

# BASW MCA Webinar

## Mental Capacity – DoLS to LPS

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# ECHR Article 5: Right to liberty and security

- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law.
- Exceptions for categories inc. “Unsound Mind” + convicted criminals, persons with infectious diseases etc.
- Everyone who is deprived of his liberty ... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful

# Key Law

- MCA 2005 – Commenced 2007 –
- DoLS Commenced 2009 via MHA 2007
- Mental Capacity (Amendment) Bill currently in Parliament probably to become:
- Mental Capacity (Amendment) Act 2019 with regulations and a new Code of Practice to follow

# Bournewood Gap Re-opens

- HL v UK ECtHR 2004
  - **House of Lords** UKHL 24 [1999]
  - Re “L” **Court of Appeal** EWCA Civ 2879 [1997]
  - R v Bournewood Community and Mental Health NHS Trust ex parte L All E.R. 289 [1997]
  
- Cheshire West and Chester Council v P, Surrey CC v P, UKSC 19, Supreme Court, March 2014

# A system under pressure?

- Number of DoLS increase every year
- MCA generally and DoLS in particular, poorly understood/applied
- Major impact of *Cheshire West*:
  - A gilded cage is still a cage (Hale)
  - Acid test – continuous supervision and not free to leave

Particular pressure on cases excluded from local DoLS

- People in their own homes
- Supported Living and Shared Lives etc – legally own home

# DoLS 6 tests – overly bureaucratic?

- Age (18+)
- No refusals – re advance decisions
- Eligibility – re MHA interface
- Mental Health – impairment for ECHR A5 cf CRPD
- Capacity – negative test
- Best Interests (least worst?)

# MC(A)B – A simplified system?

- DoLS to become Liberty Protection Safeguards (LPS)
- 3 tests to replace 6
- Capacity essentially unchanged but less formal?
- Mental Health – NOT MI - “unsound mind” or “mental disorder”
- “Necessary and proportionate” subs for “Best Interests”
- Includes harm to others – should it?

# Rushed legislation – rethought?

- No new definition of DoL
- Pivotal role for Care Home Managers
- 16-17 year-olds initially not included
- Ambiguous roles for LAs as Responsible Bodies
- AMCP – parallels to AMHP but no tribunals
- IMCAs – who to appoint?



# Rushed legislation – rethought?

- MHA/eligibility interface – Wessely review due 12/12
- Speedy review but court of ECHR A5 compliance?
- Who will appoint/fund new assessors?
- Much ambiguity but Govt promising more amendments, regs and CoP
- Impact assessment (funding) needs to match amendments