

UP604534 A Watson Proposal

Depriv Lib

by Alexander Watson

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Human rights implications of recent legal developments regarding deprivation of liberty

LLM Law (full-time)

Alex Watson (UP604534)

Supervisor: Dr. Daniel Bedford

Word count: 1942 words (excl. bibliography and footnotes)

“The deprivation of liberty on the basis of impairment is a human rights violation on a massive global scale. As this report illustrates, it is not a ‘necessary evil’ but a consequence of the failure of states to ensure their human rights obligations towards persons with disabilities.”

-- ENDING THE DEPRIVATION OF LIBERTY ON THE BASIS OF DISABILITY
(A/HRC/40/54, UN SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES,
2019)

Topic introduction

General introduction

For persons lacking mental capacity, the Court of Protection may make an order to deprive a person of their liberty, if to do so would protect them or others from harm¹. To address gaps in the common law mechanism for deprivation of liberty (DoL) and to remain compliant with human rights obligations, statutory Deprivation of Liberty Safeguards (DoLS) were introduced.

In addition to initial criticism, demands for reform soared after common law developments¹ led to a ten-fold increase in the number of applications for DoL orders². Following a House of Lords review³ and a report by the Law Commission⁴, DoLS were deemed burdensome and costly, so are due to be imminently replaced by the Liberty Protection Safeguards. This aspect of the Mental Capacity (Amendment) Act 2019⁵ (in force from 1 Oct. 2020) is expected to represent a significant shift in the legal machinery that protects the rights of disabled people.

This is an opportune moment to assess the extent to which the rights of persons without mental capacity are protected. A variety of human rights are engaged (e.g., ECHR arts. 5 and 8; UNCRPD arts. 3 and 14) by deprivation of liberty orders, and there is a large body of ECtHR case law on the matter. Exploring the interface between the UK deprivation of liberty framework (both present and pending) with human rights obligations and principles is a means of evaluating recent developments. Where deficiencies are identified, there is the opportunity to address these with recommendations to the government's forthcoming consultation on the code of practice for the application of the MC(A)A.

Relevance

The topic is made more timely by a number of factors:

- The Mental Capacity (Amendment) Act 2019 and consequent (pending) changes to DoLS
- Recent UKSC authority on the topic (*Re D(A child)* [2019] UKSC 42 (a narrow 3-2 majority judgment); *Secretary of State for Justice v MM* [2018] UKSC 60; *Welsh Ministers v PJ* [2018] UKSC 66)
- Publication of Sir Simon Wessely's review of mental health law (December 2018)
- The oft-criticised⁶ secretive, closed-door policies of the Court of Protection have been replaced with new Practice Directions to improve transparency and public reporting (since December 2017)
- Imminent commencement of the government's consultation on the code of practice for MC(A)A 2019

¹ Mental Capacity Act 2005 ("MCA") s4A

² *P v Cheshire West and Chester Council* [2014] UKSC 19

³ House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, March 2014)

⁴ Law Commission, *Mental Capacity and Deprivation of Liberty*, (Law Com. no. 372, 2017)

⁵ "MC(A)A"

⁶ C Booker (16 August 2014) "How the Court of Protection left a 94-year-old without savings or dignity". The Daily Telegraph

Research objectives

1. Clearly and concisely articulate the current framework in both statute (MCA (2005), Mental Health Act (2007), and MC(A)A (2019)) and common law (inherent jurisdiction, the *Bournewood* gap, etc.) regarding DoL.

Critics have described the overlap between the MCA and MHA as being incoherent and, in some cases, contradictory⁷. Indeed, the recent Wessely review of mental health law said the current framework “makes for neither clarity nor simplicity”⁸. Any thorough analysis of the recent developments will require a clear exposition of the muddled existing law.

2. Evaluate the proposed legislation by comparison with antecedent acts, its interaction with human rights obligations, the extent to which it affirms recent judgments and its expected practical impact

A ‘black-letter’ evaluation of the proposed new framework will identify contentious aspects worthy of further critical evaluation in objective 3.

