

DoLS v Guardianship

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Summary

This is a summary of the lengthier, referenced, discussion that follows of whether or not guardianship would be a preferable alternative to the deprivation of liberty safeguards (DoLS).

The criteria for detention under the DoLS may be preferable to those for guardianship as a) guardianship uses an outmoded 'status' approach, whereas the MCA takes a 'functional' approach to a person's capacity to make decisions about care and treatment; b) the DoLS 'best interests' criteria are better defined than guardianship's 'welfare' requirement, they make explicit requirements for proportionality, and they require consultation with a wider range of parties. Furthermore, guardianship cannot as yet be applied to people with learning disabilities who are not abnormally aggressive or seriously irresponsible, which is a significant shortcoming in comparison to DoLS. However, guardianship is much more flexible than DoLS with respect to the location of the detention (DoLS being restricted only to hospitals and care homes). Furthermore, guardianship creates no authority to consent to medical treatment, to sign tenancies, or to address any other financial, care or welfare issues not contained within powers to require a person to live at a particular place, to attend medical appointments or training/educational activities, or to allow access to them by health and social care professionals. However, the MCA could be used to 'top up' these limited powers.

Guardianship powers – as a MHA regime - would 'trump' any decisions made under the MCA, DoLS or by deputies. This can bring the regimes into conflict in horribly complicated ways. In light of recent Strasbourg rulings, it is hard to see how a guardian's powers don't result in a deprivation of liberty – as Richard Jones maintained back in 2007 – yet a guardianship order doesn't authorise this deprivation of liberty. This deprivation of liberty can only be authorised under the MCA, and the DoLS qualifying requirements must be met. This means that if guardianship is imposed upon a person who has capacity, or a guardian makes a placement decision which is not in a person's best interests, or which conflicts with the decisions of a deputy or a person with power of attorney, then it will result in a deprivation of liberty which cannot be authorised by any obvious means. There is no clear remedy for this situation. The solution, in my view, is to ditch the guardianship order entirely and apply the DoLS directly or go to the Court of Protection.

In some respects, guardianship offers families much greater leverage than the DoLS. Because the appointment of the nearest relative under the MHA is 'automatic' and

¹ <http://thesmallplaces.blogspot.co.uk/2012/01/3-dols-v-guardianship-discussion.html>

*not on the basis of selection, there is less scope for avoiding appointing relatives who object to the detention – which is a risk under the DoLS. Under the DoLS, concern has been expressed that supervisory bodies may avoid appointing family representatives who oppose the detention; there are weak safeguards against this. Furthermore, detention under the DoLS can be authorised in the face of opposition from the family representative, who must apply to court under the appeal mechanism. There are many reasons to believe this may be difficult for some representatives. Under guardianship, the nearest relative can successfully oppose an application for reception into guardianship, or request a discharge. If the local authority wish to displace the nearest relative, they must apply to court to do so: disputes in cases like *Neary v Hillingdon* would be likely to come to judicial attention far earlier under this regime.*

Guardianship has a much stronger framework for review and ongoing monitoring of the conditions of detention by the local authority than the DoLS do; this is a significant advantage. As things stand, both frameworks are very weak for ensuring detainees' Article 5(4) rights to appeal are upheld. This is because unlike detention under Part II MHA, there is no automatic referral of the detention to either a court or tribunal. Because the populations who are likely to be subject to either regime are likely to require help (sometimes considerable) accessing their right of appeal, both regimes rely upon other parties helping them to appeal. In both cases, the parties who could assist them in this may have conflicts of interest in doing so where they support the detention but the detainee objects. Independent advocacy could remedy this, but the duty to refer is weakly enforced for the DoLS and IMCAs do not appear to be fulfilling their statutory obligations under s39D MCA.

There is a much weaker obligation to appoint an independent advocate under the guardianship regime. An automatic referral to a court or tribunal has been recommended by many, and whilst I support this recommendation it would undoubtedly increase the costs associated with community based detention by increasing the number of appeals. This would undermine the case that an amended guardianship regime would be cheaper than DoLS, although it would be more likely to fulfil our obligations under the European Convention on Human Rights ('the Convention'). I have also explored the differences in the powers of tribunals and the Court of Protection in determining appeals. I argued that the broader powers of the Court of Protection may be desirable in certain community based contexts, and that a key weakness of guardianship is the lack of any accessible remedy to challenge the decisions of guardians. Another shortcoming of guardianship is that it is incumbent upon the person subject to guardianship that it is not necessary for them to remain under guardianship (ie. they carry the burden of proof to demonstrate the case for discharge). This was found to be incompatible with Article 5 ECHR for the purposes of detention under the MHA, and would need to be amended. The question of the 'burden of proof' for s21A MCA appeals in the Court of Protection is somewhat uncertain as it is not specified in statute, rules or regulations (the same goes for many procedural aspects of applications under the MCA.

I also discuss whether guardianship might carry the stigma of the MHA, and conclude that there is too little evidence on this point to say. The language of guardianship might be slightly more attractive to care providers and public authorities, but it is likely to be repellent to those within the disability rights movement. The monitoring arrangements for both guardianship and DoLS are currently pretty abysmal, but are (hopefully) improving. The UK is likely to be in breach of its duty to monitor places of detention in relation to people who are deprived of their liberty in placements which the CQC cannot visit in the course of its compliance inspections, most notably supported living but also Extra Care Housing, adult placement schemes and so on. I argue that guardianship may have a trick up its sleeve in relation to this issue, as CQC can visit people who are subject to guardianship provided they are granted access, and guardians have the requisite powers to grant them access. Finally, I argue that neither scheme has any answers for the problem of widespread, unlawful, de facto detention. Indeed, there is no clear duty upon anybody to seek the authority of a guardian, unlike the DoLS where the managing authority must seek authorisation from the supervisory body. This is the single biggest shortcoming of the DoLS, and neither framework has any solution.

The question: Would guardianship have been better than the DoLS?

