

The Liberty Protection Safeguards



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Introduction

The Mental Capacity (Amendment) Act 2019 received Royal Assent in May 2019. The primary purpose of the Act is to replace the Deprivation of Liberty Safeguards (DoLS) with a new, more efficient way of authorising deprivation of liberty to protect the individual's rights under Article 5, European Convention on Human Rights. Although the phrase is not used in the Act, the new scheme will be known as the Liberty Protection Safeguards (LPS).

Why do we need a new scheme?

DoLS has been criticised as being overly bureaucratic and poorly understood by the professionals charged with working within the scheme¹. In 2014, a Supreme Court case² gave a wider interpretation of who was deprived of their liberty which meant that far more people had to be assessed and authorisations given. This has increased the workload of local authorities and meant that many individuals were not being given the protection they were entitled to.

What is the definition of deprivation of liberty?

There is no statutory definition of deprivation of liberty contained within the LPS. Instead, the current definition derived largely from case law will remain. In *Storck v Germany*³, the European Court of Human Rights set out three requirements:

- The person is confined somewhere for a non-negligible period of time and
- They have not validly consented to that confinement (someone lacking capacity cannot give valid consent) and
- The confinement is “imputable to the State”, i.e. the State is either directly involved in the care of the person, such as when they are in an NHS hospital or where the local authority is paying care fees or where the State becomes aware that someone might be deprived of their liberty. This then engages the State's positive obligation to uphold the person's rights, in this case by providing an assessment.

In England and Wales, the ‘Storck’ requirements were further developed by the Supreme Court with the introduction of the so-called ‘acid test’.

The acid test comprises a further three elements:

Is the person under continuous supervision?

Are they under continuous control?

Are they free to leave?

Any individual who is under continuous supervision and control and who is not free to leave meets the requirements of confinement, the first Storck element and thus is likely to be deprived of their liberty in breach of their Article 5 rights.

¹House of Lords Select Committee on the MCA 2005. 2014. London TSO

²P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another: P & Q (by their litigation friend the Official Solicitor) v Surrey County Council [2014] UKSC 19

³(61603/00) [2005] 1 MHLR 211

⁴P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another: P & Q (by their litigation friend the Official Solicitor) v Surrey County Council [2014] UKSC 19

Where can LPS be used?

Alongside NHS, private hospitals and care homes, LPS will also apply to supported living schemes, as well as people's own homes. It will apply to residential schools and colleges. The new scheme could also be used to authorise deprivation of liberty in day care or on transportation between care settings.

An application under LPS will be required whenever someone lacks capacity to consent to the arrangements made for their care and treatment and that care and treatment is happening in circumstances where the person is confined (i.e. is under continuous supervision and control and is not free to leave) and where the State is involved.

How does LPS work?

- The person lacks capacity to consent to the arrangements made for their care and treatment
- The person has a mental disorder as defined within section 1(2) of the Mental Health Act 1983 and
- The arrangements are necessary to prevent harm to the person and are proportionate in relation to the likelihood and seriousness of that harm



It's important to remember that someone who has a mental disorder doesn't necessarily lack capacity to make decisions. The assessments for mental illness/disorder and those for mental capacity are distinct. Mental disorders will include such conditions as bipolar disorder, schizophrenias and personality disorders but may also include issues such as delirium, dementia and head injuries.

Before an authorisation can be given, consultation has to take place to find out the individual's wishes and feelings. People to consult include:

- The person themselves
- Anyone named by the person or anyone engaged in caring for the person or otherwise interested in their welfare
- Any Attorney under either a LPA or Enduring Power of Attorney; Court Appointed Deputies
- Any "appropriate person" or IMCA involved in the case⁶

In addition, the Responsible Body must be satisfied that the need to appoint an "appropriate person" or IMCA has been complied with and that a preauthorisation review has been carried out (see next page).

⁵MCA 2005 Schedule AA1 paragraph 13(a-c)

⁶MCA 2005 Schedule AA1 p23(2 a-f)

Who authorises the deprivation?

The Responsible Body is a replacement for the Supervisory Body under DoLS. They are responsible for authorising the deprivation of liberty once they are satisfied that the criteria are met and that it is right and proper to give an authorisation.

