**Deprivation of Liberty of Older Persons in England**

Professor Rosie Harding[[1]](#footnote-1)

Deprivation of liberty of older people and disabled people in care and support settings has been a point of tension in mental capacity law in England and Wales since 2004. The issue rose to prominence when the European Court of Human Rights (ECtHR) held that HL, a man with severe autism who had been informally admitted to a psychiatric hospital, was unlawfully deprived of his liberty, in breach of his rights under Article 5 of the European Convention of Human Rights (ECHR).[[2]](#footnote-2) The problem became known as the ‘Bournewood Gap’, which refers to any situation where a person of ‘unsound mind’ who lacks the capacity to consent receives care and/or treatment in circumstances where they cannot leave, but do not clearly object, and are therefore not covered by the legal safeguards associated with the Mental Health Act 1983, as amended.

**Initial Response: Deprivation of Liberty Safeguards**

The first attempt to bridge the Bournewood Gap came through the Deprivation of Liberty Safeguards (DoLS). The DoLS were inserted by the Mental Health Act 2007 as amendments to the Mental Capacity Act 2005,[[3]](#footnote-3) and came into force on 1 April 2009. The ECtHR have confirmed that the DOLS scheme complies with Article 5 ECHR.[[4]](#footnote-4) The DOLS scheme applies only to deprivations of liberty that took place in care homes and hospitals and only in relation to adults over the age of 18. Following a decision of the UK Supreme Court in 2014,[[5]](#footnote-5) which clarified when a person would be understood to be deprived of their liberty in care homes and hospitals,[[6]](#footnote-6) there was an exponential increase in the numbers of DOLS applications, accompanied by a similar increase in the numbers of applications that were not completed in a timely fashion. This suggests that there were and are a great number of older people who are deprived of their liberty in care settings without recourse to these legal safeguards. [[7]](#footnote-7)

The vast majority of those subject to DOLS applications are older persons.[[8]](#footnote-8) In 2020-21, 207,800 people were the subject of at least one DOLS application; of those, 83% related to people over the age of 65. The largest proportion of DOLS applications related to individuals over the age of 85 (n=86,690; 41.7%), despite people over the age of 80 accounting for just 2.5% of the UK population.[[9]](#footnote-9) There are also intersectional gendered dimensions: women over the age of 85 were the group for whom the largest number of DOLS applications were made (n=60,250), which reflects the larger number of women over the age of 85 in England, the greater prevalence of dementia in this group, and the larger proportion of care home residents who are women.

The numbers of DOLS applications made in 2020-2021 dropped for the first time since 2014 (by approximately 3%).[[10]](#footnote-10) This was likely to be due to the devastating impact of the COVID-19 pandemic on the health and social care sector (see further, below). The statutory timeframe for processing a DOLS application is 21 days, but in 2020-21, the average processing time for DOLS application was 148 days, with less than a quarter of applications being completed within the statutory timescale.[[11]](#footnote-11) Even before the pandemic, there were significant delays in processing DOLS applications, and the legal framework is widely considered to be overly bureaucratic and unfit for purpose.[[12]](#footnote-12)

**Revised framework: the Liberty Protection Safeguards**

In 2017, the Law Commission of England and Wales published a report on reforming the DOLS system, recommending a new framework which was to be called the Liberty Protection Safeguards (LPS).[[13]](#footnote-13) A new statutory scheme, based on the Law Commission recommendations (but missing out some elements) was legislated for through the Mental Capacity (Amendment) Act 2019. It has not yet been implemented, so the DOLS remain in force. At the point of submitting this evidence (March 2022) the draft Code of Practice on the LPS has been published and is subject to public consultation, along with a revised Code of Practice on the (broader) Mental Capacity Act 2005, which had fallen significantly out of date since it was published in 2007.[[14]](#footnote-14) It is expected that the LPS will not now be fully implemented until 2023. Delays in the implementation process have meant that the DOLS backlog (119,740 at statistical year end in 2021) has not reduced. This represents over 100,000 adults deprived of their liberty in formal care settings without easy access to legal safeguards, not including the estimated 53,000 adults deprived of their liberty in community settings without authorisation from the Court of Protection.[[15]](#footnote-15)

The new LPS framework will apply in a broader range of settings, including where care arrangements to support a person to live in their own home or a community placement involve a deprivation of liberty, where that person lacks the mental capacity to consent to those arrangements. Implementing the LPS in this area means that these arrangements will no longer need to be authorised by the Court of Protection, as is the case under the current system, but may consequently bring a larger number of community placements into the broad scope of the safeguards.[[16]](#footnote-16) This is controversial, as the safeguards themselves can be experienced by family carers, and older persons themselves, as an unnecessary interference with their everyday lives.[[17]](#footnote-17)

The Liberty Protection Safeguards were the subject of a great deal of controversy during their parliamentary passage, particularly around concerns about the proposals for amplifying the role of registered care home managers.[[18]](#footnote-18) Many of the concerns have been addressed, and the proposed role of care home managers in the assessment process will not be implemented along with the other elements of the scheme. The LPS (like the DOLS they replace) remain, however, a legalistic and bureaucratic solution to a human problem. As a result, it is possible that they will suffer the same lack of understanding of their role as safeguards *against* deprivation of liberty and continue to be construed as formalistic authorisations of care that deprives a person of their liberty.

**Impact of COVID-19 on Deprivation of Liberty of Older Persons**

The COVID-19 pandemic created an additional level of human rights infringements in the care sector. Early in the pandemic, older people were discharged from hospital into care homes without being tested for COVID-19. This had the effect of seeding mass infection in the residential care sector, and a large number of potentially avoidable deaths.[[19]](#footnote-19) At the same time, family members of care home residents were prevented from visiting their loved one’s care homes for an extended period of time. When family visiting was reintroduced, it often involved both resident and visitor having to engage in wearing PPE, undertaking rapid covid testing and the use of physical barriers like screens or windows. This limited visiting policy was implemented in order to protect residents from the potential for COVID-19 infection, but also had the effect of isolating people from their families. Government guidance in place in 2021 also prevented older residents from leaving care settings at all, or required them to isolate in their rooms for 14 days on their return from a trip out. That guidance was subject to legal challenge.[[20]](#footnote-20) In combination, these restrictions had a particularly negative impact on older people living with dementia, and in November 2021, a coalition of dementia charities were still making the case to policymakers for increased visiting rights for older people with dementia living in residential care settings.[[21]](#footnote-21) Many care settings continue to have significant restrictions in place on visiting residents, including booking in advance, testing using rapid lateral flow devices and wearing PPE. Public funding for rapid lateral flow testing is to be withdrawn in April 2022, which could mean that family members who cannot afford to purchase tests may be unable to visit at all, placing older people at risk of further isolation again.

In summary, whilst protection of the right to liberty for older people has been on the policy agenda in England for nearly 20 years, and two legal frameworks to safeguard against unlawful deprivations of liberty have been created, deprivation of liberty as part of care arrangements remains a significant social and legal challenge. Many older people are deprived of their liberty whilst being cared for in residential care settings, and some have no access to the safeguards in place to protect them from unlawful deprivation of liberty. Government guidance through the COVID-19 pandemic has at times put older people at increased risk, both from COVID itself and from the harms associated with deprivation of liberty and isolation from family and friends. Solving the problems associated with the deprivation of liberty of older people requires more thoughtful responses. A conscious move away from large, institutionalised care settings towards the availability of more high quality, flexible and person centred domiciliary care services is likely to be an important part of the solution.

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2. *HL* v *United Kingdom* (2004) 40 EHRR 32. [↑](#footnote-ref-2)
3. Mental Capacity Act 2005, s 4A, s 4B, Schedule A1 and associated regulations. [↑](#footnote-ref-3)
4. *RB v United Kingdom* (2017) Application no: 6406/15 (European Court of Human Rights, First Section). [↑](#footnote-ref-4)
5. *Cheshire West and Chester v P; Surrey CC v P* [2014] UKSC 19, [2014] AC 896. [↑](#footnote-ref-5)
6. Where they lack capacity to consent to care and treatment arrangements, are subject to continuous supervision and control, and are not free to leave to live where and with whomever they choose. [↑](#footnote-ref-6)
7. See R. Harding, 'Safeguarding Freedom? Liberty Protection Safeguards, Social Justice and the Rule of Law' (2021) 74 *Current Legal Problems* 329 for a detailed analysis of these issues. [↑](#footnote-ref-7)
8. <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/2020-21> [↑](#footnote-ref-8)
9. <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020#the-uk-population-at-mid-2020> [↑](#footnote-ref-9)
10. <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/2020-21> [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. House of Lords, *Mental Capacity Act 2005: Post-legislative scrutiny* (2014). [↑](#footnote-ref-12)
13. Law Commission, *Mental Capacity and Deprivation of Liberty* (London: Law Commission of England and Wales, 2017). [↑](#footnote-ref-13)
14. <https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps> [↑](#footnote-ref-14)
15. <https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps/lps-implementation-draft-impact-equalities-assessment> [↑](#footnote-ref-15)
16. See further, <https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps/lps-implementation-draft-impact-equalities-assessment> [↑](#footnote-ref-16)
17. See Mark Neary’s Blog for a family carer perspective on these issues: <https://markneary1dotcom1.wordpress.com/my-books-articles/> [↑](#footnote-ref-17)
18. Harding, 'Safeguarding Freedom? Liberty Protection Safeguards, Social Justice and the Rule of Law' [↑](#footnote-ref-18)
19. See further: R. Harding, 'COVID-19 in Adult Social Care: Futures, Funding and Fairness' in *Pandemic Legalities: Legal Responses to COVID-19 - Justice and Social Responsibility*, (eds) D. Cowan and A. Mumford,(2021). [↑](#footnote-ref-19)
20. <https://www.carehome.co.uk/news/article.cfm/id/1646545/Campaigners-start-legal-action-against-government-over-care-home-trips-ban> [↑](#footnote-ref-20)
21. <https://www.alzheimers.org.uk/news/2021-11-25/one-dementia-voice-call-urgent-action-essential-relationships-care-homes> [↑](#footnote-ref-21)