Care Quality Commission

Deprivation of Liberty Safeguards (DoLS)

This is the 2023/24 edition of State of Care

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Key findings

- Too many people are waiting too long for a Deprivation of Liberty Safeguards (DoLS) authorisation, despite multiple examples of local authorities trying their best to reduce backlogs and ensure sustainable improvement.
- We remain worried about the rights of people at the heart of the DoLS system. We continue to see people in vulnerable circumstances without legal protection, which not only affects them but also their families, carers, staff and local authorities.
- The system has needed reform for over 10 years. Unless there is substantial intervention, we are concerned that these challenges will continue.

The Deprivation of Liberty Safeguards (DoLS) were introduced under the Mental Capacity Act (MCA) 2005. The safeguards were designed to protect the human rights of people aged 18 or over if they do not have the mental capacity to consent to their care arrangements and they need to be deprived of their liberty. The safeguards apply in care homes and hospitals.

> If a person is deprived of their liberty, they are not free to leave the premises on a permanent basis, for example to live where and with whom they choose to, and they are subject to continuous supervision and control. This means they are monitored or supervised for significant periods of the day and they are not allowed to make important decisions about their own life. The safeguards are vital in ensuring that such deprivation of liberty only happens when it is necessary, proportionate and in the person's best interests.

Concerns have been raised about the effectiveness of the DoLS system for over 10 years. In 2014, the House of Lords MCA post-legislative scrutiny report warned of the lack of understanding and poor implementation of the safeguards, which meant that, "thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law."

In successive State of Care reports, we have raised strong concerns about the operation of DoLS, including delays in processing applications and the variable knowledge of staff about the safeguards. Across both health and social care services, we continue to find that many of the issues outlined in the House of Lords report are still relevant 10 years on and have been exacerbated by the stark increase in the volume of applications, bringing new challenges for the DoLS system.

DoLS were due to be replaced by the Liberty Protection Safeguards (LPS). These would have addressed the main limitations of the DoLS system, such as:

- streamlining processes

- extending the scheme to cover 16 and 17-year-olds
- giving families greater involvement
- applying the safeguards to additional settings, including people's homes and supported living services
- crucially, giving responsibility for issuing authorisations to NHS trusts and integrated care boards, along with local authorities, to reduce the strain on the system.

However, in April 2023, the government announced that the implementation of LPS would be delayed "beyond the life of this parliament". At present, it is unclear when or if the LPS reforms will be implemented. We are keen to establish a dialogue with the new government about this.

Within a system struggling to cope, in 2023/24 we continued to see people in vulnerable circumstances being left without legal protection with their rights affected. This not only affects people using services but also their families, carers, staff and local authorities.

The chronic backlogs

Ten years ago, a landmark Supreme Court judgement, known as 'Cheshire West', clarified and broadened the definition of what constitutes a deprivation of liberty. Since then, applications to deprive a person of their liberty have continued to increase far beyond the levels expected when the safeguards were designed.

This has culminated in local authorities facing unprecedented volumes of DoLS applications, and in many cases, continuing backlogs to process them, as we have reported in previous State of Care reports. In 2023/24, applications to deprive a person of their liberty increased to just over 330,000, an 11% increase compared with the previous year.

The delays in implementing LPS mean that local authorities are still the only organisations able to give a standard DoLS authorisation. To do this, local authorities have 21 days in which to assess whether the deprivation of liberty is appropriate. But in 2023/24, only 19% of standard applications were completed within the statutory timeframe. In recent years, backlogs for processing applications have remained high, with figures showing 123,790 people were waiting for an authorisation as at March 2024.

> Applications to deprive a person of their liberty must be authorised by a ‘supervisory body’. In England, the role of a ‘supervisory body’ is undertaken by local authorities, who are responsible for arranging assessments to make sure that a deprivation of liberty is only authorised if certain requirements are met. Standard authorisations can last for up to a year. If a person urgently needs to be deprived of their liberty before they have had a full assessment, providers can grant themselves an urgent DoLS authorisation. These can last up to 7 days and can be extended for a further 7 days if necessary.

We found a wide variation in how local authorities were managing applications in 2023/24. It was clear that some were struggling to process applications promptly enough, and yet one local authority had no backlogs. We continue to hear from our external stakeholders that the DoLS system is “not working” and there is “no movement once the application has been submitted.”

