



Essex Autonomy Project



Arts & Humanities  
Research Council

Office of the  
Public Guardian

# Deprivation of Liberty and DoLS

*The following report is a digest of an AHRC Public Policy Roundtable held at the Medical Research Council on 16<sup>th</sup> January 2012<sup>1</sup>*

## SUMMARY

Invited participants discussed deprivation of liberty and the Deprivation of Liberty Safeguards (DoLS), including their current performance in social care and psychiatry, their legal history, the implications of recent judgements, training needs, and their relation to wider care and mental health policy. The event included six presentations:

The Rt. Hon. Lord Justice Munby (Court of Appeal and Chairman of the Law Commission)  
*Deprivation of Liberty and DoLS: the historical perspective*

Alistair Pitblado (The Official Solicitor)

Dr Ruth Cairns (South London and Maudsley NHS Foundation Trust)  
*Deprivation of Liberty and DoLS Clinical Research*

Neil Allen (University of Manchester and Thirty Nine Essex Street)  
*The Agony of Ineligibility*

John Leighton (Social Care Institute of Excellence and Cambridgeshire County Council)  
*"Free to leave" - Variations on a theme: reflections on the assessment of deprivation of liberty in residential care*

Lucy Series (University of Exeter)  
*The DoLS and Maslow's Law of the Instrument*

The event was chaired by Prof Wayne Martin and Dr Fabian Freyenhagen from the Essex Autonomy Project and cosponsored by the Office of the Public Guardian and the Arts and Humanities Research Council. It was held under the Chatham House Rule. The briefing document is available here: <http://autonomy.essex.ac.uk/category/eap-research/green-papers>

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## *The History and Framing of Deprivation of Liberty*

Participants claimed that discussion of deprivation of liberty is often insensitive to its full history and typically overemphasises psychiatric settings to the detriment of social care. The notion of a 'deprivation of liberty' is traceable at least as far back as Article 5 of the European Convention on Human Rights. Arbitrary detention is expressly forbidden by the Convention in terms that reflect earlier English common law of false imprisonment and which pointedly reject totalitarianism. The key European Court of Human Rights (ECtHR) cases addressing deprivation of liberty are relatively well-known, but there was concern that the domestic legal history between the important House of Lords judgement in *Re F* [1990] and the introduction of the Mental Capacity Bill in June 2004 has gone unrecognised. In the wake of *Re F*, the High Court developed its *parens patriae* jurisdiction in relation to vulnerable adults, which continued to evolve due to the tardiness of government in responding to the recommendations of the Law Commission's 1995 *Mental Incapacity* report. There was a large increase in social welfare cases in the early 2000s, after changes in local authority practice and judgements such as *Re S* [2002] EWHC 2278 (Fam), making deprivation of liberty problems almost inevitable without legislation.

Despite *HL v the United Kingdom* being the immediate impetus for implementing DoLS, some participants felt it had become unduly and misleadingly prominent in guidance and training (including the DoLS Code of Practice). Some claimed that the

*'The fallacy is that it all begins with Bournemouth – it doesn't.'*

'Bournemouth gap' was closed before the ECtHR ruling in 2004, in virtue of procedural changes within the Family Division and the judgement in *Re C* [1997] 2 FLR 180 that the High Court had powers to authorise detention of a minor for the purposes of treating their anorexia nervosa under its inherent jurisdiction. So too, it was noted that HL would not be an archetypical DoLS candidate, insofar as the majority of applications are made in respect of persons with dementia or learning disabilities in care home settings, rather than in hospital, where HL had been admitted as an informal psychiatric patient due to his self-injury and the severity of his autism. Others argued that it was an irony of DoLS that they could not even authorise HL's detention, because he would have qualified as an objecting mental health patient (since the criteria for objection under DoLS are very broad). In this context, concern was expressed that, in practice, objecting mental health patients would fall between safeguarding regimes — not eligible for DoLS, but not reviewed under the Mental Health Tribunal system because mental health practitioners set the bar higher regarding what counts as objection to treatment or assessment. At any rate, the complexities of *HL v the United Kingdom* suggest that it may be misleading to rely on the case too heavily in framing DoLS.

## Recent legal developments

Recent domestic case law has attempted to clarify how to determine whether deprivation of liberty is occurring. This represents a shift in focus away from the procedural safeguards needed to authorise such deprivations; and it shows an increased readiness to question whether certain restrictions of movement amount to a genuine deprivation of liberty under Article 5 at all. The key cases in this respect are *Re P and Q* [2011] EWCA Civ 190 and *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, which employ ‘relative normality’ and ‘relevant comparator’ tests respectively. These follow what is widely agreed to be a particularly clear-cut case of (unauthorised) deprivation of liberty in *London Borough of Hillingdon v Neary & Anor* [2011] EWHC 1377.

