



A hidden crisis: Older people and deprivation of liberty in care homes

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1: Introduction

Our right to personal liberty dates back to Magna Carta in 1215, if not before: **“No free man shall be seized or imprisoned...except by the lawful judgement of his equals or by the law of the land.”** This fundamental idea, which was further developed and enshrined in the Habeas Corpus Act in 1679, is at the heart of our understanding of what it means to be free and to live in a democracy. It is part of our birthright and something we are proud of and rightly hold very dear in this country.

More recently, the right to personal liberty has been protected by Article 5 of the European Convention on Human Rights, and it cannot be infringed or removed except in very specific circumstances, when a proper legal process must be followed. However, sometimes, older people and others who lack the mental capacity to consent to their treatment or care in a care home or hospital may need to be deprived of their liberty in order to receive the care they need and stay safe. Before this can happen, the law says that a process called the Deprivation of Liberty Safeguards (DoLS) must be followed by the local authority. DoLS provides a set of checks to make sure that the deprivation of liberty is in the person’s best interests, is necessary to prevent harm to that person, and is a proportionate response to the likelihood and seriousness of that harm.

When DoLS works well it is a crucial safeguard for older people and others who lack, or are perceived to lack, mental capacity. It means that this group of people, who by definition often find it difficult or impossible to advocate for themselves, cannot simply have their right to liberty removed without any checks to ensure that this is the best option for them, in their specific circumstances – a humane and civilized response to a difficult set of circumstances.

But despite the paramount importance that we attach to upholding personal liberty here and the existence of these protections, DoLS is not working well in practice, and for an alarming number of older people is not working at all. Chronic under-funding of the scheme by central Government has led to serious problems with its local administration, leading to an ever-growing backlog of DoLS cases that is so vast it can now probably never be eradicated. Since 2015/16 the estimated number of uncompleted DoLS applications has remained at over 100,000, and in 2022/23 126,000 applications went uncompleted (**figure one, below**). Where applications were completed, it took an average of 156 days for a standard authorization - vastly longer than the statutory timeframe of 21 days (**figure two, overleaf**).¹