Some local authorities had high numbers of applications waiting to be reviewed, which meant some people had been waiting for an assessment for over a year. We are particularly worried about people’s human rights in these cases, as assessments may highlight that their care is more restrictive than it needs to be. When local authorities can carry out assessments, we have seen how this can identify unnecessary restrictions so that DoLS conditions can be used to mandate that care arrangements are the least restrictive possible.

Variation in backlogs between different local authorities means people in similar situations may have different experiences of the DoLS system because of where they live. Many factors contribute to this variation, including budget allocation, the make-up of local populations, and the number of hospitals and care homes in an area.

Local authority backlogs also have a knock-on impact on hospital and care home staff: while waiting for DoLS applications to be reviewed, they have to balance keeping people safe with protecting their rights. Our inspectors told us about staff feeling stressed and confused trying to navigate the DoLS system when waiting for an authorisation. Worryingly, our inspections and assessments have also highlighted instances where backlogs in processing existing applications mean some care providers have stopped submitting new applications. This means people have restrictions placed on them without an application or any legal safeguards.

Providers must formally notify CQC without delay when they know the outcome of an application for a deprivation of liberty, whether it was made to the Court of Protection or under DoLS. This includes both when an authorisation has not been granted or the application has been withdrawn.

In 2023/24, we received around 161,000 DoLS notifications, a 23% increase from the previous year. Recent changes in data reporting have highlighted some discrepancies between the data collected by local authorities and data we hold on notifications from providers, and we are taking steps to understand the reasons for this.

Behind the backlogs

To better understand the pressure on local authorities, this year we surveyed representatives from the National DoLS Leads Network and heard the views of over 50 respondents from supervisory bodies across England. We heard widespread concern from the local authorities that they are often significantly under-resourced to process increasing volumes of DoLS applications, as their funding has not increased in line with the number of people requiring assessments. One local authority told us:

> “DoLS is a broken system. It was designed for a pre-Cheshire West time with relatively few applications. It is impossible to make it work with the resources we have, leading to a big backlog…The situation is so bad that, if we just stopped getting any applications and just assessed people from the backlog, we would be doing this for around 18 months just to clear it.”

Insufficient staffing levels were also identified as a primary barrier to performance. Many supervisory bodies are struggling to recruit enough assessors, with some local authorities relying significantly on independent assessors to manage the volume of applications. Some respondents noted high staff turnover within DoLS teams, describing working in this area as a “marmite experience” where members of staff either thrive, or more often, leave the service.

Amid these challenging circumstances, a member of our external stakeholder group described local authorities going “above and beyond to create systems that are as safe as possible.” NHS England data shows that the number of applications completed by local authorities has increased over the last 5 years by an average of 9% each year. But while DoLS backlogs decreased by 2% in 2023/24, the number of people waiting for an authorisation remains significant. In our assessments of local authorities, we have seen multiple examples of supervisory bodies trying their best to reduce backlogs and ensure sustainable improvement. For example, many local authorities adopt risk-based approaches and tools to prioritise applications. We also saw local authorities recruiting and training more best interests assessors.

Respondents to our National DoLS Leads Network survey frequently cited the ADASS screening tool as a way of helping local authorities to prioritise applications, by categorising them as either high, medium or low priority. However, this method relies on detailed, accurate DoLS applications. We heard that many local authorities are not always confident that the information services provide on DoLS applications is correct. This increases the risk that people who urgently require an assessment are not being appropriately prioritised. Although tools can help local authorities to identify those in need of urgent attention, the statutory 21-day timeframe applies to all standard DoLS applications and the need to prioritise may be another symptom of a broken DoLS system.

We are also concerned that the use of prioritisation tools may result in some groups of people, such as people with a learning disability or living with dementia, being disproportionately affected by delays in processing DoLS applications. A respondent from the National DoLS Leads Network noted that while these people usually meet the requirements for DoLS, they often do not meet the prioritisation criteria and may be “overlooked”. We also heard from a member of our external stakeholder group about some assessments being carried out virtually. While this may offer greater flexibility, virtual assessments are not always suitable for the people who are being assessed. A member of our external stakeholder group reflected that differences in the way local authorities approach DoLS makes it difficult to support managers of care homes spread across different counties.

