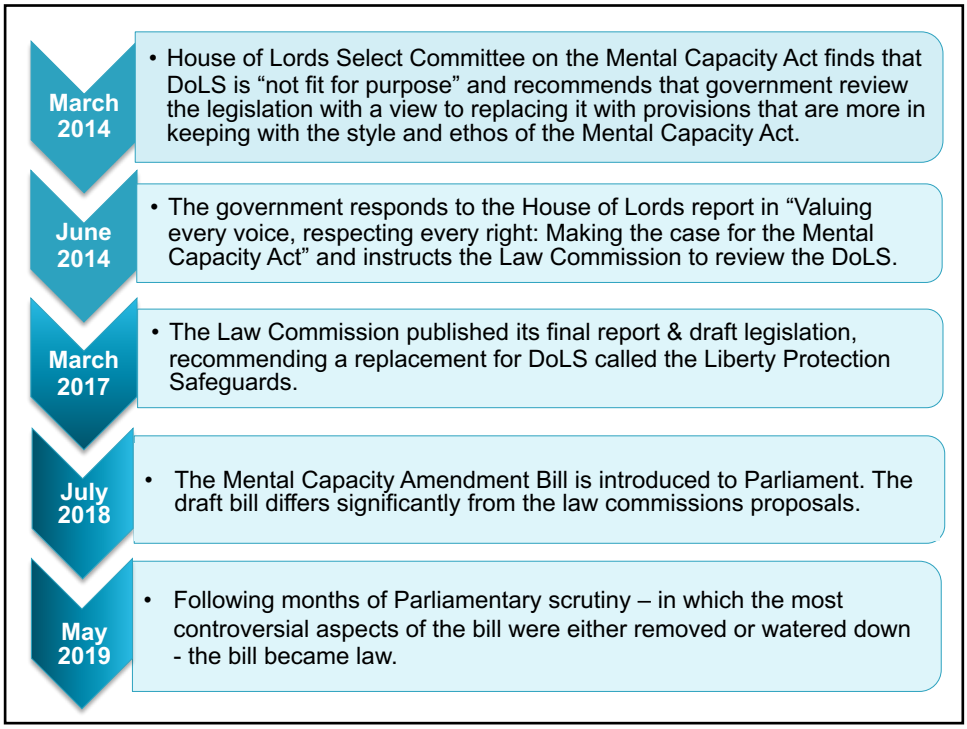
March 2014
• House of Lords Select Committee on the Mental Capacity Act finds that DoLS is "not fit for purpose" and recommends that government review the legislation with a view to replacing it with provisions that are more in keeping with the style and ethos of the Mental Capacity Act.
June 2014
• The government responds to the House of Lords report in "Valuing every voice, respecting every right: Making the case for the Mental Capacity Act" and instructs the Law Commission to review the DoLS.
March 2017
• The Law Commission published its final report & draft legislation, recommending a replacement for DoLS called the Liberty Protection Safeguards.
July 2018
• The Mental Capacity Amendment Bill is introduced to Parliament. The draft bill differs significantly from the law commissions proposals.
May 2019
• Following months of Parliamentary scrutiny – in which the most controversial aspects of the bill were either removed or watered down - the bill became law.

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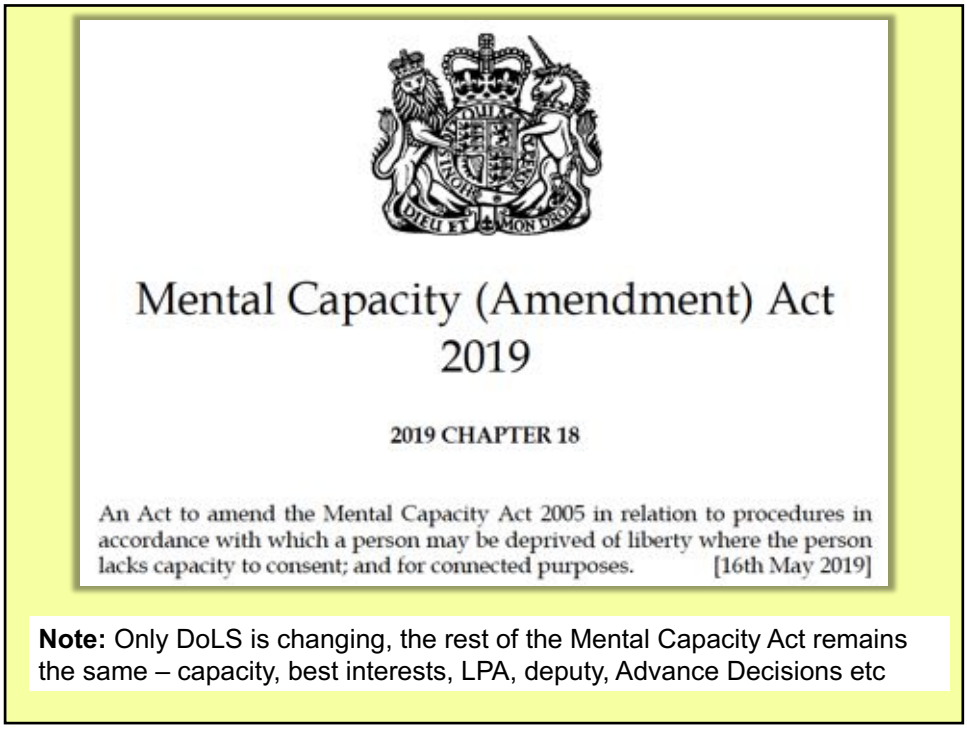

