

Deprivation of Liberty Safeguards – Recent Developments

Tim Spencer-Lane

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agenda

- 1) News update
- 2) DoLS & Article 2 inquests
- 3) DoLS & harm to others
- 4) Deprivation of liberty & social media

News update

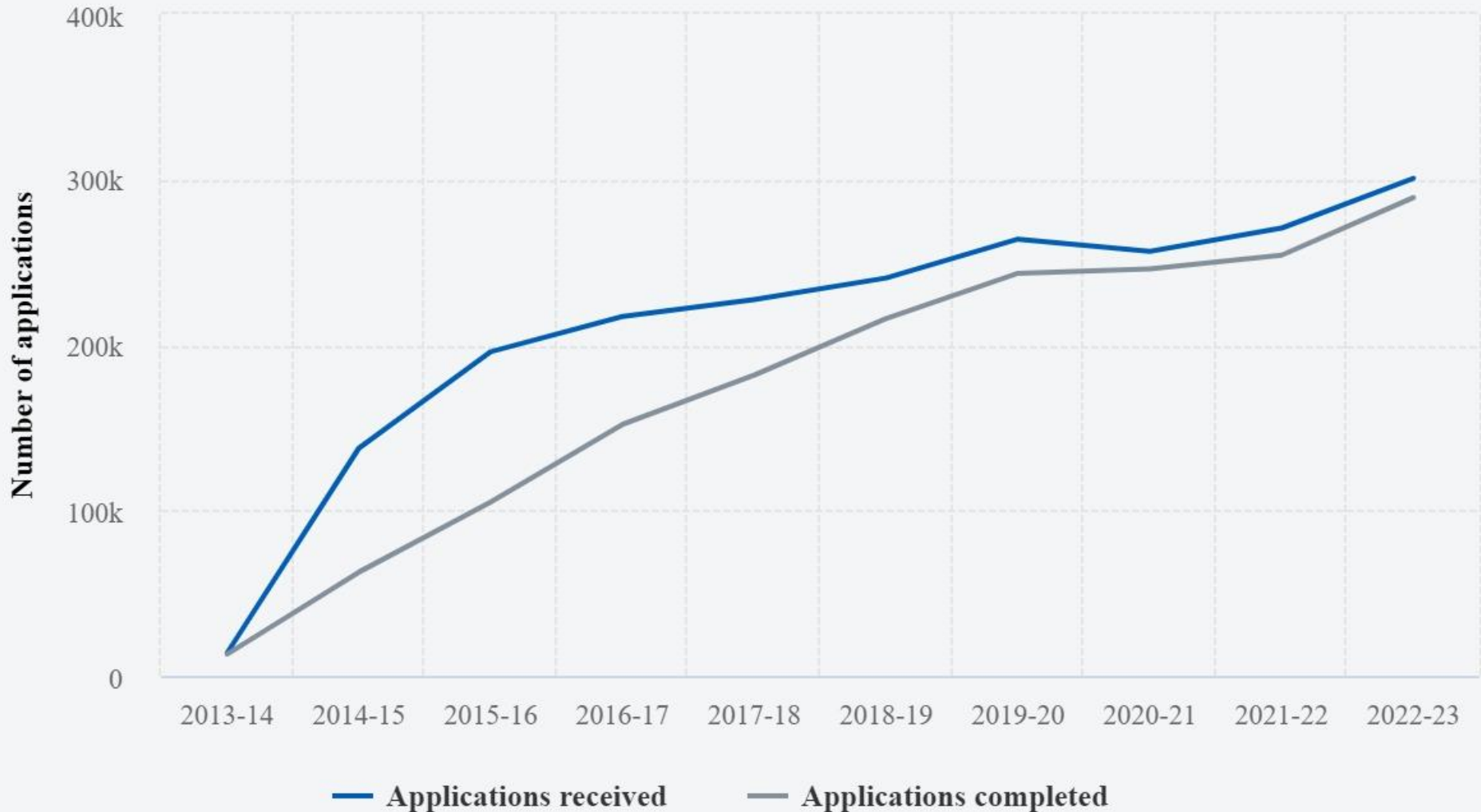


Delay to the Liberty Protection Safeguards

Letter from Helen Whately MP, Care Minister, to Joanna Cherry MP, Chair of the Joint Committee on Human Rights, 14 June 2023

- DHSC & MoJ confirmed they will publish a consultation response to the 2022 consultation & a revised 'main' MCA Code
- But no date for publication & no mention of the DoLS code
- Non-means tested legal aid will be extended to all under 18s
- But it will not be extended to
 - individuals subject to deprivation of liberty in care settings where no authorisation was in place, or
 - cases where the Court of Protection needs to make a deprivation of liberty order

Number of DoLS applications received and completed by year, England



NHS Digital - *Mental Capacity Act 2005, Deprivation of Liberty Safeguards, 2022-23*

