

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Briefing on Deprivation of Liberty
Safeguards for Report Stage of the
Policing and Crime Bill in the House of
Lords**

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy I, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Introduction

1. At Committee Stage of the Policing and Crime Bill, Baroness Finlay tabled an amendment to remove the automatic requirement of an inquest for those subject to Deprivation of Liberty Safeguards (DoLS). With the Government's support, it passed Committee stage in the House of Lords and has been added to the Bill as Clause 155.
2. DoLS were introduced for an extremely important purpose: to fill the gap that had been left in mental health provision wherein those without capacity faced entirely inadequate legal safeguards on their detention. However, Liberty recognises the need to reform the system of DoLS to provide better protection for some of society's most vulnerable. We urge Parliamentarians to introduce an improved system with greater and more appropriate safeguards. We caution against attempts at piecemeal and one-sided reform of this system with no consultation and little Parliamentary discussion. We are extremely concerned that Clause 155 makes a very significant change to the functioning of DoLS and fundamentally alters a significant safeguard without any real parliamentary consideration. Changes need to be made, but on the basis of comprehensive and evidence-based proposals for reform.
3. Liberty urges Parliamentarians to table the amendment suggested below to remove Clause 155. We urge that Parliamentarians not prejudge what should be the wholesale reform of the system for the benefit of some of society's most vulnerable.

Page 180, line 1, Leave out Clause 155.

A brief history of DoLS

4. DoLS were introduced by a 2007 amendment to the Mental Capacity Act 2005. They were created in response to the judgment of the European Court of Human Rights in *HL v. the United Kingdom*.¹ In 1999, HL – a severely autistic man without capacity to consent to hospital treatment – was admitted to Bournemouth Hospital. However, since he was not detained under the Mental Health Act (MHA), and could not consent to any informal admission for treatment, he was detained and treated under the common law doctrine of necessity.

¹ App. Np. 45508/99.

5. He was prevented from leaving the hospital and denied access to his carers, who challenged the hospital's decisions before the Court of Human Rights. It found that HL was deprived of liberty under Article 5, and his right against arbitrary detention was violated as a result of the UK's failure to have his detention "prescribed by law". As it found, there was a conspicuous "lack of any formalised admission procedure", a crucial safeguard on detention necessary to render it lawful. There was also no procedure by which HL could apply to a court to determine the lawfulness of his detention, another important safeguard on the detention of some of society's most vulnerable.
6. As a result, DoLS were introduced. These are applicable to any individual in England and Wales who is 18 years of age or over, and (i) has a mental disorder (as defined by the MHA, but also including mental disabilities, including learning difficulties), (ii) lacks capacity to consent to detention and treatment, and (iii) has a clinical need for care and treatment in circumstances amounting to a deprivation of liberty in hospital or a care home, care being in his or her best interests and necessary to protect him or her from harm.
7. DoLS set out conditions on the lawfulness of any deprivation of liberty of individuals without capacity. A person without capacity can only be deprived of their liberty where (a) it is a consequence of giving effect to an order of the Court of Protection or (b) it has been standardly or urgently authorised by the individual's hospital or care home. The person must also be over 18 and suffering from a mental disorder within the meaning of the MHA, and it must be in their best interests to be so detained and a necessary and proportionate response to the risk of harm.
8. Nonetheless, DoLS do not apply to individuals living in their own homes or in supported living arrangements elsewhere,² regardless of whether they too are deprived of their liberty as a matter of fact. Indeed, a serious problem with the DoLS regime has been the lack of protection for large numbers of extremely vulnerable individuals in detention.
9. In 2011, academics found that the system was failing many of those without capacity and leaving them without meaningful safeguards in detention. As they suggested, the DoLS system may be "failing to act as a robust watchdog":

² These may include privately-rented properties shared by other individuals with similar needs adapted for their requirements.

“Difficulty in identifying deprivations of liberty, alongside much lower than expected rates of DoLS applications, and large disparities in activity rates between comparable supervisory bodies, suggests that in some areas vulnerable adults are routinely going without protections the law affords them. Furthermore, data from the NHS Information Centre reveals that in England only around ‘2% of applications that were not authorised involved situations where the person was nevertheless judged as being in a situation that amounted to a deprivation of liberty.’ In total, less than 1% of all applications were found to be unauthorisable deprivations of liberty: 78 out of 8982 total for the year. On the surface, both the absolute numbers and percentage appear low (yet without a comparator class, it is difficult to definitively conclude this).”³

10. There remained a very serious concern that many were being denied adequate safeguards despite the fact that, as a matter of fact, they were being detained. Prior to 2014, it appeared that those subject to DoLS were being denied their rights to equal treatment, which is a right protected by the Human Rights Act 1998. It could not be right that individuals detained in care homes under very restrictive care plans did not have a right to challenge the conditions of their care, unlike others detained under mental health legislation. That year, the Supreme Court made clear that those with mental illnesses and psychosocial disabilities have the same rights against arbitrary detention as anyone else.⁴ The Court found that Article 5 of the HRA requires that all those so detained have the right to challenge their detention by the use of the DoLS system.

