

The human right to liberty and security

Bournewood: why we need safeguards

In 1994, a man known as 'HL' came to live with Mr and Mrs E, having resided at Bournewood psychiatric hospital for 32 years. HL lived with learning disabilities and autism, and did not speak. Once a week, HL would attend a local day centre, using the centre's own transport. On July 22nd 1997, HL boarded the van as usual. On this day it was not the usual driver, and the driver took a different route. As the journey progressed, HL became more and more agitated.

Later that day, Mr and Mrs E discovered that HL had been taken back to Bournewood hospital and detained there 'informally' under common law. He was considered to be compliant with his care though deemed to lack the mental capacity to make the decision for himself. He was held at the hospital for 5 months before returning to Mr and Mrs E's care.

HL's case triggered a series of legal appeals concerning whether his detention had been lawful – first at the High Court, followed by the House of Lords, and finally in the European Court of Human Rights. The ECtHR found that the common law doctrine of necessity did not provide necessary safeguards for patients who were compliant but lacking capacity.

This the Deprivation of Liberty Safeguards were introduced into British law, becoming a schedule of the Mental Capacity Act.

Human rights

The DoLS are designed to safeguard a person's rights to liberty and security of person (article 5 of the Human Rights Act), in relation to those people who: a) lack mental capacity to make their own decision about care and accommodation in a care home or hospital; b) are not free to leave that place, and; c) are under continuous supervision and control.

What are the Deprivation of Liberty Safeguards?

A standard DoLS authorisation is comprised of six assessments completed by a minimum of two assessors – a Best Interests Assessor (an appropriately qualified social worker, nurse, occupational therapist or psychologist) and a Mental Health Assessor (a doctor approved under s.12 of the Mental Health Act). These assessment criteria must **all** be met in order for someone to be detained under a DoLS authorisation. They are:

1. Age assessment: the person must be 18+
2. No refusals assessment: the DoLS authorisation must not conflict with an Advance Decision to Refuse Treatment which is applicable to this situation, or a valid decision made by a donee of LPA for health and welfare, or a deputy for health and welfare
3. Mental health assessment: the person must be experiencing a mental health disorder within the meaning of the Mental Health Act
4. Eligibility assessment: a determination as to whether the Mental Health Act would be a more appropriate mechanism for depriving the person of their liberty
5. Mental capacity assessment: the person must be determined to lack mental capacity, on balance of probabilities, to make the specific decision about their care and accommodation arrangements, at that particular time
6. Best interests assessment: an in-depth assessment involving consultation with the person and other relevant people (family, professionals, care provider), examination of care plans, consideration of less restrictive options, whether the care is necessary and proportionate to the person's needs.

If each of these criteria is met, the Best Interests Assessor must then recommend:

- a) How long the person should be deprived of their liberty for (between 1 day and 12 months)

- b) Who should be the official advocate for the person – known as the Relevant Person’s Representative – expected to keep regular contact and support the person to appeal against the authorisation through either a statutory review or directly to the Court of Protection
- c) What conditions the authorisation is subject to – these are statutory conditions which the care home or hospital must comply with in order for the authorisation to be lawful
- d) Any other action that should be taken by professionals, i.e. the CCG or social care

The professional posture of Best Interests Assessors must be towards reducing or ending restrictions that amount to a deprivation of an individual’s liberty.

So what is this changing to, and why?

