

# The LPS delay – what does it mean and what is the way forward?

June 2024

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## What has happened (1)

- LPS is being delayed “beyond the life of this Parliament” (this Parliament lasting until January 2025 at the latest)
- i.e. whether it is implemented is for the next Government, whoever that is

## Why does it matter? (1)

- “Welsh Government is deeply disappointed with this decision not to proceed with implementation at this time. The right to liberty is one of our most fundamental human rights.”
- [Written Statement: Update on the implementation of the Liberty Protection Safeguards \(5 April 2023\) | GOV.WALES](#)

## Why does it matter? (2)

- Joint Committee on Human Rights inquiry into [human rights in care settings](#) (July 2022)

53. Every person who is deprived of their liberty without the completion of an application within statutory timeframes is unlawfully deprived of their liberty. **Where this happens, it is clearly unacceptable and constitutes a breach of the right to liberty and security** (Article 5 ECHR)

56. It is important that the new LPS framework does not repeat the failings of the DoLS framework, particularly regarding delays in processing, legal aid, and data gathering. We appreciate the Government wishes to ensure that it gets its implementation right, but we are concerned that there is no timetable for full implementation. **The Government must not allow any unnecessary delays to the implementation of the LPS framework**, should commit to a firm timetable for its implementation, and should update us every three months on progress.

- More later from Ben

## What should we be doing at the moment?

- Confidence as to legal framework
  - Back to basics on the MCA
  - The meaning of deprivation of liberty
- Confidence as to how to take steps to authorise deprivation of liberty: inside and outside the scope of DoLS
- Applying LPS thinking

# Restraint and deprivation of liberty

# Restraint

- Where a person lacks capacity to consent to it, restraint is lawful if (1) it is in their best interests; and (2) necessary and proportionate to the risk of harm that they would suffer otherwise (s.6 MCA 2005)
- Not risk of harm to others – that is common law if immediate or potentially the MHA 1983
- NB, just because you **can** lawfully use restraint does not mean you **should**

# What is a deprivation of liberty?

- Article 5 ECHR:
  - Objective element: confinement to restricted space for non-negligible period of time – the *Cheshire West* ‘acid test’
  - Subjective element: either cannot or will not give valid consent
  - Imputable to the state
- [Understanding when someone is deprived of their liberty | The Law Society](#)



# The objective element

- *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69
  - Intense restrictions will lead to line from restriction to deprivation of liberty being crossed quickly
- *Birmingham City Council v D* [2017] EWCA Civ 1695
  - Meaning of freedom to leave
- *A Local Authority v AB* [2020] EWCOP 39 and *Re AEL* [2021] EWCOP 9
  - Continuous supervision and control, the ‘true powers of control’ and the ‘policy of caution’

# The subjective element

- The information relevant to the decision: *A PCT v LDV* [2013] EWHC 272 (Fam) (capacity to consent to admission as informal patient to psychiatric hospital)
- If you are to say a person has capacity to consent to what would otherwise be a deprivation of their liberty, they must be given and be able to understand, retain, use and the information relating to the restrictions upon them

# The medical treatment carve-out (1)

- Different considerations where:
  - “a person is taken into (in that case) an intensive care unit for the purpose of life-saving treatment and is unable to give their consent to their consequent loss of liberty, does not result in a deprivation of liberty for article 5 purposes so long as the loss of liberty is due to the need to provide care for them on an urgent basis because of their serious medical condition, is necessary and unavoidable, and results from circumstances beyond the state’s control” *Re D* [2019] UKSC 42
- How far does this extend? Now withdrawn Government MCA / DOLS guidance suggested during COVID that applied in care homes – possible in theory but how likely in practice?

