DoLS and LPS compared

Notes:

1. This table is based upon a table produced by Emma Sutton KC and Rhys Hadden, Counsel for the Official Solicitor in the Supreme Court case of The Attorney General for Northern Ireland's Reference, and provided by the Official Solicitor to the court in that case. I am very grateful to them for permission to draw upon it.

2. The table summarises the key features and differences between the LPS and the current framework under the MCA 2005 as they apply in England and Wales (which includes both DoLS and judicial authorisations of a deprivation of liberty by the Court of Protection under section 4A(3) and section 16(2)(a) MCA 2005).

3. The scope of the LPS will remain defined by the meaning of deprivation of liberty (see paragraph 2(1)(a) of Schedule AA1, read together with s.64(5) MCA 2005). The interface between the LPS and the MHA 1983 will remain materially the same under Part 7 of new Schedule AA1 as at present (eligibility being determined under Part 7 of Schedule AA1, rather than under Schedule 1A at present).

4. The table does not provide a comprehensive summary of all minor, technical and regulatory aspects of the differences between the two frameworks, and summarises the statutory language. For precise details, reference should be made to the legislation: Schedule A1 (DoLS) can be found here, and (in due course) Schedule AA1 (LPS) here. Note further that regulations have yet to be promulgated setting out such matters as eligibility to be an Approved Mental Capacity Professional. Draft regulations were published for consultation in 2022, to be found here, but we do not know at this stage whether any final regulations will take the same form. Similarly, a draft Code of Practice was published for consultation in 2022. We do not know at this stage whether the final Code will take the same form.

	LPS	**DoLS / Judicial Authorisation**
Age range	LPS applies to those aged 16 and over (para 2(2)(a), Sch. AA1)	DoLS applies to those aged 18 and over (para 13, Sch. A1) Where a 16-17 year old is (or will be) deprived of their liberty, an application must be made to the Court

		of Protection for authorisation under section 4A(3) and section 16(2)(a) MCA 2005.
Care settings	LPS applies to all care settings (para 2(1)(a) Sch. AA1). This includes: (a) individuals residing in domestic settings, including the person's own home and family home, share lives schemes (e.g. "adult foster placements"), supported living placements (b) care homes and hospitals including inpatient mental health units (c) Other settings such as social care settings, including children's homes, short breaks and youth club provision (d) education settings including day and residential schools and colleges	Applies only to individuals in "hospitals" and "care homes" (see paras 175 and 178 of Sch.A1 MCA 2005). In all other settings, the Court of Protection can authorise a deprivation of liberty pursuant to section 4A(3) and section 16(2)(a) MCA 2005. This process is initiated by COPDOL11 (streamlined / *Re X* process) or via a personal welfare application (or section 16 MCA 2005 application).
Arrangements	LPS will apply to the "arrangements" for the person's care, so can consider a wider range of settings a person accesses providing a more comprehensive consideration of their lives. This may include multiple settings included in the person's plan of care.	DoLS applies to a specific, named institution (such as a care home or hospital) and cannot be transferred.
Responsible Body	Under LPS, a "Responsible Body" will authorise arrangements that amount to a deprivation of liberty to enable care or treatment (para 6, Sch. AA1). Which organisation is the Responsible Body will vary according to where the arrangements are "mainly carried out". This will share the administrative responsibility authorising a deprivation of liberty more widely between local authorities and NHS bodies as follows: (a) Where arrangements are mainly carried out in an NHS hospital in England, in most cases the Responsible Body will be the hospital trust. In Wales, in most	Under DoLS the statutory body responsible for granting a standard authorisation is called a "supervisory body" (paras 180-181). (a) For a care home in England or Wales, the supervisory body will be the local authority where the individual is ordinarily resident or where the care home is situated; (b) For a hospital in England, the supervisory body will be the local authority for which the person is ordinarily resident or, if it is not possible to establish this, the area where the hospital is located; (c) For a hospital in Wales, the supervisory body will be the local health board (or Senedd Cymru /

	cases the Responsible Body will be the local health board. (b) Where arrangements are mainly carried out in an independent hospital, in England, the Responsible Body will be a local authority. The responsible local authority will usually be the authority meeting the person's care and support needs, for example under the Care Act 2014. Otherwise, the Responsible Body will be the local authority where the hospital is located. In Wales, the Responsible Body will be the local health board for the area where the hospital is situated. (c) If the arrangements are not mainly being carried out in a hospital and instead are being carried out mainly through NHS continuing healthcare (CHC) or the equivalent in Wales, the Responsible Body will be the relevant integrated care board ("ICB") in England, or the local health board in Wales. (d) In any other case, the Responsible Body will be a local authority, both in England and in Wales. The responsible local authority will usually be the authority meeting the person's care and support needs, or, if no local authority is meeting the person's needs, the authority in which the arrangements are mainly being carried out.	Welsh Parliament) if the care is commissioned by it.
Authorisation conditions	Before the responsible body can authorise the arrangements, it must be satisfied that <u>three</u> authorisation conditions are met (para 13): (1) The cared-for person lacks capacity to consent to the arrangements (2) The cared-for person has a mental disorder; and (3) The arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and	Before a supervisory body can authorise a standard authorisation under DoLS, it must be satisfied that <u>six</u> qualifying requirements are met (paras 12-20, Sch.A1). These are: (1) Age requirement; (2) Mental health requirement; (3) mental capacity requirement; (4) best interests requirement; (5) eligibility requirement; and