Note: Only DoLS is changing, the rest of the Mental Capacity Act remains the same – capacity, best interests, LPA, deputy, Advance Decisions etc

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What do we know

- **Primary legislation:** The Act = the legal framework of the LPS.
- **Statutory regulations:** Expected Spring 2020. The Act gives the Secretary of State/Welsh Minsters the power to make regulations in relation to:

✓ The start date for LPS– expected to be 1/10/2020.
✓ Transitional arrangements – The government has confirmed that DoLS will run alongside the LPS for a year after implementation.
✓ Monitoring of LPS by inspectorate bodies.
✓ Restrictions on who can complete the assessments.
✓ Qualification & approval of Approved Mental Capacity Professionals.

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What do we know

- **Code of practice:** As with DoLS, the LPS will have a code of practice which staff will have a legal duty to have regard to. It will provide Practical guidance **but is limited** by what the legislation states. Draft expected Spring 2020.
- **Case law:** The Courts will provide further guidance as to the meaning of various provisions within the Act. Much existing DoLS case law is directly transferrable e.g. Supreme Court 'acid-test.'
- **Funding:** Funding is set out in the government's impact assessment (more later).

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DoLS > LPS: What is changing?

DoLS	**Liberty Protection Safeguards**
Aged 18 +	**Aged 16 +**
Care homes & hospitals only	**Anywhere** - stops the need for court applications for domestic/community cases.
No explicit power to convey	Para 7 (3): *"The arrangements may for example be - (c) for the means and manner of transport for the cared-for person to, from or between particular places."*

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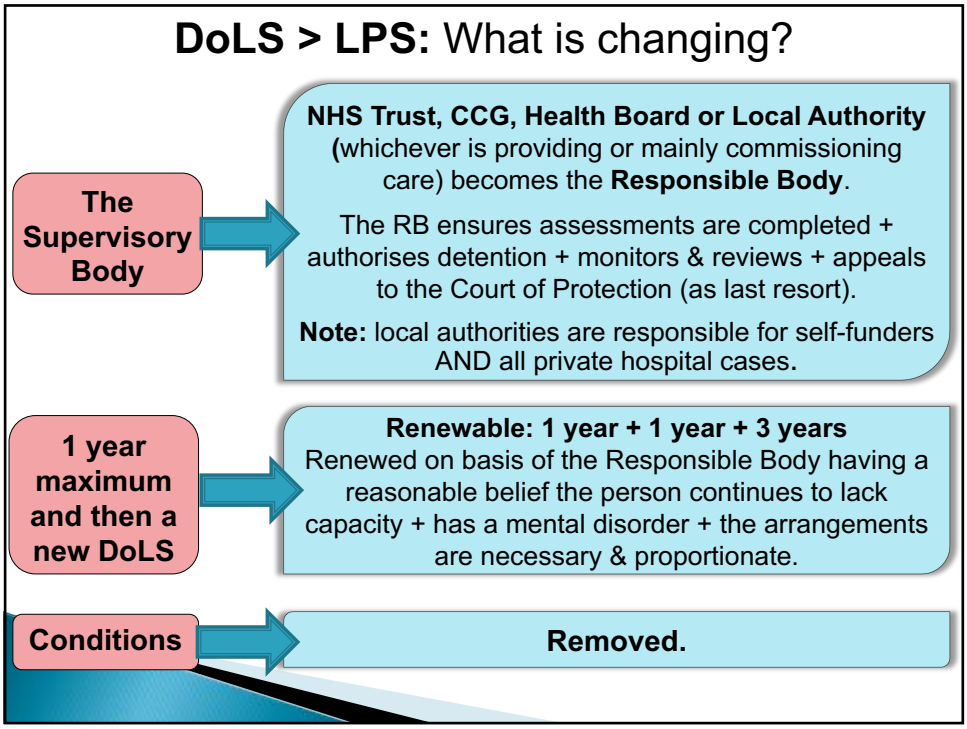
DoLS > LPS: What is changing?
The Supervisory Body
NHS Trust, CCG, Health Board or Local Authority (whichever is providing or mainly commissioning care) becomes the Responsible Body.
The RB ensures assessments are completed + authorises detention + monitors & reviews + appeals to the Court of Protection (as last resort).
Note: local authorities are responsible for self-funders AND all private hospital cases.
1 year maximum and then a new DoLS
Renewable: 1 year + 1 year + 3 years
Renewed on basis of the Responsible Body having a reasonable belief the person continues to lack capacity + has a mental disorder + the arrangements are necessary & proportionate.
Conditions
Removed.