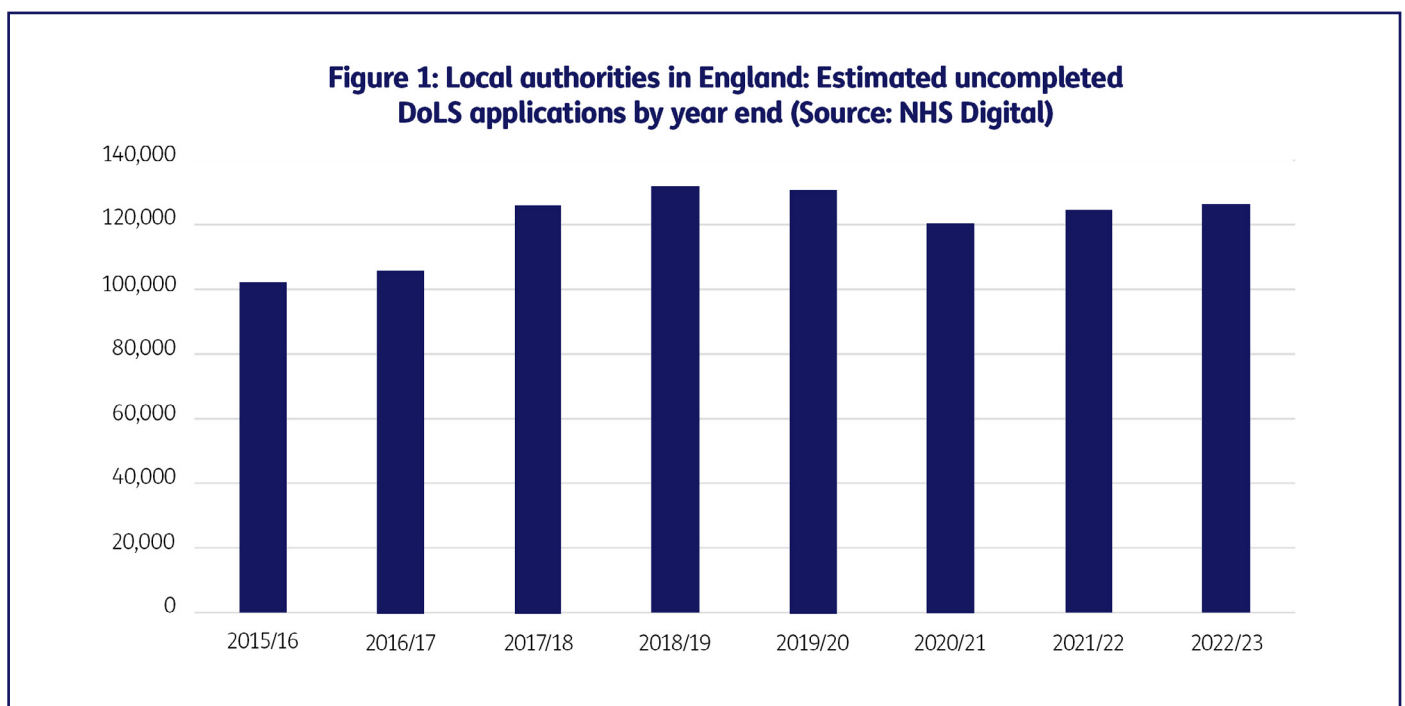


Figure 1

Figure 2

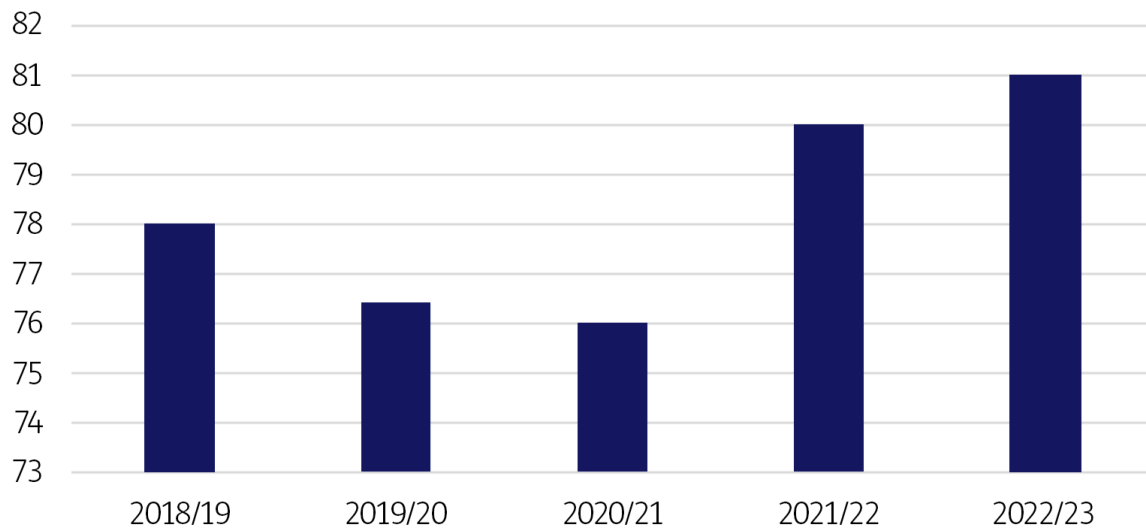


Figure 2

This means that many older people and others who lack, or are perceived to lack, mental capacity, will have been unlawfully deprived of their liberty for long periods of time before a DoLS assessment was carried out and a DoLS authorisation issued, without anyone external to the care setting checking whether this was in their best interests. In many cases the decision to constrain the individual's freedom for their own good probably would have fulfilled the criteria but within such a huge number there is inevitably a risk of injustice for some individuals, whose lawful right to liberty will have been inappropriately denied.

The Local Government and Social Care Ombudsman has also identified instances where local authorities had effectively adopted a policy of not even trying to deal with large numbers of low and medium priority applications.² The problems with DoLS particularly affect older people – 84% of people subject to a DoLS application in 2022/23 were aged 65 years or over; and in 2022/23, 49,325 people died while waiting for their application to be dealt with.³ The reality therefore is that the rights of some of the most vulnerable older people in our society have been and continue to be routinely denied.

The problems with DoLS are arguably part of a wider story of policy neglect and underfunding impacting social care. The current social care staffing crisis means that care homes often do not have sufficient staffing levels to deliver care in a way that properly reflects the human rights principles set out by the DoLS and the Mental Capacity Act. Care home managers do not always have the resources to provide person-centred care and this means that care practices can be more restrictive than they ought to be, and that the minimal restrictions specified in DoLS authorisations are not always adhered to or reviewed. For example, people may be locked up for long periods in their room in a care home, or not supported to go outside or to leave the setting at all due to a lack of staff to accompany them.⁴ There are also concerns that in some instances restless residents are simply sedated to keep them quiet.

In addition to worries about these resource issues there has been significant criticism of DoLS since their introduction in 2009, most notably in a 2014 House of Lords report which set out the difficulties facing those working with DoLS. It found that DoLS are often not used when they should be, leaving individuals without intended safeguards; issues with the complexity and bureaucratic nature of DoLS; and concluded that the 'legislation is not fit for purpose'.⁵ The CQC have highlighted a widespread lack of knowledge of the principles of the Mental Capacity Act among care professionals, a lack of training, and inadequate support for individuals or families who want to challenge DoLS decisions.⁶

In addition, Age UK's own research, set out within this report, found a marked lack of concern from some professionals and others caught up in the system about the absence of proper DoLS processes being followed, on the basis that what really mattered was that the individuals in question were safe. This is understandable to a degree, given our beleaguered system of social care and health services within which it is by no means certain that an older person with, say advanced dementia, will be able to access the support they need to stay safe. However, at Age UK we think we need to challenge this narrative, partly because infringing liberty can be a *'slippery slope'*, and also because we passionately believe that no older person should be deprived of basic rights that the rest of us take for granted, just because they are unwell or disabled.

In response to criticism of DoLS the Government planned to replace DoLS with a new framework known as the Liberty Protection Safeguards (LPS), which were set out in the Mental Capacity (Amendment) Act 2019. The reforms were intended to improve human rights outcomes for those deprived of their liberty, with the introduction of a simplified authorisation process applying to all settings, not just care homes and hospitals. Under the LPS, the NHS would also take on responsibility for authorising deprivations of liberty in certain circumstances, e.g., where the person is a patient in an NHS hospital.

These plans for LPS were not universally welcomed it should be said, in large part because of concerns about the lack of resources within care settings and local authorities to implement them.

However, in any case, despite initial plans to introduce this framework in October 2020 the Government said that this would now not be possible and announced a new implementation date in April 2022. This date was subsequently pushed back pending consultation and then in April 2023, the Government announced that the implementation of the LPS would be delayed beyond the life of the current Parliament – effectively kicked into the long grass for a future administration to deal with.