The Mental Capacity Act 2005 (MCA) deprivation of liberty safeguards (DoLS), as readers will know, were introduced to close [the 'Bournewood gap'](#) – to provide safeguards against arbitrary detention for incapacitated adults in hospitals and community settings. The DoLS are only three years old in April 2012, but they have had a troubled early life. From their inception, observers like Roger Hargreaves wondered early on if they were a 'bureaucratic monster', and recently declared them 'not fit for purpose' in a [draft report for the Mental Health Alliance](#). Barrister [Paul Bowen](#) (who acted in the original Bournewood case) has called them:

'decidedly inelegant... the provisions so labyrinthine and bureaucratic that those responsible for administering them are likely to take every opportunity to avoid using them.' (Paul Bowen, Barrister and author of [Blackstone's Guide to the Mental Health Act 2007](#))

And [Richard Jones](#) – author of 'the bible' on the Mental Capacity Act, has described them as:

'hugely complex, voluminous, overly bureaucratic and difficult to understand, and yet provides mentally incapacitated people with minimum safeguards' (Richard Jones, Solicitor and author of the [Mental Capacity Act Manual](#))

It has been suggested – by Richard Jones, by the [Mental Health Lawyers Association](#) (MHLA) – that an amended form of guardianship under the Mental Health Act 1983 would have provided a better alternative. In [their response to the legal aid consultation](#), the MHLA wrote:

'The DOL Safeguards are cumbersome and unpopular with nearly all those who have to deal with them. The only appeal avenue is to the Court of Protection at considerable expense. Often, the case has to be heard in London, a long way from where the person subject to the DOLS (and their family and the professionals

concerned) is based. DOLS cases are mainly still heard before the senior judiciary, with the effect that counsel is often relied upon. The costs are often many times in excess of the costs of even the most complex tribunal. The Safeguards could be replaced by amendments to the Guardianship scheme under the MHA 1983, with the Tribunal service dealing with appeals rather than the Court.'

In a 2007 article for the *Journal of Mental Health Law*² (sorry, paywalled), Richard Jones suggested that a person subject to guardianship powers was very likely to be deprived of their liberty:

'Put bluntly, a person under guardianship can be forced to leave his or her home to go to a place where he or she does not want to go to, can be required to stay in that place and can be returned to that place if he or she leaves without being given permission to do so. Given the interpretation that the European Court of Human Rights and the High Court have given to the meaning of a deprivation of liberty, how can it possibly be argued that a person who is subject to the operation of such powers is not being deprived of his or her liberty? Such a person is clearly subject to the continuous control of the guardian and is not free to leave the specified place of residence. The fact that the provisions of the MHA that relate to guardianship do not specifically state that guardianship can be used to authorise the deprivation of a patient's liberty is not legally relevant to the question of whether the provisions can have that effect.'

I'm not sure whether he would still hold this to be the case following the rulings in [P & Q](#) and [Cheshire](#), let alone the rulings in [C v Blackburn and Darwen Council](#) and [CC v KK](#) – where people who were required to live in places despite their objections were not considered to be deprived of their liberty. Having said that, those rulings are [almost certainly wrong with respect to recent Strasbourg authorities](#), and so the question of whether there is a better alternative to DoLS may become more pressing when the Supreme Court revisits *Cheshire* in 2013.

Jones regards the guardianship regime as preferable to the DoLS. But seems from [a more recent ruling](#) of the Court of Appeal, that if the effect of Guardianship is to detain a person, then as things stand it cannot be regarded as satisfying the requirements of Article 5(4). In [The Secretary of State for Justice v RB & Anor \[2011\]](#) Arden LJ found that a tribunal cannot order a conditional discharge for a restricted patient ([s73 MHA](#)) on terms that would create a deprivation of liberty: the review mechanism was inadequate, the criteria not set out, parliament had not intended s73 to be used for this purpose, and it foresaw detention for the purpose of 'containment' rather than treatment, which was contrary to the policy of the MHA [44], [54], [57]. I think similar difficulties would hold for Guardianship, since it was never intended by parliament to be a mechanism for detention, and the government explicitly rejected such a use in the Bournemouth Consultation report. But, it does seem possible that in the light of widespread criticisms and [the spiralling costs of the DoLS](#) (albeit costs that the Ministry of Justice [seems reluctant to keep track of](#)), the government may return to this issue and re-consider the use of guardianship. And so, in this piece, I want to explore how DoLS and guardianship compare, and in what ways guardianship (and indeed the DoLS) might need to be amended to comply with Article 5(4) and offer robust safeguards against detention. I will look at:

² Jones, R. (2007) 'Deprivations of Liberty: Mental Health Act or Mental Capacity Act?', *Journal of Mental Health Law* November 2007 p170

criteria for detention; coercive powers; the appeal and review mechanisms; the role of family, friends and advocates; terminology and stigma; and monitoring and enforcement.

Criteria for detention

In [their work on mental incapacity](#) in the 1990's, the Law Commission notes that historically guardianship was rarely used, even though it was the only framework providing real authority for personal welfare decisions for people who lacked capacity. The already minimal use of guardianship dwindled further after it was reformed under the [Mental Health Act 1983](#) (as amended by the Mental Health Act 2007, henceforth MHA), which reduced the eligibility criteria, and in particular excluded from scope adults with learning disabilities who are not 'abnormally aggressive' or 'seriously irresponsible'. As [Bartlett and Sandland](#) put it:

'...it means that the majority of persons with learning disabilities, for whom guardianship was designed, who are not normally aggressive nor irresponsible, are not eligible for guardianship' (p489-90).

This problem was highlighted by several respondents to the government's [Bournewood Consultation](#), which canvassed views on whether guardianship could provide an appropriate solution to the 'Bournewood gap': The Law Society, the Healthcare Commission, Bevan Brittan (incidentally, I can't link to these as I only have paper copies of these responses – requested from the Department of Health under the FOIA).