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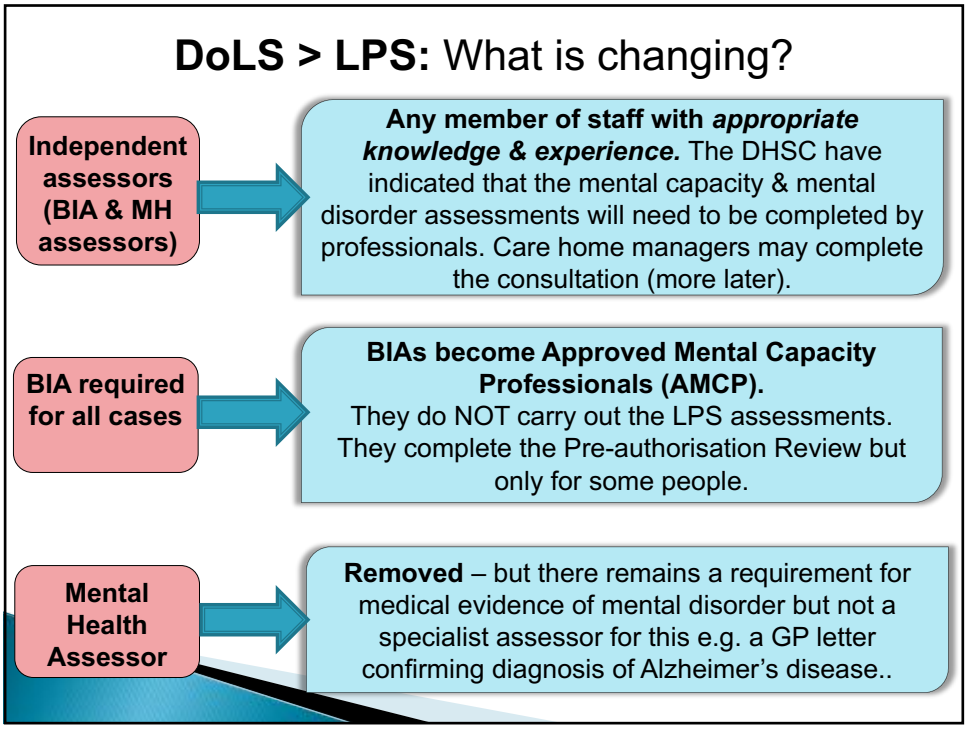
DoLS > LPS: What is changing?
Independent assessors (BIA & MH assessors)
Any member of staff with appropriate knowledge & experience. The DHSC have indicated that the mental capacity & mental disorder assessments will need to be completed by professionals. Care home managers may complete the consultation (more later).
BIA required for all cases
BIAs become Approved Mental Capacity Professionals (AMCP).
They do NOT carry out the LPS assessments. They complete the Pre-authorisation Review but only for some people.
Mental Health Assessor
Removed – but there remains a requirement for medical evidence of mental disorder but not a specialist assessor for this e.g. a GP letter confirming diagnosis of Alzheimer's disease..