*‘If there’s no fuss, there’s no deprivation.’*

Several participants claimed that the main guiding principles for identifying deprivations of liberty were now relatively lucid. Assessors should first ask whether there is an alternative residence available and whether the person wishes to live there. If the

person is prevented from doing so, there will be a deprivation of liberty, whose authorisation requires that it be in their best interest and subject to Article 5 compliant review mechanisms. Otherwise, assessors should apply the Cheshire method of identifying a relevant comparator (i.e. someone of a similar age with the same capabilities) to help determine whether any restrictions of liberty amount to a deprivation.

Participants were worried that the courts’ recent reliance upon an objective ‘reason’ and ‘purpose’ in distinguishing restrictions and deprivations of liberty — e.g. to provide care rather than treatment — would exert a downward pressure on the criteria for being deprivations (irrespective of their authorisation). Concerns were also raised about the extent to which deprivation of liberty was dependent on the response of families and local authorities to persons lacking capacity to make decisions about their care. If families are absent, unable or unwilling to house someone, and care providers refuse or lack the funds to make an alternative residence available (or provide support to carers), then this can transform what would otherwise have been a deprivation into a mere restriction of liberty. So too, if there is no vocal advocate for a detained person — typically a family member willing to go to court — then, in practice, a finding of deprivation of liberty (and the procedural safeguards this triggers) will be unlikely. In short, ‘if no-one makes a fuss, there is no deprivation’, or, as a member of one DoLS team was reported as saying, ‘A Neary scenario is not a one-off, but a Mark Neary probably is far more so.’ Even then, the role of IMCAs is often crucial (as Mark Neary’s case demonstrates), with their low-rates of use being another worry raised by participants.

## *Cheshire comparators*

The *Cheshire* judgement's use of a 'relevant comparator' test has been controversial, especially amongst care practitioners. Partly, this is because it can seem to imply that the appropriate criterion of deprivation of liberty

*'The comparator sets a benchmark for grey cases'*

for those with disabilities can be much lower than for other people. The practical upshot of emphasising a contextual rather than universal standard is that much restraint and restriction of movement does not then qualify for review and justification in relation to Article 5, nor attract the greater scrutiny this brings. In response, some participants thought that opposition to the comparator method was 'unprincipled' because it conflated Convention requirements for review in relation to deprivation of liberty with the need for proper external inspection and review of care practices in general. Many agreed that Article 5 should not be 'tortured' to perform unintended functions.

Several participants stressed that relevant comparators were only germane in some assessments of deprivation of liberty and that the test could not be 'mechanically applied'. For example, objection and availability of an alternative residence can themselves be determinative, whereas 'the comparator sets a benchmark for grey cases'. Furthermore, against the suggestion that *P & Q* and *Cheshire* are watershed judgements, one participant found no need to revise their training notes in light of them. Despite these continuities with existing practice, there will be a 'huge impact on detention which might otherwise fall within the Safeguards'. If taking 'inherent mental and physical disabilities and limitations' into account means that deprivation of liberty can no longer be established, then legal authorisation of deprivation is no longer necessary. In particular, people with lifelong disabilities are less likely to fall under DoLS or have grounds to apply to the courts on Article 5 issues; and this may prompt equality concerns. Since fluctuating capabilities usually feature in dementia cases — the mainstay of the DoLS scheme — then there will be less impact on them. However, there will still be a considerable easing of resource demands on local authorities, as a consequence of the narrowed conception of deprivation of liberty in recent case law.

Potential problems with the approach include the difficulty of specifying the relevant comparator. For example, who is the relevant comparator for a middle-aged medical patient whose medication has temporarily caused psychosis? Some (but not all) participants struggled to identify a 'type' of person in such circumstances to use as a contrast. Similarly, since a person's capabilities can vary depending upon the support they receive, does this mean that standards of deprivation of liberty are relative to the level of resources available to provide such support? If so, the worrying implication is that funding cuts that led to a lowering of the average capabilities of someone with some disorder or disability could cause the stringency of conditions for deprivation of liberty to fall with them. Proponents of relevant comparators recognised that case law would develop on such questions.