By contrast, the DoLS are more flexible with respect to population: it does require that a person is suffering from mental disorder in the meaning of the Mental Health Act, but takes out the restrictions on learning disabilities ([last year](#) 14% of people detained under the DoLS had learning disabilities). And furthermore, whereas the criteria for guardianship are based on a person's 'status' as mentally disordered, the DoLS have the additional 'functional' requirement that a person must lack capacity with respect to whether he should be accommodated in a particular place for the purposes of care or treatment. A person considered to have the capacity to decide about these matters could – in theory – still be coerced under guardianship. I wonder if, for example, KK in *CC v KK* – who had a mental disorder in the meaning of the MHA (dementia), would have been considered eligible for guardianship, even though she was found to have capacity and so be ineligible for the DoLS? And so, if guardianship was to replace DoLS, I think it would have to be amended not only to remove the learning disabilities exclusions, but also to include a capacity criterion so it does not become an outmoded 'status' based tool of coercion.

The key difference, in my view, comes down to the 'welfare' requirement under guardianship and the 'best interests' requirement under the DoLS. Aside from the mental health requirement, reception into guardianship requires that:

...it is necessary, in the interests of the welfare of the patient or for the protection of other persons, that the patient should be so received.

Meanwhile, detention under the DoLS requires that:

- it is in the best interests of the relevant person to be deprived of liberty

- it is necessary for them to be deprived of liberty in order to prevent harm to themselves, and
- deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm.

The DoLS qualifying requirements of course also incorporate the s4 MCA best interests considerations, such as a person's past and present wishes, feelings and beliefs, the perspectives of any person named by P or involved in caring for P, and P must be involved in the decision to the maximum possible extent. By contrast, reception into guardianship requires merely that P is assessed, and his Nearest Relative is consulted (on which, more below).

Although these criteria have broad similarities, it strikes me that the best interests requirement is potentially much more stringent than the 'welfare' requirement for guardianship. For a start, it explicitly requires the harm that would arise if a person wasn't detained to be spelled out, whereas harm is only implicitly referred to under the welfare requirement. It carries an explicit requirement for 'proportionality', perhaps as a nod towards European Convention on Human Rights case law on Article 8. And most importantly, it engages the 'best interests' checklist procedure of the MCA. The substantive criteria under the DoLS seem, to me, to be far more likely to accord with [Winterwerp](#) (indeed, this was found to be the case in [G v E](#)), the [UN's MI Principles](#), and [Article 12 Convention on the Rights of Persons with Disabilities](#) (CRPD). It is entirely possible that those applying guardianship would choose to apply similar 'best interests' style considerations, or would consult a wider range of people than they are statutorily obliged to (indeed, the MHA code of practice suggests it is appropriate to consult more broadly when an application for detention is being made, see paragraphs 4.66-4.70). But, importantly, these aren't clear legal requirements, and would not necessarily form grounds to challenge a decision about reception into guardianship.

DoLS also engages emerging 'best interests' case law which places a high value on 'social' as well as 'medical' and safety considerations (e.g. Munby LJ 'What good is it making someone safer if it merely makes them miserable?' in [Re MM \(2007\)](#) [120]). I'm not well placed to comment as I'm not so well read in guardianship case law, but it strikes me that in the context of the MHA 'welfare' may place greater emphasis on medical matters – I'd be interested in your views on this. Having said that, the tribunal panel is also composed of a lay member, and so perhaps they would inject greater 'social' reasoning to counterbalance any tendencies to medicalisation of criteria.

Another qualifying requirement of the DoLS is 'no refusals' by any suitably empowered deputy or person with power of attorney. This means that a person cannot be detained under the MCA if their deputy or attorney objects to any treatment which the detention is designed to facilitate, or decisions to place a person in particular accommodation. By way of contrast, reception into guardianship would 'trump' the decisions of any attorney or deputy, as decisions made under an MHA regimes displace those made under the MCA (the principle of 'primacy' of the MHA):

While the reception of a patient into guardianship does not affect the continued authority of an attorney or deputy appointed under the MCA, such attorneys and deputies will not be able to take decisions about where a guardianship patient is to reside, or take any other decisions which conflict with those of the guardian. [[MHA 1983 code of practice](#), [2.26]]

This suggests that where a person has designated a particular individual to make decisions for them under an LPA, guardianship raises additional Article 8 concerns as it designates decision making authority to a person whom P did not choose over those they did. As Judge Lush noted in [Re Harcourt](#), 'the Mental Capacity Act has been drafted in a labyrinthine manner to ensure that any decision by the court to revoke an LPA cannot be taken lightly', because of the Article 8 issues therein.

One serious shortcoming of the DoLS is that it the regime can only be used in care homes and hospitals. Because the DoLS cannot be used in settings like supported living, authority for detention in those settings can only be sought directly from the Court of Protection, and it must be renewed every year. This is a tremendous burden on public authorities, providers and courts alike. The [decision by the government not to include supported living](#) and similar schemes in the DoLS regimes was, frankly, indefensible, and is – in my view – a prime reason why the scope of the DoLS has been castrated in successive judgments seeking to avoid the burden of thousands of applications for authorisation, which must be renewed every year (see the comments of Munby LJ in the [Cheshire](#) costs order, that 'the importance of the appeal was not really at all about how P will be dealt with. The point of major importance for the local authority, and indeed local authorities generally, was how often they have to come back to court in this and other like cases'). By contrast, guardianship is not subject to any constraints over *where* it can be applied. This locational flexibility places guardianship at a distinct advantage over DoLS - it could potentially even be applied to a person living with family or in a [residential school](#).

Another potentially useful advantage of guardianship is that it can be applied to minors over the age of 16 (see [s7\(1\) MHA 1983](#)), whereas the DoLS have a minimum age requirement of 18. Greater flexibility over age could help remedy some of the issues that have started to emerge about older children who may be detained unlawfully in children's homes (e.g. [Re RK](#)), residential schools (e.g. [A Local Authority v C](#)) and even care homes (e.g. [MIG & MEG](#)).

