

from  
DoLS  
to  
Liberty Protection Safeguards (LPS)

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Health  
warning!

This is my understanding of the legislation which has been passed.

It is not legal advice.


Much of the detail will be worked out in the Code of Practice which will be published towards the end of 2019

We can start to make plans based upon what we know so far

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## To cover

- Where we are now?
- How did we get here?
- What does LPS look like?
- What do we think about it?
- What challenges?
- What's happening now and next?



Where are we  
now?

- Mental Capacity Amendment Act 2019 due for Royal Assent soon
- Date for the new scheme going live yet to be set – likely to be spring 2020
- Work on a Code of Practice for the LPS and a revision of the MCA Code is underway

But in the meantime

**The DoLS scheme is not dead yet!**

It has not ended or changed in any way and applications should continue to be made as usual

## What is wrong with DoLS?

- Overly complex and difficult to understand – in part because poorly written
- Much criticism – House of Lords review of MCA in 2014 ‘DoLS not fit for purpose’
- JCHR report – wholesale failure to adequately protect Article 5 rights of incapacitated people in care settings
- Cheshire West – Lady Hale described its ‘cumbersome bureaucracy’ - not such a problem for small numbers but Cheshire West decision opens floodgates
- Numbers – most authorities not close to meeting demand for assessments
- Partial system – Only applies to care homes and hospitals – DoL anywhere else has to go to the CoP
- Complex interface with the MHA

## What did the government do about it?

- Law Commission asked to propose replacement legislation
- LC very extensive public consultation
- 1<sup>st</sup> version of proposals rejected by DHSC
- 2<sup>nd</sup> version of proposals largely accepted by the DHSC
- DHSC publishes proposed legislation in July 2018 – based upon but significantly different from the LC proposals
- New proposals very heavily criticised as not providing adequate protection but the govt. resistant to amendment proposals and trying to push the legislation through quickly
- Several amendments agreed in parliament including about the role of care home managers
- Some of the key govt proposals designed to save money are rejected

# Mental Capacity (Amendment) Act 2019

- Legislation should be permissive not overly proscriptive – in contrast to DoLS which proved difficult to amend for this reason
- The primary legislation should be in skeleton form with the detailed Code of Practice providing the flesh.
- The scheme applies in all settings where people who may lack capacity are being cared for – including people's own homes
- The safeguards should be built into existing assessment and decision-making processes
- Overall the government hopes the scheme should be less bureaucratic and less costly than DoLS



LPS applies to  
people who

1. Are aged 16+
2. Are subject to care arrangements which provide continuous supervision and control
3. Are not free to choose where to live
4. Lack mental capacity to consent to the care arrangements

