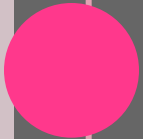
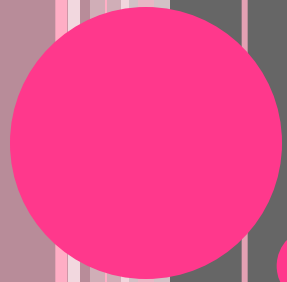




# **LIBERTY PROTECTION SAFEGUARDS**

**Alison Bush  
Principal Lawyer  
Derby City Council**

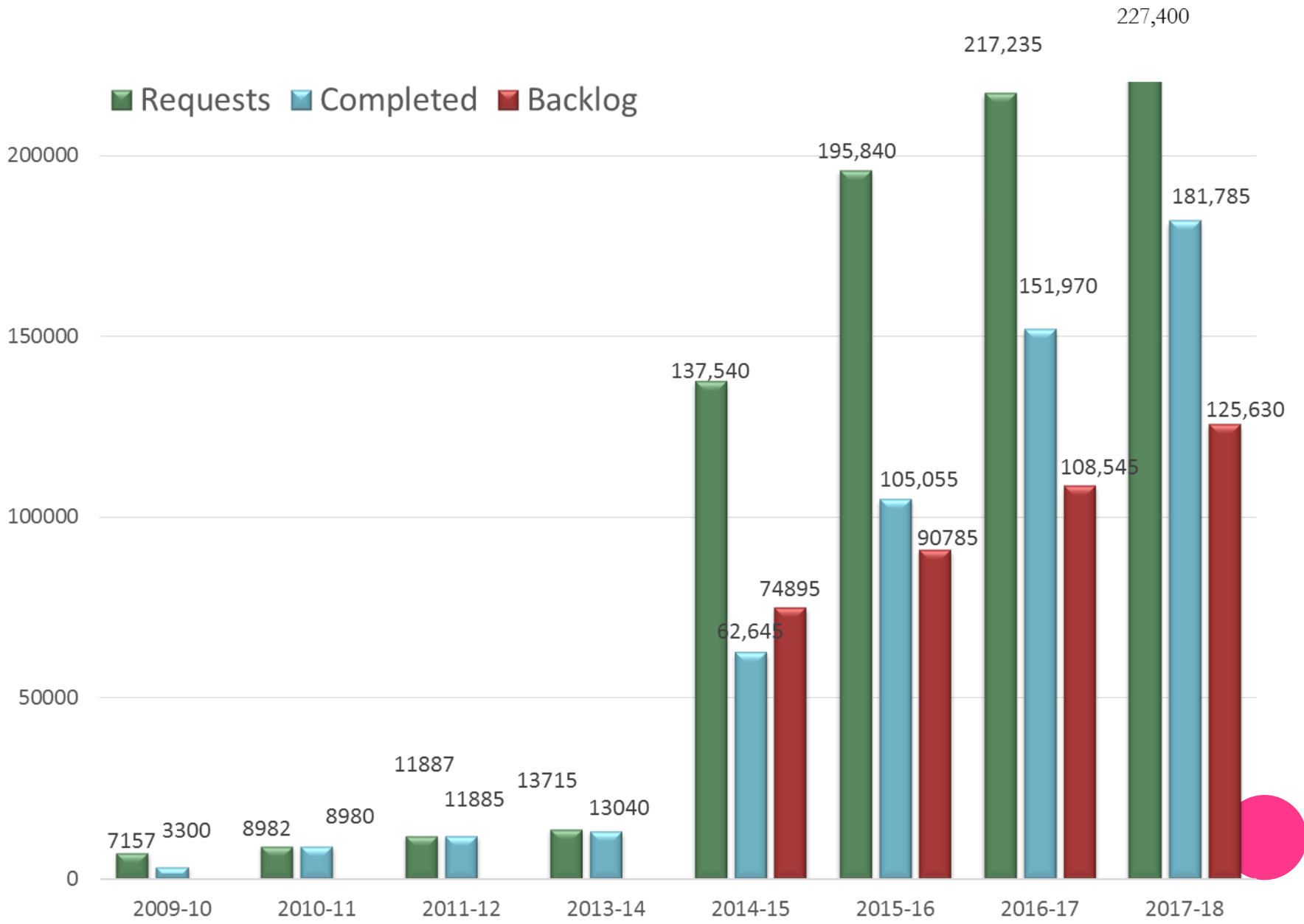
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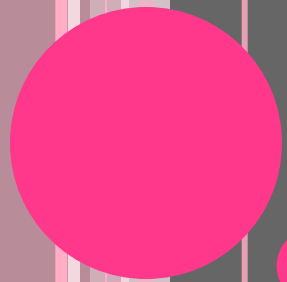