Powers

The effect of an accepted guardianship application is to:

...confer on the authority or person named in the application as guardian, to the exclusion of any other person—

(a) the power to require the patient to reside at a place specified by the authority or person named as guardian;

(b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;

(c) the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved mental health professional or other person so specified. ([s8\(1\) MHA 1983](#))

I have to confess, I've never really understood the point of these powers, given that the MCA provides a framework which can be used to make decisions regarding residence and treatment, and it is a more complete framework than guardianship in several important respects. Guardians do not

have authority to consent to any medical treatment. By contrast, the DoLS do not provide 'consent' to treatment, but the MCA does provide authority for a deputy or attorney to do so, or provides a 'best interests' defence for those treating P. Tenancy (especially relevant for those in supported living services) is something of a grey area under both schemes. Neither the DoLS nor guardianship contain authority to enter into a tenancy on P's behalf. Deputies or attorneys under the MCA might do, but the reality is that most people in supported living services have neither, and [the status of their tenancies is something of a grey area](#). [Bartlett and Sandland](#) write:

'...in practice, the paradoxical situation is that, to be effective, these 'compulsory' powers rely on the cooperation, or at least absence of positive resistance, of patients.' (p489)

The [MHA code of practice](#) gives the following, rather obscure, advice on deciding whether to use guardianship or the MCA to make decisions about where a person should live and who should have access to them:

26. 11 Where an adult is assessed as requiring residential care but lacks the capacity to make a decision about whether they wish to be placed there, guardianship is unlikely to be necessary where the move can properly, quickly and efficiently be carried out on the basis of:

- section 5 of the MCA or the decision of an attorney or deputy; or
- (where relevant) the MCA's deprivation of liberty safeguards.

26.12 But guardianship may still be appropriate in such cases if:

- there are other reasons – unconnected to the move to residential care – to think that the patient might benefit from the attention and authority of a guardian;
- there is a particular need to have explicit statutory authority for the patient to be returned to the place where the patient is to live should they go absent; or
- it is thought to be important that decisions about where the patient is to live are placed in the hands of a single person or authority – for example, where there have been long-running or particularly difficult disputes about where the person should live.

The language of guardianship is more explicitly 'bossy' sounding than the MCA, the patient is "required" to reside at a place, attend various activities, allow access to professionals. But the reality is that however 'fluffy' the language of the MCA in comparison, it still permits coercive acts. However, it does so in a much more nuanced fashion, allowing for capacity and best interests to be determined separately for each specific issue. The key difference, in my view, is that guardianship has greater safeguards than the main provisions of the MCA, which may be [why it is still used by](#)

[some local authorities](#) who want to offer people who are not detained greater legal protection. Following *Cheshire*, that might be a very wise move.

As Jones points out in his 2007 article, there are no explicit powers for conveying under the DoLS. But the Court of Protection has now twice confirmed that a standard authorisation implicitly creates a power to coercively return a person to a care home or hospital they are detained to ([Re P \(Scope of Schedule A1\) \(2010\)](#), [DCC v KH \(2009\)](#)). A person under guardianship, who is absent without leave from the place they are required to live at, may be forcibly returned by a social worker (or anyone authorised in writing by them) or police officer under [s18\(3\) MHA](#). Cases like [Storck v Germany](#) strongly suggest forcibly returning a person to live at a setting would engage Article 5, as do the 'objections' issues discussed in *P & Q*. This would suggest that unless guardianship is amended to authorise detention, it would have to be used in conjunction with DoLS.

This can potentially be really problematic. If a guardian requires a person to live in a placement, in circumstances which constitute deprivation of liberty, but they do not meet the qualifying requirements for detention under the MCA, then we are at an impasse. The detention is occurring, because of the decision of the guardian, but it cannot be authorised in accordance with the requirements of the MCA. As the ruling in *C v Blackburn and Darwen Borough Council* showed, the Court of Protection cannot authorise the detention either (because of s16A MCA). This means that although in theory guardians can make decisions which conflict with the decisions of deputies and attorneys, or which do not have regard to capacity and best interests, in practice if that decision results in detention it is likely that it will constitute an unlawful deprivation of liberty. This is one of the many weird and wonderful tangles we get into when the MHA and the MCA collide. The courts seem to have sidestepped this difficulty in rulings in *C v Blackburn and Darwen Borough Council* by deciding that compelling a person to live in a place where they do not want to be does not constitute a deprivation of liberty. As I've argued elsewhere, [these decisions must be regarded as incorrect in light of recent Strasbourg rulings](#), and it is only a matter of time before the courts will have to revisit this. I was once asked by a BIA what they would do if they happened upon a situation like this. I would direct the guardian to this passage from the MHA code of practice:

26.13 However, it will not always be best to use guardianship as the way of deciding where patients who lack capacity to decide for themselves must live. In cases which raise unusual issues, or where guardianship is being considered in the interests of the patient's welfare and there are finely balanced arguments about where the patient should live, it may be preferable instead to seek a best interests decision from the Court of Protection under the MCA.

I'd say that a jurisdictional collision of this nature is a case which raises unusual issues, and an application to the Court of Protection would be preferable. If they refuse to budge, I suppose you could always threaten to judicially review their decision to disregard this guidance in the code of practice and to use their authority in a way which results in an unlawful detention...

The role of family under the different regimes

Depending on one's perspective, one of the strengths of guardianship in relation to DoLS may be that it offers far greater power to family members. Under the DoLS the detainee is appointed a

representative, and [according to regulations](#) this should be chosen by the person themselves if they have capacity, then if not by their deputy or LPA, and then – in the last resort – by the best interests assessor. As [the Mental Health Alliance have noted](#), the possibility for the supervisory body to select a representative who does not oppose the detention is rife with potential for conflicts of interest. There is very little monitoring or accessible means of challenge to ensure that P is allowed to choose their representative when capable, and there is very little to stop the best interests assessor choosing a more compliant representative than a more appropriate or obvious candidate.

In terms of the potential for abuse, this compares poorly with the selection of the comparable person – the ‘nearest relative’ – under the MHA. The nearest relative is automatically selected from a list ([s26 MHA](#)), and the approved mental health professional (AMHP, roughly analogous with the ‘best interests assessor’ under the DoLS) can displace them by application to court. One shortcoming of the MHA method of appointing the Nearest Relative, of course, is that if the person themselves has capacity, they might end up in a situation which, to quote David Hewitt, their nearest isn’t their dearest. In such circumstances, it would be incumbent upon them (or the AMHP) to apply to the court to have them displaced, which is a rather cumbersome process to ensure that you are supported by a person whom you prefer. Furthermore, if a person is reliant on others for support, and both the AMHP (obviously) and their nearest relative supports the detention, it seems possible that a person might find it hard to recruit assistance in exercising this right.