Local authorities told us that ongoing issues with the level of understanding of the safeguards among health and social care staff can exacerbate the backlogs. We heard that applications from care homes and acute hospitals are not always appropriate, and we have also seen evidence of this, with some staff unclear on the circumstances that require a DoLS authorisation. This risks people who need the safeguards getting lost in the high volume of referrals, or not having an application made when they need one. Local authorities found that the quality of mental capacity assessments made by providers before they submit an application was sometimes poor, which can also result in unnecessary applications. It also means that they may need to contact providers to get information that should have been included in the application, thereby delaying the process and requiring additional resources from all parties.

Another factor that has a negative impact on the backlogs is a lack of communication between providers and local authorities. When providers apply promptly for DoLS renewals, it can help reduce workloads for supervisory bodies. Yet, we heard this does not always happen in practice. In addition, local authorities are not always informed of important changes following submissions, such as a person dying, being discharged, admitted to hospital or their condition changing. These people therefore remain on the waiting list for DoLS when they may no longer need to be. In other circumstances, providers may also not communicate important changes such as objections or increased restrictions, preventing local authorities from giving priority to some assessments that need it.

Limited understanding of the Mental Capacity Act and DoLS

The Mental Capacity Act 2005 (MCA) directly affects the lives of millions of people. Everyone providing care to people over the age of 16 must be familiar with this vital piece of legislation, which introduced rights and protections for people who may lack mental capacity. A decade after the House of Lords report, we continue to find a lack of understanding of the MCA among providers.

Any action taken as part of the DoLS process must be in line with the principles of the Act. While providers often demonstrate an awareness of the MCA and its principles, many managers and staff still lack confidence in applying them in their work. This is reflected in care records, mental capacity assessments and best interests decisions. We found that some care records did not show how best interests decisions were made and how the appropriate people were involved.

A key principle of the MCA is that people should be cared for in a way that least restricts their rights and freedoms. This principle shines through every aspect of the Act, including DoLS. For example, we saw services routinely reviewing restrictions to check if they remain the least restrictive option, rather than assuming the restrictions continue to be necessary simply because a DoLS authorisation was granted. However, providers continue to have a mixed understanding of DoLS. Some struggle to understand when the safeguards apply and we also saw examples of DoLS applications from providers that:

- did not include capacity assessments
- did not specify what and why specific restrictions were needed
- failed to acknowledge less obvious restrictions that were already being implemented, such as sensor movement trackers or bed rails.

Worryingly, we also heard of a misconception among some providers that a DoLS application equated to an authorisation being in place.

We saw how, in a few services, a lack of person-centred planning and staffing issues meant there were blanket restrictions – depriving all residents of their liberty despite not being necessary for everyone. One local authority also mentioned that some services are still influenced by a “protection imperative” when caring for older people. In their experience, older adults are more likely to have more restrictive care plans in place, as some providers feel a need to reduce risks to the person regardless of their capacity to make specific decisions.

If people lack capacity to make one decision, it is vital that staff do not assume they lack capacity to make all decisions. Yet, we have seen examples of this happening in some services, which could lead to unnecessary restrictions and is not in line with the Act.

Care plans, mental capacity assessments and DoLS authorisations should be reviewed regularly to ensure they remain appropriate. In our last State of Care report, we highlighted that restrictions were not always reviewed often enough, meaning providers may have missed opportunities to reduce them. This may also be a warning sign of a closed culture. When services stop recognising and reviewing restrictions, they risk becoming part of the culture, passed on and accepted by new employees.

Application of the safeguards

In some services for autistic people and people with a learning disability, we have seen DoLS assessments and authorisations that do not consistently show that the least restrictive option has been considered. DoLS authorisations in these services can also lack information on how people's emotional and physical wellbeing is protected when they are subjected to restrictive practices such as seclusion and restraint. We have previously raised concerns that poor understanding of the MCA and issues with the management of DoLS are contributing to the overuse of restrictive practices and our policy position is clear that the restrictive practices are only appropriate in limited, legally justified, and ethically sound circumstances in line with people's human rights.

