

Institution: University of East Anglia		
Unit of Assessment: 18 - Law		
Title of case study: Safeguarding the Liberty of People Who Lack Capacity: Reforming the Mental Capacity Act 2005		
Period when the underpinning research was undertaken: 2012 – 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Rob Heywood	Professor	2007 – to present
Period when the claimed impact occurred: 2014 – 2020		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact		
<p>Given that liberty is a fundamental human right it is reasonable to ask in which situations, if any, should it be permissible to deprive an incapacitated person of her liberty. Originally the Deprivation of Liberty Safeguards Scheme (DOLS) was inserted into the Mental Capacity Act 2005 to provide a lawful procedure by which a mentally incapacitated person could be deprived of her liberty, but it quickly became apparent that the system was unsatisfactory and not fit for purpose.</p> <p>This impact case study focuses on how best the law should authorise deprivations of liberty for mentally incapacitated individuals. It significantly influenced the recent abolition of the original DOLS procedure and provided a major contribution to the introduction of a new piece of legislation, the Mental Capacity (Amendment) Act 2019. This implements a new scheme, known as the Liberty Protection Safeguards (LPS), which provides a more proportionate and streamlined procedure for authorising an incapacitated individual's deprivation of liberty. Alongside helping to shape the wider and more general contours of the scheme, UEA research had considerable impact on one key proposal of the LPS which sought to introduce a provision making it possible for an incapacitated individual to provide an advance consent to a future deprivation of liberty. The research underpinning the impact was used to argue against the introduction of this measure and the Government eventually decided not to enact it in the new Mental Capacity (Amendment) Act 2019 in its current form.</p>		
2. Underpinning research		
<p>The Mental Capacity Act 2005 (MCA 2005) sets out the legal framework for determining how decisions are made for individuals who lack capacity. As a part of this, it may sometimes be necessary to deprive an incapacitated person of her liberty in order to provide treatment. This was historically justified by reference to the best interests principle under the English common law, but the decision of the European Court of Human Rights in <i>HL v United Kingdom</i> [2004] ECHR 471 held that this approach provided insufficient procedural safeguards for an incapacitated individual and thus violated her Article 5 rights. Article 5 states that no one shall be deprived of liberty except in accordance with a procedure prescribed by law, so the DOLS scheme was inserted into the MCA 2005 to solve this problem. This, however, was a knee-jerk response to the judgement in <i>HL v United Kingdom</i> [2004] and the original DOLS procedure was both rushed and inadequately thought-through. Far from improving matters, it provided insufficient protection for those who needed it the most and placed an unworkable burden on professionals who had to implement the system. It was therefore identified by the Government in 2014 as an area of law that was in urgent need of reform.</p> <p>The UEA research underpinning this impact case study concerns the MCA 2005 in a broader sense, with a particular emphasis on best interests. Equally, and more specifically, the research has exposed the dangers associated with the concept of advance decision-making. A leading article in the world-famous <i>Medical Law Review</i> in 2014, entitled 'Revisiting Advance Decision Making Under the Mental Capacity Act 2005: A Tale of Mixed Messages', explored the legal</p>		

problems associated with advance decisions and analysed how judges have treated them of late (**R1**). This was the first significant piece of literature that explored the evolving case law after the introduction of statutory advance decisions under the MCA 2005 and has been widely cited by internationally renowned outstanding scholars in the field of medical law. Frequently referenced in both textbooks and important journal articles, the piece recognised that while advance decisions are useful tools to protect an individual's precedent autonomy, a delicate balance needs to be struck by the law in how it regulates them. Accommodations need to be made for the fact that advance decision-making is an incomplete form of decision-making, and that an individual may change her mind. Her circumstances may also alter, or developments may arise which were beyond her contemplation at the time she executed her original decision. More crucially, however, the law needs to question whether an individual has capacity to make an advance decision at the point of its creation. All these factors need to be considered when determining whether to comply with the terms of any purported advance decision, or whether or override it. These considerations become especially important when viewed through the lens of an ability to provide an advance consent, especially where a capacitous individual attempts to provide that consent to authorise a future deprivation of liberty.

Other UEA research underpinning this case study considers how advance decisions may be relied upon in end-of-life scenarios. A pioneering article in the world-leading law journal *Legal Studies*, entitled 'The Value of Life in English Law: Revered But Not Sacred?' (2016), has been regularly cited by scholars in the legal community and contemplates how the best interests principle may be interpreted to effectively safeguard the interests of vulnerable, incapacitated individuals at the end of life (**R3**). Two other articles in the *Medical Law Review*, entitled 'Live or Let Die? Fine Margins Between Life and Death in a Brain-Dead Pregnancy' (2017) (**R5**), and 'Moving on From *Bland*: The Evolution of the Law and Minimally Conscious Patients' (2014) (**R4**), also expose the tensions that exist between the concepts precedent autonomy on the one hand, and the sanctity of life on the other.