One hybrid option, which could avoid the potential for manipulation contained in the DoLS appoint system, might be to allow a person with capacity to select their nearest relative/representative, and then if they lack capacity to refer to a decision by a deputy, or finally a statutory list system if they have none. Another might be to use a statutory list but to allow P/Patient to exercise a right of veto for any person they do not want as their representative/Nearest Relative. If they get to the bottom of the list, a paid representative could be appointed. I would prefer that latter option, as it seems more in keeping with the Article 12(4) CRPD emphasis on allowing a person greater control over who supports them. I would favour a right of veto which was insensitive to whether or not a person has capacity – how much capacity do you need to know that you don’t like or trust somebody?

In comparison with the representative under the DoLS, the nearest relative has considerable powers. The nearest relative can oppose an application for reception into guardianship, and they [also have powers to discharge a person from guardianship](#) simply by writing to the local authority. However, the AMHP can – as stated – apply to have the nearest relative removed from that position by the court, if they feel they are likely to inappropriately exercise these rights. In their response to the Bournemouth Consultation, the Law Society noted that sometimes the threat of displacement may discourage a nearest relative from ‘acting vigorously on behalf of their family member’. One solution to this issue may be to support the nearest relative with independent advocacy, and ensure they have access to good quality information about their rights. The representative under the DoLS would be entitled to this support from a s39D IMCA. I had difficulty finding equivalent guidance for nearest relatives as the [Department of Health supplies for representatives for the DoLS](#), but perhaps there is some out there (certainly [I don't think they should have to cough up for a handbook](#); perhaps the detaining authorities could buy copies for them?!).

In contrast, the representative under the DoLS has no right to oppose the detention (unless they have power of attorney or deputyship with the requisite authority), nor of discharge; their only right

is to request a review of whether the qualifying requirements are met (which can be refused) or to appeal to the Court of Protection under [s21A MCA](#). The weakness of this position will be discussed more in [Part 2](#), but for now it's worth noting that the balance of power between family representative and professionals is entirely shifted with a switch from DoLS to guardianship. Whereas in the DoLS the representative has to make the case that a person should not be detained, and in any case it is relatively easy to avoid giving significant powers to any oppositional family member, under guardianship, where the nearest relative opposes the detention, the shoe is on the other foot. To put this in perspective, had [Steven Neary](#) been detained under a guardianship-like regime, his father could have opposed his placement in the care home from the start, or discharged him by merely writing a letter to Hillingdon Council. Had the council wanted to oppose this, it would require them to refer the case to court to displace his father as the nearest relative, and as history tells us, it is unlikely they would have succeeded.

The roles of different professionals under the different regimes

Under the MHA, an application for reception into guardianship must be approved by two medical professionals. Usually the application is [made by an AMHP](#) working for a local authority social services team, which means that a professional who is likely to have a social care background is involved in the process. Although AMHP's are making the application on behalf of the local authority, the code of practice is careful to stress that 'the decision to make an application lies with the AMHP personally' [8.14]. They are expected to be independent, and as the instigator of the application arguably have more power than the medical professionals – who merely exercise a right of veto. However, in the responses to the Bournemouth Consultation, law firm Bevan Brittan argued that it might be better if one of the professionals who must approve applications for reception into guardianship had a social care background. I would probably support this view, as I think that the expertise of social care professionals is very relevant to community based forms of detention.

Under the DoLS, an assessment must be made by both a doctor (the mental health assessor) and a best interests assessor. The requirements for the best interests assessor are somewhat vague; they must not be related to P, must be independent from his care planning, and must have no conflict of interest. The code of practice says the supervisory body 'must be satisfied in each case that the assessors have the skills, experience, qualifications and training required by regulations to perform the function effectively' [4.15]. Best interests assessors [must be](#) either an AMHP, a social worker, a nurse, an occupational therapist or a chartered psychologist with the requisite background. The 'eligibility' assessment – which relates to the intersection between the DoLS and MHA regimes – [must be conducted](#) either by a s12 MHA approved doctor who is eligible to be a mental health assessor, or an AMHP who is eligible to be a best interests assessor. My understanding is that s12 MHA assessors can be hard to come by for DoLS, so in all likelihood the BIA will also be an AMHP in many cases.

Appeal and review mechanisms: Not only entitled, but *enabled*...

Any framework providing for deprivation of liberty that is compatible with the European Convention on Human Rights must ensure that, in accordance with [Article 5\(4\)](#):

‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

As I have [argued elsewhere](#), I am not at all convinced the DoLS currently achieve this. The problem is that they follow the letter of the law but not the spirit. A person detained under the DoLS is 'entitled' to take review proceedings, but the reality is that the majority of people deprived of their liberty under the DoLS (or under guardianship if such a framework were to replace it) will find it very difficult to access their right of appeal under [s21A MCA](#) without the support of others around them. The key point is summed up by Jackson J in [Neary v Hillingdon](#):

‘...there is an obligation on the State to ensure that a person deprived of liberty is **not only entitled but enabled** to have the lawfulness of his detention reviewed speedily by a court.’ [202] (emphasis mine)

I am unaware of any Convention jurisprudence on positive obligations to *enable* a person to appeal (I just had a look through [Mowbray’s excellent book on positive obligations](#), and can see nothing in there on this issue), although the court in [Stanev v Bulgaria](#) (2012) does say:

...In the case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see, among other authorities, Winterwerp, cited above, § 60). [170]

I suspect the lack of any stronger rulings on this point is because if a person is enabled to take their case to the ECtHR, they are almost certainly likely to have been enabled to have this issue heard in a domestic court, and so the enabling issue is unlikely to reach this point. I would like to think, though, that the ECtHR would endorse Jackson J’s comment on positive obligations under Article 5(4).