Our assessments highlighted some differences between hospitals and care homes in the way DoLS are applied. Because the length of stay in an acute hospital tends to be shorter than in a care home, DoLS backlogs mean often patients are not assessed before they are discharged or moved elsewhere. This means that people at the heart of the process may not practically benefit from the protection afforded by the safeguards for most of their hospital stay, despite the work and resources used by providers and local authorities to follow the process in line with the law.

Where a person has a DoLS authorisation in place during a hospital stay, we have seen the positive effects of this on their care. For example, in one case the authorisation meant staff were more aware of the patient's needs, which was evident in care records. By better understanding the patient and tailoring their care, staff were able to prevent escalations.

However, we also identified a lack of communication about DoLS at some acute hospitals, which affected numerous patients on the ward. For example, we found that people sharing a ward with someone subject to a DoLS authorisation did not always know that certain restrictions, like not being able to open locked doors, only applied to one person. In mental health inpatient settings, we continue to see different interpretations of the interface between the Mental Health Act and the Mental Capacity Act, with the safeguards being used more frequently in wards for older adults.

Although staff should be familiar with the conditions for a DoLS authorisation, this is not always the case. We identified limited oversight of DoLS at some services and we are concerned that the safeguards are viewed as a 'management issue' rather than something every team member needs to engage with to protect people's human rights. A local authority also told us that frequent staff and management changes in care homes represents a challenge, as local authorities do not have the resources to regularly undertake in-depth work with providers to improve their understanding and application of DoLS.

While there is a clear need for further training, we found examples of a lack of training on DoLS in anticipation of the introduction of the Liberty Protection Safeguards. A member of our external stakeholder group explained that providers had invested energy preparing for LPS and some were finding it difficult to adjust to uncertainty around its implementation at such a late stage. However, it is vitally important that services ensure staff have adequate knowledge of DoLS to protect people's human rights – both now and in the future.

New registrations and the Mental Capacity Act

Concerns around providers’ knowledge of DoLS and the MCA are mirrored in an analysis of our regulatory enforcement data on Notices of Proposal. At the point of registration, we expect all providers to demonstrate a clear understanding of the MCA and, when applicable, DoLS. As the regulator, we will serve a Notice of Proposal to impose conditions on a new provider or refuse registration if they cannot demonstrate this. We analysed a sample of 139 Notices of Proposal issued in 2023/24 to new adult social care providers and managers applying to register with CQC. This found that almost half the Notices (66) were based on a lack of compliance with standards outlined in the Mental Capacity Act (MCA). In many cases, applicants also failed to demonstrate compliance with other regulations.

Of the Notices of Proposal relating to the MCA, nearly all were refused applications because the applicant lacked vital knowledge in this area. For example, one applicant could not demonstrate that they understood how and when to use restraint. We were concerned that another applicant had a poor understanding of mental capacity, which presented a risk that consent may be gained from a person who is not legally able to give it.

Some Notices of Proposal were issued because applicants could not provide evidence that they would implement the principles of the MCA effectively. One applicant was aware that a representative with appropriate power of attorney was able to provide legal consent, but for people without a power of attorney, there was nothing else in place to ensure that people would benefit from the rights and safeguards afforded by the MCA. It is key that services and managers applying to register with CQC, and their staff, are aware of their responsibilities under the Act, to respect people’s rights in line with both the MCA and Health and Social Care Act regulations.

People’s experience and involvement

DoLS are essential human rights safeguards that were designed to protect people in vulnerable circumstances. Multiple members of our external stakeholder group told us about waiting years for responses to some DoLS applications. This leaves people without legal protection, and some do not have accessible routes to challenge their deprivation of liberty. In some cases, people are receiving overly restrictive care that is not aligned with their needs and does not respect their autonomy. Our updated human rights approach makes clear that care that does not respect and promote human rights is neither safe nor high quality.

Our last State of Care report highlighted how a lack of communication around DoLS authorisations can affect people and their friends and families. It is important that people subject to a DoLS authorisation, their families, and carers have the information they need to understand the process and allow them to advocate effectively. One member of our external stakeholder group felt care settings are getting better at explaining the safeguards and people's rights, which they linked to the presence of best interests assessors being a "valuable education component".