Place of deprivation	Responsible Body
NHS Hospital or Community inpatient unit	NHS Trust Board or Local Health Board in Wales
Independent Hospital or inpatient unit	Local Authority or Local Health Board
NHS Continuing health funded care home/unit	Clinical Commissioning Group (of GP registered) or Local Health Board
Care Homes or other community placement	Local Authority

Organisations will have to establish management processes to ensure the appropriate actions are taken to fulfil the legal duties of the Responsible Body and/or work with the Local Authority/ Local Health Board to ensure appropriate and timely referrals and assessments for LPS. Your Trust/ organisation will have identified a senior manager responsible for leading on LPS and authorisations for deprivation of liberty.

What is a Pre-authorisation review?

Each case will need a pre-authorisation review. “In all cases, a person who is not involved in the day-to-day care of or in providing any treatment to the person...must carry out a pre-authorisation review to determine whether the authorisation conditions are met...”⁸. This pre-authorisation review will either be carried out by an Approved Mental Capacity Professional (AMCP) or another professional.

An AMCP must undertake the review if:

There is reason to believe that the person does not wish to either live or receive care and treatment at a particular place or

If the deprivation of liberty is happening mainly in an independent hospital or if the Responsible Body refers the case to an AMCP

AMCPs will have to meet with the individual and consult with the people listed above and then review the information to decide whether the authorisation conditions are met.

The situation in care homes for over 18s is slightly different. The Act allows for the Responsible Body to authorise based on assessments organised by the manager of the care home who will have to provide a statement that the process has been followed and evidence to back this up.

⁷HM Government MCAA 2019 Explanatory notes p 7 para 29. London. TSO

⁸MCA 2005 Schedule AA1 P24

How long will an authorisation last?

Authorisations can be given for up to a year in the first instance. At the end of that period of time, the authorisation can be renewed for a further year and following this for three-yearly periods. In order to renew an authorisation, the Responsible Body has to satisfy itself that the criteria remain unchanged, consultation has been carried out and it is unlikely that there will be any change to the person's condition over the longer term.

⁹MCA 2005 Schedule AA1 pp.28-36



Can an authorisation be reviewed?

All authorisations must contain a programme of regular reviews. As with DoLS, reviews can also be requested by someone with an interest in the case such as an 'appropriate person'.

¹⁰MCA 2005 Schedule AA1 p.38 (2-12)

Are there any additional safeguards?

Before the authorisation is given, the Responsible Body will be required to identify someone who can take on the role of 'appropriate person' for the individual being deprived. This is likely to be a family member or friend or someone else who is not professionally involved with the person. There will be rules about how this person should be identified. If the Responsible Body cannot identify an 'appropriate person' then they have to appoint an IMCA to represent the person.

Once the authorisation has been granted, there is a right to information, regular reviews and the right to challenge the authorisation in the Court of Protection.

¹¹ MCA 2005 Schedule AA1 pp.41-43



What about people subject to the Mental Health Act 1983?

The current situation is largely unchanged. Anyone who is detained in a hospital under the MHA 1983 or who objects to treatment for a mental disorder cannot be given an authorisation under LPS.

People in the community, subject to provisions of the MHA 1983, who are deprived of their liberty can be given an authorisation as long as that authorisation does not conflict with the MHA requirements.



What about young people aged 16-18?

Unlike DoLS where the qualifying age is 18, LPS applies to those aged 16 and above, partly to bring this procedure in line with the rest of the MCA 2005. Therefore, anyone aged 16 and over who is confined, who lacks capacity to consent to that confinement and where the confinement is imputable to the State will need an assessment under LPS.



What happens if the case is urgent?

The MC(A)A 2019 contains a provision to allow someone to deprive a person of their liberty, without authorisation in three circumstances:

Where a decision relevant to whether there is a deprivation of liberty is being obtained from the Court of Protection.

Whilst awaiting, or during, the full process of obtaining an authorisation under LPS.

In an emergency.

The person who is depriving the other of their liberty must reasonably believe that the person lacks capacity and that the actions are necessary in order to provide life-sustaining treatment or to prevent a deterioration in the person's condition.

Where can I get further information?

Either or both of these websites will give you reliable information about the progress of LPS and the application of the new scheme.

- <https://www.scie.org.uk/mca/dols/practice/lps>
- <https://www.mentalcapacitylawandpolicy.org.uk/resources-2/liberty-protection-safeguards-resources/>

References:

Mental Capacity (Amendment) Act 2019. London. TSO

Mental Capacity (Amendment) Act 2019 Explanatory Notes. London. TSO

Download the resources which accompany this booklet as part of the MCA series, at www.nccdsw.com

NCCDSW **Part 1**
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