Liberty Protection Safeguards - Update

- **5 February 2019**: the Committee Stage of the LPS Bill finished on 22 January. The next stage is the Report Stage and a date for this is yet to be confirmed. LPS is now likely to become law (Royal Assent) in April or May. There will then be a delay to the start of LPS to allow for organisations (particularly NHS Trusts and CCGs) to get ready for the new process and for training of staff. LPS could be expected to start late 2020.
- **All of the key parts and processes of LPS are now set.** For a Bill to become law, it must pass through 11 stages in the House of Lords and Commons. So far, the LPS Bill has completed 8 of these. The following elements are all now fixed, and the Liberty Protection Safeguards will apply from the age of 16 upwards; cover harm to self only; apply to any settings (hospitals, care homes, supported living, domestic settings); responsibility for LPS will rest with NHS Trusts, private hospitals, CCGs or local authorities. Any further changes in the House of Commons will be relatively minor as the government has a majority in the Commons (for domestic legislation such as LPS, Scottish and Northern Irish MPs abstain).
- Final changes will probably rest with the House of Lords who have shown they can out vote the government. At the final stage, Lords can make changes to parts of the Bill they did not originally see – this includes the definition of deprivation of liberty which was only introduced in the House of Commons (see further details below).
- If you have any concerns about the Bill as it stands please contact your local MP and copy in the Minister with responsibility for the Bill, Caroline Dinenage (caroline.dinenage.mp@parliament.uk). It is most effective if you can describe real situations (anonymous) and why you think LPS may or may not provide adequate safeguards.
- To download the Bill and other documents such as records of debates and evidence submitted by organisations go to: https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html
- Some details not in the Bill (qualification for AMCP or Reviewers) will be addressed in statutory regulations or the new Code of Practice (see debate on this below) which will be published later.
- A series of resources and a full day training course on LPS (hosted by Edge or delivered in house) are available from www.edgetraining.org.uk/news/ or email admin@edgetraining.org.uk for details.

Deprivation of liberty

A statutory definition of deprivation of liberty has been put into the Bill (clause 4ZA(3)). A leading group of barristers from Doughty Street Chambers has described this definition as follows: *'...we consider the approach in the proposed definition would violate ECHR standards, be unduly rigid and lead to undesirable conclusions.'* (23 January: https://publications.parliament.uk/pa/cm201719/cmpublic/MentalCapacity/memo/MCAB68.htm) The definition put into the Bill by the government is given at the end of this table.

Care and treatment

LPS will authorise a deprivation of liberty but not care or treatment (just like DoLS). Care providers will still have to assess the person's mental capacity to consent to care and treatment and if they lack mental capacity, make and record best interests decisions under the Mental Capacity Act.

Detention

LPS will only authorise deprivation of liberty (just like DoLS) and not interferences in private or family life (Article 8 ECHR) such as restricting contact with family or preventing a person living with their family despite serious safeguarding concerns. Court orders would still be required in such cases where there is a dispute.

Anywhere

LPS can be used in any setting so there will be no need to apply to the court for community cases (supported living and domestic settings) as there is at present. The number of community cases is put at 50,000 by the government but this appears to be a huge underestimate and could result in LPS being chronically underfunded (just like DoLS).

Mental disorder

A person must have a mental disorder for LPS to apply confirmed by a doctor (just like DoLS). Under DoLS a mental health assessor completed this assessment. Under LPS the role of the mental health assessor is removed so that any existing evidence from a doctor (something a GP has written in accessible records) can be used. A problem will arise when no evidence of mental disorder has been recorded. This will require the responsible body (or care home) to arrange for a written statement by a doctor. Unfortunately, there is no funding allocated for this situation in LPS and no accurate assessment of the percentage of the 300,000 cases per year that will need such statements.

Harm to self
LPS can only be used to authorise the detention of people who present a risk of harm to themselves (just like DoLS).