- 300,765 DoLS applications (11% rise on previous year, which is closer to the rate of growth pre COVID-19 of 14%)
- 289,150 completed applications (no has increased over last 5 years by an average of 10% per year)
- 126,100 cases not completed (2% rise on previous year)
- 56% of applications were not granted, most of these are due to a change in the person's circumstances, eg being discharged from a short term stay in hospital
- 19% of cases were completed within the 21 day statutory timeframe - average for completed applications was 156 days, compared to 153 days in the previous year

LGSC Ombudsman & DoLS backlogs

Report No 22 014 808 – Surrey CC

- Found significant delays by Surrey CC in assessing DoLS requests – only discovered when investigating another complaint
- Backlog 5,700 (highest in England & an increase of 600 from previous year)
- Average time for DoLS assessments was 345 days & only 7.6% of requests completed within 21 days
- It assessed & made decisions on 3,700 requests – of these, 840 requests had been granted
- Of the rest, the delay was so significant that 1,320 requests could not be granted because the person had died
- 1,400 requests not granted as the person's circumstances had changed (meaning a new DOLS request had to be made)

The final decision

- Within 3 months, the council must create an action plan to address the delays & how they intended to reduce the backlog
- The action plan should consider a remedy for cases where:
 - 1) a request was not approved & an unlawful deprivation of liberty had a potentially harmful impact on the individual, and
 - 2) a request was approved with less restrictive measures & an unlawful restriction of liberty had a potentially harmful impact on the individual


DoLS & Article 2 inquests



DoLS & Article 2 inquests


R (Maguire) v HM Senior Coroner for Blackpool & Fylde & Anor [2023] UKSC 20

- Jackie Maguire had LD & died in hospital from a perforated gastric ulcer, peritonitis and pneumonia
- She lived in a care home, subject to DoLS & lacked capacity to make decisions about residence, care & medical treatment
- In the days leading up to her death, Jackie sought help from her carers, her GP, the ambulance service & out-of-hours GP service
- However, when attempts were made to take her to hospital she refused because of her LD & fear of hospitals
- On the advice of the GP, she remain at the care home - when her condition worsened, Jackie was taken to hospital, where she died
- The coroner concluded there was no violation of the state's positive Article 2 duties & therefore there should not be an Article 2 inquest
- Jackie's mother challenged this decision on the basis of her daughter's vulnerability & deprivation of liberty
- Supreme Court decided the coroner was entitled to conclude that Article 2 was not engaged - there was no arguable breach of the systems or operational duty by the care home or health care provider



An individual such as Jackie is placed in a care home so that they can be provided with a substitute form of familial care when they are no longer able to look after themselves and their family cannot cope either. There may well be a deprivation of liberty according to the standards laid down under article 5 of the Convention, but this is for their own benefit. They are in a situation very different from a prisoner ... In a care home or a nursing home, loss of liberty is an incidental feature of the vulnerability of the individual resident ... It is appropriate that the duties applicable under Article 2 should reflect this different context.

Para.148(4)



DoLS & harm to others



DoLS best interests requirement

Sch A1, para 16 to MCA & DoLS Code, para 4.58

- The **first** condition is that the relevant person is, or is to be, a detained resident
- The **second** condition is that it is in the best interests of the relevant person to be a detained resident
- The **third** condition is that, in order to **prevent harm to the relevant person**, it is necessary for them to be a detained resident
- The **fourth** condition is that it is a proportionate response to **(a) the likelihood of the relevant person suffering harm, & (b) the seriousness of that harm**, for the relevant person to be a detained resident

DoLS & harm to others

DY v A City Council & Anor [2022] EWCOP 51

- DY was a young man in his 20's who had complex needs & diagnosed with ASD, generalised anxiety disorder & paedophilia
- As a child, DY demonstrated sexualised behaviour & self-harming
- In 2017, he pleaded guilty to 2 offences of sexual assault of a girl aged under 13 & received a 26-month Youth Rehabilitation Order
- Placed on sex offender's register for 5 years with a concurrent Sexual Harm Prevention Order with a residence requirement & curfew - prohibited from having contact with children under 16
- He was referred to MAPPA & assessed as a category 1 offender requiring level 2 management
- Assessed as lacking capacity to make decisions about residence & care

DY's care regime

- Living in care home accommodation provided by the local authority
- DY was always accompanied by male staff when he went into the community
- He was checked four times a night due to his sexualised behaviour & self-harm
- He was not allowed to enter bedrooms other than his own in his placement
- Subject to a standard authorisation under DoLS (this case was a s.21A challenge)

Decision of the court (1)