Meanwhile, no extra funding has been made available to ensure that local authorities are able to meet their statutory responsibilities under DoLS and there is no policy in place to tackle the huge DoLS backlog. Therefore, a decade after the House of Lords report which branded DoLS a failure there is still no alternative set of arrangements and hundreds of thousands of older people have lived and died without the legal safeguards that were supposed to protect them and their liberty.

Against this shocking and depressing story of a lack of Government leadership and policy drift, Age UK commissioned Britain Thinks to undertake qualitative research with care home staff, representatives of local authority DoLS teams, and families of those affected by DoLS to understand more about how DoLS operates in relation to care homes and to enable us to gain a better understanding of the issues affecting DoLS and the impact on older people. The main findings are reported below and form the basis for the arguments we make for reforming the DoLS framework.

The long-term Government failure to grasp the nettle around DoLS is arguably symptomatic of a broader failure to reform and refinance social care. It might be considered by some to be a niche issue – it is certainly not nearly as widely known about as it should be – but in our view at Age UK it really does matter - because older people matter. We support reform of the DoLS system, via the LPS as long as it delivers effective human rights protections for older people and is fully funded. In the meantime, we believe the Government should properly fund DoLS until such time that reform of the system can take place, and put in place policies to ensure that local authorities can begin to tackle the backlog.

We are very clear that every day this does not happen, highly vulnerable older people are being let down because they are being denied their legal rights in plain sight, and that's fundamentally wrong.

2: Recommendations

- **Urgent action must be taken to resolve the ongoing human rights crisis around DoLS** and ensure that the rights of older people, who lack, or are perceived to lack, mental capacity, are not forgotten or ignored.
- Until any reform of DoLS comes into force, **the current DoLS system must be properly funded** so that local authorities can properly deal with the number of new DoLS applications and uphold the rights of older people. **Funding for this should be ring-fenced so it is not spent elsewhere.**
- Local authorities must be supported to recruit sufficient staff to ensure that **adequate time can be given to DoLS assessments** and that these can be meaningfully carried out and the needs of older people placed at the forefront of the process.
- Alongside the above, **the Government must face up to the existence of the massive backlog**, decide once and for all what to do about it and then speedily implement that decision.
- We **support the reform of deprivation of liberty arrangements via the introduction of the Liberty Protection Safeguards (LPS), as long as they protect people's rights to liberty.** Before any implementation of the LPS, the Government must engage with stakeholders to ensure that the safeguards are robust and protect people's human rights.
- **The LPS must be fully funded** to ensure that local authorities and the NHS are able to meet their legal obligations.
- **Whether or not the Government implements the LPS, it must confirm as quickly as possible what the future system will be**, as delays and indecision are having a significant impact on the day-to-day functioning of the system and leaving many unprotected.
- **The Government must clearly communicate plans for DoLS reform via the introduction of the LPS or other measures so that local authorities can plan effectively.** Local authorities should continue to recruit Best Interest Assessors until DoLS is replaced to ensure that there are sufficient staff available to carry out DoLS assessments. Because of the lack of clarity, we have heard from one local authority which has stopped recruiting BIAs, further exacerbating problems within the system. This situation is unsustainable and highlights the urgency of making reform plans clear.
- While we have spoken to people involved in running the DoLS process **the voices of those affected by DoLS are missing in discussions about this topic.** They are not included in this research because many, if not all, potential participants would not have the capacity to consent to being part of the research project. We encourage organisations whose role includes speaking to people using care services, such as the CQC, to prioritise engagement and research with this group.
- Our research found that despite a legal framework which places value on the rights, opinions and best interests of older people and others, older people's rights were rarely centred in practice. **A cultural shift is required within social care to ensure that older and disabled people's rights are recognised and protected, via the progressive values and aims of the Mental Capacity Act**, and that professionals who work with the DoLS framework understand and feel confident in enacting these values.
- Efforts to tackle staff shortages in social care must **ensure that care homes have sufficient numbers of staff** to avoid unnecessarily restrictive practices due to understaffing. Care staff also need the training and skills to ensure compliance with both DoLS and the Mental Capacity Act.
- **Reform of and investment in social care** is needed to ensure that care settings have the resources to uphold the principles of the Mental Capacity Act and DoLS.
- Future social care planning should aim to ensure that **settings can support older people's freedoms and choices** to as great a degree as is possible.

3: About the research

In light of our concerns about the DoLS, Age UK commissioned Britain Thinks to undertake the research that forms the basis of this report, to enable us to better understand the impact on older people and the stakeholders involved in its implementation.

The research and this report is concerned with how the DoLS apply in England.

The research focuses on how DoLS operate in care homes as this is the setting the majority of DoLS applications relate to. In 2022/23, 64% of DoLS applications in England related to people living in care homes.

While our research examines deprivations of liberty in care homes, there are also grounds for concern about how the DoLS operate in hospitals. The Care Quality Commission (CQC) in its 2022/23 *'State of Care report'* highlight how, for example, people are at risk of being unlawfully deprived of their liberty in hospital emergency departments while waiting to be admitted to a ward. An examination of how the DoLS operate in hospitals would be a fruitful area of future research, which would complement the findings of this report.