# WHY THE CHANGE?

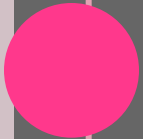
- The LPS is designed to provide a more streamlined alternative to DoLS, which has reached breaking point because of the substantial caseload increase triggered by the 2014 Supreme Court Cheshire West judgment. This effectively lowered the threshold for what constituted a deprivation of liberty in care, leading to a rise in DoLS applications in England from 13,715 in 2013-14, to 227,400 in 2017-18, with a backlog of 125,630 by the end of that year.
- In February, over 100 care organisations and charities called for the bill to be paused on the grounds that it posed a threat to human rights. Since then, the bill only changed marginally, and one of those organisations, the Voluntary Organisations Disability Group, said many of its concerns over the level of safeguards and the adequacy of funding remained unresolved.







# TIMESCALES



- New Code of Practice
- Changes to the CoP rules
- New Practice Directions and new forms
- National guidance to LA's and NHS etc
- Judicial training will need to take place
- The Act requires a Commencement Order – no date set yet for that



- Received the Royal Assent on 16th May 2019
- Will be implemented from 1st October 2020
- Draft Regulations to be issued towards the end of 2019
- Final versions agreed by Parliament in the Spring of 2020
- Draft Code to be issued towards the end of 2019
- Final version agreed by Parliament in the Spring of 2020
- Existing authorisations under DoLS would continue until their expiry date, at which point they would need to be authorised under LPS
- No new Standard or Urgent DoLS authorisations could be made after 1st October 2020





# **MENTAL CAPACITY (AMENDMENT) ACT 2019**



- The legislation provides for the repeal of the Deprivation of Liberty Safeguards (DoLS) contained in the Mental Capacity Act 2005 (MCA), and their replacement with a new scheme called the Liberty Protection Safeguards (LPS).
- The LPS establishes a process for authorising arrangements enabling care or treatment which give rise to a deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights (ECHR), where the person lacks capacity to consent to the arrangements.
- It also provides for safeguards to be delivered to people subject to the scheme.

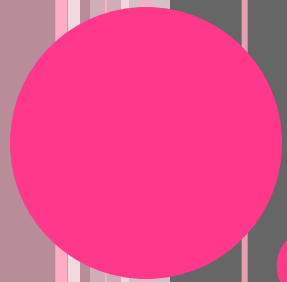


- It's an amendment Act, so MCA 2005 remains the base Act.
- 6 sections and 2 Schedules
- S.21A is replaced by **s.21ZA**
- Sch A1 and 1A MCA 2005 replaced by new **Sch AA1**

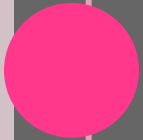


- One scheme will apply in all settings (eg care homes, nursing homes, hospitals, supported living, people's own homes, day services, sheltered housing, extra care, Shared Lives etc).
- The LPS will apply to anyone aged 16+.
- There is no statutory definition of "deprivation of liberty" under LPS. Therefore the "Acid Test" set by the Supreme Court in the "Cheshire West" case remains. Code of Practice to provide guidance.
- The role of "Supervisory Body", which authorises deprivations of liberty, will be abolished. It will be replaced by the "Responsible Body". There will be different Responsible Bodies in different settings. For some cases the Responsible Body will be the NHS Trust; in other cases the role will be filled by the Clinical Commissioning Group (or Local Health Board in Wales); and in other cases still it will be the local authority.
- There will only be 3 assessments: the "Capacity" assessment, the "Medical" assessment and the "Necessary and Proportionate" assessment.
- In certain circumstances the Responsible Body may ask a care home manager to organise the assessments.
- There will be a brand new role of Approved Mental Capacity Professional to deal with more complex cases.
- There will be an expansion of the role of the Independent Mental Capacity Advocate.