3. Critically evaluate the new framework against normative human rights principles, e.g., dignity, autonomy, etc.

The ECHR is a ‘living instrument’ and evaluation against its current position risks becoming quickly dated. An evaluation drawing on normative principles may prove to be more robust.

4. Propose directions for reform in respect of findings in obj. 3 and 4

To add a constructive dimension to the criticism, recommendations for reform should be proposed. These should arise naturally from objs. 3 and 4, and may draw on developments in other jurisdictions for assistance.

Indicative sources

Primary material

The distinction between the following sources of material is largely arbitrary, however helps to discuss similar items together.

“Hard law” sources

A large body of relevant legislation and case law exists in the field. In particular, it is expected that frequent reference to the following primary material will be required:

- | | |
|--|---|
| • Mental Health Act 1983 | • EU Charter of Fundamental Rights |
| • Human Rights Act 1998 | • <i>HL v UK</i> |
| • Mental Capacity Act 2005 | • <i>Re D(A child)</i> [2019] UKSC 42 |
| • Mental Health Act 2007 | • <i>Secretary of State for Justice v MM</i> [2018] UKSC 60 |
| • Mental Capacity (Amendment) Act 2019 | • <i>Welsh Ministers v PJ</i> [2018] UKSC 66 |
| • European Convention on Human Rights | • Various ECtHR/CJEU judgments |



“Soft law” sources

The government have published codes of practice for the implementation of deprivation of liberty orders, which can be useful in interpreting the practical application of the legislation. In addition, the Optional Protocol to the UNCRPD gives the UN Committee the power to investigate and report upon complaints relating to alleged breaches of disabled persons’ rights. Finally, consulting Hansard

⁷ Richardson, G ‘Mental Capacity At The Margin: The Interface Between Two Acts’ *Medical Law Review*, 18, Winter 2010, pp. 56–77

⁸ Wessely, S ‘Modernising the Mental Health Act: increasing choice, reducing compulsion’, p27

records of parliamentary proceedings may help to guide interpretation of the legislation, following the principle in *Pepper v Hart* that statutory interpretation may draw on such records.

“Political” sources (reports, reviews, etc.)

Much activity has taken place in this area in recent years. Notably, Professor Sir Simon Wessely’s 2018 review of the Mental Health Act(s) and the 2019 UN report on deprivation of liberty globally. The extent to which the pending changes give effect to their recommendations will be a helpful evaluative consideration.

Secondary material

Whilst the primary material listed above will be invaluable for research objs. 1 and 2, objs. 3 and 4 will lean heavily on academic sources.

Significant assistance regarding the chronology of recent changes can be found in the monthly *Legal Action* journal, which regularly publishes ‘Mental Health: Update’ and ‘Court of Protection: Update’ articles to keep practicing lawyers abreast of changes. Concise case-notes and updates on the MC(A)A’s passage through parliament serve to dramatically simplify the process of retracing recent history.

There is little doubt that a substantial body of literature exists covering interpretation of rights under the HRA and ECHR. Whilst some effort may be required to apply literature to the specific circumstance of deprivation of liberty, it is doubtful this will pose a challenge to the success of the research project.

A number of charitable human rights organisations have published their own reports on DoLS, most notably the International Red Cross⁹. This adds additional texture to criticism of the current framework and provides practical, sociological context to the ‘real-life’ application of the law.

Consideration of recent developments from a normative perspective will require further reading than has been conducted so far. A thriving academic community have published significant amounts of scholarship on the topic, and whilst a large number of these have been sourced (see *Bibliography*, below), it will take time to sift through and identify the leading arguments and academics (see *Research timetable*, below). Of particular interest is the diversity of contributors. Articles from a range of authors with significantly different legal backgrounds have already been sourced – from medico-legal studies, to public law and human rights. This broad cohort of commentators will surely yield a variety of meaningful lenses to apply to the research.

Whilst a thorough comparative legal analysis with similar jurisdictions is not the focus of this project, there exists a large volume of academic work that considers deprivation of liberty from an international perspective¹⁰. In part, this is due to the multinational human rights treaties, such as UNCRPD and ECHR. International commentaries will be helpful in providing inspiration for obj. 4, and also in considering the margin of appreciation afforded to parties signatory to various human rights treaties.