How the research was conducted

Britain Thinks conducted in-depth telephone interviews with three types of DoLS stakeholders -

- Six family members of people subject to a DoLS authorisation
- Six care home staff who refer DoLS cases and provide care for people who are subject to DoLS authorisations
- Eight local authority staff responsible for processing and authorising DoLS cases

We wanted the research to feature these three groups, to ensure we captured the perspective of those responsible for applying the DoLS in practice, namely care homes and local authorities, as well as representatives of those affected, namely the family members of those subject to DoLS authorisations.

The key group not included in the research is older people subject to DoLS authorisations. We were unable to include this group as many, if not all, potential participants who are subject to DoLS would lack mental capacity to give informed consent to being part of the research. This is a challenge facing all research on this topic. We encourage organisations which have statutory responsibilities in this area to prioritise engagement and research with this group.

The interviews were carried out between January and February 2023 and the case studies and insights drawn from those interviews form the basis of this report.

The interviews were carried out on a confidential basis, in compliance with the Market Research Society Code of Conduct. In the case studies, names have been changed to ensure anonymity of interviewees.

The local authorities and care homes included in the research were drawn from a range of locations, to ensure we captured a broad range of experience across England.

4: What are the Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards is a procedure under the Mental Capacity Act (2005) by which a person aged 18 or over in a care home or hospital can be lawfully deprived of their liberty for the purposes of their care or treatment if they lack mental capacity to consent to their care or treatment arrangements.

Why were DoLS introduced?

The DoLS were introduced to protect the right to liberty provided for by Article 5 of the European Convention on Human Rights of people lacking mental capacity who may need to be deprived of their liberty in a care home or hospital. Under Article 5, no one can be deprived of their liberty except in very specific circumstances, when a legal process must be followed. Those deprived of their liberty under DoLS have access to the Court of Protection, a specialist court established by the Mental Capacity Act, to challenge their detention.

Current DoLS procedure

The DoLS procedure should begin when a care home or hospital believes a person in their care is likely to be deprived of their liberty within the next 28 days. The care home or hospital must apply to the local authority for a '*standard authorisation*' to deprive the person of their liberty.

Once an application for a standard authorisation has been received, the local authority has 21 days to check whether the six '*qualifying requirements*' set out in the Mental Capacity Act have been met. This includes a requirement to check that depriving someone of their liberty is in their best interests, is necessary to prevent harm to that person, and is a proportionate response to the likelihood and seriousness of that harm. Where all six requirements are met, the local authority must authorise the deprivation of liberty, which can last up to one year. Where one or more of the requirements are not met, the local authority must refuse authorisation and the care home or hospital must ensure the person is not deprived of their liberty.

If someone needs to be deprived of their liberty before a standard authorisation can be obtained, the care home or hospital can grant themselves an '*urgent authorisation*' for up to seven days while they apply for a standard authorisation. An urgent authorisation can be renewed once, by the local authority, for a further seven days. Where an urgent authorisation is in force, the local authority must determine whether the requirements for a deprivation of liberty are met before it expires.

5: DoLS fails to protect human rights due to a lack of resources

Funding for DoLS does not meet the demand for DoLS applications

The Deprivation of Liberty Safeguards are significantly under-resourced and the system suffers from a long-term lack of investment. A large backlog of cases has been in place for many years - since 2015/16, the estimated number of uncompleted DoLS applications in England has remained at over 100,000, peaking at 131,350 in 2018/19. In 2022/23, 126,100 applications were not completed. Statutory timescales are rarely met – in 2022/23 the average length of time for completion of an application was 126 days (a standard application should be completed in 21 days), and over 75% of DoLS standard applications have not been completed within statutory timescales each year since 2017/18.⁷ In practice this means that large numbers of vulnerable older and other adults are likely to have been unlawfully deprived of their liberty,⁸ in many cases for long periods of time.

The DoLS backlog initially developed in part due to an increase in applications following a Supreme Court decision known as ‘Cheshire West’, which provided a clarification of the meaning of ‘deprivation of liberty’ for the purposes of the DoLS process. The ruling broadened the definition of deprivation of liberty because it meant that people who lacked mental capacity in social care settings who had previously had their liberty restricted (even if they had not objected to it) now required a DoLS authorisation. This was to ensure that the test for deprivation of liberty was the same for everyone whether or not they had a disability. It meant that some arrangements that had been considered ‘usual’ before 2014, such as preventing patients with dementia from leaving a care home, now required a DoLS assessment in authorisation to ensure that the Deprivation of Liberty was proportionate and that effective safeguards were in place. **The ruling increased the safeguards available to older people and others who lack capacity to make decisions about their care but also placed an increased administrative burden on local authorities.**⁹

Despite these changes, funding for DoLS has not increased sufficiently to match the demand for applications. While initially the Government did not anticipate the number of DoLS applications that would follow the above judgement (the initial impact report suggested that there would be an upper estimate of 21,000 cases a year,¹⁰ while in 2022/23 there were almost 300,000 applications)¹¹, there has never been an adequate financial response. **More than 10 years on, funding for DoLS remains insufficient for the number of cases received and the backlog of DoLS cases remains significant.**

The Government acknowledges that the system is considerably under-resourced and cannot cope with the number of cases. In its impact assessment for the Liberty Protection Safeguards, dated March 2022,¹² the Government estimates that fully operationalising the DoLS process to ‘cope with the actual number of applications since the Cheshire West and Re D judgements’ and reduce the backlog in relation to supervisory bodies (including local authorities) and the courts, would cost in the region of £2.45 billion per annum, a significant increase from the estimated 2022 costs of £527.18 million per annum listed in the same document. They state that fully operationalising the DoLS would mean that: **‘assessments would all take place within statutory time limits, cases would be taken to Court when they should be, and referrals would be made by managing authorities when they should be...it would improve human rights outcomes, as fully funding DoLS would enable local authorities to process all cases within statutory time limits.’**