However, we remain concerned about issues with communication. Many respondents to the National DoLS Leads Network survey noted confusion and upset among family members who are often unaware that a DoLS application has been made until being contacted by an assessor. Our external stakeholder group echoed this, with many sharing experiences of people and families who felt excluded or unheard. One care home provider explained that relatives of residents who had been determined to lack capacity by a hospital have often not been informed about DoLS, and are surprised when care home staff explain the Mental Capacity Act and DoLS process to them. Another member of the group highlighted that the DoLS process can be very confusing for patients and families, stressing the need for time, patience and a point of call for any questions.

We are particularly concerned about communication around DoLS for people who do not speak English as a first language or who use alternative ways of communicating. For example, we found that some acute hospitals were limited in being able to communicate with patients with a DoLS authorisation in any way other than verbally. Whereas using an alternative form of communication such as Makaton may have helped some patients to understand what was happening to them. Our external stakeholder group spoke of concerns around language barriers and inadequate interpretation services, which caused distress to people using services and their family members. One stakeholder felt these issues can be compounded by poor cultural competency among staff, which can lead to poorer care, less effective interventions, and reduced engagement with services.

Several local authorities felt that more challenges to DoLS authorisations have been brought to the Court of Protection in recent years. When a DoLS authorisation is in place, people have a right to have these arrangements reviewed by a court. It is positive that people are aware of their rights to challenge a deprivation of liberty and are supported to do so. However, a local authority also told us that this can be a time-consuming process, which has a further impact on their resources.

Earlier in this report, we raised concerns about older teenagers who may fall through the gaps when accessing mental health services. Similar concerns about the quality of transitions from children to adult services have emerged through our DoLS survey, with one local authority noting that a ‘start again syndrome’ may happen when a young person enters adult services. They said the information provided by children’s services is often insufficient for planning a DoLS application, which can lead to delays in the DoLS process when the person turns 18. At present, the Court of Protection is also responsible for authorising a deprivation of liberty for young people aged 16 and 17 who lack mental capacity, as DoLS only applies to adults. We heard some frustration from local authorities about delays in LPS implementation, as the new scheme would have helped to speed up authorisations for these young people. Like the DoLS process for adults, we have heard that there continue to be delays associated with the Court of Protection authorisation process.

Protecting people in the future

The DoLS system has needed reform for over 10 years. Unless there is substantial intervention, we are concerned that these challenges will continue, leaving people at the heart of this process without the key human rights safeguards that the DoLS system was intended to offer.

In 2023/24, approximately half of the total number of DoLS applications completed were closed without any assessments happening. This means that, in many cases, the DoLS application process may not bring increased safeguards for people's human rights, despite the efforts and resources used by care homes and hospitals to submit applications, and local authorities' work to process and triage these.

With the volume of applications continuing to increase, the current system means that local authorities remain the only organisations able to process them, and many have told us they do not have sufficient resources to cope with the demand. Supervisory bodies told us that increased funding, an updated Code of Practice, better training and regulatory oversight are all factors which could help to improve outcomes for people while we wait for the LPS to be implemented.

While we heard that DoLS remains an "overly bureaucratic system", local authorities across England have also implemented some improvements to help existing processes run more smoothly. These include:

- making assessments proportionate and using equivalent assessments when appropriate
- streamlining administrative processes, using IT systems and updating forms
- developing strong working relationships between local authorities and providers to improve communication, especially when circumstances change or when a renewal is due

- workshops and training for providers to reduce the number of inappropriate applications they receive and improve the accuracy of applications.

Despite these efforts, we remain concerned that the number of people requiring the legal protection afforded by DoLS continues to increase and the system is unable to cope with this demand. Ongoing issues with the DoLS system will disproportionally affect certain groups, such as disabled people and older people, who are more likely to need the safeguards. A recent report by Age UK highlighted that in 2022/23, 84% of DoLS applications were made for people aged 65 or over, and almost 50,000 people died while waiting for their application to be processed. Reflecting on the operation of DoLS, the charity said, “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.”

Too many people are waiting too long for a DoLS authorisation, while variation in the level of knowledge of staff means that others may not have a DoLS authorisation in place when they need one. For many, the current DoLS system is not providing the vital safeguards they need. After a decade of chronic and widely documented issues, urgent action is required to ensure the system does not continue to fail people in the future.