The risk that the research objectives have already been fulfilled by existing literature is low when considering the timeliness of the project. The most significant elements of the MC(A)A are expected to come into force from 1 Oct 2020.

⁹ ‘Protecting people deprived of their liberty’ (2016) 98 Int’l Rev Red Cross 1043

¹⁰ Popescu, I ‘The Rights Of A Person Deprived Of Liberty Of Maintaining Family Ties In Five European Countries’ (2018) LESIJ NO. XXV(2) pp188-201

Procedure

Structure

1. Front matter
 - a. Title page
 - b. Abstract
 - c. Table of contents
 - d. List of abbreviations, case list, etc.
2. Introductory matter **[total: 500 words]**
 - a. General introduction (150 words)
 - b. Outline and objective (100 words)
 - c. Background and context (250 words)
3. Existing framework **[total: 2,000 words]**
 - a. Statutory (1,500 words)
 - i. MCA
 - ii. MHA
 - iii. MC(A)A
 - b. Common law (500 words)
 - i. Inherent jurisdiction
4. The proposed/new framework **[total: 4,000 words]**
 - a. Exposition of significant changes (2,000 words)
 - b. Dis/approval of antecedent legislation (500 words)
 - c. Reflections on recent cases (500 words)
 - i. Judicial directions affirmed/rejected by parliament by new statute
 - ii. Could the new framework have significantly influenced recent cases?
 - d. Practical social/political consequences (1,000 words)
 - i. Authorised persons
 - ii. 'Unsound mind' vs 'Mental disorder'
 - iii. etc
5. Critical human rights evaluation of (controversial) aspects of the new framework **[total: 5,500 words]**
 - a. Compliance with human rights obligations (2,000 words)
 - i. Domestic obligations
 - ii. European obligations
 - iii. UNCRPD
 - b. Compliance with human rights principles (3,500 words)
 - i. e.g. autonomy, dignity, vulnerability, etc)
6. Proposals for (further) reform **[total: 2,000 words]**
 - a. Matters arising from (4)
 - b. Matters arising from (5a)
 - c. Matters arising from (5b)
7. Conclusion **[total: 500 words]**

Subtotal: 14,500 words
Margin of error: 500 words
Total: 15,000



Research methodology

The methodology for this research involves purely “desk-based” library work.

Conference opportunities may arise as the government opens their consultation on the code of practice for the implementation of MC(A)A. Attendance at such events may inform the research, however there will be no formal “data gathering” in the sense that requires ethical consideration.

Research timetable

Three major factors have been considered when constructing the research timeline given below. Firstly, recognition that the taught element of the LLM Law course will demand the majority of attention until its conclusion in mid-May. Secondly, reflections on previous dissertation-length research projects has helped to steer decisions regarding (self-imposed) chapter deadlines. Finally, the pace at which coursework of an acceptable quality has been produced was considered – throughout the academic year, coursework was written at a pace of approximately five days per 2,000 words, with an average grade to-date above 70%. Together, these factors give a robust basis for the estimates below.

Week commencing	Event	Notes
2nd March	Dissertation proposal submitted	
30th March	Light reading re:obj. 1	Continued preliminary reading with a focus on particular objs. to guide study, before the main dissertation effort after LLM (taught) complete.
6th April	Light reading re:obj. 2	
13th April	Light reading re:obj. 3	
20th April	Light reading re:obj. 4	
18th May	LLM (taught) complete	Following a short break, focus on the dissertation commences here
25th May	Intensive reading	
1st June		
8th June	Writing s2 and s3 (total 2,500 words)	This is a relatively descriptive section and should be quick to complete
15th June	Writing s4	
22nd June		
29th June	Effect feedback from s2&3; review notes for s5; catch-up as necessary	
6th July	Writing s5	Expected to be the most challenging and longest section: over-provision of time to accommodate difficulty
13th July		
20th July		
27th July	Effect feedback from s4	
3rd August	Writing s6	This section should take less time as obj. 4 can be added to throughout the project
10th August	Effect feedback from s5, continued work	
17th August	Effect feedback from s5, continued work	
24th August	Effect feedback from s6, continued work	
31st August (short)	Compile work for submission, tidy up, etc.	
2nd September	Dissertation deadline	