	seriousness of harm to the cared-for person. The responsible body must carry out three assessments to determine whether the authorisation conditions are met (para 21-22, Sch. AA1): (1) A capacity assessment: to determine whether the person lacks the relevant capacity to consent to the arrangements (2) A medical assessment: to determine whether a person has mental disorder as defined by the Mental Health Act 1983 (3) A "necessary and proportionate" assessment: to determine whether the arrangements are necessary to prevent harm to the person and whether they are proportionate to the likelihood and seriousness of that harm.	(6) no refusals requirement. Under DoLS the supervisory body must undertake six equivalent assessments to determine whether those qualifying requirements are met (paras 33-48, Sch. A1).
Avoiding repeat assessments	Under LPS there is the option of allowing greater reuse of existing assessments. It is possible to rely upon the capacity assessment and medical assessments carried out for an earlier authorisation and / or for any other purpose where it is reasonable to do so (para 21(8)-(9), Sch AA1). A necessary and proportionate assessment is still required for every authorisation (para 22, Sch. AA1).	Every time a repeat DoLS authorisation is requested, the supervisory body must ensure that the same six assessments are completed, albeit it may consider using "equivalent" assessments in certain cases (para 49, Sch. A1).
Duty to consult	Para 23, Sch.AA1 introduces an express duty on the responsible body or the care home manager (if the arrangements are in a care home) to consult the following people before an authorisation is given to ascertain the person's wishes or feelings about the proposed arrangements: • the person themselves • anyone named by the person as someone who should be consulted • anyone engaged in caring for the person or interested in the person's welfare	DoLS has an implied duty (linked to the best interests assessment) to consult with the person and those engaged in caring for the person or interested in their welfare where possible before the arrangements to deprive someone of their liberty can be authorised and/or renewed.

	• any attorney of a lasting power of attorney (LPA) or an enduring power of attorney (EPA) granted by the person • any deputy appointed by the Court of Protection • any appropriate person • any IMCA	
Role of independent assessor	LPS introduces a new role for an Approved Mental Capacity Professional ("AMCP"). An AMCP will only be involved in specified cases (paras 24-25 Sch. AA1): • If the person does not want to live at the specified place. • If the person does not want the care or treatment to be provided at the place. • Any person being deprived of their liberty in an independent hospital who is not subject to the Mental Health Act. • If the Responsible Body refers a case to an AMCP, and they accept it (these will typically be complex and borderline cases which do not necessarily fall into any of the above categories). A revised Code of Practice will provide further detail about which types of cases should be accepted by the AMCP. The AMCP must meet with the person (unless it is not appropriate or practicable to do so) and complete further consultation.	A best interests assessor ("BIA") is required to complete a best interests assessment in relation to every standard authorisation granted under DoLS (e.g. para 39, Sch.A1 MCA 2005).
Duration of authorisation	Part 3 of Sch. AA1 identifies that the maximum duration of an authorisation of a deprivation of liberty under LPS may be for: (1) Up to 12 months for the first authorisation (2) Up to 12 months for the first renewal; (3) Up to 36 months thereafter.	Authorisation of a deprivation of liberty for a standard authorisation under DoLS may be granted for a maximum of up to 1 year at a time (para 42(2)(b), Sch.A1 MCA 2005) There is no statutory requirement that court-authorised DoL should not exceed 1 year. In practice the court has largely understood itself to be subject to the same statutory time

		limit afforded by Sch.A1 MCA 2005: see *Re UF* [2013] EWCOP 4289.
Appropriate Person	From the outset, the person will be independently represented and supported either by an IMCA or an "appropriate person". An appropriate person is to be someone that is not engaged in providing care or treatment to the person in a professional role (para 42(2), Sch.AA1 MCA 2005).	Under DoLS, if a standard authorisation is granted, the supervisory body must appoint a person with legal powers to represent them. This is called the 'relevant person's representative' ("RPR") (Part 10, Sch.A1 MCA 2005). In summary, they may be a family member, friend, if no one suitable is available, an independent advocate (often referred to as a "paid RPR"). An IMCA appointed under section 39C MCA 2005 may also be appointed if there is a temporary gap in the appointment of an RPR. For individuals with a judicial-authorisation of a deprivation of liberty under section 4A(3) and 16(2)(a) MCA 2005, the Court of Protection may appoint a representative under rule 1.2 of the Court of Protection Rules 2017 (rule 1.2 representative), or an Accredited Legal Representative, or a Litigation Friend to represent them during the period of authorisation: see *Re PQ (Court Authorised DOL: Representation During Review Period)* [2024] EWCOP 41 (T3).
Role of the Court of the Protection	LPS will apply to all care settings and all ages (16 and over). As such, there is no requirement to obtain lawful authorisation from the Court of the Protection under section 4A(3) and 16(2)(a) MCA 2005. A challenge to an LPS authorisation that has been granted may be made to the Court of Protection pursuant to section 21ZA MCA 2005. In these circumstances, the court has the power to: • uphold authorisations • terminate authorisations • vary the authorisation	If a person is (or proposed to be) deprived of their liberty in a different care setting to a care home or hospital, an application to the Court of Protection will be required for judicial authorisation under section 4A(3) and 16(2)(a) MCA 2005. A challenge to a DoLS authorisation that has been granted may be made to the Court of Protection pursuant to section 21A MCA 2005. In these circumstances, the court has the power to: • uphold authorisations • terminate authorisations • vary the authorisation