Responsible Body
Under LPS, the commissioner or funder of care will become the responsible body. This means NHS Trusts, private hospitals, CCGs, health boards and local authorities will all become responsible bodies. The responsible body has to organise assessments, reviews, authorisations, renewals and monitoring. See Private Hospitals below

Private Hospitals as Responsible Bodies
Many groups have expressed concern that private hospitals will become responsible bodies in their own right. Alex Cunningham, MP (15 January*) stated: *'It beggars belief that we can hand over to countless private organisations the responsibility to determine whether a person in their care—for whom substantial fees are being paid —should be deprived of their liberty and detained without recourse to anyone other than those within their own circle'*. The government have agreed (after lobbying) that in private hospitals, all LPS cases will have to be reviewed by an Approved Mental Capacity Professional (AMCP) however the AMCP can be an employee of the hospital itself and private hospitals remain as responsible bodies, assessing and authorising deprivation of liberty directly themselves.

Assessments
LPS requires at least 9 separate assessments to be completed and recorded (evidenced) prior to the responsible body carrying out its pre-authorisation review. The majority of these can be completed by **any** staff considered by the responsible body to have the necessary experience and knowledge (including unqualified staff). The assessments are:

1. Mental capacity *(this must be completed by a professional – nurse, O/T, doctor, social worker or psychologist)*
2. Mental disorder *(this must be completed by a doctor, but it could something written for another purpose not LPS)*
3. Arrangements are a deprivation of liberty
4. The deprivation of liberty is necessary and proportionate to prevent harm to the person
5. Consult the person and others with an interest in their welfare. The duty to consult is **not** absolute. If consultation is deemed not 'practicable or appropriate' the duty does not apply (para 20(4)). This assessment can be undertaken by a care home manager if the person being assessed is in a care home.
6. Excluded arrangements – should or could the Mental Health Act be used instead or is there any conflict?
7. Does the person meet one of the AMCP review categories (for example, they are objecting to care or treatment)
8. Can an Appropriate Person be identified? (if not an IMCA may be appointed)
9. Age – is the person aged 16 or over?

Note: the government have said the responsible body must also confirm the arrangements are in the person's best interests and consider if a health and care attorney or deputy is objecting. Caroline Dinenage, Minister of State (15 January*) stated: *'Best interest decision making remains fundamental to the existing Act, within which the liberty protection safeguards will sit. Before a liberty protection safeguards authorisation is considered, it will need to be decided that the arrangements are in a person's best interests.'*

Care Homes
The House of Lords reduced the role of care home staff in assessing people for LPS however care homes will still be able to arrange some assessments with the agreement of the relevant responsible body. The Minister of State, Caroline Dinenage, MP (17 January*) stated that statutory regulations will: *'...ensure that all care home staff and those connected to a care home are excluded from completing assessments and pre-authorisation reviews.'* The Bill still permits care home managers to undertake the consultation assessment (including consulting the person, anyone interested in their welfare, a Lasting Power of Attorney and an advocate if involved) for LPS and also the renewal statement (see duration) used for renewing LPS and LPS reviews.

Young People
LPS applies from the age of 16 upwards. Considerable concern has been raised about the protection under LPS for young people aged 16 or 17. Alex Cunningham, MP (15 January*) stated: *'I have been contacted, as I am sure everybody else has, by a number of organisations that have raised concerns. Most of them tell me that the Bill does not do enough to safeguard 16 and 17-year-olds.'* LPS gives no recognition or specific authority to people with parental responsibility of young people aged 16 or 17 and does not guarantee they will all be seen by an AMCP (as with private hospitals). Barbara Keeley, MP (17 January*) stated: *'Many social workers and other professionals in the field have made submissions. There is a strong consensus that additional safeguards should be available where objection is made by a person with parental responsibility.'*