Despite this acknowledgement, little has been done to address the funding issues leading to the backlog, or to make additional funding available to clear the existing backlog of cases. The expected introduction of the Liberty Protection Safeguards was intended to reduce the resource pressures on the system, via a simplified authorisation route, but after proposed implementation dates in October 2020 and April 2022, the Government recently announced that the implementation of the LPS would be delayed ‘beyond the life’ of the current Parliament. The Government has also not said how or whether it would tackle the existing backlog of cases during the roll-out of the new system. While the Department for Health and Social Care has recently committed to making an additional £7.5 billion in funding available for adult social care and discharge,¹³ none of this has

been ring-fenced to tackle the DoLS backlog or fund DoLS. Given other current pressures in social care, we are concerned that funding will not be prioritised to address the issues within DoLS and to tackle the backlog.

Under the current system, older people's rights continue to be breached and this breach has now become commonplace, as action to resolve the issue has been continuously delayed. As with other policy areas affecting older people, we believe it is likely that ageism, age discrimination and ableism plays a significant role in the deprioritisation of this issue. Urgent action must be taken to resolve the ongoing human rights crisis around DoLS and ensure that the rights of older people who lack, or are perceived to lack, mental capacity are not forgotten or ignored. **Notwithstanding the valid criticism of DoLS, we believe the application of DoLS procedures, in the absence of a replacement such as the LPS, are vital for the protection of the rights of older people and other adults who lack, or are perceived to lack, mental capacity.** Until any reform of DoLS comes into force, **the current DoLS system must be fully funded** so that local authorities can properly deal with the number of new DoLS applications and uphold the rights of older people. **Funding for this should be ring-fenced** so it is not spent elsewhere. **The Government must also introduce a new policy that will enable local authorities to deal with and reduce the backlog, alongside tackling new cases.**

Resource pressures at the local level

The operation of DoLS at the local authority level is affected by the lack of Government funding and investment in the system. Local authorities continue to face large funding gaps and high levels of demand in relation to adult social care. This has a significant impact on the operation of DoLS and contributes to the backlog. In addition to funding pressures, our research found that low staffing levels and difficulty in recruiting staff qualified to carry out DoLS assessments further impacted on the ability of local authorities to complete high levels of DoLS applications.

“It’s more staff, that’s the only way around it. More staff and better pay” - Local authority representative

“Recruitment is a huge issue...if you can’t recruit people, you can’t get through the backlog” - Local authority representative

“We are having money taken away and there needs to be more” - Local authority representative

Difficulty in recruiting staff for DoLS teams in local authorities makes it challenging for local authorities to effectively manage the number of DoLS applications they receive, particularly as these continue to rise (there were 11% more DoLS applications in 2022/23 than the previous year)¹⁴ and this **contributes to a growing backlog**. A social worker interviewed for our research felt that the large backlog of DoLS applications at their local authority was “almost impossible to clear”, adding that there are simply not enough staff to get everything done and she is “constantly playing catch-up”.

Local authorities also told us that there is **a shortage of Best Interest Assessors (BIAs)** to carry out Best Interest Assessments, a key part of the DoLS process. BIAs are often social workers with other responsibilities outside of the DoLS team. Because of these other responsibilities it can be difficult to secure their time to work on DoLS applications. Insufficient staffing leads to delays in completing assessments and DoLS applications cannot be progressed. Some local authorities contract agency BIAs to resolve some of these issues, but others noted that it was difficult to recruit people due to poor levels of pay and high levels of responsibility. **The expected introduction of the Liberty Protection Safeguards (now delayed until at least the next Parliament) also meant that some local authorities stopped training BIAs as under the LPS this role would have become obsolete.** This is also contributing to resource pressures in the current system.

“With the legislation changing over to the LPS you often find LAs aren’t doing the BIA training anymore, which causes more delays. We’re in limbo waiting for the LPS to be introduced!”

- Local authority representative

A lack of Best Interest Assessors may also impact on the extent to which the DoLS framework is meaningfully engaged with. If there are too many cases to get through, it is likely that in some cases assessors will not have time to effectively engage with the framework, for example to consider whether there are less restrictive alternatives to depriving the person of their liberty. One local authority representative stated:

“Less people will be deprived of their liberty if there is more money. Are there enough people working to properly scrutinise each case and see if there are any other options?”

One family member told us that the Best Interest Assessor “barely engaged” with her father and the experience of the Best Interests Assessment felt like a “box-ticking” exercise. Such lack of engagement raises questions about whether the current operation of the DoLS process is meaningful, or whether it is effectively operating as a ‘rubber stamp’.