Review of detention by the supervisory body

As Richard Jones points out in his 2007 article, guardianship does place much stronger explicit requirements on the supervisory body (which is to say, the local authority), to monitor the person’s welfare than DoLS do. A guardian must visit the person at least once every three months, and they must be visited by a doctor once a year ([regulations](#)). By contrast, and somewhat inexplicably, under the DoLS it seems to be the (implied) responsibility of the relevant person’s representative to ensure the managing authority is complying with the conditions of the DoLS authorisation, and the responsibility of the managing authority or the representative to alert the supervisory body to any change in the person’s circumstances which may mean the authorisation criteria are no longer met. Given that it is almost always the case that the supervisory body are held responsible for unlawful detentions, and that detention that does not comply with the conditions and criteria under the DoLS would be unlawful, this seems a rather strange state of affairs. It seems far more sensible that the supervisory body - not a relative or the care provider - take on the monitoring role. Especially given that they – not the managing authority or the representative – are those with the experience and knowledge to determine whether the byzantine processes of the DoLS are being followed appropriately. In practice, some DoLS teams do voluntarily monitor whether the conditions are complied with – but they are under no *explicit* duty to do so.

Guardianship also comes with an automatic renewal requirement (within the last two months of the authorised period), which requires the appropriate officer to produce a report stating that the conditions for reception into guardianship are still satisfied ([s20\(6\) MHA](#)). In contrast, a supervisory body under the DoLS can refuse to conduct a review, even if requested by the representative, and can also [rely on old assessments](#) to renew an authorisation if they believe they are still accurate and they were conducted within the last 12 months. It is hard to know how they could satisfy themselves of this without conducting a further assessment; and in Neary an inadequate review was held to breach Article 5(4). This means that potentially a person could be detained without any kind of visit from the supervisory body for up to a year, which surely cannot be an acceptable state of affairs. In this respect, the DoLS require significant amendment to offer a robust monitoring and review framework, and could borrow a lot from the guardianship regime.

Just as an aside, I sometimes come across the suggestion that the Part 8 review procedure under the DoLS is meant to be a quasi-judicial procedure, which is somehow equivalent to going to court for a review. It's not. The reasons for this are obvious: if there was a problem with the initial DoLS assessments, it's entirely possible these will be replicated at the review (which could very well be conducted by the same assessors). A review by a BIA is *emphatically not* a review by a judge, as required under Article 5(4). During the *Bournewood Consultation* the government had originally mooted the idea that such a review could be a 'first tier' appeal mechanism. However, by the end of the consultation they concluded that:

'In the Consultation Document the Government had proposed that a "first-tier" review should be established so that a proportion of cases could be resolved on review without incurring the extra bureaucracy of a formal legal hearing. Following further consideration, the Government has decided to abandon the proposal for a "first-tier" review on the grounds that it might be seen as interfering with the right, under Article 5(4), of appeal to a court and delay the speedy decision by such a court on the lawfulness of instances of deprivation of liberty.' (paragraph 41, [Summary of responses to the Bournewood Consultation](#)).

A review cannot replace a person's right to appeal against their detention in court, and should not unduly delay it either.

Appealing against a detention in a court or tribunal

Unlike detention under the MHA, neither the DoLS, nor guardianship, automatically refer detention to the court/tribunal for review after a certain period of time has elapsed. Under the DoLS, it is envisaged that a person's 'representative' (usually family or a friend, sometimes a paid advocate), or an IMCA will help them trigger the appeal process. But as the [Mental Health Alliance pointed out in 2010](#):

[The safeguards depend] far too much on family representatives who may be elderly or disabled themselves, and there is far too much scope for supervisory bodies to protect their actions from scrutiny by selecting representatives who agree with them, by removing those who do not, or by failing to provide them with enough information or support and by batting away requests for review.

The [Neary](#) case is a good example of how disinformation, deceit and the power imbalance between a supervisory body and a family representative can dissuade a person who is manifestly opposed to the detention from challenging it in court. This may be particularly the case if the supervisory body is funding a package of care a person and their carer may rely on, if representatives are concerned about rocking the boat for fear of jeopardising future support arrangements. In the *Neary* case, the role of the IMCA countering this disinformation and ensuring Steven's father understood the right of review was pivotal, and failure to refer the family to an IMCA earlier was held to contribute towards a violation of Article 5(4) by Jackson J.

Where representatives who support the detention are selected over those who do not, others may still trigger the [s21A MCA](#) appeal mechanism, but they will need to seek permission from the Court of Protection to do so (which commands a fee), and they will not be [automatically entitled to legal aid](#) (although they may be entitled to it subject to means and merits tests). They may also have trouble drafting an application without any right to view the documentation pertinent to the detention. But a more serious problem, in my view, will occur when all parties bar P support the detention. Under such circumstances, how is P to have his appeal heard? The answer to that should be through the action of a [s39D IMCA](#). Under s39D MCA a supervisory body must instruct an IMCA if it appears to them that 'without the help of an advocate, P and R would be unable to exercise one or both of the relevant rights'. I have to say, I would feel more comfortable if that said 'P *or* R', given that the conjunction 'and' suggests that P and R's interests always overlap. In any case though, I would imagine that a court called upon to interpret this would have to do so in accordance with Article 5(4), which nowhere says that a person's right of review for detention is conditional upon their family supporting that right. If P is objecting but R isn't helping them appeal, I would think a supervisory body would be duty bound to appoint a s39D IMCA to help them exercise their right of appeal under Article 5(4). That IMCA is statutorily required to help P 'exercise the right to apply to court, if it appears to the advocate that P... wishes to exercise that right' (s39D MCA).

I think the importance of s39D IMCA's in triggering the appeal mechanism may be vastly underestimated by many players in the DoLS. A lot of professionals (health and social care, legal too) seem to regard IMCA's as if they are some kind of underqualified non-experts who take up time and resources snooping around their professional activities and asking annoying questions. All the evidence suggests that s39D MCA is [misunderstood and underused](#). The number of referrals to s39D IMCAs is far, far, lower than the impact assessment predicted (it predicted that 90% of unpaid representatives would need support from an IMCA), and by 2011 one third of local authorities had never made a referral. This included some local authorities that had made over 100 authorisations in that year alone.