Pre-authorisation review
After the assessments have been completed for LPS they are reviewed (pre-authorisation review). The reviewer can

be any person from the responsible body not involved in the day-to-day care or treatment of the person. They do not meet the person but simply read the assessments (just like a DoLS signatory now). If a person meets certain criteria, the review must be undertaken by an Approved Mental Capacity Professional (AMCP) who must meet the person and consult others if it appears *appropriate and practicable* to do so. Alex Cunningham, MP (17 January*) voiced concern that an AMCP may not therefore actually meet the person who is objecting, if they considered it was not *appropriate and practicable* to do so: *'It is baffling to me that the approved mental capacity professional is not required in the Bill to meet the cared-for person... It may well be that the person in care does not have the capacity for a meaningful conversation to express their wishes and beliefs, but the assessor does not know that unless they meet them.'*

The role of the AMCP has also been extended so that all pre-authorisation reviews must be undertaken by an AMCP for people in private hospitals. However, the AMCP could be an employee of the private hospital. In addition, responsible bodies have been given the ability, at their discretion, of referring any case to an AMCP for the pre-authorisation review.

Assessors

Under LPS the majority of assessments required to authorise detention can be carried out by any member of staff of an NHS Trust, private hospital, CCG, Health Board or local authority. They do not need to be professionals or have had any defined training (see funding later).

Appeals

If a person appeals against LPS, it will go to the Court of Protection (just like DoLS)**.** The responsible body (NHS Trust, private hospital, CCG, Health Board or LA) authorising the deprivation of liberty are taken to court for appeals.

Duration

LPS can last for up to 1 year initially and then be renewed for up to another year and then for up to 3 years at a time. Renewals can, at the discretion of the responsible body, be paper based only with no direct re-assessment of the person apart from a duty consult the person and others. For people in care homes, the renewal assessment (statement) can be undertaken by the care home manager which is then considered by the responsible body without any direct assessment by the responsible body or its staff. As private hospitals are responsible bodies, they will be able to undertake the renewal process themselves. Steve McCabe, MP (17 January*) stated: *'I am struggling to understand the justification for having a renewal period of three years, other than on the grounds of cost;..'* Barbara Keeley, MP (17 January*) stated: *'There is near unanimity in the sector that three years for renewals is too long. Even the Alzheimer's Society is worried about the impact it could have. The power on renewals lies with the managers of independent hospitals or care homes, who are people with a vested interest in renewing the authorisation and keeping the cared-for person as a client.'*

Advocacy (IMCA)

If an appropriate person cannot be identified, then an advocate will be appointed by the responsible body unless it is considered an advocate would not be in the person's best interests. The right to advocacy is considerably less than under DoLS on a number of points. For example, under DoLS local authorities have an open discretion to appoint an IMCA if they think one is appropriate. There is no equivalent discretion under LPS. MPs and Lords have both voiced concern about the limited right to advocacy under LPS. Dr Paul Williams, MP (22 January*) stated: *'Support from an IMCA should not depend on a person's best interests, as defined by other people. It should be a right that everyone is able to access an advocate, and people can then choose to opt out. That would improve the Bill by offering clarity to the cared-for person and the responsible body.'*

Appropriate Person

Some people, but not all, will have an appropriate person (family etc) appointed by the responsible body whose role is to support and represent the person. They cannot be engaged in providing care or treatment for the person in a professional capacity. If an appropriate person cannot be identified, an advocate may be appointed by the responsible body. Unlike DoLS, there is no statutory duty to maintain contact with the person.

Duty to inform the person of their rights under LPS

The House of Lords inserted a comprehensive duty to inform the person of their rights under LPS during assessment and following authorisation. However, on 15 January, the government introduced an amendment significantly reducing this right. Barbara Keeley, MP (15 January*) stated: *'The existing arrangements under paragraph 13 have wide third sector support, including from Mencap, Mind, Rethink Mental Illness, the Alzheimer's Society, Disability Rights UK, Inclusion London, Liberty, VoiceAbility, the National Autistic Society, Sense and a host of others. I am at a loss to know why the Government want to remove them'.* The government won the vote (it had a majority on the committee) so the statutory duty on responsible bodies to inform the person of their rights was reduced significantly.

