



Title of meeting: Community Wellbeing, Health and Care Portfolio Meeting

Date of meeting: 7th November 2023

Subject: The Liberty Protection Safeguards and Deprivation of Liberty Safeguards

Report by: Jacquie Bickers, presented by Andy Biddle

Wards affected: All

Key decision: No

Full Council decision: No

1. Purpose of report

To set out the implications for Deprivation of Liberty Safeguards (DoLS) service now that there is no clear pathway for the introduction of the Liberty Protection Safeguards, (LPS).

2. Recommendations

2.1 The Cabinet Member write to the Secretary of State raising concerns that the LPS have not been implemented and there is no timetable to do so.

2.2 The Cabinet Member to write to the Members of Parliament for Portsmouth and invite them to contact the Secretary of State and express their concerns.

3. Background

The Liberty Protection Safeguards (LPS) for the legal authorisation of the deprivation of liberty of a person without mental capacity to consent to their accommodation for care and treatment, were scheduled to replace the Deprivation of Liberty Safeguards (DoLS) in 2023.

LPS, had been delayed from its original implementation of October 2020 but with the consultation on the new draft code of practice in 2022, the government advised the public bodies affected by the change, to prepare for implementation late 2023. The planned preparations for change across Portsmouth City Council were set out to the Health, Wellbeing & Social Care Portfolio Meeting on 1st November 2022. However, On 5 April 2023, the government formally announced that LPS would be delayed beyond the life of this parliament.



The social care sector¹ has expressed concerns about the delay to implementation of LPS and this means that the DoLS process continues to be applied in cases of deprivation of liberty.

Deprivation of Liberty Safeguards were introduced in 2009 as a response to the findings of the European Court of Human Rights in the ²*Bournemouth* case concerning the deprivation of liberty of an autistic man with a profound learning disability.

A Deprivation of Liberty Safeguard is part of the Mental Capacity Act 2005 (MCA) framework to protect the European Convention of Human Rights (ECHR) Article 5 Rights (liberty and security) of people who lack capacity, because of a mental disorder or mental disability, to consent to their health and/or social care treatment.

Deprivation of Liberty legislation applies to people 18+ who are in hospital, residential and nursing care homes who do not have the capacity to consent to their care and treatment. The current DoLS process sets out that a managing authority (a hospital or care home) must seek authorisation from a supervisory body (local authority) in order to be able to lawfully deprive someone of their liberty.

One of the key drivers for the change to LPS was to simplify the DoLS process and reduce the numbers of people awaiting an assessment under DoLS arrangements. As the national DoLS statistics published on 24 August 2023 show, the number of completed applications has increased over the last five years by an average of 10% each year. In 2022-23 this was estimated to be 289,150 applications, however, the reported number of cases that were **not completed** as at year end was an estimated 126,100, 2% more than the end of the previous year, and the proportion of standard applications completed within the statutory timeframe of 21 days was 19% in 2022-23; which has fallen from 20% in the previous year.

The average length of time for all completed applications was 156 days, compared to 153 days in the previous year.

Figure 1 shows that the number of DoLS referrals in PCC has increased and the 2022/23 return indicates a 19.5% increase in the numbers of applications received.

¹ [Decision to shelve LPS 'unacceptable blow to thousands unlawfully detained' - Community Care](#)

² [Bournemouth case | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

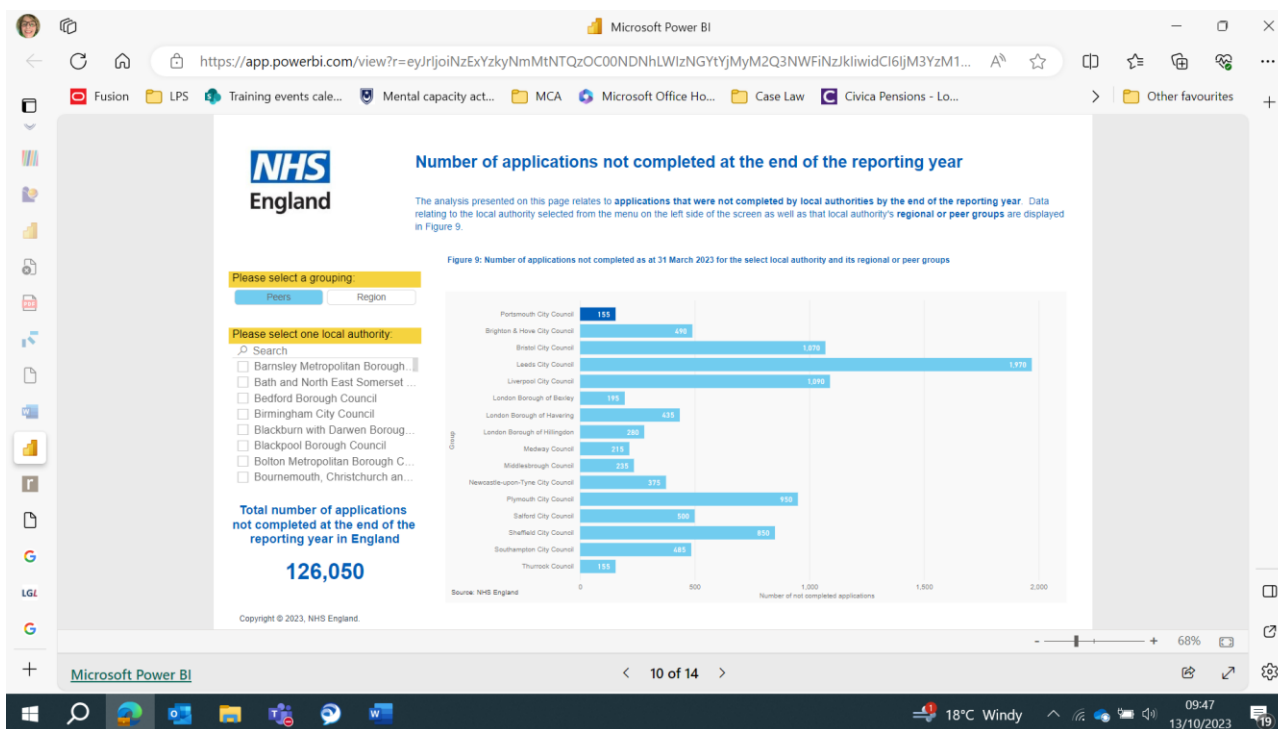
Figure 1 Comparison of DoLS applications over the last two years





