

EDITORIAL

**DEPRIVATION OF LIBERTY IN A HEALTH AND SOCIAL CARE CONTEXT:  
DoLS AND THE WAYS FORWARD**

Deprivation of Liberty Safeguards (DoLS) were introduced in England and Wales in 2007 and came into force in 2009 as a response to the European Court of Human Rights decision in the case of *HL v UK*.<sup>1</sup> The Court held that the lack of legal safeguards for incapacitated adults deprived of their liberty in hospitals and care homes, the so-called ‘Bournewood gap’, was a breach of Article 5 (Right to liberty and security) of the European Convention on Human Rights.

Recent developments have reinforced the importance of discussions about the future of DoLS. First, the House of Lords Select Committee post-legislative scrutiny of the Mental Capacity Act 2005 concluded in 2014 that DoLS, due to their excessive complexity and lack of clarity, are not ‘fit for purpose’ and called for them to be replaced. Second, the Supreme Court decision in *Cheshire West and Cheshire Council v P*<sup>2</sup> clarified that an incapacitated person, whose care arrangements are the state’s responsibility, is to be considered objectively deprived of her liberty if she is subject to continuous supervision and control and is not free to leave. This is the case irrespective of the person’s compliance or lack of objection and of the relative normality of the placement or the reason for it. This decision has had a major impact on social and health care bodies, who have been overwhelmed by the consequent increase in the number of applications.<sup>3</sup> Baroness Hale, who wrote the leading opinion in *Cheshire West*, recognized the need for a system that expands the protection to placements outside hospitals and care homes, but that does not need to be as elaborate as DoLS.<sup>4</sup> Considering the findings of the House of Lords Select Committee and the Supreme Court decision in *Cheshire West*, the Law Commission is currently working on proposals to replace DoLS with a system that would suit health and social care providers and users better.

In the context of a general acceptance that legal reforms are necessary, this issue of the IJMHL brings together research articles and contributions based on relevant experience in legal practice and policy-making to discuss deprivation of liberty in health and social care settings. This issue draws on the ‘Rethinking Deprivation of Liberty in a Health and Social Care Context’ conference held in London on 30 September, 2015. This conference, convened by the Department of Law at Queen Mary University of London with the support of the Wellcome Trust<sup>5</sup>, assembled experts from different jurisdictions to consider alternatives to DoLS. It was convened – in part – to inform the Law Commission’s deliberations as to the replacement for DoLS, a project which remains underway as at the date of publication.<sup>6</sup>

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<sup>1</sup> *HL v UK* (2004) 40 EHRR 761.

<sup>2</sup> *Cheshire West and Chester Council v P* [2014] UKSC 19.

<sup>3</sup> Health and Social Care Information Centre (2015). *Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England): Annual Report, 2014-2015*.

<sup>4</sup> *Cheshire West and Chester Council v P* [2014] UKSC 19 para 57.

<sup>5</sup> Grant number 109046/Z/15/Z.

<sup>6</sup> See Law Commission (2015) *Mental Capacity and Deprivation of Liberty: A Consultation Paper*, Consultation Paper 222, and *Mental Capacity and Deprivation of Liberty: Interim Statement* (May 2016), available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/06/mental\\_capacity\\_interim\\_statement.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/06/mental_capacity_interim_statement.pdf)

One of the overarching conclusions that can be drawn from the conference and this IJMHL issue is that the debate about DoLS – and indeed any regime for the authorising of deprivation of liberty – should be part of a broader conversation about how to reconcile health and social care users' need for care and support with their right to liberty and autonomy. Meeting needs and protecting rights rarely have to be competing objectives.

This edition starts with Eilionóir Flynn's 'Deprivation of Liberty Safeguards and International Human Rights Law: Reconciling European and International Approaches'. The author engages with the question of whether disability-specific forms of deprivation of liberty are in themselves compatible with both the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This article analyses the difficulties for domestic legislation of reconciling Article 5(1)(e) of the ECHR, which authorizes restrictions to liberty based on a mental disability, and Article 14 of the CRPD, which can be interpreted as ruling out any disability-specific form of deprivation of liberty. This sets the scene for Eilionóir Flynn's analysis of the current law in England and Wales and the Law Commission's proposals to replace DoLS.

Gordon R. Ashton offers a critical analysis of DoLS from his personal perspective as a judge of the Court of Protection and as the parent of a social care service user. 'DoLS or quality care', discusses the relation between legal safeguards and the quality of the patients' care. Gordon R. Ashton argues that the former does not guarantee the latter and may even be detrimental to it depending on how they are perceived or applied. A whistle blowing procedure is proposed as an alternative to DoLS.

'Deprivation of Liberty: the position in Scotland', by Laura J. Dunlop Q.C., discusses the response to the 'Bournewood gap' and to *Cheshire West* proposed by the Scottish Law Commission. A decision not to adopt DoLS in Scotland was made in light of the difficulties with its operation in England and Wales. The author, who served on the Scottish Law Commission, discusses the challenges of developing a scheme that is easy to operate, sensitive to different individual circumstances, protective of the liberty of adults with incapacity, and compatible with the jurisprudence of the European Court of Human Rights.

A case-study on the application of the current legal framework for protecting the right to liberty of psychiatric patients is offered by Benjamin Perry, Swaran Singh and David White in 'Capacity Assessment and Information Provision for Voluntary Psychiatric Patients: A Service Evaluation in a UK NHS Trust'. Based on data collected from one mental health trust they suggest that more needs to be done to ensure vulnerable individuals are not being coerced to consent to treatment or are accepted as informal patients without a proper assessment of their mental capacity to consent.

Widening the perspective further, Bo Chen discusses the protection of the rights of persons with mental disabilities in China in '*Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*'. Mental health legislation was introduced in China in 2013 to elevate the threshold for involuntary inpatient treatment there but, as shown in this case note, the application of the law raises questions about the compliance of the Chinese legislation with the CRPD. This case note also highlights the challenges

of implementing legislation that is protective of the right to liberty of people with mental disabilities in a context where social care in the community is insufficient.

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