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November 2021

Liberty Protection Safeguards:

What You Need to Know



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I.

INTRODUCTION



The Liberty Protection Safeguards: A Factsheet on What You Need to Know

Introduction

The [Mental Capacity \(Amendment\) Act 2019](#) makes changes to the [Mental Capacity Act \(2005\)](#) introducing the Liberty Protection Safeguards (LPS) and making the Deprivation of Liberty Safeguards (DoLs) redundant.

The amendments will come into effect on
1st April 2022.

This date has been pushed back several times because of the COVID-19 pandemic but it is looking increasingly likely it will be the actual implementation date.

This Factsheet aims to offer an overview of the changes, what they mean for your business and what changes you might need to make to remain compliant.

II.

DEPRIVATION OF LIBERTY SAFEGUARDS



What were the Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards were introduced by an amendment to the Mental Capacity Act (2005) via the [Mental Health Act \(2007\)](#). They aimed to provide a framework to protect persons residing in a hospital or care-home setting from deprivation of their rights under the [Human Rights Act \(1998\)](#).

Under the system if a hospital, care home or Supported Living service are depriving someone of their liberty they have to apply to the Local Authority for a **standard authorisation**. The Local Authority must then send two experts to assess whether there is a deprivation taking place and whether this is legal and the least restrictive option. If so, then the DoLs order is granted.

If a Supported Living service is attempting to authorise a Deprivation of Liberty Safeguard, there is a slightly different procedure to follow.

More can be read about this in brief [here](#) and in depth [here](#).

'Everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law' – Article 5 Human Rights Act

What was the ‘P vs Cheshire West’ Judgement?

P vs Cheshire West was a 2014 landmark Supreme Court legal case which ruled that the interpretation of the definition of a ‘Deprivation of Liberty’ was too narrow to be compatible with the Human Rights Act.

The judges summed it up in what they called an ‘acid test’ for those lacking capacity to consent to, or refuse their care arrangements:

- Is the person free to leave?
- Is the person subject to complete or continuous supervision **and** control?

They said it didn’t matter why these things were happening and whether they were really positive for the person, the facts were simply the facts- it should mean the same thing for all people whether they have a disability or not.

“A gilded cage is still a cage” – Lady Hale

This became case law and meant that a huge number of people went from being ‘free’ to being ‘deprived of their liberty’ overnight. More can be read about this [here](#) (condensed) and [here](#) (technical).

Problems with the DoLS Framework

Since Cheshire West the DoLS system has become overwhelmed:

- There were 263,940 applications for DoLS received during 2019-20, relating to 216,980 people.
- The number of applications has increased by an average of 13.9% each year since 2014-15.
- The number of applications completed in 2019-20 was 243,300.
- The number of completed applications has also increased each year, by an average of 31.2% each year since 2014-15.
- The proportion of standard applications completed within **the statutory timeframe of 21 days was 23.6%** in 2019-20. The average length of time for all completed applications was 142 days.

NHS Digital have an assortment of statistics and graphs based on available data [here](#). In depth criticism of the DoLS Framework can be read [here](#).



III.

LIBERTY PROTECTION SAFEGUARDS



Liberty Protection Safeguards

The Liberty Protection Safeguards were introduced in the Mental Capacity (Amendment) Act 2019 and will replace the Deprivation of Liberty Safeguards (DoLS) system. The date for implication has been pushed back several times and is currently scheduled for April 2022.

Three assessments form part of the authorisation:

1. A **'capacity assessment'** – to assess capacity
2. A **'medical assessment'** – to assess whether the person has a mental disorder
3. a **'necessary and proportionate' assessment** – to assess if the proposed arrangements are necessary to prevent harm to the person and proportionate to the likelihood and seriousness of that harm.

Responsible Bodies will organise the assessments needed under the scheme and ensure that there is sufficient evidence to justify a case for deprivation of liberty. Ultimately, the Responsible Body is responsible for authorising any deprivation of liberty in certain settings.

Deprivations of liberty have to be authorised in advance by the 'responsible body'.

- For **NHS hospitals**, the responsible body will be the **'hospital manager'**.

- For arrangements under **Continuing Health Care** outside of a hospital, the 'responsible body' will be their local **CCG (or Health Board in Wales)**.
- **In all other cases** – such as in care homes, supported living schemes etc. (including for self-funders), and private hospitals, the responsible body will be the **local authority**.

The Department for Health and Social Care's guidance is available [here](#).

What are the key differences between LPS and DoLs?

