

Liberty Protection Safeguards: points to note as consultation period continues

Deprivation of Liberty Safeguards was due to transition to Liberty Protection Safeguards in October 2020 but delayed due to the pandemic. While the public consultation has now closed and we're still unclear of what the final legislation and code will look like, it's worth noting and keeping a watching brief.

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Deprivation of Liberty Safeguards (DoLS) are due to transition to Liberty Protection Safeguards (LPS).

LPS is legislation that will provide protection for people aged 16 or over who lack mental capacity and are, or need to be, deprived of their liberty to enable their care or treatment.

LPS was due to be implemented in October 2020, but the pandemic delayed it. In March 2022, the Government launched a public consultation on LPS which ran until 7 July 2022. No date has been confirmed for the start of LPS. As the LPS continues under a consultation period, we are unclear what the final legislation and code will look like, but it is worth noting and keeping a watching brief.

This is a complex area and the biggest change since the implementation of the Mental Capacity Act 2005 (MCA) in 2005.

Alongside the legislation is a Code of Practice, which updates the Mental Capacity Act Code. Eventually, LPS will replace DoLS. It has been designed to put the rights and wishes of the 'person' at the centre of decision-making about a deprivation of liberty.

LPS has made a raft of proposed changes to include assessing capacity, fluctuating capacity, the role of the Court of Protection, the MCA and the Mental Health Act 1983 interference, what is a deprivation of liberty, what is the process to authorise a deprivation of liberty, roles and responsibilities, how LPS is monitored, DNACPR, medical treatment. (This list is not exhaustive).

It is intended that LPS will better integrate with legal frameworks and make the process more straightforward and easier for councils by reducing duplication; for example, by carrying out the application alongside other health or care assessments, or reviews. This means six assessments are halved to three.

LPS will also allow a renewal of the deprivation without having to reapply afresh in certain circumstances. It should also assist supervisory bodies as the LPS is intended to include a change of setting 'reasonably foreseen', such as a respite break, so no new application needs to be made.

Deprivation of Liberty Safeguards

Article 5 of the Human Rights Act 1998 provides that everyone has the right to liberty and security of person. When it is necessary to deprive someone of their liberty, the procedure prescribed in law is DoLS.

To consider if the conditions are met to deprive a person of their liberty under DoLS the following conditions must be met:

- The person is over 18
- The person is suffering from a mental disorder
- The person lacks capacity to decide for themselves about the restrictions which are proposed so they can receive the necessary care and treatment
- The restrictions would indeed deprive the person of their liberty
- The restrictions proposed would be in the person's best interests

- Whether the person should instead be considered for detention under the Mental Health Act 1983
- There is no valid advance decision to refuse treatment or support that would be overridden by the DoLS process.

Standard authorisations

Care homes and hospitals must ask councils to authorise a deprivation of a person's liberty. This is known as requesting standard authorisation. Before a standard authorisation can be given, six assessments must be carried out.

Councils are known as the 'supervisory body' and the care home or hospital the 'managing authority'. The request for standard authorisation may be made up to 28 days in advance of the plan to deprive someone of their liberty.

On receipt of a standard authorisation, the supervisory body has 21 days to decide whether deprivation of liberty is authorised. In this time, the supervisory body must appoint two assessors to see if the conditions are met.

Urgent authorisations

A person may need to be deprived of their liberty before the supervisory body can respond to a request for a standard authorisation. In this situation the managing authority can themselves issue an urgent authorisation and send the completed form to the supervisory body. Urgent authorisations can deprive a person of their liberty for up to seven days, and a request can be made for a further seven-day extension. The managing authority must however have a reasonable belief that a standard authorisation would be granted if an urgent authorisation is sought.

Deprivation of liberty in the community

For a person who is deprived of their liberty in the community, standard authorisations are not appropriate. The relevant public body (councils, local health boards and integrated health boards who are responsible for the care arrangements that give rise to that deprivation of liberty) must make an application to the Court of Protection for judicial scrutiny at the earliest opportunity. These applications fall under what is called a streamlined procedure or Re X procedure.

DoLS application requests

In 2020-21 standard authorisation requests fell; however, there has been a sharp rise in 2021-22. This has led to a dip in the proportion of cases completed within the statutory timescales. The increase in standard authorisations is 5.5% from 2020-21. Community DoL applications have also risen in number.

It is perhaps unsurprising there is a drop in the proportion of standard authorisations completed on time. In 2020-21 only 24% of supervisory bodies met the target times and this decreased to 20% in 2021-22.

Applications for standard authorisation are normally made online. Organisations must act in accordance with the Mental Capacity Act 2005 as well as being advised to follow the DoLS Code of Practice and the Mental Capacity Act Code of Practice.

DoLS was ripe for reform - not only due to delays but other factors, including widespread unauthorised DOLS, the need for a proper legal process to ensure compliance with Article 5, and the current processes being overly complex and underfunded.

While a revised timeline is expected, DoLS should continue to be used. It is strongly advised that authorisations continue until further notice. Even when the LPS launches, there will be a transition period.

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