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'Prisoners, mental health detainees and deprivations of liberty' (2019) P.L., Jan, 209-211

'Protecting people deprived of their liberty' (2016) 98 Int'l Rev Red Cross 1043

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Ethical opinion form for Faculty of Business and Law (BAL) taught undergraduate and postgraduate students (except MRes)

Instructions to student

This form should be completed by the student, referring to the Guidance Notes to accompany this form and the 'Research ethics – issues to consider' guide (also to be found as an appendix to the Guidance Notes). If you are not collecting primary data or data that are identifiable with individuals, then you should answer Qs 1-4, then Q11 and as many of the questions between Qs 12-20 as are relevant in your case. The completed form should then be passed to the supervisor prior to a review of the possible ethical implications of the proposed dissertation or project. Students should read the guidance that accompanies this form to help them complete it.

No primary data collection or recruitment of potential participants must be undertaken before a final version of this form has been approved.

If, following review of this form, amendments to the proposals are agreed to be necessary, the student should provide the supervisor with an amended version for endorsement.

If, following the completion of the review process, your supervisor and, where relevant, any independent reviewer is unwilling to grant you a favourable ethical opinion, you have a right of appeal to BAL Faculty Ethics Committee. If you wish to exercise this right, email the Faculty Ethics Administrator (email address available from your supervisor), stating your name, HEMIS no., the relevant unit and course, and briefly stating your grounds for requesting that BAL Faculty Ethics Committee review the decision. Attach your completed ethics form and any supplementary documentation and include any relevant correspondence about the case.

A final signed and dated version of this form must be bound in to however many copies of the dissertation you are required to hand in. The form MUST be signed and dated by both the student, the supervisor and, where required, any peer ethics reviewer. If the dissertation is submitted without a fully completed, signed and dated ethics form it will be deemed to be a fail. Second attempt assessment may be permitted by the Board of Examiners.

1. What are the objectives of the dissertation / research project?

Human rights implications of recent legal developments regarding deprivation of liberty:

- Clearly and concisely articulate the current framework in both statute and common law regarding deprivation of liberty.
- Evaluate the proposed legislation by comparison with antecedent acts, its interaction with human rights obligations, the extent to which it affirms recent judgments and its expected practical impact
- Critically evaluate the new framework against normative human rights principles, e.g., dignity, autonomy, etc.
- Propose directions for reform in respect of findings in obj. 3 and 4

2. Does the research involve *NHS patients, resources or staff*? ~~YES~~ / NO (please delete as applicable).

If YES, it is likely that full ethical review must be obtained from the NHS process before the research can start. Please discuss your proposal with your Supervisor and/or Course Leader and consult the Guidance Notes for this ethics form.

3. Does the research involve MoD staff? ~~YES~~ / NO (please delete as applicable).
If YES, then ethical review may need to be undertaken by MoD REC. Please discuss your proposal with your Supervisor and/or Course Leader and consult the Guidance Notes for this ethics form.
4. Do you intend to collect *primary data* from human subjects or data that are identifiable with individuals? (This includes, for example, questionnaires and interviews.) ~~YES~~ / NO (please delete as applicable)
If you do not intend to collect such primary data then please go to question 11.
If you do intend to collect such primary data then please respond to ALL the questions from Q5 onwards. If you feel a question does not apply then please respond with 'n/a' (for 'not applicable').
5. How will the primary data contribute to the objectives of the dissertation / research project?
6. What is/are the *survey population(s)*?
7. a) How big is the *sample* for each of the survey populations, and b) how was this sample arrived at? (Please answer *both* parts of this question.)
8. How will respondents be a) *recruited* and b) *selected*? (Please answer *both* parts of this question.)

9. What steps are proposed to ensure that the requirements of *informed consent* will be met for those taking part in the research? If an Information Sheet for participants is to be used, please attach it to this form. If not, please explain how you will be able to demonstrate that informed consent has been gained from participants.