The underpinning research has also explored how to effectively resolve tension and conflict when determining what is in the best interests of those who lack capacity to make decisions for themselves (**R6**). Equally, from a broader perspective, it has also sought to illuminate the weakness of how the MCA 2005 perceives the status of incapacitated individuals, both in terms of treatment and research. These issues were highlighted in a recent article in *Medical Law International*, entitled 'Lost Voices in Research: Exposing the Gaps in the Mental Capacity Act 2005' (2019) (**R2**). While the MCA 2005 should aim to balance out the two notions of protection and empowerment, it does not always reach an appropriate compromise. In some areas it seeks to overprotect an incapacitated individual at the expense of empowering her, whereas in others it places too much emphasis on empowerment, which could be detrimental to her wider interests. The inclusion of the ability to provide an advance consent to a future deprivation of liberty would have been a paradigm example of the law seeking to empower an individual to the greatest possible extent, but then failing to appreciate the very real dangers inherent in doing so. This article has been widely recognised as an important contribution to mental capacity law by those who work closely with incapacitated individuals in society. The argument has been well received as a way of ensuring that the law protects the wider participatory interests of vulnerable people and has been shared extensively on social media platforms such as Twitter and Facebook.

3. References to the research

(UEA authors highlighted in **bold**)

- R.1** 'Revisiting Advance Decision Making Under the Mental Capacity Act 2005: A Tale of Mixed Messages'
Rob Heywood
(2015) 23 *Medical Law Review* 81 – 102. DOI: 10.1093/medlaw/fwu021
- R.2** 'Lost Voices in Research: Exposing the Gaps in the Mental Capacity Act 2005'
Rob Heywood, Hayley Ryan, Anne Killett, Peter Langdon, Yvonne Plenderleith, Ciara Shiggins, Karen Bunning

(2019) 19 *Medical Law International* 81 – 112. DOI: 10.1177/0968533219867365

R.3 ‘The Value of Life in English Law: Revered But Not Sacred?’

Rob Heywood and Alexandra Mullock

(2016) 34 *Legal Studies* 658 – 882. DOI: 10.1111/lest.12131

R.4 ‘Moving on From *Bland*: The Evolution of the Law and Minimally Conscious Patients’

Rob Heywood

(2014) 22 *Medical Law Review* 455 – 466. DOI: 10.1093/medlaw/fwu003

R.5 ‘Live or Let Die? Fine Margins Between Life and Death in a Brain-Dead Pregnancy’

Rob Heywood

(2017) 4 *Medical Law Review* 628 – 653. DOI: 10.1093/medlaw/fwx026

R.6 ‘Parents and Medical Professionals: Conflict, Cooperation, and Best Interests’

Rob Heywood

(2012) 20 *Medical Law Review* 29-44. DOI: 10.1093/medlaw/fwr037

4. Details of the impact

Consider the common scenario in which a patient may lack the necessary mental capacity to make a decision for herself, but who nonetheless requires medical treatment in a hospital. During that patient’s stay not only will some treatment decisions need to be made for her on the basis of best interests, but it may also become necessary to restrict her movements. The ward in which the patient is located may be secured so that she is unable to leave, or the door of her room may be locked at certain times. In other words, the patient’s liberty may occasionally be interfered with. Given that liberty is a fundamental human right, in which situations, if any, should it be permissible to deprive an incapacitated person of her liberty and what legal protections ought to exist in order to safeguard her rights and interests?

Originally the Deprivation of Liberty Safeguards Scheme (DOLS) was inserted into the Mental Capacity Act 2005 to provide a lawful procedure by which a mentally incapacitated person could be deprived of her liberty, but, even though it was frequently used, it quickly became apparent that the system was unsatisfactory and not fit for purpose. Figures indicated that in 2015-16 hospitals and care homes in England made 195,840 DOLS applications, and it was predicted that the cost of full compliance with the DOLS scheme would be GBP2,200,000,000 per year. Coupled with an estimated figure of up to 2 million people in England lacking capacity, the sheer scale of the problem was obvious, and it was clearly not going to go away. In recognition of this being such an emotive and sensitive issue, and something that has the potential to affect a significant portion of the population both now and in the future, the Government came under increasing pressure to reform this area of law.

UEA research led by Professor Rob Heywood positively informed the revision of the Mental Capacity Act 2005, and ensured that a potentially harmful and negative clause was not enacted. The research has in addition more broadly informed thinking about the pace at which reforms should be enacted, and how practitioners approach potential restrictions of liberty of those with impaired mental capacity.

Amending the Mental Capacity Act

On 7 July 2015, the Law Commission opened a consultation on the law of mental capacity and deprivation of liberty. Prior to this, Professor Heywood was contacted by the lead lawyer on the Law Commission project – who had read the leading article in the *Medical Law Review*, entitled ‘Revisiting Advance Decision Making Under the Mental Capacity Act 2005: A Tale of Mixed Messages’ (2015) [**corroborating Source A**]. The lead lawyer requested an opinion about one of the Law Commission’s specific proposals concerning the ability of an individual to provide an advance consent to a future deprivation of liberty. Various e-mail exchanges followed discussing the strengths and weaknesses of this proposal [**corroborating source B**]. As a result of this correspondence, Professor Heywood was invited by the Law Commission to provide a formal written response to their wider consultation paper [**corroborating source C**].