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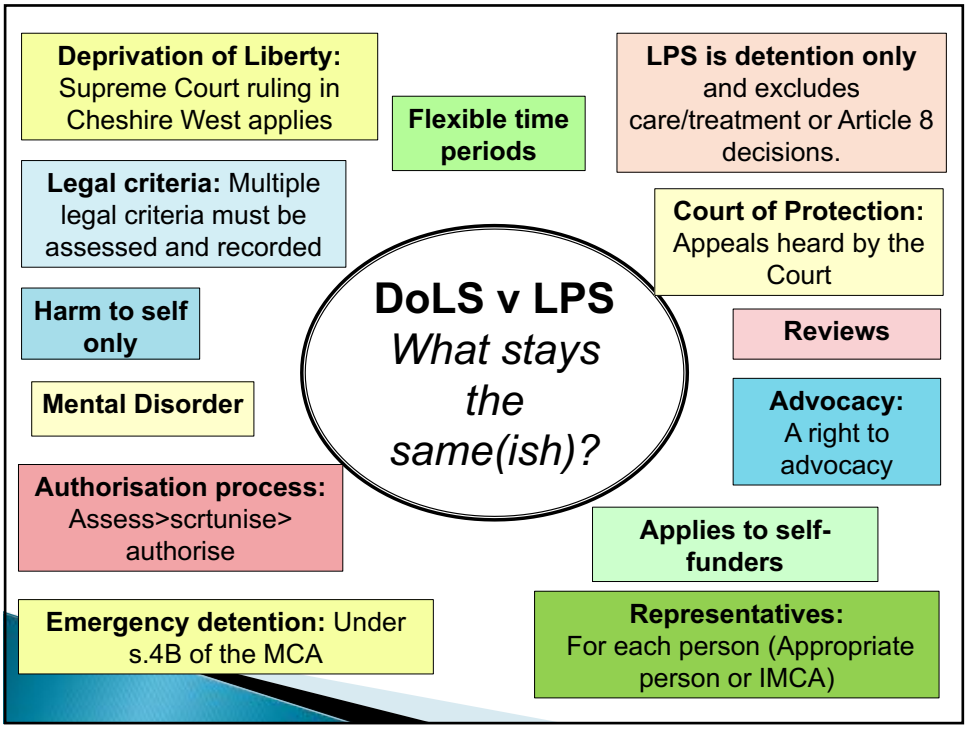

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The Responsible Body

- If the arrangements are 'mainly' in an NHS Hospital = **the NHS Trust** (hospital manager).
- If the arrangements are 'mainly' in an independent hospital in England = **the local authority** where the hospital is situated.
- If the arrangements are 'mainly' through the provision of NHS continuing healthcare (CCG or Local Health Board) = **the CCG or local health board.**
- When a **local authority** is the Responsible Body it will either be:
  1) meeting the person's need under the Care Act 2014, or
  2) responsible for an Education Health & Care Plan under the Children & Families Act 2014, or
  3) providing accommodation under s.20 of the Children Act 1989, or
  4) responsible for for a care order/interim care order under the Children Act 1989; or
  5) because the person is ordinarily resident in their area.

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LPS process

Assessment

The Responsible body can use any staff with appropriate knowledge and experience to undertake the assessments + use pre-existing assessments. The government has indicated that the Mental Capacity assessment will need be completed by a registered professional and Mental Disorder assessment by a doctor. Care home managers can complete the consultation and organise other assessments at the discretion of the Responsible Body.

Pre-authorisation review

The Responsible Body assigns a member of staff who is not involved in the day to day care or treatment of the person. They do not meet the person, but read the completed assessments and decide if the LPS criteria are met.

If the person is **objecting** or in a **private hospital**, the pre-authorisation review must be completed by an **AMCP**, who must also meet the person and consult others if appropriate & practicable.

Authorisation

The Responsible Body authorises. There is no detail or guidance on who will undertake this role and this may be specified in regulations/Code of Practice.

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Emergency detention?

Section 4B: "Deprivation of liberty necessary for life-sustaining treatment or vital act"

It will be lawful to deprive a person of their liberty in an emergency to give *life-sustaining treatment or do a vital act* (necessary to prevent a serious deterioration) on condition that either:

- An application has been made to the Court of Protection requesting an order to authorise the deprivation of liberty.

OR

- A responsible Body is determining whether to authorise the deprivation of liberty under the LPS.

Time limit? Unlike the urgent authorisation in DoLS there is no time limit to the use of section 4B e.g. 7 days? 7 weeks?? 7 months???

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The Assessment conundrum

Conditions? **Assessments?** **Criteria?**

- The Department of Health & Social Care has stated that there are only three assessments required for LPS. This is slightly misleading (in the nicest possible way) and more of a play on words!!!
- There are three *conditions* in LPS that must be met **but** a series of other criteria must also be satisfied before a Responsible Body can authorise an LPS.

The Care Home anomaly

- Technically care home managers can arrange LPS assessments **BUT** a statutory regulation will prevent any person with a financial interest from completing assessments (except the consultation assessment & renewal statement).
- The Responsible Body can therefore ask a care home to **arrange** the LPS assessments but the care home staff cannot carry them out directly! They would need to employ or commission someone else to carry out the assessments.