10. How will *data* be *collected* from each of the sample groups?

11. a) How will *data* be *stored* and b) what will happen to the data at the end of the research? (Please answer *both* parts of this question.)

a. none collected

b. N/A

All work saved to password-protected computer.

12. What measures will be taken to prevent unauthorised persons gaining access to the data, and especially to data that may be attributed to identifiable individuals?

No sensitive data stored.

Work saved to password-protected computer.

13. What steps are proposed to safeguard the *anonymity* of the respondents?

N/A.

14. Are there any *risks* (physical or other, including reputational) *to respondents* that may result from taking part in this research? ~~YES~~ / NO (please delete as applicable).

If YES, please specify and state what measures are proposed to deal with these risks.

15. Are there any *risks* (physical or other, including reputational) *to the researcher or to the University* that may result from conducting this research? ~~YES~~ / NO (please delete as applicable).

If YES, please specify and state what measures are proposed to manage these risks.

16. Will any *data* be *obtained from a company or other organisation*? ~~YES~~ / NO (please delete as applicable) For example, information provided by an employer or its employees.

If NO, then please go to question 19.

17. What steps are proposed to ensure that the requirements of *informed consent* will be met for that organisation? How will *confidentiality* be assured for the organisation?

N/A

18. Does the organisation have its own ethics procedure relating to the research you intend to carry out? ~~YES~~/NO (please delete as applicable).

If YES, the University will require written evidence from the organisation that they have approved the research.

N/A


19. Will the proposed research involve any of the following (please put a ✓ next to 'yes' or 'no'; consult your supervisor if you are unsure):

- | | | | | |
|---|-----|--------------------------|----|-------------------------------------|
| • Vulnerable groups (e.g. children and adults unable to consent)? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Particularly sensitive topics? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Access to respondents via 'gatekeepers'? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Use of deception? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Access to confidential personal data (names, addresses, etc)? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Psychological stress, anxiety, etc.? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |
| • Intrusive interventions? | YES | <input type="checkbox"/> | NO | <input checked="" type="checkbox"/> |

If answers to any of the above are "YES", please explain below how you intend to minimise the associated risks.

20. Are there any other ethical issues that may arise from the proposed research?

No.

	Print name	Signature	Date signed
Student	ALEXANDER WATSON		2/3/2020

I / we grant a favourable ethical opinion:

Supervisor

Peer reviewer
(where applicable)

AMENDMENTS

If you need to make changes please ensure you have permission before recruiting any participants and any primary data collection. If there are major changes, fill in a new form if that will make it easier for everyone. If there are minor changes then fill in the amendments (next page) and get them signed before the primary data collection begins.

CHANGES TO ETHICS PERMISSION

VERSION: _____

Please describe the nature of the change and impact on ethics:

Print name

Signature

Date signed

Student

I / we grant a favourable ethical opinion:

Supervisor

Peer reviewer
(where applicable)

(please cut and paste the next section, together with the heading at the top of this page, as many times as required)

VERSION: _____

Please describe the nature of the change and impact on ethics:

Print name

Signature

Date signed

Student

I / we grant a favourable ethical opinion:

Supervisor

Peer reviewer
(where applicable)

UP604534 A Watson Proposal Depriv Lib

GRADEMARK REPORT

FINAL GRADE

72/100

GENERAL COMMENTS

Instructor

Overall, this is very thoughtful proposal that focuses on a topic of contemporary importance. It has identified the key developments and relevant sources upon which to construct the thesis. The structure is detailed and considered. The sources have been clearly identified.

The proposal could be improved by avoiding a list like approach, which was notable when the relevance of the topic was mentioned. This would have made it clearer why, for example, these various "factors" made the topic timely.

A little more on the contribution of the thesis to existing debates would have been helpful - this could be achieved by identifying what those existing debates are.

PAGE 1

PAGE 2

PAGE 3



Comment 1

Date



Comment 2

The developments were not at "common law". There were developments in the interpretation of a deprivation under Art 5 in *Cheshire West*.



Comment 3

Good



Comment 4

These are all relevant, but would be better explained in full paragraphs, rather than as a list of points

PAGE 4



Comment 5

And Cheshire West...

PAGE 5

PAGE 6



Comment 6

Very good structure

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