	DoLs	LPS
Applies to 16 and 17 year olds	No	Yes
Hospitals	Yes	Yes
Care Homes	Yes	Yes
Supporting Living	Yes	Yes
Domiciliary Care/own home	No	Yes
GPs	No	No
MCA principles apply	Yes	Yes
Length	Reviewed annually	Reviewed annually initially but extends to three yearly after first renewal.
Additional rights if the person objects	No	Yes – referred to an Approved Mental Capacity Professional
Number of assessors needed	2	1

Approved Mental Capacity Professional

The approved mental capacity professional (AMCP) is a new, specialist role providing enhanced oversight for those people who need it most. AMCPs will be independent, trained, registered professionals.

In some cases, AMCPs will carry out pre-authorisation reviews to determine whether the authorisation conditions are met.

The AMCP will carry out the pre-authorisation review if:

- The arrangements provide for the cared-for person to reside in a particular place and it's reasonable to believe that the cared-for person does not wish to reside in that place.
- The arrangements provide for the cared-for person to receive care or treatment at a particular place, and it's reasonable to believe that the cared-for person does not wish to receive care or treatment at that place.
- The arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or the case is referred by the Responsible Body to an AMCP and that individual accepts the referral.

The AMCP will be required, if appropriate and practical, to meet with the person and consult with:

- Anyone named by the person as someone who should be consulted.
- Anyone engaged in caring for the person or interested in the person's welfare.

- Any attorney of a lasting power of attorney (LPA) or an enduring power of attorney (EPA) granted by the person.
 - Any deputy appointed by the court of protection.
 - Any appropriate person.
 - Any independent mental capacity advocate (IMCA).

The AMCP is also required to:

- Review the information and decide whether the authorisation conditions are met.
 - Take any other action, provided it is appropriate and practicable to do so.

This has been taken from the [Department for Health and Social Care.](#)

Care Home Managers

The original version of the [Mental Capacity \(Amendment\) Act 2019](#) intended for some of the capacity assessment responsibility to be transferred to the care home management. The aim of this was to take some of the burden off the Local Authority who were struggling to process the queue of DoLS applications since the Cheshire West judgement in a timely fashion- the bulk of which originated from people residing in care homes with usually minimal deprivations.

This drew criticism from some quarters such as civil liberties and human rights groups that the process might not be followed properly as care home managers may authorise deprivations without giving them the same level of unbiased assessment an independent adjudicator was. Some people also argued that they didn't necessarily have the same level of legislative understanding trained assessors did.

The government has decided that care home managers **will not** have this added responsibility at the April 2022 rollout but that they reserve the right to reassess and implement this if they feel it is necessary in the future most likely if the LAs struggle to cope. Source [here](#).

IV.

FURTHER READING



- **Mental Capacity (Amendment) Act 2019 -**
<https://www.legislation.gov.uk/ukpga/2019/18/enacted/data.htm>
- **Mental Capacity Act 2005 -**
<https://www.legislation.gov.uk/ukpga/2005/9/contents>
- **Mental Health Act 2007 -**
<https://www.legislation.gov.uk/ukpga/2007/12/contents>
- **Human Rights Act 1998 -**
<https://www.legislation.gov.uk/ukpga/1998/42/contents>
- **Deprivation of Liberty Safeguards (DOLs) at a glance -**
<https://www.scie.org.uk/mca/dols/at-a-glance>
- **Deprivation of Liberty Safeguards: a practical guide -**
<https://www.lawsociety.org.uk/en/topics/private-client/deprivation-of-liberty-safeguards-a-practical-guide>
- **P vs Cheshire West -**
https://www.39essex.com/cop_cases/1-p-v-cheshire-west-and-chester-council-and-another-2-p-and-q-v-surrey-county-council/
- **Quick Guide to Deprivation of Liberty Safeguards (DOLs) -**
<https://www.adass.org.uk/media/5896/quick-guide-to-deprivation-of-liberty-safeguards.pdf>

- A Gilded Cage Is Still a Cage -
<https://www.adass.org.uk/media/5896/quick-guide-to-deprivation-of-liberty-safeguards.pdf>
- Mental Capacity Act 2005, Deprivation of Liberty Safeguards, England - Interactive Report -
<https://app.powerbi.com/view?r=eyJrIjoiZjExNTkwYjltNDUxNy00NWNILWFkOWQtZDRiY2I4YTYyMDkwIiwidCI6IjUwZjYwNzFmLWJiZmUtNDAxYS04ODAzLTYzMzc0OGU2MjllMmIsImMiOjI9&pageName=ReportSectioncad3aca2d37b20b07509>
- The critical issues affecting deprivation of liberty safeguards (DOLs) -
<https://www.mentalhealth.org.uk/blog/critical-issues-affecting-deprivation-liberty-safeguards-dols>
 - Liberty Protection Safeguards: what they are -
<https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-what-they-are>
 - Liberty Protection Safeguards: the approved mental capacity professional role -
<https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-the-approved-mental-capacity-professional-role>
 - Liberty Protection Safeguards (LPS): Latest developments -
<https://www.scie.org.uk/mca/lps/latest>