Increased funding must be made available to local authorities and **strategies put in place to increase the recruitment of social workers with the correct skill set** to undertake DoLS assessments. Now that the Government has postponed the introduction of the LPS, **training for BIAs should recommence where this has stopped**, and the **Government must communicate clearly with local authorities about any future plans for LPS roll-out or DoLS reform to ensure that local authorities are able to ensure a smooth transition to any new system.** Work should also be carried out to **ensure that staff have the resources and knowledge of older people’s rights under the Mental Capacity Act to properly engage with the person being assessed for DoLS and their rights.**

Resource pressures in social care

While fixing the funding and resourcing issues affecting the processing of DoLS applications at the national and local authority level is essential, these are not the only resourcing issues facing DoLS. **The day-to-day management of DoLS operates in a social care system that is severely underfunded, that cannot meet the demand for services, and which suffers from a significant shortage of staff due to a workforce crisis.** These issues impact on both the rights and care of older people who lack, or are perceived to lack, mental capacity who are deprived of their liberty before a DoLS authorisation has been put in place, as well as the rights of those who have a DoLS authorisation but who may live with more severe restrictions of their freedom than are really necessary. In addition, the current DoLS backlog and waiting times can place additional strain onto care providers who may need to provide care for residents who need a DoLS authorisation but must wait for one, or potentially place them in a difficult legal situation if they deprive someone of their liberty but a DoLS authorisation has not been received.

The operation of DoLS in a pressured social care system

In some care settings, older people and others deemed to lack mental capacity are having their liberty taken away from them for long periods of time - the average time in 2022/23 was 156 days,¹⁵ significantly more than the statutory timeframe of 21 days - before a DoLS authorisation has been put in place, with no health or social care professional external to the care home checking whether this right for the resident, or whether the restrictions are the minimum level needed.

In these circumstances, for example where a care provider is placing restrictions on someone’s liberty before a DoLS authorisation is completed, **the care provider is making decisions about whether an older person should be deprived of their liberty and to what extent, without an external check.** The point of DoLS is to protect human rights by ensuring that a set of external checks, covering mental capacity and an assessment of whether a deprivation of liberty would be in someone’s best interests, is carried out before an external decision maker makes a decision about whether the deprivation of liberty can be authorised. In many cases, these checks are not being carried out and it is concerning that we are currently in a position where arrangements to deprive someone of their liberty may be taken by care home staff who are also responsible for that person’s care. **This is particularly worrying in the current social care context, where despite the efforts of many excellent and hardworking care staff, resources are extremely stretched** and staffing pressures mean that care home managers and staff cannot always provide the level of care they would wish.

“There is such a shortage of staff, and we do feel under pressure – there is just too much to do in a shift”

- Care home staff member

Skills for Care figures show that in 2022/23, there were more than 152,000 vacant posts across the care sector.¹⁶ Staff turnover is also high at 30% in the same period. Staff working in care homes are often responsible for caring for a large number of residents, many of whom have complex needs, and staffing shortages impact on the quality of care that care homes are able to provide. For example, **care home managers told us that they feel overburdened and spread too thin with the amount of administration that is required of them, while junior care workers felt that they didn't have enough time to spend with each resident to deliver proper care.** This is supported by findings highlighted in a UNISON survey¹⁷ of care workers that shows that in some care homes there are not enough carers to deliver a good standard of care, that too little time is spent with residents due to high levels of work, and that support with feeding or bathing is rushed or doesn't happen, and residents are sometimes put to bed early because staff need to attend to other tasks.

In a context where resources are highly stretched, **care home managers need to make decisions about how to use available resources within the care home, and these decisions may conflict with the needs and best interests of older people.** As a result, there are likely to be circumstances where older people are deprived of their liberty where they otherwise might not need to be, or where care practices are overly restrictive because there are too few care staff to support less restrictive care. In the CQC's 2021/22 'State of Care' report, they note that there has been an increase in restrictive practices where a DoLS authorisation has not been applied for or authorised. They give examples of people's rooms being locked, people being confined to their rooms, and people being prevented from leaving the service, e.g., to go outside for fresh air or to visit home, before a proper DoLS authorisation is in place.

These restrictive practices are obviously concerning. Resource pressures and the social care staffing crisis mean that even where there is a DoLS authorisation in place, an older person may still be subject to more restrictive practice than is necessary. While the aim of DoLS is to ensure that the minimum level of restriction is used in any given case, in care settings with staff shortages, it may be difficult to find someone to help an older person leave their room even for a short time, and in practice it is hard to know whether minimum restrictions are always followed.

Workforce challenges, including a high turnover of staff, also mean that in some cases staff have not had sufficient training to properly understand the principles of the Mental Capacity Act and DoLS. In their 2022/23 report, the CQC note that care home staff do not always implement the conditions attached to DoLS orders such as supporting access to places of worship or visits to a relative's home, due to a limited understanding of the DoLS framework among care providers.¹⁸

For DoLS to effectively protect the rights of those who need restrictions on their liberty, **sufficient resources are needed to ensure that older people are supported to live their lives with as much freedom as possible.** Solutions to the workforce crisis in social care must be found to ensure that care homes have enough staff to provide care in line with their duties under DoLS and the Mental Capacity Act, which supports people's liberty as far as possible, and which avoids unnecessarily restrictive practices. Staff must also receive effective training on DoLS and the Mental Capacity Act.

Care providers and families are placed in a difficult position

Long waits for DoLS authorisations also place care providers in a difficult position and can place a further strain on stretched resources. A person cannot be deprived of their liberty in a care home unless there is a DoLS authorisation in place. However, care home staff commonly experience a delay of weeks or even months for a standard DoLS authorisation to be given. One care home representative told us that, in some cases, they had been waiting for over a year for authorisation to be given. Another stated that the wait for authorisation can be “4-6 weeks or 4-6 months”. It appears that a common practice is for care homes to cover the initial deprivation of liberty under an urgent DoLS authorisation, which they can grant themselves for a maximum of 7 days, and which can be renewed by the local authority, once, for a further 7 days, while waiting for a standard authorisation.