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LPS legal criteria (assessments)

- The person **lacks mental capacity** to the arrangements giving rise to the deprivation of liberty
- The person has a **mental disorder**
- The arrangements are **necessary and proportionate** to prevent harm (must be carried out at the time)
- The arrangements amount to **deprivation of liberty** (continuous supervision & control and not free to leave)
- **Consult the person and others** (caring for + interested in welfare)
- Is the person **Objecting?** (AMCP needed)
- **Excluded arrangements** (Mental Health Act)
- Is there an **Appropriate Person** (if not = IMCA)
- The person is **aged** 16 and over (18 and over in a care home)

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Best interests? No refusals?

Department of Health & Social Care

- The government has stated that the responsible body must also confirm that the arrangements are in the person's **best interests** and consider if there is a health and welfare attorney or deputy is **objecting**.
- **Caroline Dinenage, Minister of State**: *"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**."*

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The person lacks capacity

- Nothing new! The wider provisions of the Mental Capacity Act 2005 & case law will continue to apply.
- **The assessment:** whether the person has capacity to consent to the arrangements that give rise to deprivation of liberty.
- **Paragraph 21(8):** *"An assessment may be one carried out for an earlier authorisation or for any other purpose…"*
- **Paragraph 21(9):** The assessor must consider: (1) the length of time since the assessment was carried out (2) the purpose for which it was carried out (3) whether there has been a change in circumstances (**Note**: This paragraph also applies to Mental disorder assessment).

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The person has a mental disorder

- As with the mental capacity assessment, this assessment *"may be one carried out for an earlier authorisation or for any other purpose…"* (paragraph 21 again).
- **No funding allocated** to pay GPs for it and no power to make them do it!

Contemporaneous? *"The competent domestic authority must subject the expert advice before it to a* ***strict scrutiny and reach its own decision*** *on whether the person concerned suffered from a mental disorder...Medical expert reports relied on by the authorities* ***must therefore be sufficiently recent…"***

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The arrangements are necessary and proportionate to prevent harm

- The principle of **proportionality** is embedded in Article 5 of the ECHR and is currently covered in DoLS.
- **Necessary:** It is not enough that the arrangements that amount to deprivation of liberty have been made in good faith. There must be clear evidence to show that the arrangements are **necessary to prevent harm to the person**.
- **Proportionate:** Evidence to show that the arrangements are proportionate to the likelihood and seriousness of harm. What less restrictive options been tried? What is the evidence they failed?
- This assessment must be carried out at the time (it is not possible to rely on a pre-existing assessment).

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The arrangements amount to deprivation of liberty

P v Cheshire West and Chester Council & P and Q v SCC [2014] UKSC 19:
MIG was 18 years old. She had a severe learning disability with hearing, visual and speech impairments. *"She is incapable of independent living. She is largely dependent on others."*

- She lived in a domestic dwelling with a foster mother whom she regarded as her 'mummy.'
- She was settled and content.
- Her relatives did not oppose the placement.
- There were no locked doors **BUT** if she tried to leave alone she would be stopped.
- She was escorted outside as she was not safe to cross the road alone.
- She spent much of her time on her own listening to music on her iPod.
- There was no chemical or physical restraint.
- She had a good social life & went to college daily.

The Supreme Court found she was subject to:
"Continuous supervision and control AND not free to leave"

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The law on DoL for 16 & 17 year olds
Re D [2019] UKSC 42

26/9/2019: The Supreme Court overturned the previous Court of Appeal ruling that decided that someone with with parental responsibility **could** consent to the deprivation of liberty of a 16-17 year old.

- **Lady Hale:** *"In conclusion, therefore, it **was not** within the scope of **parental** responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5."*
- **Implications:** Any 16/17 year who lacks capacity to consent to care arrangements that amounts to deprivation of liberty, requires authorisation from the Court of Protection (in the short-term) and LPS in the long-term (**Note:** implications for the number of people covered by the LPS in the future).

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Consult the person and others

The responsible body must ensure that the following individuals are consulted:

- ✓ The cared-for person.
- ✓ Those named by the person to consult.
- ✓ Anyone engaged in caring for them or interested in their welfare.
- ✓ Any power of attorney (finance or health and care) or EPA.
- ✓ Any deputy.
- ✓ Any appropriate person or any IMCA concerned.

The purpose is to ascertain the persons wishes or feelings in relation to the arrangements.

Note: This assessment **can be undertaken by a care home** manager if the person being assessed is in a care home.

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Is the person Objecting?

The task: To determine whether or not the person **objects** to either residing at the place or the care or treatment. If so there is a duty to refer to an AMCP.