## *DoLS and External Review in Social Care*

The *de facto* uses of DoLS, particularly in social care, extend beyond being a mechanism ensuring Article 5 compliance. It was suggested that auxiliary benefits of the standard authorisation process include: a ready means of securing capacity assessments by doctors; scrutiny of care plans by experienced, independent professionals, directed towards determination of best interests, the views of P and those involved in their care, and whether there are less restrictive options or alternatives; and unbefriended people gaining access to representation and advocacy services. DoLS also provide a permission-free route to court, along with 'gold plated' legal aid, in order to resolve intractable disputes. Plus, conditional authorisations give DoLS team leverage over care delivery, which can be used to force-through improvements. Finally, DoLS provide some of the very few checks there are on inappropriate use of restraint under s.6 of the MCA and on the propriety of certain medications in care homes, such as anti-psychotics for dementia.

Whilst recognising that DoLS can help to institute beneficial changes to social care, many participants felt that, as an instrument for Article 5 review, it was not the best mechanism to achieve these wider goals (as noted above in relation to Cheshire

*‘Back to the drawing board’ for  
social care review?*

comparators). Efficiency weighs heavily here, especially as costs associated with DoLS applications are now significantly higher than originally estimated and continue to rise.

Nevertheless, there was a widespread feeling that social care review was broken, even if DoLS was the wrong tool to fix it. Some thought independent regulation by the Care Quality Commission could be extended, although this could only ever be sporadic scrutiny, and which would likely be conducted by generic inspectors rather than those with expertise in the relevant social care specialisms. These problems would be present to an even greater degree for The Local Government Ombudsmen, and cuts in funding to advocacy groups make it even less feasible for them to carry out effective review functions.

Some participants claimed there was a need to 'go back to the drawing board' with respect to scrutiny of care practice, which could include replacing DoLS with a more comprehensive system of inspection and review. This might also be an opportunity to address what was said to be potential discrimination in the current system, where patients detained under the MHA have recourse to more extensive rights – primarily in relation to Mental Health Review Tribunals — unavailable to those detained under the MCA. Either way, participants displayed an appetite for a more effective and efficient system than the present one.

## *Training and the Code of Practice*

Training on DoLS was said to be patchy and often misdirected, rarely being provided to the mid-level managers who were best-placed to ensure institutional changes. However, legal problems encountered by managing authorities and supervisory bodies are often attributable to a poor grasp of mental capacity and community care law in general rather than deficits in DoLS training in particular. This may have been compounded by a more local and haphazard approach to training that has emerged due to the loss of regional networks that can co-ordinate and share responsibility for events, legal refreshers and the production of local policy guidelines. In order to improve the situation, the development of computerised guidance and procedural representations, such as legal flowcharts, was suggested.

*Is the Code of Practice  
'beyond fixing'?*

Potential improvements to the DoLS Code of Practice were discussed, which was said to be outdated and unhelpful in several respects. The main deficit was thought to be a lack of useful guidance for identifying deprivation of liberty, which can, in part, be attributed to the

sparsity of relevant case law when it was written. Chapter 2 was described as a 'council of despair', with the existing advice (p.17-8) being 'unhelpful and inaccurate', and the case summaries now being far from comprehensive (p.21-7), such that both would benefit from revision or supplementation. For example, current guidance has a 'misleading' focus on mental health and some of the case reports, such as *Nielsen v Denmark*, are no longer relevant. Other recommendations included a broader and clearer explanation of the function of DoLS, less keyed to the details of *HL v the United Kingdom* (p.9), as well as revision to advice on local dispute resolution (p.106) which has been used as an excuse for not making court applications.

Several participants stressed the huge efforts which would be needed to revise the Code, which cannot be 'messed about with easily', and suggested that this effort could be better directed elsewhere. Some also claimed the Code was 'beyond fixing' insofar as it follows the DoLS schedules which are themselves broken. The DoLS Code is unusual in this respect, acting more as a working replacement for the DoLS schedules, since these are so impenetrable, rather than as a general orientation to the legislation and good practice in implementing it, such as the main MCA Code provides. It was suggested that non-governmental organisations might collaborate to produce an equivalent set of guidance for practitioners on deprivation of liberty and DoLS which had this character.

## RESEARCH AND ACTION

Proposals for further action and research:

- i. Mechanisms for the dissemination of updates on case law regarding deprivation of liberty and DoLS to be improved.
- ii. Coalition of non-governmental organisations to supplement the DoLS Code of Practice with clear, succinct and more accurate guidance.
- iii. Government to take clearer leadership to co-ordinate DoLS activities (a function which the Department of Health has failed to perform).
- iv. Empirical research into whether inter-rater reliability in identifying deprivations of liberty (which current research shows to be very poor) has improved in the wake of guidance in the Cheshire judgement.
- v. Further examination of mechanisms for social care review, alongside efforts to communicate the need to revise them.