Once an urgent authorisation has expired, any deprivation of liberty without a standard authorisation is unlawful. In these circumstances, care home staff are faced with a difficult choice. If they place restrictions on someone who may need them, they are at risk unlawfully depriving the person of their liberty, but if they follow the law and do not deprive someone of their liberty while they wait for a DoLS authorisation to be approved, they then face the challenge of keeping someone who may be at high risk of harm safe. This situation can also be distressing for family members, **as shown by the case study below:**

Case study: Helen's grandad

“I was saying ‘let’s do it [the DoLS application] today’. But it took ages. It took six weeks and he was running around all over the place. They said there was backlog and there were more urgent ones they had to deal with. I was pleading with staff ... saying **“stop him”**, they were saying **“Helen*, we can’t – we’re not allowed to”**. It was frustrating.”

Helen's Grandad, Peter, has had Alzheimer's for a long time and has been living in care for two years. He was regularly leaving the care home and being found roaming the streets as he thought he was going to work. As the care home was close to a dual carriageway, Helen and her family felt a constant sense of dread that something serious would happen. Each time he left the care home, Helen had to come into the care home to speak to the staff.

As her Grandad's power of attorney, Helen was approached by the care home about implementing a DoLS. It was framed as a way which would enable staff to prevent him from leaving the home, and she was relieved that there might be a solution. They contacted the local authority and a BIA was assigned who organised a multi-agency meeting with the care home, Peter's GP, the family and the local authority. This was followed by a BIA assessment.

Following these assessments and meetings, Helen and her family heard almost nothing from the local authority about the application for over 6 weeks. They were informed there was a backlog, but in this time - as there was no emergency DoLS in place - her Grandad was regularly leaving the home on his own and the care home staff could do nothing to force him to remain. **Helen describes feeling totally helpless during this period and frustrated because she couldn't understand what was taking so long.**

When Peter's DoLS eventually came through it was a relief.

6: Further rights issues affecting DoLS

Older people's human rights are not always recognised by local authorities

Our research found that despite the DoLS framework existing to safeguard the right to liberty, this right was not always recognised in practice by local authority staff. While the local authorities included in our research all had a good understanding of DoLS and its legal role in ensuring that older people are not deprived of their liberty unnecessarily, **in some cases depriving an older person of their liberty without a DoLS in place was not viewed as a significant breach of human rights.**

“I am very aware of it [the backlog], it is a huge problem. You have lots of people who have a routine breach of their rights. And it is further impacted by the backlog in the courts. I see it more as an administrative problem. It is more of a procedural breach of human rights” - Local authority representative

There was further evidence that there seemed to be a lack of concern for older people's human rights and there was a **narrow focus on safety.**

“It's not nice to think you have people waiting. When you see the number waiting you do feel terrible. But it's not that big of a deal, those people are safe, and if there were concerns they would be raised and prioritised” - Local authority representative

“I don't think people [who are in care] are unsafe. We just need to ensure these service users are being treated in the least restrictive way. We need to ensure they're being safeguarded and it's lawful” - Local authority representative

It is concerning that local authorities do not always see the DoLS backlog as problematic for older people.

Making assumptions about the DoLS process or the size of the backlog not mattering because an older person is perceived to be 'safe' or because an eventual DoLS authorisation is seen as inevitable, risks diminishing the rights and experiences of a group of people who are likely to find it particularly difficult to speak out or have their voices heard if there is an issue with their care, or they have been subject to restrictions where these are not necessary.

In particular, a focus on 'safety' as mattering above all else is both paternalistic and inappropriate. Firstly, **we cannot assume that an older person who has had restrictions placed on their liberty is always 'safe'**, particularly where all the necessary assessments have not been carried out and the legal process has not been followed. Resource pressures in care homes mean that care is not always delivered to a high standard and that some older people will experience neglect or abuse. Older people who lack, or are perceived to lack, mental capacity in care settings are likely to be extremely vulnerable and may find it almost impossible to complain effectively about any mistreatment.

Secondly, **the assumption that safety is the only important priority in relation to decision-making about deprivation of liberty is too narrow.** Under the Mental Capacity Act, the person's autonomy and freedom should be promoted as far as possible and a deprivation of liberty seen as a last resort. As stated in the DoLS Code of Practice, 'any restrictions placed on the person while in ... a care home must be kept to the minimum necessary, and should be in place for the shortest possible period' and, 'every effort should be made... to prevent deprivation of liberty'.¹⁹ Where the sole focus is on safety, there is a risk that wider considerations, such as promoting independence and minimising restrictions, are not being properly taken into account. By not upholding the principles of the Mental Capacity Act, we risk returning to a system where the rights of older and disabled people are overlooked, ignored or devalued and which has failed to deliver an appropriate standard of care for many older people. **A culture shift is needed to ensure that the legal frameworks designed to protect the rights of older people are properly understood and upheld by professionals involved in making decisions and caring for them.**

“I struggle to see why you have to jump through all of these hoops for someone in a nursing home, when they're happy there and don't want to leave. It seems a waste of resource” - Local authority representative

7: Where are we now?

In light of criticism of the DoLS, the Government tasked the Law Commission with making proposals for reform. This culminated in the Commission's 2017 report, *'Mental Capacity and Deprivation of Liberty'*, which proposed a new set of safeguards, the Liberty Protection Safeguards (LPS), to replace the DoLS.

