

# The LPS for care homes

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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: *Cheshire West* and ‘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
- The ‘policy of caution’

# 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

# Authorisation – the future: the MC(A)A 2019

- Body of the Act:
  - No statutory definition of deprivation of liberty – guidance in Code
  - 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 (*Re D*)
  - Authorisation by responsible body – NHS for CHC/hospitals, LA for all other cases (including self-funders and independent hospitals).
  - Conditions: capacity, mental disorder and necessity and proportionality
  - Additional scrutiny by AMCP in ‘RTB’ cases (and independent hospitals)
  - Representation and support by appropriate person/advocate (but latter on ‘all reasonable steps’ basis)
  - Provisions for variation, review and renewal (1 year, 1 year then up to 3 years)
  - (Broadly) the same division between the MCA and MHA as under DOLS

## LPS: what's the point?

- Deprivation of liberty is everyone's business
- Moving consideration to the frontline
- It's not about the backlog

# Process

- Responsible body takes necessary steps to secure determination of conditions, consultation, advocacy/appropriate person support and pre-authorisation review (by AMCP where relevant)

## Care providers

- (Now) no specific provisions relating to care providers in the Act but key responsibilities will be:
  - To recognise that arrangements to enable care and treatment amount to a deprivation of liberty
  - To trigger authorisation process by approaching responsible body
  - To assist RB in assessment process
  - To comply with the requirements of s4B whilst awaiting completion of assessment process (i.e. higher threshold of carrying out ‘vital act’ to justify deprivation of liberty)





# Identifying your responsible body

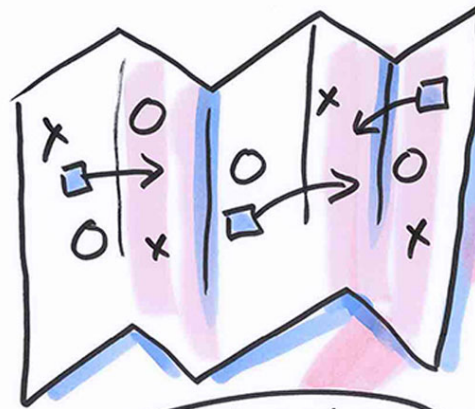
- If carried out mainly in an NHS hospital: the hospital manager (in most cases the trust that manages the hospital in England or the local health board in Wales)
- If in independent hospital, a LA
- If carried out mainly through the provision of NHS continuing health care: the relevant clinical commissioning group in England or local health board in Wales
- Otherwise: the responsible local authority:
  - The LA meeting needs under Care Act/SSWB Act
  - Otherwise LA for the area where arrangements being carried out for self-funders (including in care homes/own homes)
- NB, the RB identity can change (e.g. if person becomes eligible for CHC care) without necessarily ending authorisation – but limits to what new RB can do to vary authorisation

## Tying LPS to the MCA

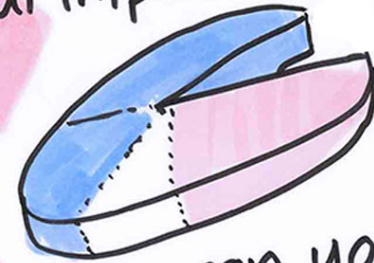
- The MCA comes first
- How well do you know the MCA?
- How well do your staff know the MCA?
- How well do your partners know the MCA (the Mrs Jones test)?
- What can you do to improve their knowledge?

Liberty Protection  
Safeguards

16x  setting neutral  more agencies



carry out  
Local Impact Assessments



coordinate  
discussions

how can you  
share resources  
across agencies

drawn by Cara Holland  
@GraphicChange  
graphicchange.com

# 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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