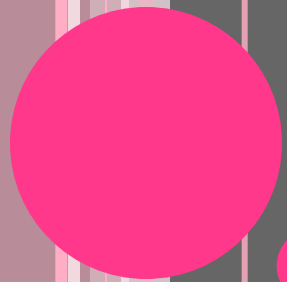


# SCOPE

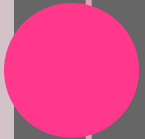


- Hospitals
- Care Homes
- Supported living
- Shared lives
- Private and domestic settings
- Not tied to accommodation or residence - they could be used, for example, to authorise day centre and transport arrangements
- Authorisations can also be given for arrangements being carried out in more than one setting
- Any person who lacks capacity and is aged 16 years or over



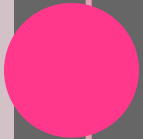
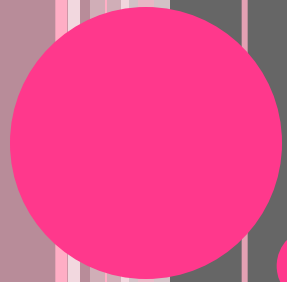


# CRITERIA



- A responsible body may authorise arrangements if the following “authorisation conditions” are met:
  - the person lacks capacity to consent to the arrangements; (capacity assessment)
  - the person has a mental disorder within the meaning of section 1(2) of the Mental Health Act 1983; (medical assessment) and
  - the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person.



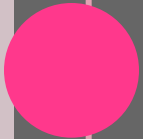
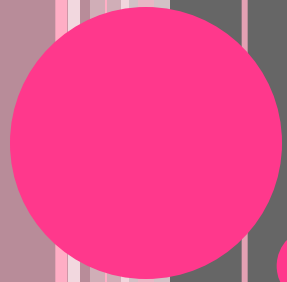


# RESPONSIBLE BODY



- The LPS replaces the “supervisory body” under the DoLS scheme with the “responsible body”, as the agency charged with authorising the arrangements that give rise to a deprivation of liberty.
- There can only be one responsible body for any authorisation that is granted:
  - Hospital = hospital manager
  - Independent hospital = responsible local authority
  - NHS CHC = CCG
  - Other than above = responsible local authority
- **BUT** for a 16 or 17 year old it is:
  - The local authority with a EHCP or
  - The local authority where P is accommodated under Children Act or
  - The local authority with a care order or
  - (if none of above) then ordinary residency rules apply





# PRE-AUTHORISATION REVIEW

- To provide a degree of independence
- Completed by either an approved mental capacity professional (AMCP), or some other health or care professional
- In the following cases, the pre-authorisation review must be undertaken by an AMCP:
  - if it is reasonable to believe that person does not wish to reside in, or receive care or treatment at, a particular place;
  - the arrangements provide for the person to receive care or treatment mainly in an independent hospital; or
  - the responsible body refers the case to an AMCP and the AMCP accepts the referral.

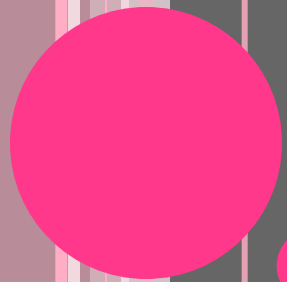


- In cases which are referred to an AMCP the AMCP is required to:
  - meet with the person and consult all those listed below as requiring consultation (if it is appropriate and practicable to do so); and
  - review the information and determine whether the authorisation conditions are met.
- In cases which are not referred to an AMCP, the reviewer must:
  - review the information; and
  - determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

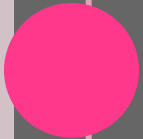


- The responsible body cannot authorise arrangements unless the person carrying out the pre-authorisation review has determined that the authorisation conditions are met (in AMCP cases) or that it is reasonable for the responsible body to conclude that the authorisation conditions are met (in non-AMCP cases).



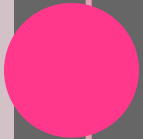
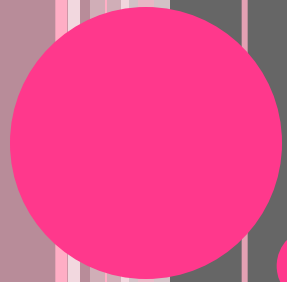


# CONSULTATION



- Before arrangements can be authorised, consultation must take place with the following individuals in order to ascertain the person's wishes or feelings, (unless it is not practicable or appropriate to do so):
  - the person;
  - anyone named by the person as someone to be consulted;
  - anyone engaged in caring for the person or interested in the person's welfare;
  - any donee of a lasting power of attorney or an enduring power of attorney;
  - any deputy appointed by the Court of Protection; and
  - any appropriate person and any independent mental capacity advocate.
- In addition, before authorising arrangements, the responsible body must:
  - be satisfied that any duty to appoint an appropriate person or independent mental capacity advocate has been complied with; and
  - has arranged a pre-authorisation review which has been completed.