In 2018, the Government introduced the Mental Capacity (Amendment) Bill to legislate for the replacement of the DoLS with the LPS, based on the Commission's proposals. The Bill received Royal Assent in 2019 as the Mental Capacity (Amendment) Act 2019.

With the LPS, the Government aimed, among other things, to deliver improved human rights outcomes for those deprived of their liberty with the introduction of a simplified authorisation process applying to all settings, not just care homes and hospitals.²⁰

Furthermore, the Government considered the estimated cost of fully operationalising the deprivation of liberty framework (namely the DoLS and authorisations made by the Court of Protection) in the context of the large increase in applications detailed above. The Government proposed that the LPS would deliver the improved human rights outcomes of full operationalisation at reduced cost.²¹

Timeline: LPS delay and non-implementation

- The Government initially aimed to introduce the LPS in October 2020. However, in July 2020 it stated that it would not be possible to introduce the LPS within that timescale and announced a new implementation date of April 2022.²² In December 2021, the Government announced the LPS would not be implemented in April 2022, adding that no new implementation date would be given until after a consultation on the design and implementation of the LPS.²³
- In March 2022, the Government launched a consultation on changes to the MCA Code of Practice, including new chapters on the LPS, as well as draft LPS regulations.²⁴ Although the consultation closed in July 2022, at the time of writing the Government have not provided a response.
- In April 2023, the Government announced that the implementation of the LPS would be delayed 'beyond the life' of the current Parliament, stating, *'this was one of a number of decisions taken as part of prioritising work on social care'*.²⁵
- In the meantime, the Government has announced no further support specifically for DoLS or any further funding to tackle the backlog and the problem continues.

We urge the Government to take **immediate action to tackle the backlog**. In the longer term, we **support the reform of deprivation of liberty arrangements via the introduction of the Liberty Protection Safeguards (LPS), as long as they deliver human rights protections for older people and others who fall within its scope**.

While we support reform via the introduction of the LPS, we note concerns expressed by respondents to the Welsh Government consultation on the LPS Draft Regulations for Wales, about the definition of deprivation of liberty included in the draft Code of Practice intended to support the LPS. The response states that the draft Code's definition of deprivation of liberty under the LPS *'takes many vulnerable people who lack capacity out of the reach of Article 5, yet still allows for intensely restrictive care with no right to appeal or independent scrutiny'*.²⁶ This **raises questions about whether the LPS, as currently proposed, would offer sufficient protections to those who are deprived of their liberty**. Ahead of any future implementation, and given the time that has elapsed since the initial implementation date, the **Government must work with stakeholders to ensure that the safeguards are robust and protect people's human rights**. In addition, **the LPS must be properly funded** to ensure that local authorities are able to meet their legal obligations and that the rights of older people are able to be upheld.

8: References

Reference Number	Reference Information	Page Number
1	NHS Digital, Mental Capacity Act 2005, Deprivation of Liberty Safeguards statistics 2015/16, 2016/17, 2017/18, 2018/19, 2019/20, 2020/21, 2021/22, 2022/23	3
2	Local Government and Social Care Ombudsman, Investigation into a complaint against Staffordshire County Council (reference number: 18 004 809) , and Cheshire East Council (19 010 786)	4
3	NHS Digital, Mental Capacity Act 2005, Deprivation of Liberty Safeguards statistics 2022/23	4
4	CQC (2022) State of Care report 2021/22	4
5	House of Lords (2014) 'Mental Capacity Act 2005: post-legislative scrutiny'	4
6	Law Commission (2014) Mental Capacity and Deprivation of Liberty	4
7	CQC State of Care Report 2022/23	9
8	Department for Health and Social Care, Government Impact Assessment, Liberty Protection Safeguards, March 2022	9
9	Judgement, P v Cheshire West and Cheshire County Council: P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents), P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent) (supremecourt.uk).	9
10	Law Commission (2017) Mental Capacity and Deprivation of Liberty	9
11	NHS Digital, Mental Capacity Act 2005, Deprivation of Liberty Safeguards statistics, 2023/23	9
12	Department for Health and Social Care, Government Impact Assessment, Liberty Protection Safeguards, March 2022/23	9
13	DHSC response to the Joint Committee on Human Rights letter about the delay to LPS roll-out, dated 14 June 2023	9
14	NHS Digital, Mental Capacity Act 2005, Deprivation of Liberty Safeguards statistics, 2022/23	10
15	NHS Digital, Mental Capacity Act 2005, Deprivation of Liberty Safeguards statistics	11
16	Skills for Care (2023) The State of the Adult Social Care Workforce in England, 2022/23	12
17	UNISON (2021) 'Staffing levels are dangerously low'	12
18	CQC (2023) State of Care 2022/23	12
19	Deprivation of Liberty Safeguards Code of Practice, paragraphs 1.2 and 2.7	14

Reference Number	Reference Information	Page Number
20/21	Department for Health and Social Care, Government Impact Assessment, Liberty Protection Safeguards, March 2022	15
22	UK Parliament, Implementation of Liberty Protection Safeguards Statement made on 16 July 2020.	15
23	Letter from DHSC to Liberty Protection Safeguards (LPS) national steering group members, December 2021.	15
24	Consultation on changes to the MCA Code of Practice and implementation of the LPS, March 2022	15
25	Department of Health and Social Care, Liberty Protection Safeguards Newsletter, 5 April 2023. Reproduced in full by Alex Ruck Keene KC here.	15
26	Welsh Government (2023) Welsh Government consultation – summary of responses. Liberty Protection safeguards: Draft Regulations for Wales.	15



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