Meanwhile, even once an IMCA is appointed, I think there are reasons to doubt they themselves are fulfilling their role in the way s39D expected them to. [Data collected by the Department of Health on IMCAs](#) suggests that they were involved in only 13 formal complaints in 2010/11, and 4 cases where their involvement led to an application to the Court of Protection. That's for the IMCA service *as a whole*, not just DoLS. Four cases. To my mind it is absolutely inexplicable how the strong duty to help a person apply to court to exercise their right of appeal should they want to can be reconciled with IMCAs being involved in only four court applications. Inexplicable, and legally and morally indefensible. The IMCA role under s39D is distinct from their role elsewhere under the DoLS, which is primarily information gathering and supporting and involving a person. The IMCA

role under s39D is to help a person understand and exercise their rights to challenge their detention. I am personally aware of cases where 'P' is detained under DoLS, objecting, has input from an IMCA and the IMCA has not helped them to appeal. I suspect it is only a matter of time before IMCAs themselves become defendants in cases where P's Article 5 rights have been breached.

Another option where P seeks to challenge his detention, but is not assisted in doing so by his representative, is for the local authority to displace his representative and appoint a paid representative who will assist him in exercising his appeal rights. This happened in [A v A Local Authority \(2011\)](#), as case where the court emphasised that even if it seemed obvious to everybody that it was in P's best interests to be deprived of his liberty, the court should take his appeal seriously and not just 'rubber stamp' the authorisation. P's representative can only be displaced, however, [where they are not maintaining sufficient contact with P or not acting in his best interests](#). In order to do this, therefore, supervisory bodies would have to construct 'best interests' as 'enabling P to appeal, even if his appeal appears futile to everybody else'. I would support this construction – in fact, I'd say that best interests has no place in a person's *absolute* right to appeal against their detention under Article 5(4), but some might dispute this point. At some point the question of whether P's right to appeal can be denied, obstructed, or not supported in his 'best interests' is likely to be determined by a court.

In terms of ensuring a person is assisted in their right to an appeal, guardianship may be just as deficient as DoLS. It comes with no automatic referral for a review by a court. In fact, his rights of review may be somewhat weaker than under the DoLS. P can apply to the tribunal for discharge once within the first six months of the day the application was accepted ([MHA s66](#)), once within the next six month period of renewal, and once per year thereafter. By comparison, s21A MCA contains no such limitations on when a person can apply to the Court of Protection, or how many times.

If P's nearest relative has already objected to reception into guardianship, then P will be discharged or the case will come to court in the guise of whether the nearest relative will be displaced. But if P's nearest relative does not object, then unlike under the DoLS nobody else but P can bring an appeal. For example, other family members who object may be unable to, although they could attempt to support P in mounting an appeal. As under the DoLS there is provision for advocacy support for P in the form of IMHA's (Independent Mental Health Advocates); [s130A MHA](#) provides:

'The appropriate national authority shall make such arrangements as it considers reasonable to enable persons ("independent mental health advocates") to be available to help qualifying patients.'

This seems to be much weaker than the hard duty of s39D MCA to appoint an advocate to help a person who is failing to exercise the relevant right when it might be reasonable to expect them to. Of course, if guardianship were to be used for detention one could perhaps read the *Neary* ruling into it – that failure to appoint an advocate to support a person to exercise their Article 5(4) rights is in itself a breach of Article 5(4) [32].

In summary, I think if guardianship were to supplant DoLS as a mechanism for review of detention it would be best of all if reviews by a court came up automatically as under MHA detention cases (s68 MHA). In fact, to fail to do so might in itself be discriminatory under [Article 14 ECHR](#) in comparison with the MHA regime. In [The Secretary of State for Justice v RB & Anor \[2011\]](#), Arden LJ accepted

that if tribunals were able to discharge people to conditions amounting to detention in the community, the secretary of state would be duty bound to show why this lesser right of review for detention was not discriminatory under the Convention [64]-[65]. In a wider sense, I would suggest that the weaker rights of review under the DoLS than the MHA may also, already, be potentially discriminatory under Article 14.

But simply tagging an automatic review mechanism onto guardianship may not be enough to address the Article 8 issues that increasingly plague appeals under the DoLS, if it did not also allow other parties to appeal against it or act as parties to the case (as s21A does). If guardianship were to replace DoLS, it should be born in mind that P has Article 8 rights in relation to other parties than the Nearest Relative, and they will have Article 8 rights as well. One example might be certain kinds of non-related paid carers, for example like E's 'foster mother' in [G v E \(2010\)](#). In fact, as far as I can work out Mr and Mrs E would not have been HL's Nearest Relative in the *Bournewood Case*, so had he been subject to guardianship (as opposed to s2/s3 MHA) it's not entirely clear how much better off he would have been. Better access to legal aid for those parties may also be required, as the Court of Protection [has itself indicated](#) in relation to reviews of detention outside the scope of s21A MCA.

I also wanted to make another point; if the MHLA want to promote guardianship on the basis that it will be cheaper than DoLS, I believe the question of an automatic review mechanism will be their downfall. At present, [very, very few cases](#) under the DoLS are appealed; a situation which from the perspective of the Article 5(4) rights of detainees is highly problematic, but from the perspective of the public purse is rather convenient. It was never clear why – bar wishful thinking by accountants perhaps – it was thought that only 2.5% of DoLS authorisations would result in an appeal. It strikes me that as deprivation of liberty is increasingly defined in terms of objections by P, and disputes about alternative residences, we should expect to see the majority of cases ending up in court. The only reason we do not, I suggest, is because the safeguards are not working.

Should a court or a tribunal hear appeals against detention?

From the very beginning, one of the biggest debates around the DoLS has been whether the final destination for appeals should be the Court of Protection or a tribunal (like the mental health tribunal). According to the government's summary of responses to the Bournewood Consultation, 'Many saw the MHRT as the most appropriate body' for appeals under the DoLS. However, the government was 'persuaded by the arguments put forward by the minority who considered the Court of Protection to be best placed to undertake this role'. This was because 'the legal framework for the Bournewood provisions will be provided by the Mental Capacity Act 2005, the Court of Protection (which is established by that Act) will be best placed to take on this role as part of its overall responsibility for the personal welfare of those who lack capacity.'