The written evidence submitted broadly supported the Law Commission's overall proposal for a new LPS scheme to replace the original DOLS procedure. This evidence was cited six times in the Law Commission's Consultation Analysis [**corroborating source D**], and then also in its Final Report [**corroborating source E**], to highlight the shortcomings of the original DOLS procedure and to illuminate the potential advantages of the new proposed LPS system. However, Professor Heywood's evidence cautioned against the inclusion of a provision to enable an individual to provide an advance consent for a future deprivation of liberty. It was argued that this was a dangerous recommendation because it had insufficient safeguards built into it to prevent potential future abuse. While its intention was to allow an individual to express her autonomy to the greatest possible extent, there was a danger that this could backfire, especially because it had scope to be interpreted as an open-ended consent that could, potentially, give health care professionals carte blanche to treat a patient in any way they saw fit based on her purported advance consent.

After the publication of the Law Commission's Final Report, the Government proceeded to commission a Joint Committee on Human Rights to consider the Law Commission's proposals for the new LPS scheme. Professor Heywood accordingly submitted written evidence to this Committee [**corroborating source F**]. In its Final Report, the Joint Committee on Human Rights endorsed the majority of the Law Commission's recommendations and the written evidence provided was again cited four times in support of the new overall LPS scheme [**corroborating source G**]. Yet, the Final Report of the Joint Committee on Human Rights also cited that written evidence to illuminate some of the dangers associated with the specific recommendation pertaining to the ability to provide an advance consent to a future deprivation of liberty [**corroborating source G**]. The Government then took some time to reflect on how best to proceed and to consider whether it was necessary to reform the law based on the various investigations it had ordered.

Eventually the Government decided to reform the law and recently introduced a new piece of legislation, the Mental Capacity (Amendment) Act 2019 [**corroborating source I**]. This legislation implemented the majority of the Law Commission's new proposed LPS scheme, which Professor Heywood's evidence argued in favour of. Importantly, the Government resisted the temptation to include the provision which Professor Heywood's written evidence had argued forcefully against, which would have allowed an individual to provide an advance consent to a future deprivation of liberty. In regard to this, the Government concluded that before this provision could be enacted, 'it would need to consider in more detail this recommendation's practical application and implementation' [**corroborating source H**]. Thus, the concerns raised about this mechanism by the UEA research were recognised and halted a potentially dangerous change to the law.

Impact on External Stakeholders

UEA research has additionally had impact more broadly on the thinking and practice of professionals and practitioners.

Public Policy and Law

In a challenging and contemporary field of law, UEA research has been relied upon to support the view that certain ideas for reform should not be implemented at present, without further thought and consideration being given to the substantive content of any provisions and the possible dangerous consequences of enacting them [**corroborating source H**]. The work has therefore had an impact upon a number of identifiable beneficiaries, such as government and public sector organisations, including the Law Commission [**corroborating sources B, C, D and E**] and the Joint Committee on Human Rights [**corroborating sources F and G**], leading to both implementation and non-implementation of policies, systems or reforms. Specifically, the research has stimulated critical public debate that has led to the non-adoption of policy pertaining to an advance consent to a future deprivation of liberty [**corroborating sources H and I**].

Practitioners and Delivery of Professional Services

UEA research has positively influenced the professional behaviour, standards and guidelines of a range of different practitioners. The research stimulated a change among professional lawyers working for the Law Commission in how they reason and consider questions about deprivation of liberty and advance consent [**corroborating source B**]. Moreover, despite a COVID-related delay to the implementation of the new LPS scheme and the accompanying Code of Practice,

professionals such as Approved Mental Capacity Professionals will need to undertake anticipatory training in view of the important role that they will continue to play in the roll out of the LPS scheme **[corroborating source J]**. Those professionals involved in the organisation and management of care homes will also have to begin taking steps to ensure that their employees are suitably educated about what to expect from the forthcoming Code of Practice. The research has thus had an impact on practitioners involved in the operational side of the LPS scheme by prompting the need for enhanced training and dissemination seminars relating to changes in law and policy **[corroborating source J]**.

5. Sources to corroborate the impact

- A. Final published PDF version of *Medical Law Review* article - 'Revisiting Advance Decision Making Under the Mental Capacity Act 2005: A Tale of Mixed Messages' (2015) 23 *Medical Law Review* 81 – 102.
- B. E-mails documenting correspondence with the lead lawyer on Law Commission Deprivation of Liberty Safeguards project.
- C. Written evidence submitted to Law Commission Consultation on Deprivation of Liberty Safeguards.
- D. Law Commission Consultation Analysis Document (pp. 6,10, 18, 213, and 217)
- E. Law Commission Final Report on Mental Capacity and Deprivation of Liberty (p 35)
- F. Written evidence submitted to the Joint Committee on Human Rights - The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards.
- G. The Final Report of the Joint Committee on Human Rights - The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards (pp. 14 and 20)
- H. The Government's Final Response to Law Commission on the Deprivation of Liberty Safeguards.
- I. Mental Capacity (Amendment) Act 2019
- J. Advertising for Community Care training seminars