The Liberty Protection Safeguards
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Background to the review

• Criticism by the House of Lords on 13 March 2014 and a proposal from MIND for a review of the relationship between the DOLS and the MHA. Department of Health to consider DOLS in its entirety.

• Pre-consultation and the drafting of the Consultation Paper Summer 2014 – July 2015

• Public consultation on the provisional proposals – including consultation events and written responses July 2015 > November 2015

• Interim report published May 2016

• Final report and draft Bill published 13 March 2017
The purpose of the law Commission’s review was to consider how the law should better protect people who lack the mental capacity to consent to their care or treatment and who need to be deprived of their liberty in order to receive that care or treatment.

In completing its review, the Law Commission has published a draft Mental Capacity (Amendment) Bill which makes recommendations to reform the law. The bill does so by amending the Mental Capacity Act 2005.

In particular, the draft Bill entirely replaces the provisions of schedule A1 to the Mental Capacity Act (known as the DOLS and introduces a new process for authorising arrangements enabling the delivery of care or treatment which would give rise to a deprivation of liberty.
The draft Bill is proposing amendments to the Mental Capacity Act which are designed to improve decision-making in respect of all those who lack capacity to make particular decisions.

These include:

- All decision makers having an **active duty to comply with the MCA** and place a greater weight on the person’s wishes and feelings when making decisions under the Act

- Professionals having to confirm in writing that they have complied with the requirements of the Mental Capacity Act when making important decisions – such as moving a person into a care home or providing serious medical treatment.
The Law Commission recommends through its draft Bill, that the law should be replaced with a new scheme, called the Liberty Protection Safeguards.

In short, these would be designed to provide for:

- enhanced rights to advocacy and periodic checks on the care or treatment arrangements for those most in need

- greater prominence to issues of the person’s human rights, and as to whether a deprivation of their liberty is necessary and proportionate, at the stage at which arrangements are being devised

- the extension of protections to all care settings such as supported living and domestic settings
Proposal - The Liberty Protection Safeguards (2)

- the widening of the scope of protection to cover 16 and 17 year olds and planned moves between settings

- the cutting of unnecessary duplication by taking into account previous assessments, enabling authorisations to cover more than one setting and allowing renewals for those with long-term conditions

- the extension of responsibilities for giving authorisations, from councils to the NHS, if in a hospital or NHS health care setting

- a simplified version of the best interests assessment which emphasises that, in all cases, arrangements must be necessary and proportionate before they can be authorised.
The draft Bill replaces the DOLS in their entirety, with a new administrative process for authorising arrangements which would give rise to a deprivation of liberty.

The Law Commission believe that its recommendations create a clear and accessible scheme for authorising arrangements which give rise to a deprivation of liberty which would practically and effectively safeguard the Human Rights of the people that they are intended to protect.
To whom do the Liberty Protection Safeguards apply?

The person must be aged 16 or over, lack capacity to consent to the arrangements that are proposed or in place, and be of “unsound mind” within the meaning of Article 5(1)(e) of the ECHR.

The Liberty Protection Safeguards apply to arrangements which are proposed or in place to enable the care or treatment of a person, and which would give rise to a deprivation of that person’s liberty.

The following arrangements can be authorised:

- a person is to reside in one or more particular places
- a person is to receive care or treatment at one or more particular places
- and the means by and manner in which a person can be transported to a particular place or places
The Law Commission strongly recommends that Government should review the mental health law, with a view to the possible introduction of mental capacity-based care and treatment for mental disorders as well as for just physical disorders.

Therefore, the draft Bill requires that the Liberty Protection Safeguards cannot be used:

- to authorise arrangements carried out in hospital for the purpose of assessing or treating mental disorder, and

- to authorise arrangements which conflict with any requirement under one of the “community powers of the Mental Health Act - such as guardianship or a community treatment order.
Who can authorise assessments?

The responsible body (the LPS replaces the “supervisory body” with the “responsible body”, which is charged with authorising arrangements that give rise to a deprivation of liberty) may authorise the arrangements.

If the person is receiving treatment in hospital or in receipt of NHS continuing health care, the responsible body will be the relevant NHS body (e.g. the hospital trust, CCG or local health board).

Otherwise the responsible body will be the local authority (including where the person is a “self-funder”).

The body responsible for arranging care or treatment should be responsible for considering requests for authorisations, commissioning the assessments and giving the authorisation.
The Liberty Protection Safeguards include a prescribed list of “conditions” that must be met in order for the responsible body to authorise arrangements which would give rise to a deprivation of a person’s liberty.

Some of these are positive conditions; they would need to be met before authorisation is granted. The rest are negative conditions; if one of these conditions is met, an authorisation cannot be granted.

The positive conditions are as follows:

- the person lacks capacity to consent to the arrangements
- the person is of “unsound mind”
- the arrangements are necessary and proportionate
What are the conditions for authorisation? (2)

The positive conditions (continued)

- the required consultation has been carried out
- an independent review has been carried out
- and in certain cases, the approval of an Approved Mental Capacity Professional has been obtained

The negative conditions - are the arrangements that do not conflict with a valid decision of:

- a donee of a lasting power of attorney
- or a court appointed deputy.
What safeguards must be provided? (1)

A person subject to the LPS will have regular reviews of the authorised arrangements (and the right to request a review), as well as an advocate or appropriate person to represent and support them during the initial authorisation process and during the period of the authorisation itself. The person will have the right to challenge the deprivation of liberty in court.