**Apart from the age reduction, this is exactly the same as under the DoLS scheme**

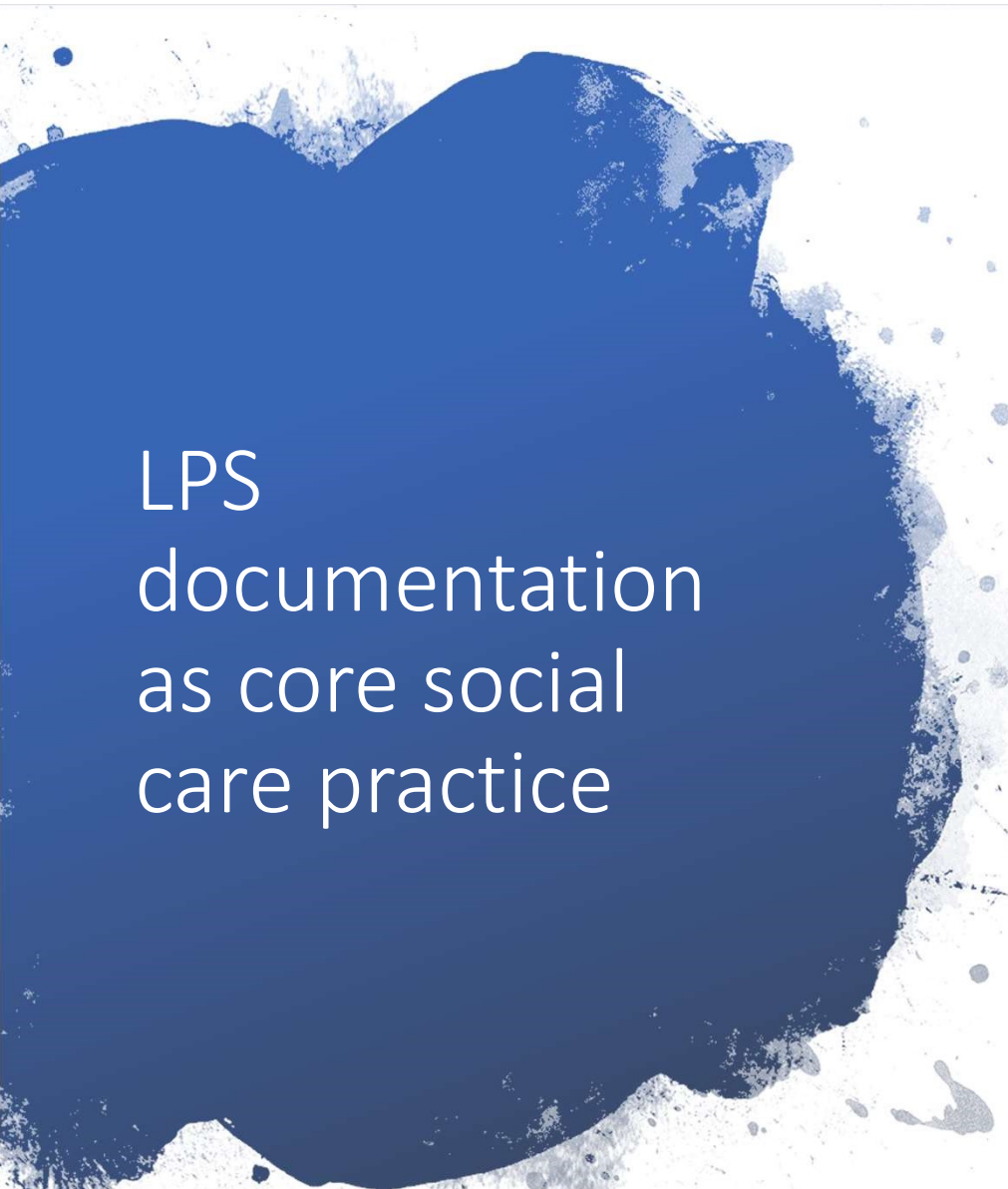


## Process overview

1. Whoever is 'making arrangements' which may constitute DoL and for which the person lacks capacity to consent notifies the relevant Responsible Body
2. RB decides how the evidence required should be collated/generated
3. RB receives the evidence and carries out a pre-authorisation review and
4. Authorises if evidence adequate and no objection
5. Refers to an AMCP if an objection by P or LPA or other family
6. AMCP consults P and others and decides if authorisation can be granted and if an application to the CoP is required

Evidence  
required for  
authorisation  
– similar to  
DoLS but no  
defined  
assessor roles

- Age
  - Mental disorder  
(medical practitioner)
  - Mental capacity  
(prescribed profs)
  - Is it deprivation of  
liberty?
  - Necessary and  
Proportionate
  - Consultation – P's and  
other's views
- 
- Excluded  
arrangements (MHA)
  - Identify an  
Appropriate Person  
(family representative  
or IMCA)



