

LPS on the shelf – what can we do now?

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What has happened (1)

- LPS is being delayed “beyond the life of this Parliament” (this Parliament lasting until December 2024 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.

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

What is a deprivation of liberty?

- Article 5 ECHR:
 - Objective element: confinement to restricted space for non-negligible period of time
 - Subjective element: either cannot or will not give valid consent
 - Imputable to the state
- The life-saving treatment carve-out
- [Deprivation of liberty – the fundamentals – Mental Capacity Law and Policy](#)

Deprivation of liberty does matter

- Distinction between substantive and procedural breaches of Article 5:
 - ***Bostridge v Oxleas NHS Foundation*** [2015] EWCA Civ 79 (where the Court of Appeal held that a patient unlawfully detained in a mental hospital for over a year was only entitled to nominal damages as the NHS Trust could have lawfully detained him under the MHA 1983)

Cf

- ***LB Haringey v Emile*** [2020] MHLO (CC): contested case: £143,000 for 8 years failure to authorise causing harm
- ***Essex County Council v RF*** [2015] EWCOP 1 (where DJ Mort approved an award of £60,000 plus costs of between £50,000 and £64,000 and repayment of £23,000 in care home fees where the local authority's conduct - depriving P of his liberty in a care home for 13 months - had been "*reprehensible*")
- Burden of proof on detaining (and/or authorising) body to show no harm caused
- Also remember the role of the Ombudsman

Applying DoLS at present – and not just DoLS

- DOLS statistics for 2021-22 (England – Wales not available)
 - 270,650 applications for DoLS, 56% with an urgent application request alongside standard authorisation
 - 83,035 were in nursing homes, 76,000 were in care homes, 70,230 were in acute hospitals, and 5,220 were in mental health hospitals. Remainder ‘other,’ blank or invalid.
 - 124,145 not completed at year end
 - 56% not granted, of which change of circumstances accounted for 65%
 - Average length of time for completed applications 153 days (up from 148 the year before)
 - A major acute hospital problem: 59,360 not granted and 3,140 granted...
- And ‘community DoL’ – everyone below 18 or outside hospital/care home
 - Far fewer applications (1,002 for the last quarter of 2022, roughly consistent with previous quarters)
- How are you doing?

Applying LPS thinking

- Cannot apply the LPS itself – the MC(A)2019 is not in force, so you can't e.g. rely upon s.4B 'emergency' deprivation of liberty absent court order
- But you can apply the thinking that underpinned the LPS: above all:
 - Front-loading thinking – will still require fresh assessment from BIA but should **already** be capturing consideration of confinement, capacity and deprivation of liberty at the point of care planning: good care planning practice already
 - Making sure you capture information about the confinement as part of the information relevant to the capacity test: [LDV](#)
 - Focusing on necessity and proportionality as part of the DoLS “best interests plus” test (remember *DY v A City Council & Anor* [2022] EWCOP 51)

‘Community DoL’

- Renewed focus required on community DoL applications – the **only** way to get authority to deprive someone of their liberty in the community
 - Remember: CHC funding => ICB responsibility
- Section 4B – when application made, authority from the outset where necessary to provide life-sustaining treatment or reasonably believe necessary to prevent a serious deterioration in condition
- [Judicial Deprivation Liberty Authorisations | 39 Essex Chambers](#)

And the legal aid problem

- Non-means-tested legal aid available for s.21A challenges, but only where an authorisation is in place
 - Not available where the urgent authorisation has run out, or where standard authorisation has expired (or not been sought)
- And no non-means-tested legal aid available for ‘community DoL’ cases
- Consequential changes to legal aid provisions would have very substantially closed the gaps here
- What to do now?

More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)

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