

# So the LPS is delayed until April 2022 – what should I do now?

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# Who are we talking about?

- Circa 300,000 people aged 16 plus who are (1) confined; (2) cannot consent; and (3) whom the state knows or ought to know about
- Not only those within the scope of DoLS but also (1) those aged 16/17 and (2) those outside care home/hospital – perhaps 50,000+?
- Against just under 240,000 applications in 2017-2018 (data not available yet for 2018-9)

# And the C word

Since the start of lockdown, we have seen notifications from adult social care services drop by almost a third (31%), and in hospitals by almost two-thirds (65%).

	March - May 2019	March - May 2020	% change
Adult social care	20,301	13,914	-31%
Hospitals	10,756	3,807	-65%

The decrease has varied across the regions. In adult social care, London saw the largest percentage change with a 37% drop, followed by a 35% reduction in the East of England. For hospitals, the South East saw the largest percentage reduction of 82%, followed by 71% in London.

CQC 3<sup>rd</sup> Covid Insight <https://www.cqc.org.uk/publications/major-reports/impact-covid-19-use-deprivation-liberty-safeguards> 15  
July 2020)

# Why?

Providers have had to introduce certain restrictions into an already complex and confusing picture, with a potential lack of understanding about DoLS that might affect confidence about whether such restrictions amount to a deprivation of liberty or not. To help providers, in April 2020 the Department of Health and Social Care introduced specific guidance on looking after people who lack mental capacity during the pandemic. This explained that during the pandemic, in most cases, changes to a person's care or treatment would not constitute a new deprivation of liberty, and a DoLS authorisation would not be required.

However, our inspectors have seen that, with providers increasingly looking towards the introduction of the Liberty Protection Safeguards (LPS), providers' focus on DoLS has waned and training in some areas has stagnated. Poor understanding of DoLS has remained a fundamental issue. This together with the delays and uncertainty over the progress of LPS may mean there is an increasing risk of people being deprived of their liberty without the proper authorisation.

CQC 3<sup>rd</sup> Covid Insight <https://www.cqc.org.uk/publications/major-reports/impact-covid-19-use-deprivation-liberty-safeguards> 15 July 2020)

# What did we think was coming down the line?: the MC(A) 2019

- Body of the Act:
  - Revised s.4B – court approval, replacement for urgent DOLS and emergency
  - No statutory definition of deprivation of liberty: guidance in Code
  - Provisions relating to Court of Protection
- Schedule AA1: The Liberty Protection Safeguards
  - Setting neutral and more than one setting
  - From age 16
  - Authorisation by responsible body – NHS for CCG/hospitals, LA for all other cases (including self-funders and independent hospitals). Potential for delegation of some tasks to care home managers in some cases
  - Conditions: capacity, mental disorder and necessity and proportionality
  - Additional scrutiny by AMCP in 'RTB' cases (and independent hospitals)
  - Representation and support by appropriate person/advocate (but latter on 'all reasonable steps' basis)
  - Provisions for variation, review and renewal (1 year, 1 year then up to 3 years)
  - (Broadly) the same division between the MCA and MHA as under DOLS

# Key changes from DoLS

- Wider scope – location and age (but query whether Code guidance will narrow cohort)
- Responsibilities lying with NHS bodies in some cases where do not at present
- The (unlikely) potential for greater role for care home managers
- No more urgent authorisations
- No more conditions (at least expressly, but in practice implicit)
- AMCPs rather than BIAs
- Necessity and proportionality rather than best interests requirement (but in practice proportionality encompasses same considerations)
- No more RPRs – appropriate person and advocates (and watering down of advocacy duty to ‘all reasonable steps’)
- Renewals

## LPS: what's the point?

- Deprivation of liberty as everyone's business
- Moving consideration to the frontline

# But...

*It is paramount that implementation of LPS is successful so that the new system provides the safeguards needed. The intention to date, subject to the Department for Health and Social Care's work with stakeholders and delivery partners, was for LPS to come into force on 1 October 2020.*

*It is now clear that successful implementation is not possible by this October. **We now aim for full implementation of LPS by April 2022.** Some provisions, covering new roles and training, will come into force ahead of that date. I will continue to update the sector and stakeholders on timings.*

Helen Whateley (Minister for Care): 16 July 2020 [LPS written statement](#)



# Timeframe to April 2022

*The Government will undertake a public consultation on the draft regulations and Code of Practice for LPS. That will run for 12 weeks, allowing sufficient time for those that are affected, including those with learning disabilities, to engage properly.*

*The sector will need time following the publication of the final Code to prepare for implementation. We will give the sector sufficient time to prepare for the new system to ensure successful implementation. I am considering a period of approximately six months for this.*

*After we have considered responses to the consultation, the updated Code and regulations will need to be laid in Parliament to allow for proper scrutiny. This needs to happen well in advance of the target implementation date, first to allow for that scrutiny and second because some of the regulations need to come into force earlier.*

Do the math... Final Code/Regulations will need to be in place by October 2021

## So what can we do? (1)

- Applying DoLS under Emergency MCA / DoLS Guidance –
  - Scope of the *Ferreira* judgment - ‘ordinary’ life-saving treatment in care home cf ‘ordinary’ life-saving treatment in hospital is outside the scope of deprivation of liberty
  - Remote assessment
  - Making more use of older assessments: nb as part of determination of whether requirement met
- With us for the foreseeable future – and what are we learning as we go?

## So what can we do? (2)

- Advance consent in the palliative and hospice context – DHSC (and Law Commission) consistently held it's appropriate: how to record?
- And also consent to planned operations and post-operative delirium where foreseeable consequence

# Applying LPS thinking

- NB **not** the LPS itself – the MC(A)2019 is not in force, so you can't e.g. rely upon s.4B 'emergency' deprivation of liberty absent court order
- But you can start to apply LPS thinking – above all:
  - Front-loading thinking – will still require fresh assessment from BIA but should **already** be capturing consideration of confinement, capacity and deprivation of liberty at the point of care planning: good care planning practice already and integral to LPS in due course
  - Making sure you capture information about the confinement as part of the information relevant to the capacity test: *LDV*
  - Focusing on necessity and proportionality as part of the DoLS “best interests plus” test

## Beginning to think about the LPS

- Categories not relevant to DoLS but who will be relevant to LPS
  - CHC v social care funding
  - Self-funders vs CHC/LA-funded individuals in care homes
- Assisting children's services get up to speed with the MCA: crucial post *Re D* [2019] UKSC 42:  
<https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-and-16-17-year-olds-shedinar/>

# ‘Community DoL’

- Renewed focus required on community DoL applications – the **only** way to get authority to deprive someone of their liberty in the community (and very good preparation for LPS thinking)
- Section 4B – when application made, authority from the outset where necessary to provide life-sustaining treatment or reasonably believe necessary to prevent a serious deterioration in condition
- COP DOL11 form, and guidance:  
<https://www.39essex.com/judicial-deprivation-liberty-authorisations/>
- The critical importance of consultation and truth-telling: *Re JDO (Authorisation of Deprivation of Liberty)* [2019] EWCOP 47

## Beginning to prepare for LPS

- Local impact assessments
- Sharing expertise
- Planning to share personnel
- Identifying sources of advocacy
- Above all, strengthening knowledge of the MCA

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <https://www.mentalcapacitylawandpolicy.org.uk/resources-2/liberty-protection-safeguards-resources/>
- <https://lpslaw.co.uk>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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