LPS  
documentation  
as core social  
care practice

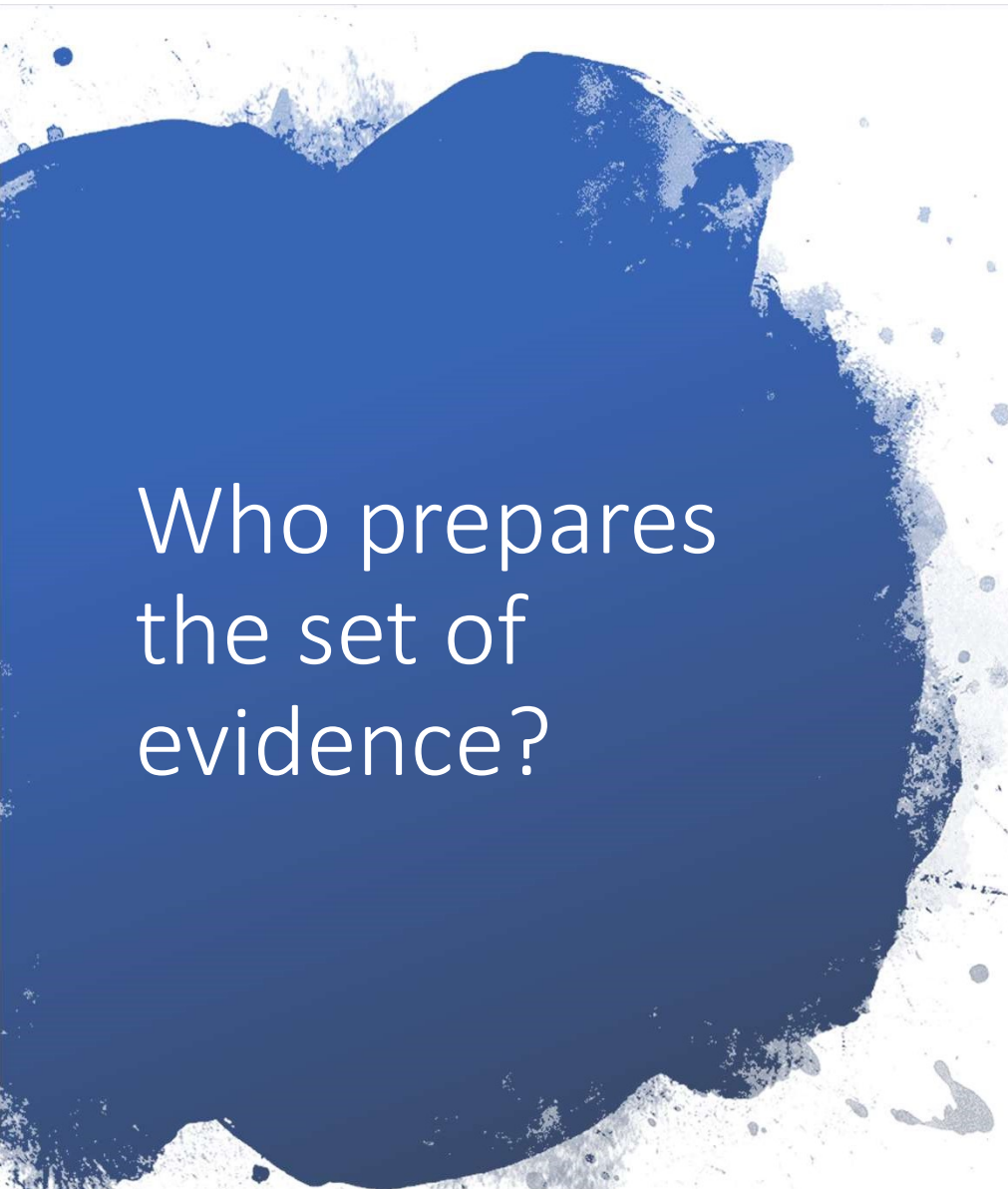
At the time decisions are being made for a person who lacks capacity to consent to them, and which restrict their liberty

- By care providers
- By hospital staff
- By social work or CHC teams

It will be necessary to consider whether the person may be deprived of their liberty as a result

and to gather the evidence required for authorisation

(The DoLS scheme often considers this after decisions have been made)




## Who prepares the set of evidence?

- Social work teams when assessing and care planning for council funded care
- CHC team for CHC funded care
- Hospital staff for their patients

**For people who fund their own care** – in a care home or domiciliary care – the Responsible Body (the local authority) is able to decide who is best to do this.