11. However, significant problems remain. The provisions governing applications for DoLS have also been criticised as complex and convoluted, and as lacking sufficient safeguards against the very things they were designed to regulate, namely, deprivations of liberty.⁵ The House of Lords Post-Legislative Scrutiny Committee on the Mental Capacity Act 2005 recommended that the DoLS system be replaced for precisely this reason.⁶

³ See the criticisms cited in Szerletics, A., and O’Shea, T., ‘The Deprivation of Liberty Safeguards’, Essex Autonomy Project, February 2011, p. 22, available here: <http://autonomy.essex.ac.uk/deprivation-of-liberty-and-dols>

⁴ *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another* [2014] UKSC 19.

⁵ See the criticisms detailed in ‘The Deprivation of Liberty Safeguards’, pp. 1-2.

⁶ House of Lords Select Committee on the Mental Capacity Act 2005, ‘Mental Capacity Act 2005: post-legislative scrutiny’, 2014, available here: <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>.

12. Some have recommended that the Mental Health Tribunal be given the power to authorise and review deprivations of liberty, or for the same to be done by a new First-tier Tribunal for Mental Capacity. This would be a significant change, since under the current regime it is the relevant care home or hospital that authorises DoLS under the supervision of the Court of Protection. This would place the UK's system in line with those of other countries such as German, which employs a system of guardianship similar to the DoLS regime but which requires far greater court involvement, including the approval by the Custodianship Court of any guardianship application, in addition to overseeing their implementation.⁷ The German system also applies to any deprivations of liberty, and not simply those taking place in a hospital or care home.⁸
13. Liberty urges Parliamentarians to undertake a proper inquiry through the full legislative process to examine the case for reform and provide better and more appropriate safeguards for those under DoLS. As we detail below, Clause 155 amounts to piecemeal, isolated reform which will drastically fail to solve, and may exacerbate, the real problems facing the DoLS system.

The duty to conduct an inquest

14. Section 1 of the Coroners and Justice Act 2009 (CJA) provides that a senior coroner must conduct an investigation into a person's death of which they are aware in their area wherever (i) the death was unnatural or violent, (ii) the cause is unknown, or (iii) it occurred in state detention. Clause 155 alters the CJA to provide that no one subject to DoLS can be deemed to be in state detention for the purposes of section 1. The Clause therefore removes the automatic requirement that coroners investigate the death of anyone subject to DoLS.
15. When the new clause was proposed, its supporters raised concerns that some families are suffering real distress at the prospect of inquests into the deaths of loved ones whose deaths are in no way suspicious, but which are mandatory since they occurred in state detention. However, it is crucially important to highlight that the Government, in accepting the amendment, was likely also concerned to reduce the administrative costs incurred in overseeing the detention of some of society's most vulnerable.

⁷ 'The Deprivation of Liberty Safeguards', 2011, pp. 28 and 33-37.

⁸ 'The Deprivation of Liberty Safeguards', 2011, pp. 36-37.

16. There are real concerns with these changes, despite their understandable impetus. Families deserve to be treated with respect and sensitivity after the death of a loved one, and overly invasive responses by the authorities have caused distress for some. However, substantive safeguards are needed for those detained by the state, wherever this occurs and no matter who the detainee is. The amendment risks undercutting the crucial decision of the Supreme Court in *Cheshire West*, which held that those with mental health problems and psychosocial disabilities have just the same rights in detention as anyone else. Clause 155 purports to giving those detained under DoLS lesser rights than other detainees.
17. Changes may need to be made to support families within the inquest process, or to assist coroners in conducting their investigations in a timely and appropriate manner. Additional resources should be deployed where they are necessary to do justice to the individual cases and to provide full support to the families involved. But substantive legal changes must only be made alongside wholesale consideration of the regime, which remains only 7 years old. Serious parliamentary scrutiny needs to be undertaken to identify the changes needed to properly improve the system, not isolated and untested amendments.
18. And while resource constraints must be taken into account, cost-cutting remains an inappropriate rationale by which to restrict the rights of society's most vulnerable, and their families, to have the strongest safeguards on their treatment in detention. Indeed, current concerns as to resource constraints will only be intensified by faulty decision-making and worse safeguards. The over-hasty removal of the requirement to conduct an inquest risks many cases going unheard where real investigation was necessary.
19. Liberty is extremely concerned that Clause 155 of the Bill will prejudice, if not forestall, real reform to the DoLS system to the benefit of some of society's most vulnerable and their families. Change may be necessary, but piecemeal reform without proper consultation or comprehensive assessment is not the answer. Liberty urges Parliamentarians to table an amendment to remove Clause 155 from the Bill.

Sam Hawke