Victoria Butler-Cole QC, 18/3/2019:

- ❑ *"It will be for care home managers, during the consultation process, to establish whether the cared-for person is objecting to the proposed arrangements.* ***Care home managers will therefore act as the gateway to the additional scrutiny offered by AMCPs."***

- ❑ *"Similarly, the time, resources and skills it will take for care home managers to carry out proper consultation should not be underestimated.* ***Establishing whether a cared-for person is objecting to proposed arrangements will not necessarily be a straightforward task****. The person's responses may be ambiguous, or change from day to day, or be difficult to ascertain."*

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Excluded arrangements (Mental Health Act)

- **Could or should the Mental Health Act be used? (aka Eligibility):** Probably the most complex and criticised part of DoLS is kept.
- *Schedule 1, Part 7, Para's 45-57* devotes 12 different sections over four pages to this one assessment! **As with DoLS the key issue is whether a person objects.**
- **Good news for local authorities? YES** as LAs won't have to have arguments with hospitals about which Act to use because this will be decided by the hospital manager and **NO** as LAs will have the same arguments with private mental health hospitals for which they will be Responsible Body!
- **Community cases:** LPS & Guardianship, LPS & CTO and LPS & Conditional Discharge - as long as there is no conflict.

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Pre-authorisation Review

All assessments must have a pre-authorisation review before an authorisation can be granted. If the person is objecting or in an independent hospital the pre-authorisation review is completed by an AMCP. Otherwise, the **Responsible Body** assigns a member of staff who is not involved in the day to day care or treatment of the person. The reviewer reads the papers/forms (like a DoLS signatory). They must:

*"a) **review the information** on which the responsible body relies, **and** (b) determine whether it is **reasonable** for the responsible body to conclude that the **authorisation conditions are met**."*

Justice Jackson: "*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….Where a supervisory body grants authorisations on the **basis of perfunctory scrutiny** of superficial best interests assessments, it cannot expect the authorisations to be legally valid."* Steven Neary v Hillingdon Council [2011] EWHC 1377

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Approved Mental Capacity Professional (AMCP)

Schedule1, Part 2, Para 24: *"The review must be by an Approved Mental Capacity Professional if—*

*(a) the arrangements provide for the cared-for person to reside in a particular place, and it is **reasonable to believe that the cared-for person does not wish to reside in that place**,*

*(b) the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is **reasonable to believe that the cared-for person does not wish to receive care or treatment at that place**,*

*(c) the arrangements provide for the cared-for person to receive care or treatment mainly in **an independent hospital**, or*

*(d) the case is **referred by the responsible body** to an Approved Mental Capacity Professional and that person accepts the referral.'* (e.g. complex cases).

Note: In determining that a person person does not wish to reside or receive care or treatment, the Responsible Body **must consider the views of anyone engaged in caring for the person or interested in their welfare** about the wishes of the cared for person.

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Role of the AMCP

Schedule 1, Part 2, Para 25:

'"(1) If the review is by an Approved Mental Capacity Professional, the Approved Mental Capacity Professional must—

*(a) **review the information** on which the responsible body relies, **and***

*(b) **determine** whether the authorisation conditions are met.*

(2) Before making the determination the Approved Mental Capacity Professional must—

*(a) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be **appropriate and practicable** to do so, **and***

*(b) **consult** any other person listed in paragraph 20(2), or take **any other action**, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so."*

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Duty on local authorities to approve AMCPs

Schedule 1, Part 4, Para 39: "*Each local authority must make arrangements—*

*(a) for persons to be **approved** as Approved Mental Capacity Professionals, and*

*(b) to **ensure that enough** Approved Mental Capacity Professionals **are available** for its area.'*

Note: Local authorities will be responsible for the approval of AMCPs for themselves, NHS Trusts and CCGs. However, one issue to clarify with the government is the requirement to *"ensure that enough AMCPs are available."* Will local authorities be responsible for the supply of AMCPs if the local NHS Trust/CCG fails to train sufficient staff for the role?

AMCP qualification? DHSC memo states: *"it is expected"* that an AMCP will be an **AMHP, social worker, nurse, OT or psychologist** with 2 years post registration experience and has completed an approved AMCP course + completes further training every year + has the skills necessary for role. It is also *"expected"* that **existing BIAs** will be ***"fast-tracked into the new role."***

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Renewals

The LPS renewal process is streamlined and there is no need to repeat the initial procedure.

The Responsible Body can renew an LPS authorisation in a care home if it is satisfied:

i. *"that the authorisation conditions **continue to be met,***

ii. *that 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, **and***

iii. *that the care home manager [or the Responsible Body] has **carried out consultation..."*** Schedule 1, Part 3, Para 34 & 35.