An “appropriate person” cannot be someone who is providing care or treatment to the person in a professional capacity or for payment. They must be appointed to act as such unless they do not consent, or the person whom they would represent does not consent or (if that person lacks capacity to give or withhold consent) it would not be in their best interests to be represented or supported by that other person. The appropriate person has a right to advocacy support.

If there is no appropriate person, an IMCA must be appointed.
What safeguards must be provided? (2)

The Safeguards require an “independent review” to be carried out to confirm that it is reasonable for the responsible body to conclude that the conditions for an authorisation are met, or (in certain cases) to refer the case to an Approved Mental Capacity Professional.

No one who is involved in the day-to-day care or treatment of the person can act as the reviewer.

In cases which are not referred to an AMCP, the reviewer is required to certify *personally* that it is reasonable to conclude that the conditions for an authorisation are met. They must review the information available to the responsible body and determine whether or not the decision to authorise the arrangements is reasonable on the basis of that information.
The Approved Mental Capacity Professional (AMCP) is a new role which is intended to build upon the existing Best Interests Assessor (BIA) role.

The LPS aim to put Approved Mental Capacity Professionals in a similar position to Approved Mental Health Professionals (AMHP).

An AMCP would act “on behalf” of the local authority but would be independent decision-makers who could not be directed to make a particular decision.

An AMCP cannot be someone who is involved in the day-to-day care or treatment of the person.
The Liberty Protection Safeguards require a referral to be made to an Approved Mental Capacity Professional if:

- it is reasonable to believe that the person does not wish to reside or receive care or treatment at a particular place; or
- the arrangements are regarded as necessary and proportionate wholly or mainly by reference to the likelihood and seriousness of harm to others.

In all other situations cases there would be a power to refer cases to an Approved Mental Capacity Professional.
The role of the AMCP is to determine whether or not to approve the arrangements. They must meet with the person, and can consult with other key individuals.

The written approval of the arrangements by the AMCP would enable the authorisation by the responsible body.

Local authorities would be responsible for the approval – and ensuring there are sufficient numbers – of Approved Mental Capacity Professionals. The Law Commission’s review recommends that each local authority appoint a manager who is responsible for the conduct and performance of Approved Mental Capacity Professionals and is accountable directly to the director of social services.
Authorisation of the new safeguards

An authorisation under the Liberty Protection Safeguards can have effect immediately, or up to 28 days later.

The responsible body must produce an “authorisation record” which must include matters such as details of the arrangements authorised.

An authorisation can last for an initial period of up to 12 months and can be renewed for a second period of up to 12 months and thereafter for periods of up to three years.
The responsible body seeks to authorise arrangements which would give rise to a deprivation of a person’s liberty.

An advocate or appropriate person is appointed by the responsible body.

The responsible body arranges a capacity assessment.

The responsible body arranges a medical assessment.

The responsible body arranges the necessary and proportionate assessment.

The responsible body consults with the required persons.

Independent reviewer reviews the information / assessments

Is it reasonable to conclude that the conditions are met?

The person does not wish to reside or receive treatment at the particular place, or the authorisation is necessary and proportionate on the basis of harm to others

The arrangements may be authorised.

Referral to an AMCP

Safeguards

Ongoing rights to advocacy and an appropriate person.

Regular reviews.

Access to court.

Safeguards

Safeguards

Safeguards
Next steps….  

Nationally

• The government will consider the review and the Draft Bill
  Whether this is implemented, or whether adjustments are required and
  the timescale for doing so is up to the government.

• Potential for pre-legislative scrutiny i.e. a detailed examination of the
draft Bill by a parliamentary select committee before the final version is
drawn up by the government.

Locally

• Making the MCA matter – ACS MUST ensure all staff are both MCA
  compliant and confident; safeguarding the customer, practitioner and
  the local authority now and when the arrangements are implemented.

• Continuing to comply with the current safeguards for
  authorising a deprivation of Liberty e.g. DOLS of COP.
Further information: [www.suffolk.gov.uk/mca](http://www.suffolk.gov.uk/mca)

Mental Capacity and Deprivation of Liberty Safeguards

About Mental Capacity and Deprivation of Liberty Safeguards (DoLS) and advice concerning mental capacity and deprivation of liberty.

All pages in this section

**Mental Capacity Act 2005**
The Act provides the framework for acting and making decisions on behalf of individuals who lack capacity to make particular decisions for themselves.

**Independent Mental Capacity Advocate**
This service provides independent safeguards for people lacking capacity to make certain important decisions.

**MCA and DOLS training in Suffolk**
We provide a number of training courses regarding the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards.

**Deprivation of Liberty Safeguards**
Information about how people in hospitals or care homes who lack the capacity to consent to certain treatments are protected.

**Deprivation of Liberty following the Supreme Court Judgement**
Essential reading and guidance for all staff following the Supreme Court ruling 19 March 2014 – P v Cheshire West and Chester Council.