# If it is a deprivation of liberty?

- DoLS: 18 and over, care homes/hospitals
  - Care provider responsibility: making the application (urgent / standard) to the LA for the place where the person is ordinarily resident (or for the area where the person is present), and helping the LA by providing the (surprisingly extensive) list of information required of you – including care plans: and how can you properly care for a person if you don't already have a care plan identifying that they are confined?
  - LA responsibility, check on capacity, mental disorder, whether deprivation of liberty is in best interests of person and necessary and proportionate to risk of harm they would be at otherwise
  - In the respite situation, is the person there often enough / long enough for them to be 'detained resident'?
- Otherwise: if the person is too young or in the 'wrong place': court order

# DoLS in survival mode (1)

- DoLS statistics for 2022-23 (England – Wales not available)
  - 300,765 applications for DoLS received during 2022-23, of which 100,490 were from nursing homes, and 92,010 from residential care homes (i.e. 2/3rds of applications in total)
  - Cases not completed as at year end: 126,100, of which 53,275 were nursing care homes, and 52,190 residential care homes (i.e. 85% of non-completed applications)
  - The proportion of standard applications completed within the statutory timeframe of 21 days was 19% in 2022-23;
  - The average length of time for all completed applications was 156 days, compared to 153 days in the previous year.
  - 56% of applications were not granted, but only 3% were not granted because one or more of the DoLS criteria were not met.
    - Most not granted due to a change in the person’s circumstances, for example being discharged from a short term stay in hospital following an urgent authorisation.
    - Almost **50,000** people died whilst waiting for a DoLS authorisation to be considered
- Those not put forward for DoLS
- How are you doing?

# DoLS in survival mode (2)

- [CQC State of Care report 2021-22:](#)

We heard how delays in DoLS authorisations leave provider staff feeling ‘in limbo’ about their legal authority to deprive people of their liberty where there are welfare concerns. Equally this leaves family, friends and staff unsure of how to raise concerns or make necessary decisions.

- [CQC State of Care report 2022-23](#)

[p]roviders are not always clear on how to navigate the difficult legal situation of caring for people who are waiting for an assessment

## DoLS in survival mode: the questions for care providers

- On what basis is the person with you?
- On what basis are you providing treatment to them?
- On what basis are you providing care to them?
- Is there a treatment escalation plan in place? And, if so, how has the person participated in the process of drawing it up?
- Are they deprived of their liberty? If so,
  - Can you do anything to stop them being deprived of their liberty?
  - Have you done what you can to get the situation authorised?
  - How thick is your legal ice? And if it is thin, what are you doing about it?
- [Deprivation of liberty and care providers – how thick is your legal ice? – Mental Capacity Law and Policy](#)

## What might be coming down the line?

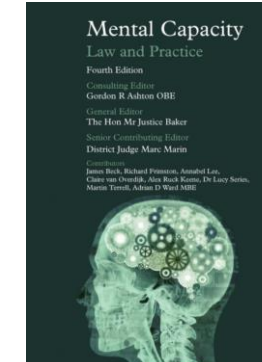
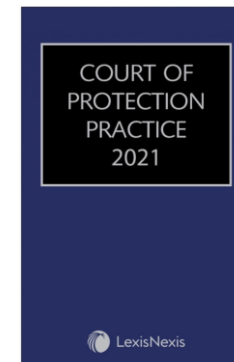
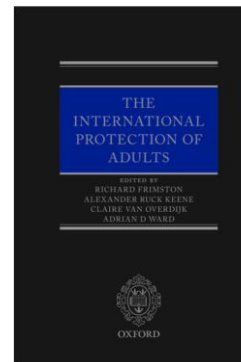
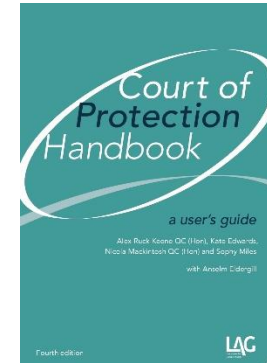
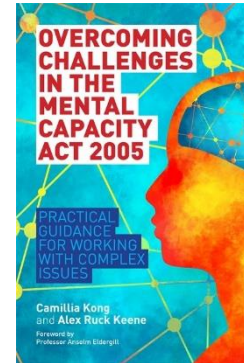
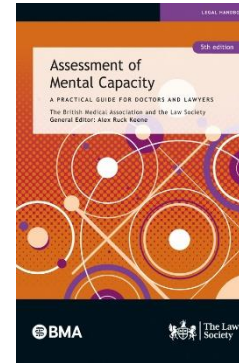
- Code of Practice to the main MCA update?  
Not known at present, but obvious collateral damage from decision not to implement LPS
- In the meantime [Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf \(netdna-ssl.com\)](#)
- Caselaw?





# More resources

- [39 Essex Chambers Mental Capacity Law Resources](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)
- [Open Justice Court of Protection](#)



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