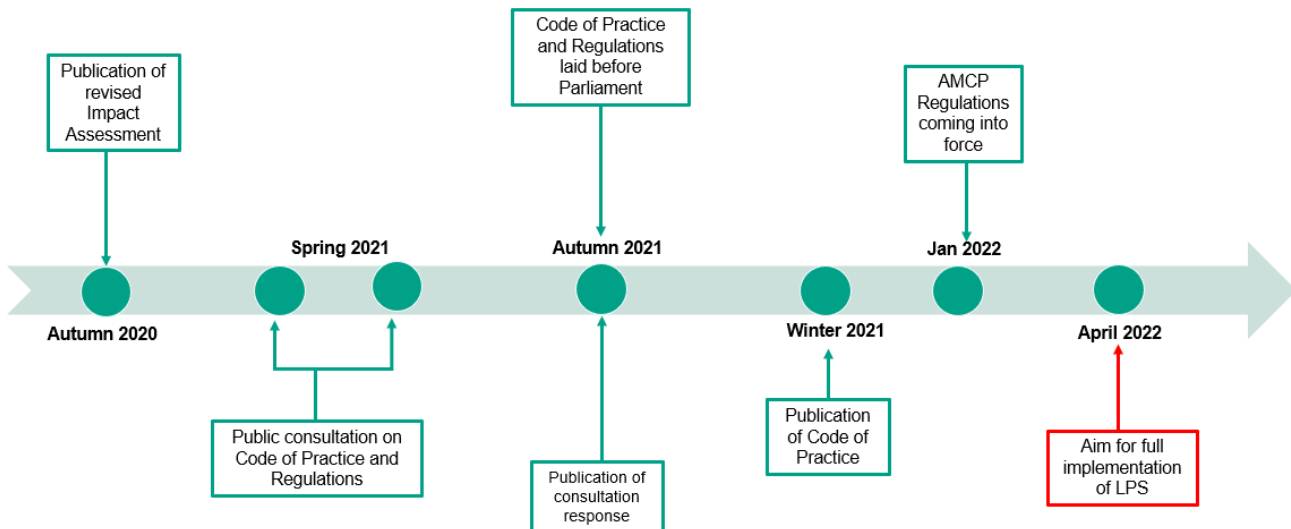
In 2019, the Mental Capacity (Amendment) Act was given Royal Assent. This removes the DoLS scheme and replaces it with the Liberty Protection Safeguards. The government’s explanation at the time *“called for the DoLS to be replaced as a matter of “pressing urgency” and set out a replacement scheme. The new scheme was intended to establish a proportionate and less bureaucratic means of authorising deprivation of liberty”* (Mental Capacity Amendment Act Explanatory Notes).

The Liberty Protection Safeguards are in many ways a radical departure from DoLS, in process if not in principle. The safeguards abolish the ‘two-tier’ system of protections for those within care homes/hospitals and those without, place more responsibility for decision-making on frontline staff, and are more flexible in their application, as explained in the table below.

A comparison of DoLS and LPS for English law		
Change	DoLS	LPS
Age	Applies to 18+	Applies to 16+
Setting	Applies only to care homes and hospitals	Applies to all settings
Authorising body	One Supervisory Body to authorise deprivations of liberty: the Local Authority	Three Responsible Bodies: the Local Authority; the NHS trusts; the CCG
Assessments	Six assessments	Three assessments, drawing on existing assessments
Urgency	Two types of authorisation: standard and urgent with statutory timeframes associated	Interim authorisations (no statutory timeframes given in the Act)
Professionals involved	Completed by a BIA and an MHA	Completed by a professional involved with the person’s care, where objecting assessed by an Approved Mental Capacity Professional (replacing BIA role)
Longevity	Can be authorised for up to 12 months	Up to 12 months on first authorisation, then; 12 months for first renewal; up to 3 years on any subsequent renewal
Portability	Applies to a specific ‘Managing Authority’ (care home or hospital)	Applies to care arrangements which can cover multiple settings as well as transport arrangements
Care homes	Request the DoLS authorisation	Can provide a statement and do consultation stating assessment criteria are met

The Department for Health and Social Care have published a timetable for the intended implementation dates of the LPS (please see below).

Planned milestones for Liberty Protection Safeguards



Key points for all professionals

- Assessment of mental capacity will be a key skill for all professionals involved in someone's care – in particular nurses, doctors and social workers
- Gain an understanding of **necessity** (what are the risks presenting to this person such that these care arrangements are needed?) and **proportionality** (what is the severity and likelihood of these risks and therefore are these level of care arrangements warranted?)
- Identify when someone may be deprived of their liberty in any setting – do they appear to lack mental capacity for making the decision about their care arrangements? Are they not free to leave? Are they subject to continuous supervision and control?
- Liberty Protection Safeguards will bring new opportunities for joint working between children's and adults services, health, other public sector bodies and care providers

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