Portsmouth City Council (PCC) has, notwithstanding this increase, been in the fortunate position of not running a significant 'pending' list for people waiting a DoLS authorisation. Figure 2 shows that for 2022/23, Portsmouth had 155 people whose application had not been 'signed off' compared to those not signed off by its peers.

Figure 2 - Number of applications not completed during 2022/23



So while at this stage there is no sense that the position in PCC for managing the DoLS service will be significantly affected by the delay to LPS. The greater implication is likely to be felt in the area of DoLS in a community setting.

4. Reasons for recommendations

4.1 Deprivation of Liberty in a community Setting

The Deprivation of Liberty Safeguards only apply when a person is in hospital or a care home. If a person is living in another setting such as supported living, shared lives or extra care and they meet the 'Acid Test' an application to deprive the person of their liberty in their best interests, must be made through the Court of Protection.

Depriving a person of their liberty within a community setting is referred to as a Deprivation of Liberty Order or Community DoLS – the lawful authorisation of arrangements enabling care or treatment which give rise to a deprivation of liberty for the person.

One of the most significant changes in the LPS schedule was the extension of a DoLS to cover community settings in order to free up the Court of Protection. As set out in the government's draft impact assessment of the introduction to LPS 'The current system cannot keep pace with the high demand for DoLS authorisations and not all deprivations of liberty in community settings are being authorised through the CoP, meaning there has



been subsequent non-compliance with the law and potential breaches of human rights.' PCC, alongside other local authorities took the view that while the plans for LPS were progressing that applications to the CoP for authorisation of a Deprivation in the Community would be prioritised for those people who were 'objecting' or with high level restrictions in place. A triage and risk management system was put in place for others likely to be deprived of their liberty in a community setting. There are currently 10 people in PCC under a CoP authorised Deprivation in the Community.

In consultation with Portsmouth City Council legal colleagues and the teams which act under the Mental Capacity Act and the Care Act, we are in the process of now identifying all those who would meet the definition of a Deprivation in the Community in order to progress those through to the Court of Protection. This analysis is in the early stages but we know that the greater number will be for Portsmouth residents with a learning disability. The learning disability service has in the region of 880 people that live at home or in another community setting. Until collection of all the data has been completed, the actual number of people under a DoLs in the community that would need to go to the Court of Protection for authorisation cannot be verified. Early analysis has identified 100 people within Shared Lives that would meet the criteria for a Deprivation in the Community, which would suggest the figure for people living in their own homes is likely to be as great or greater given the higher numbers at home.

4.2 Deprivation of Liberty in a Community Setting 16 and 17 years old

Case Law of September 26, 2019 in the ³[Re D](#) [2019] UKSC 42 case, the Supreme Court has held (by a majority) that where a 16 or 17 year old child cannot (or does not) give their own consent to circumstances satisfying the 'acid test' of the *Cheshire West* judgement, and if the state either knows or ought to know of the circumstances, then the child is to be seen as deprived of their liberty for purposes of Article 5 European Convention of Human Rights, and requires the protections afforded by that Article. This means that It is not within the scope of parental responsibility to consent to living arrangements for a 16- or 17-year-old child which would otherwise amount to a deprivation of liberty.

There are 195 children aged 16/17 years of age in Children's Services, of those 42 have a disability status and 18 are Looked After Children. Children Services have been engaged with the proposed LPS changes and there is ongoing work with the teams to embed understanding and training around the Mental Capacity Act and Deprivation of Liberty Safeguards.

As in Adult Services, further analysis is needed to identify those young people who may be deprived of their liberty in the community. It should be noted that in cases involving 16-17 year olds who lack capacity, the courts will not automatically assume that the Court of Protection is the appropriate jurisdiction and will consider whether on the facts of a particular case, a child's welfare will be better safeguarded under the inherent jurisdiction of the High Court.

5. Integrated impact assessment

As there is no change to the legislation/process that governs deprivation of liberty, an IIA is not required.

³ [In the matter of D \(A Child\) \(supremecourt.uk\)](#)



6. Legal implications

As the LPS scheme has not been implemented, there is no change to the process of depriving a citizen of their liberty.

7. Director of Finance's comments

There are no direct financial implications arising from the recommendations in this report.

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Signed by:

Appendices:

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location

The recommendation(s) set out above were approved/ approved as amended/ deferred/ rejected by on

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Signed by: