

Ten signs of trouble with the deprivation of liberty safeguards

The deprivation of liberty safeguards (DoLS) are a legal framework that were introduced to protect people from arbitrary detention in hospitals and care homes. They were introduced in a rush, after the UK was found to be failing to protect the Article 5 rights to liberty of adults who lacked mental capacity¹.

1. **Almost nobody appears to have been released from detention using the DoLS.** The only recorded case of a person successfully using the safeguards to be discharged from detention is Stephen Neary. This took a year – longer even than HL in *Bournewood*. No official figures are collected.
2. **The appeal rate is worryingly low.** In the first year 1 in 200 authorisations resulted in an appeal. In the second year, this rose to 1 in 120. This suggests that the rights of appeal provided by the safeguards are inaccessible to most people.
3. **The meaning of ‘deprivation of liberty’ given in case law is complex, contradictory and increasingly narrow.** Those who are expected to apply the safeguards do not understand where they should use them. Recent rulings have taken on an Orwellian character, where even a person who kicked down the door of his care home trying to escape was not considered to be deprived of his liberty.² Without safeguards people are left in a Kafkaesque limbo, unable to challenge their involuntary confinement in hospitals and care services, or attract proper scrutiny of restrictive care practices like restraint or seclusion.
4. **The scheme is highly complex and riddled with loopholes.** Even judges have complained that the scheme is so intricate that it is ‘completely inaccessible to those for whose benefit the legislation has been devised’³.
5. **The scheme is poisoned by conflicts of interest.** Local authorities and PCT’s exercise a quasi-judicial role in authorising and reviewing detention under the safeguards, and are also responsible for supporting people to appeal against their detention. However, they have often arranged the care that constitutes detention themselves, and may not want to attract scrutiny or challenge of their commissioning or safeguarding decisions.
6. **The rights of people in supported living, residential schools and children’s care homes are still not protected at all by the safeguards.** Although detention has occurred in these settings, the safeguards do not apply there. Meanwhile, local authorities are expected to authorise detention outside the scope of DoLS directly from the courts, which is cumbersome and extremely expensive.
7. **The courts are creaking under the strain of the DoLS.** Despite the fact the appeal rate is worryingly low, there are signs that the courts are struggling to cope with DoLS cases. This may be related to the extreme complexity of the safeguards, and a lack of additional funding for the High Court to hear such cases and train the judiciary.
8. **Support for detainees to exercise their appeal rights is patchy.** Most detainees will require support to appeal, and many families will struggle to understand the safeguards without input from an advocate. Yet advocacy referrals are very low indeed, despite being recognised in case law as a vital element of Article 5 protection.
9. **There is a postcode lottery in Article 5 protection, and many thousands of people are detained without any safeguards at all.** Government figures show that use of the safeguards varies enormously, and that their uptake is still far lower than even the conservative predictions of the impact assessment.
10. **The scheme is deeply unpopular amongst those who must apply it.** The name ‘deprivation of liberty safeguards’ deters managing authorities from seeking authorisation where they should. The highly bureaucratic and resource-intensive application and authorisation process leads to resistance among supervisory bodies and managing authorities, and there are few incentives or pressures to encourage compliance.

¹ *HL v. United Kingdom* (App no 45508/990) [2004] 40 EHRR 761; also known as *the Bournewood judgment*

² *Re C; C v Blackburn and Darwen Borough Council* [2011] EWHC 3321 (COP)

³ *Re C; C v Blackburn and Darwen Borough Council* [2011] EWHC 3321 (COP)

What you can do

If these ten reasons to be worried about DoLS concern you, then you can help to make some noise. Write to your MP, write to the Equality and Human Rights Commission, or write to the Joint Committee on Human Rights and ask them to look into DoLS. If you work for an organisation with an interest in human rights and you want more information, don't hesitate to get in touch.

About

Lucy Series is researching the protection of human rights under the Mental Capacity Act 2005 and the deprivation of liberty safeguards for her PhD in law. Prior to becoming a legal researcher, she worked in health and social care for over a decade. She can be contacted at:

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Read more

MENTAL HEALTH ALLIANCE *Briefing Paper 1: Deprivation of Liberty Safeguards: an initial review of implementation* (Mental Health Alliance: London: 2010)

<http://www.mentalhealthalliance.org.uk/resources/DoLS_report_July2010.pdf>

MENTAL HEALTH ALLIANCE *The Mental Health Act 2007: A review of its implementation* (Mental Health Alliance: London: 2012) < http://www.mentalhealthalliance.org.uk/news/MHA_May2012_FINAL.pdf>

CARE QUALITY COMMISSION *The operation of the Deprivation of Liberty Safeguards in England, 2010 /11* (2012)

<<http://www.cqc.org.uk/public/news/second-annual-report-deprivation-liberty-safeguards-published-today>>