Forms

LPS will need forms (just like DoLS) to show all the necessary assessments have been completed and indicate the evidence they are based upon. Although forms are not required by law (just like DoLS) without standardised, organised record keeping, it would be difficult for the pre-authorisation reviewer to confirm all the legal criteria have been met on behalf of the responsible body. The Court of Protection (and lawyers) will need to scrutinise these forms in LPS appeals.

Funding

Government estimates for the cost of LPS are based on a series of highly questionable estimates including the total number of LPS assessments per year and the rate of appeal under LPS. Just like DoLS it appears that LPS will be under funded, putting pressure on responsible bodies to meet their legal duties. Baroness Murphy in the House of Lords described the government's funding assessment for LPS as: *'..a pie-in-the-sky, almost delusional, impact assessment of its likely costs if it is implemented as drafted.'* (16 July 2018, House of Lords debate).

For example, in relation to training to carry out the statutory assessments required there is funding for only 10% of staff (actually 10% of qualified social workers and doctors) and that consists of £23.19 per person (a half day course). This means there is no funding for 90% of social workers to have any training or the large number of unqualified social care staff that will be completing LPS assessments in the future. The Department of Health & Social Care (DHSC) have also engineered a saving of £50 million by presuming the appeal rate under LPS compared to DoLS will halve from 1% to 0.5%. This is despite there being no statistical or research evidence for such a claim. Barbara Keeley, MP (22 January*) also noted: *'... the Government's impact assessment took the cost of administration of the current DoLS system from the Law Commission's impact assessment, but then inexplicably halved the cost to £155 to account for the fact that it would be less intensive than under DoLS at present. Will the Minister explain how the calculation in the impact assessment was arrived at?'* The financial estimates are available in the DHSC impact assessment: https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html

Code of Practice

Members of the Lords and Commons have voiced concern at the lack of statutory protection and duties in the Bill itself. The government are relying on putting detail in a new Code of Practice however as Barbara Keeley, MP (22 January*) stated: *'We cannot leave crucial details about how a new system of protections would work, including what resources will be given to it, to a code of practice that has not been drawn up yet, but that is what the Government have done.'* and *'Overall, the Government's approach of constantly mentioning the code of practice as being the place where whatever is not in the Bill will be plays fast and loose with the rights and liberties of cared-for people.'*

Mental Health Act and Mental Capacity Act interaction

LPS has the same overlap with the Mental Health Act that DoLS has. Under DoLS there is the Eligibility Assessment, and this is simply re-named for LPS and becomes the Excluded Arrangements assessment. At its simplest level, this means on mental health wards, a person who lacks mental capacity and is not objecting could be detained under either LPS or the Mental Health Act. Barbara Keeley, MP (22 January*) stated: *'I call on the Government to pause the Bill until they have given proper consideration to the interface between the two Acts and can produce a Bill that will not require near-immediate amendment and generate a lot of court cases, as we think this Bill will do.'*

* Public Bill Committee, House of Commons.

"4ZA Meaning of deprivation of liberty

(1) In this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention and, accordingly, a person is **not** deprived of liberty in any of the circumstances described in subsections (2) to (4).

(2) A person is **not** deprived of liberty in a particular place if the person is free to leave that place permanently.

(3) A person is **not** deprived of liberty in a particular place if— (a) the person is not subject to continuous supervision, **and** (b) the person is free to leave the place temporarily (even if subject to supervision while outside that place).

(4) A person is **not** deprived of liberty if— (a) the arrangements alleged to give rise to the deprivation of liberty are put in place in order to give medical treatment for a physical illness or injury, **and** (b) the same (or materially the same) arrangements would be put in place for any person receiving that treatment.

(5) A person is free to leave a particular place for the purposes of subsections (2) and (3) even if the person is unable to leave that place provided that if the person expressed a wish to leave the person would be enabled to do so."