- Managers and staff in care homes will be expected to do some of this as part of the pre-admission assessment process.
- This is not any clearer at the current point but the Code should help



# Responsible bodies – who are they?

- **DoLS – 1 Supervisory Body** in each local authority area – the local council – responsible for hospitals and care homes
- **LPS - 3 Responsible Bodies (RB)**
  - a) NHS trust for patients in its hospitals
  - b) CCG for people whose care it commissions outside hospitals (CHC)
  - c) LA for everyone else following Ordinary Residence rules (care homes, supported living, family homes) plus patients in private hospitals in its area
- Hospices – depends who commissions
- S.117 people – who is lead commissioner?  
LA or CCG

# Authorisation and Renewals

- Up to 12 months initially
- Then for 1 year, then 3 years
- Renewal can be very light touch based entirely upon information from the manager of a care home about whether P is settled or objecting
- No requirement to involve an AMCP for renewals even if there is evidence of objection, but
- RB does have discretion to refer any case to AMCP
- RB will have to decide upon its criteria for AMCP referral and whether to authorise for 3 years. The legislation is permissive.

## What can be authorised? Portability

### **Sets of arrangements not just specific locations.**

- A person could live at home with a dom. care package and regular respite breaks in a care home. One authorisation could cover all of this and the transfer between
- A transfer from an acute hospital to a community hospital could be covered with one authorisation
- At any transfer point – someone – would have to decide whether the authorisation could be relied upon or needs revising/replacing

# Approved Mental Capacity Professional

- Replaces the BIA role but is not primarily an assessor
- Automatically involved in any case where P or another involved person is objecting to the arrangements
- Automatically carries out Pre-authorisation review for any authorisation request for a patient in an independent hospital
- Can be involved in reviewing other cases as decided by the RB



## Pros...

- DoL issue considered as part of care planning
- Reduces duplication of assessments
- Removes confusion about best interests decisions and best interests assessors
- Authorisation is portable – to a limited degree
- Power to convey is covered
- CoP not required to authorise DoL in supported living etc
- Evidence of mental disorder does not require a new assessment
- Re-authorisation can be very light touch if appropriate

## ...and cons



- Different systems for evidence gathering for people in care homes according to how care is funded
- Hospitals need to create system from scratch
- No clear plan for resolution of the current backlogs in the DoLS system
- Level of objections likely to be higher because consideration of DoL is at the point of placement
- Resourcing may not be adequate

# Impact assessment

The DHSC Impact Assessment assumes:

- Evidence of mental disorder and mental capacity will be provided by GPs at no cost
- 20% of social work staff will need to be trained in the LPS system
- 821 BIAs will need to convert to being AMCPs across 152 local authorities
- Managers of care homes will require half a day's training to be able to operate this system
- Appeals to CoP will halve to 0.5%

Much lobbying going on to persuade the government to revise the figures to avoid some of the current scheme's problems

# Resourcing

- DHSC does not accept that one of the barriers to DoLS working effectively is a resourcing one
- Flawed sums in the impact assessment preserve the assertion that the scheme will produce savings
- Funding based upon these assumptions likely to result in an underfunded scheme from the start
- No clear plan – yet - for dealing with existing backlogs



## What's happening next?

- Nationally – work to produce the Code of Practice and the regulations for the scheme
- Nationally – lobbying about the resourcing calculations
- Regionally and Locally – engagement between LAs and NHS bodies for linking systems
- Regionally and Locally – workforce planning and development being developed for LA and NHS staff, and for care providers
- Care providers – residential and domiciliary care need to devise enhanced pre-admission assessments for identifying potential LPS cases
- NHS bodies – need to devise internal authorisation and evidence systems

# Useful resources for LPS

From Edge Training - A comparison between DoLS and LPS

[http://www.edgetraining.org.uk/wp-content/uploads/2019/01/DoLS and LPS comparison table January 2019.pdf](http://www.edgetraining.org.uk/wp-content/uploads/2019/01/DoLS_and_LPS_comparison_table_January_2019.pdf)

LPS overview

[http://www.edgetraining.org.uk/wp-content/uploads/2019/04/LPS one page overview chart March 2019.pdf](http://www.edgetraining.org.uk/wp-content/uploads/2019/04/LPS_one_page_overview_chart_March_2019.pdf)

SCC will place updated information about the development of the LPS including any future briefing and training events on the MCA web pages, so please keep an eye on these

[https://ssab.safeguardingsomerset.org.uk/mca\\_intro/](https://ssab.safeguardingsomerset.org.uk/mca_intro/)