The primary purpose of the care plan

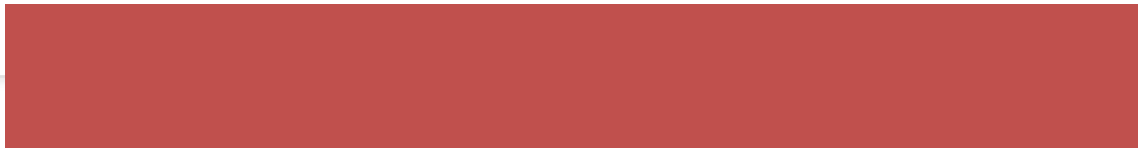
- DY argued the primary purpose of the care plan was public protection & this is not permissible under the MCA.
- Judge concluded it was a false dichotomy to conclude that protection of the person cannot also include public protection
- No doubt that DY posed a risk to the public, but it was also clear that it would be very harmful to DY himself were he to commit further offences
- If he were to re-offend, he would become very distressed & engage in self-loathing which, in turn, would put him at risk of self-harm
- There would also be the risk of retribution from the public
- Therefore, DY fell squarely within the best interests requirement

Decision of the court (2)

Capacity

- Local authority argued that DY lacked capacity on care & support because he made contradictory statements, did not think things through & overestimated his abilities
- But judge accepted the evidence of the forensic psychiatrist & concluded DY had capacity & the local authority had set the bar of capacity too high
- Judge accepted there was a high risk that DY would reoffend but agreed with the psychiatrist that any further offending was a matter for the criminal justice system
- Therefore, DoLS was terminated – although noted DY would be offered the same care package as now

Deprivation of liberty & social media



Social media & deprivation of liberty

Manchester CC v P (Refusal of Restrictions on Mobile Phone) (Rev1) [2023] EWHC 133 (Fam)

- P was aged 16 & subject to a care order
- She had ADHD & working at the level of a 7-year-old child
- History of family abuse & repeated acts of self-harm
- Often went missing from home & at risk of child sexual exploitation & involvement in organised criminal gangs
- Following attempt on her life, P was admitted to hospital for an extended period & discharged to unregistered 'solo placement'
- Court gave a DoL order which was later extended to include restrictions on P's mobile, tablet, laptop & social media access
- P later moved placements & the local authority sought a new order authorising the same restrictions

The restrictions

- 3:1 supervision inside & outside the placement
- use of physical restraint inside and outside to protect P from harming herself
- regular supervision & observation
- removal of items that she may use to harm herself
- staff given access to P's rooms & restriction on P's access to the kitchen & staff room

- no access to house phone
- supervised when making calls to friends
- P was to use wi-fi only
- wi-fi turned off & phone taken away if concerns about her behaviour
- staff could check her devices

Reasons for the social media restrictions

- P's peers had been known to encourage her to be aggressive towards staff
- P was sharing her address with friends, some of whom posed a risk towards her
- P had been recording staff and these recordings might have been posted online or shared with individuals that posed a risk towards her and the staff

The local authority's arguments

- The restrictions were an integral element of continuous supervision and control & lack of freedom to leave
- Children's Guardian argued that a mobile phone was an integral aspect of what P considers to be her liberty & was an avenue to the outside world, particularly whilst locked behind closed doors
- In *Guzzardi v Italy* (1980) 3 EHRR 333 court agreed that individual measures, cumulatively & in combination, could be DoL, even if those elements did not have that effect when viewed individually
- The restrictions in *Guzzardi* included informing authorities in advance of who he was calling & who was calling him

The judge's decision (1): Social media

- Accepted that for P access to devices & social media equated to 'liberty broadly defined as the state or condition of being free'
- However, case law repeatedly made clear that Article 5 is concerned with individual liberty in its 'classic sense of the physical liberty of the person'
- In this case, the restrictions did not deprive P of physical liberty, but rather restrict her communication, to ensure her physical & emotional safety
- The restrictions in question were an interference with P's Article 8 right to respect for private and family life

The judge's decision (2): parental responsibility (PR)

- Not open to serious dispute that restrictions on mobile phone or devices would constitute an exercise of PR
- Decisions to confiscate phone or devices where a child is at risk of significant harm was a “relatively uncontroversial” use of PR (even though she was 16)
- In this case the appropriate legal framework was s.33(3) Children Act 1989 which gives local authority PR & powers to determine extent to which a parent or guardian may exercise their PR
- But the use of physical restraint or other force to remove phone or device was a grave step that would require sanction by the court

Final declarations

- It was *not* appropriate for the court to authorise the restrictions on P's phone & devices and in a DoL order
- The appropriate legal framework in this case was provided to the local authority by s.33(3) Children Act 1989.
- The evidence did not justify authorising the use of restraint or other force if P refused to surrender her devices
- It would not 'ordinarily' be appropriate to authorise restrictions on mobile phones & devices in a DoL order
- A DoL order was granted authorising all the other restrictions



My contact details:

t.spencer-lane@kingston.ac.uk