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Renewals

- The Responsible Body can use **any staff** to authorise a renewal.
- The Responsible Body can decide what time period it authorises (the Code of Practice may give guidance on this – similar to that in the DoLS code).
- There appears to be considerable scope for the evidence that the Responsible Body could rely upon to satisfy parts 1 & 2 of the renewal process (the Code of Practice may give further detail or examples).
- Potentially renewal under the LPS could be **paper based** with **NO direct re-assessment** of the person.
- There is **no** role for AMCPs in the renewal process. However, any person under an LPS authorisation must have a regular programme of reviews and this may trigger a referral to an AMCP if the person is objecting.

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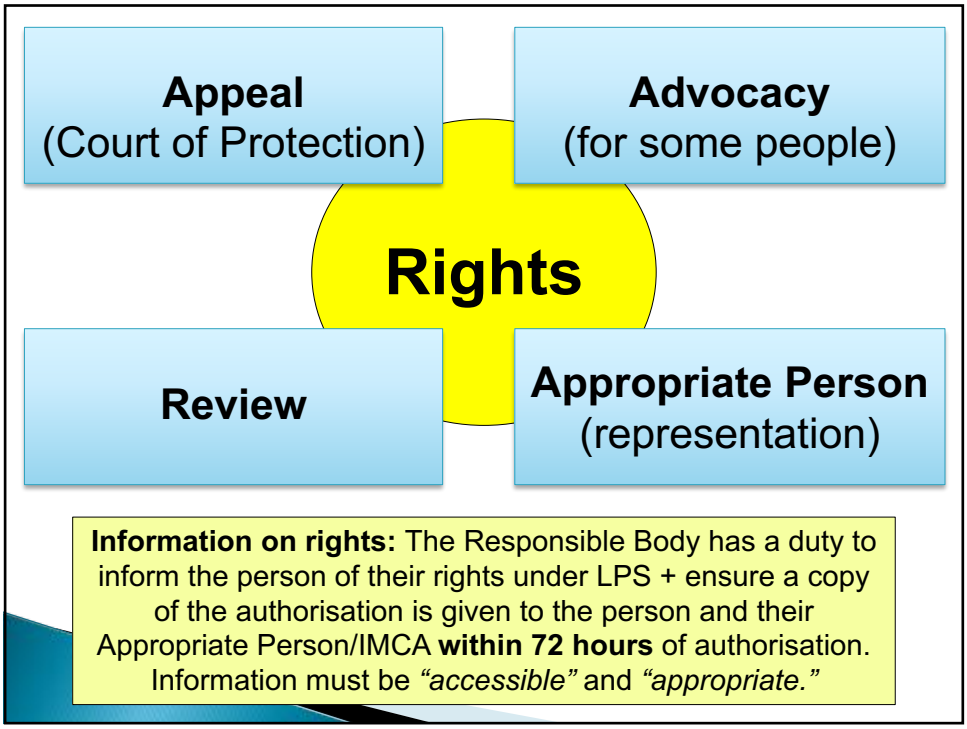

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Rights: Appropriate Person

- Any person under an LPS authorisation will have an **Appropriate Person** appointed.
- An appropriate person must **not** be engaged in providing care or treatment in a professional capacity to the cared-for person and they must **consent** to being appointed.
- The Responsible Body must be satisfied that the Appropriate Person will **represent and support** the cared-for person = being willing and able to appeal on behalf of the cared for person.

Mr Justice Baker: *"…it is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation.* ***BIAs and local authorities should therefore scrutinise very carefully the selection and appointment of RPRs in circumstances which are likely to give rise to this potential conflict of interest.*** **" AJ v A local authority [2015] EWCOP 5**

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Rights: Appeal

- Appeals will be heard by the **Court of Protection.**
- There have been increasing numbers of appeals under DoLS (approximately 1,000 a year on latest statistics). Local authorities now have a regular number of 'live' appeals. The same can be expected for LPS.
- LPS appeals could be on many issues – each of LPS criteria, duration and what the authorisation relates to. The Court has wide ranging powers and can make judgments on many issues.
- The Court will look at the current LPS **AND** previous DoLS authorisations AND the circumstances surrounding the deprivation of liberty.

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Rights: Review

Reviews can be carried out by any member of staff of a responsible body **or** care home managers (as agreed by the responsible body). There are 2 types of review.

1. **Standard review** – every LPS must contain a programme of regular reviews

2. **Responsive reviews** – a review must be undertaken if any of the following occur:

a) a variation of the LPS
b) a person with an interest in the arrangements asks for one
c) the Mental Health Act is used
d) there is a significant change in the cared-for person's condition or circumstances
e) a person who was not considered to be objecting to the placement/care/treatment when the LPS was originally authorised is now considered to be objecting
f) a person providing care or interested in their welfare requests a reviews because they believe the cared-for person objects to the placement/care/treatment

AMCPs undertake category (e) reviews and are required to meet the person/consult others. If the Responsible Body is carrying out the review, there is **NO** requirement to meet the person/consult others!