# CARE HOME ARRANGEMENTS

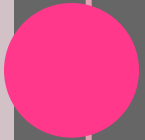
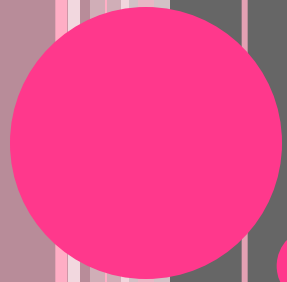


- In such cases, the responsible body can decide if:
  - it will arrange the necessary assessments and other evidence to be provided; or
  - whether the care home manager should do so.



- Care home manager is performing this role:
  - required to provide a statement to the responsible body confirming that:
    - the person is aged 18 or over,
    - the arrangements give rise to a deprivation of the person's liberty (with reasons);
    - the arrangements are not mental health arrangements or requirements (see below);
    - the “authorisation conditions” are met;
    - they have carried out the required consultation (see above), and
    - they are satisfied (with reasons) that i) either para 24(2)(a) or para 24(2)(b) (of sch 2) applies; ii) neither of those paras apply or iii) it is not satisfied that a decision can be made as to whether either applies.
- The statement must be accompanied by:
  - a record of the assessments confirming that the authorisation conditions are met;
  - evidence of the consultation carried out, and
  - a draft authorisation record.





# EFFECT AND DURATION

- Can come into effect immediately, or up to 28 days later
- Does not provide a general authority to deprive a person of their liberty
- Instead, those carrying out the arrangements are provided with a defence to civil or criminal liability

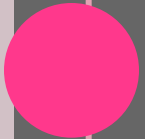
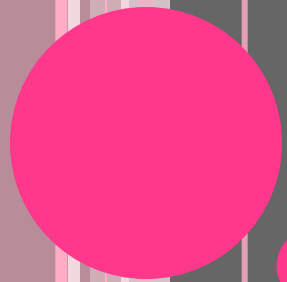


- Initial period of up to 12 months
- Can be renewed for a second period of up to 12 months
- Can be renewed thereafter for periods of up to 3 years



- Responsible body can decide authorisation should cease at any time
- Also ceases if any of the authorisation conditions not met ie
  - the person has, or has regained, capacity to consent to the arrangements;
  - the person does not have a mental disorder; or
  - the arrangements are no longer necessary and proportionate
- Also ceases to have effect if not in accordance with requirements of a community power under the Mental Health Act 1983, such as guardianship or a community treatment order, to which the person is also subject.





# RENEWALS AND REVIEWS

- A responsible body can renew an authorisation if it is satisfied that:
  - the authorisation conditions continue to be met, and
  - it is unlikely that there will be any significant change in the person's condition during the renewal period which would affect whether those conditions are met.
  
- The responsible body must specify a programme of regular reviews of authorisations. This must be set out in the person's authorisation record and could include fixed dates or prescribed intervals.





- A review must also be carried out:
  - before an authorisation is varied, or if that is not practicable or appropriate, as soon as practicable afterwards;
  - if a reasonable request is made by a person with an interest in the arrangements;
  - if the person becomes subject to mental health arrangements or requirements;
  - if (in any other case) there has been a significant change in the person's condition or circumstances.
  
- “The reviewer” is the responsible body unless, in relation to care home arrangements, the responsible body decides the care home manager should be the reviewer.





# **INDEPENDENT MENTAL CAPACITY ADVOCATES**

- The responsible body is required to take reasonable steps to appoint an IMCA if:
  - the person has capacity to consent to the appointment and requests an IMCA, or
  - the person lacks capacity to consent, unless the responsible body is satisfied that being represented and supported by an IMCA would not be in the person's best interests.
- This duty however does not apply if there is an “appropriate person” to represent and support the person

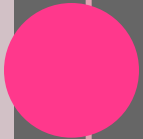
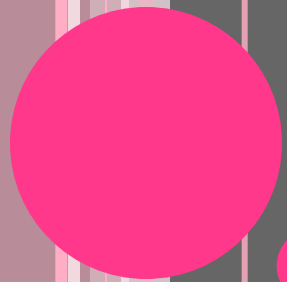




# CHALLENGING AN AUTHORISATION

- Applications will be made to the Court of Protection
- S.21A is replaced by s.21ZA
- Application can be made by:
  - P
  - Others with the permission of the court
- Court will determine:
  - any question relating to whether the LPS apply to the arrangements,
  - whether the authorisation conditions are met,
  - the duration of the authorisation and
  - what the authorisation relates to.
- In doing so, the court can make an order varying or terminating the authorisation, or directing the responsible body to vary the authorisation.





**KEEPING UP TO DATE**

- <https://www.39essex.com/resources-and-training/mental-capacity-law/>
- <https://www.scie.org.uk/mca-directory/>



**NOT THE END**

