

# DoLS is dead, long live the LPS

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# What is a deprivation of liberty?

- Article 5 ECHR:
  - Objective element: confinement to restricted space for non-negligible period of time: ‘the acid test’
  - Subjective element: either cannot or will not give valid consent
  - Imputable to the state: the state knows or ought to know of the confinement

# Consequences

- Can only be authorised by a procedure prescribed by law – a check on arbitrariness
- Right to challenge before a court
- Damages for the person if unlawfully deprived of liberty or not given effective right of challenge

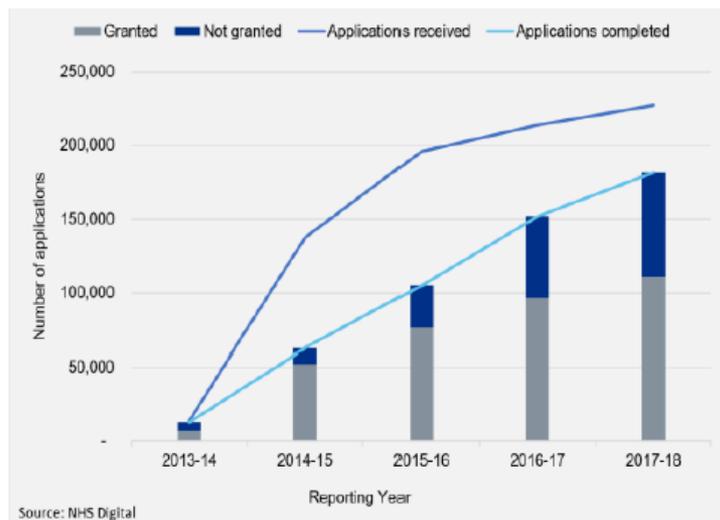
## Authorisation: the present

- Deprivation of Liberty Safeguards:
  - 18 +, hospitals and care homes
  - Urgent authorisation: 7 days, renewable once
  - Standard authorisation: granted by local authority supervisory body
  - No definition of deprivation of liberty

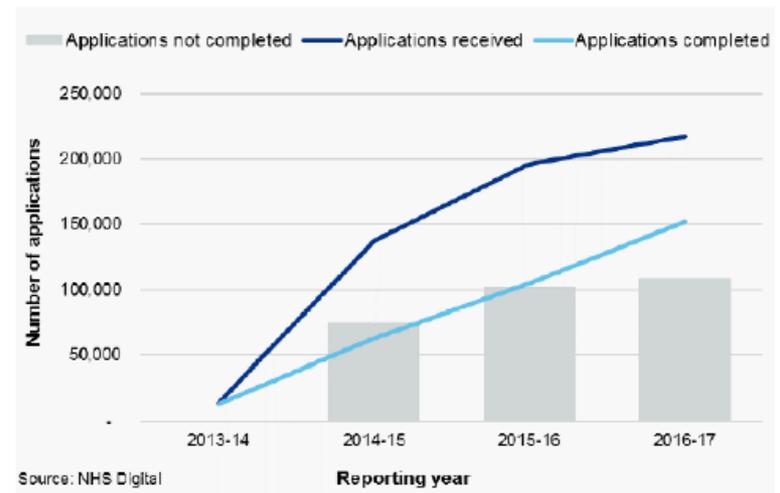
# The problems at present (1)

- Post *Cheshire West* backlogs in relation to care homes and hospitals

**DoLS applications in England, 2013-18**



**Backlog numbers 2013-2017**



## The problems at present (2)

- DoLS doesn't apply outside care homes and hospitals: e.g. supported living, own home, and doesn't apply to those under 18
  - So need to go to the Court of Protection for a 'community DoL' order
- Criticisms of complexity of DoLS by House of Lords
- Combination of all of these led to Law Commission report in 2017 and legislation in 2018-9

# The Mental Capacity (Amendment) Act 2019 in one slide

- Body of the Act:
  - Revised s.4B – court approval, replacement for urgent DOLS and emergency
  - Provisions relating to Court of Protection
  
- Schedule AA1: The Liberty Protection Safeguards
  - Setting neutral and more than one setting, from age 16
  - Authorisation by responsible body – NHS for CCG/hospitals, LA for all other cases (including self-funders and independent hospitals). Potential for delegation of some tasks to care home managers in some cases
  - Conditions: capacity, mental disorder and necessity and proportionality (of risk to self alone)
  - Additional scrutiny by AMCP in ‘objection’ cases (and independent hospitals)
  - (Broadly) opt-in representation and support by appropriate person/advocate (latter on ‘all reasonable steps’ basis)
  - Provisions for variation, review and renewal (1 year, 1 year then up to 3 years)
  - (Broadly) the same interface between the MCA and MHA as under DOLS

# Interface

- LPS **cannot** be used for
  - “Mental health arrangements” for in-patient treatment for mental disorder to which person objects (as with DoLS) (para 47) (but subject to LD exception)
  - Arrangements which conflict with “Mental Health Requirements” (e.g. s17 leave, guardianship, CTO, conditional discharge)
- LPS **could be used** for in-patient admission where patient does not object or where LD exception in MHA applies
- **New**: could have LPS alongside MH detention for additional deprivation of liberty to which patient subject for physical health treatment – e.g. *Dr A* case.

# Summary: key changes from DoLS

- Wider scope – location and age (but query whether Code guidance will narrow cohort)
- Responsibilities lying with NHS bodies in some cases where do not at present
- The (unlikely) potential for greater role for care home managers
- No more urgent authorisations
- No more conditions (at least expressly, but in practice implicit)
- Necessity and proportionality rather than best interests requirement (but in practice proportionality encompasses same considerations)
- No more RPRs – appropriate person and advocates (and watering down of advocacy duty to ‘all reasonable steps’)
- Renewals

## Where next?

- Implementation day (meant to be) 1 October 2020
- Regulations required – e.g. as to knowledge and experience required for assessors
- Code of Practice – in parallel or as part of new single Code (main Code also under review)
- Transition arrangements – including backlog

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/resources-2/liberty-protection-safeguards-resources/>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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