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Rights: Advocacy (IMCA)

The Responsible Body should appoint an IMCA if:

- If the cared-for person has mental capacity to consent to being supported by an IMCA and requests one.
- The relevant person does not have an **Appropriate Person** and the Responsible Body believes one would be in their best interests.
- An Appropriate Person requests an IMCA.

Victoria Butler-Cole QC, 18/3/2019: *"Access to advocacy will be significantly weaker under the MCAB than the current system, and the approach that has been adopted is problematic in a number of important ways."*

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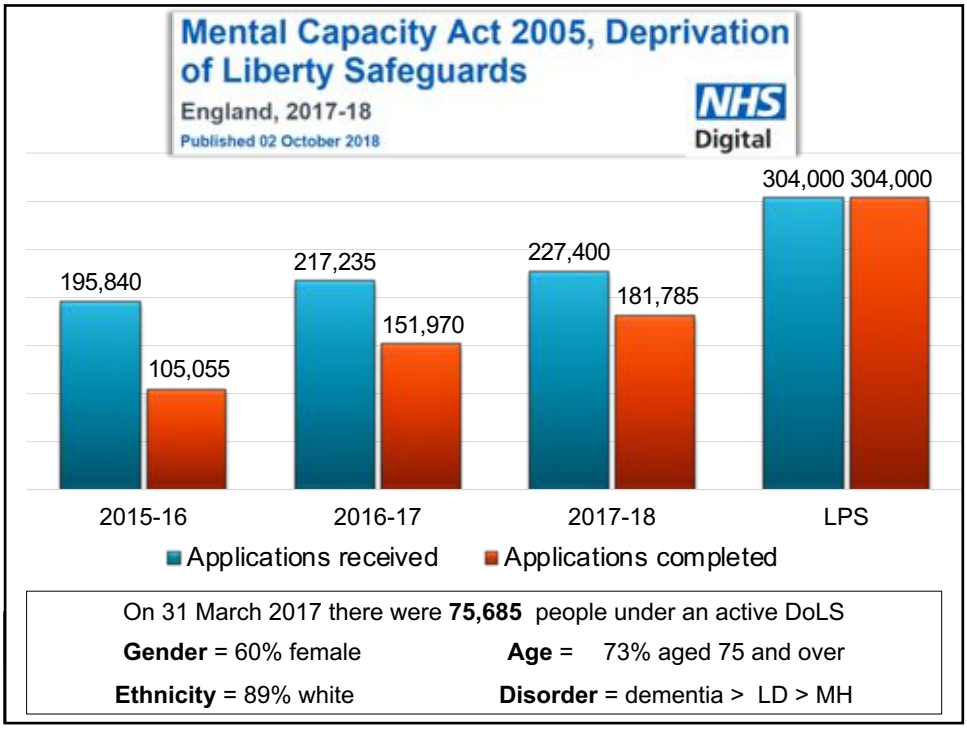

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The costings for LPS are based on a number of assumptions, which may leave the new scheme chronically underfunded:

- **AMCPs:** Funding is based on an estimated figure that 25% of people will be objecting. There is no proper research on this and as LPS is designed to be completed close to when a person first moves into care so in reality it may be much higher.
- **Appeals:** Funding for appeals is based on the assumption that the number of appeals will reduce from 1% at present to 0.5%!
- **Medical assessments:** If a Responsible Body cannot find medical evidence of mental disorder it will need to request one from a GP or other doctor but there is no funding allocated for this.
- **Training:** The assessment of training costs is based on an assumption that only 20% of registered social workers & doctors will require training. + the only funding provided for the care sector is for care home managers only.
- **Applications:** The government assumes that 304,000 applications will be received and completed per year **(good luck with that!!).** However, there is no reliable evidence as to the number of community cases or 16-17 year olds that will come under LPS.

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What do we need to do?

- **Don't delay!** The LPS framework is set and will not change. Don't wait for the Code of Practice and regulations as this will leave only a few months before the LPS comes into force.
- **Identify** the number of people that will be covered by the LPS, particularly those in the community and 16/17 year olds.
- **Identify** the staff that will require training. Are all staff sufficiently trained on the wider provisions of the MCA 2005?
- **Make representations -** although the Act is fixed, the Code of Practice is not. Contribute to the consultation and contact the DHSC if you have concerns about funding of the LPS.

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