Perhaps one of the reasons the MHLA and others promote guardianship, is because guardianship is appealed in a tribunal setting, not the Court of Protection. Contrasts are generally drawn on the following points:

- **Delays.** The Tribunal Service aims to hear 75% of cases within 9 weeks ([last year it achieved only 51% within this time limit](#)). There is no public target for the Court of Protection to hear

DoLS cases (although, the Court of Protection do attempt to fast-track DoLS cases). This issue may need looking at, but I am unaware of any public data on delays for DoLS hearings specifically. Solicitors often complain about delays at the Court of Protection, but from a research and policy perspective it's difficult to see how serious this problem is; it's one of the many data-holes in our knowledge about the DoLS.

- **The Court of Protection is said to be more costly to the public purse than a tribunal.** I came across this concern a lot, so I did a little research and wrote to some friendly solicitors and local authorities that I knew had been involved in DoLS appeals, and [the results were staggering](#). From the information I obtained, it seems the overall cost to the public purse of a DoLS appeal (including legal aid for P and R and the costs of the local authority, but not including any additional costs to the Court of Protection or the Official Solicitor) may range between £5,000 to £59,000, with a mean of around £24,000. If these data are representative, this is deeply concerning, and helps to explain why in cases like *Re RK, P & Q*, and *Cheshire*, public authorities and courts alike have been so concerned about the resource implications of a more expansive reading of Article 5. There are several possible explanations for these very high costs of appeals. Firstly, the DoLS are full of technicalities and 'angels on a pinhead' type debates about how they should be interpreted. This may necessitate the use of counsel where they might not otherwise be needed, and may take up considerable resources in preparing arguments and judicial determination. Secondly, the MCA itself often collides with complex welfare and Article 8 issues. Munby LJ has described these hearings as having 'all the complexity of a heavy child care case but, in addition, the extra complexity of disputes about capacity and, sometimes, also about deprivation of liberty' (The Right Honourable Lord Justice (Sir James) Munby (2011) 'Dignity, Happiness and Human Rights', *Elder Law Journal* 1(1) p 32-38). Arguably, then, the correct comparator for a s21A MCA appeal is not a mental health tribunal at all, but child welfare proceedings in the family court. This is a contentious point, however, and merits further research and debate. Thirdly, the costs of expert reports in the Court of Protection may be much higher than the reports prepared by the medical member and independent experts in tribunals. Again, this needs further research to understand why these reports are needed, and whether they cost more.
- **Tribunals are local to P, whereas the Court of Protection (often) sits in London.** It is my understanding that the Court of Protection are trying to address this with more regional courts, and I am aware of cases where Court of Protection judges have made site visits to a person's place of residence to resolve disputes. A tribunal generally sits wherever P is detained to, but this isn't necessarily the case for community based forms of detention. I'm unsure how often a guardianship tribunal would typically sit in P's care home, or supported living service? However, it's probably fair to say that most people live closer to a hospital than a regional court, and so the chances of it being a more convenient location for P and P's family are probably greater overall with a tribunal than the Court of Protection.
- **P attends a tribunal in person, but typically does not attend Court of Protection hearings.** The DoLS and the MHA relate to very different populations, both in terms of capacity (obviously), but perhaps also in terms of physical health needs (the majority of DoLS detainees are people in later life with dementia). I'm unclear whether the population

detained under the DoLS would attend a tribunal in person as frequently as patients detained under the MHA do – perhaps mental health lawyers can comment on this? But attendance in court is a really neglected point, I feel, in discussions around the Court of Protection. In a very few cases mention is made that the judge has either met P (e.g. [W v M](#)), or that P wished to attend court (e.g. [Re MP](#)– although it’s not actually clear whether he actually did or not!), but in others it is clear that the judge did not meet ‘P’ but ‘feels like they know them’ on the basis of what others say about them (e.g. [MIG and MEG](#)). In *CC v KK*, the meeting between KK and Baker J was absolutely essential to enable him to determine her capacity. For reasons I discuss more fully [in my commentary on CC v KK](#), I think Articles 6 and 8 ECHR may require a judge to meet with P where they are making decisions relating to his capacity, or ‘adopting decisions with serious consequences for a person’s private life’. Consequently, P’s being able to attend court may be an increasingly important concern in relation to the MCA and the DoLS.

- **The Court of Protection is said to delve too deeply into case management.** In his latest introduction to the *Mental Capacity Act Manual*, Richard Jones opines that in cases like [A London Local Authority v JH & Anor](#) judges are not giving sufficient regard to the demands of the system as a whole, hearing detailed oral evidence and not dealing with the matter quickly and proportionately. He comments:

‘Judges and practitioners should focus their attention on the essential issues that arise in applications; the temptation to convert legal proceedings into a Rolls Royce case conference service for the very few should be resisted.’

I think, again, this comes back to the question of whether you regard DoLS appeals as being more like a mental health tribunal or more like a child welfare case – if it’s the latter, then detailed oral evidence may seem less disproportionate. I’ve heard this view expressed by other professionals whose views I also respect, but I have to say I have some misgivings about it. It sometimes seems to come from a place of ‘professionals know best and the courts should let them do their job’, a perspective which I have my doubts about. However, it is undeniably true that there is a tension between the depth of scrutiny you give to a detention, and the number of cases the system can realistically hear. What is the point of a Rolls Royce system which hears such a pitiful number of appeals as the DoLS? What is the point of hearing them all, but acting as a rubber stamp?

The powers of tribunals and the Court of Protection

In respect of Guardianship, the Tribunal has only these powers:

Where application is made to the appropriate tribunal by or in respect of a patient who is subject to guardianship under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—

(a) that he is not then suffering from mental disorder ; or

(b) that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that the patient should remain under such guardianship. (s72(4) MHA)

In respect of DoLS, the Court of Protection has the following powers under s21A MCA:

- (2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—
 - (a) whether the relevant person meets one or more of the qualifying requirements;
 - (b) the period during which the standard authorisation is to be in force;
 - (c) the purpose for which the standard authorisation is given;
 - (d) the conditions subject to which the standard authorisation is given.

- (3) If the court determines any question under subsection (2), the court may make an order—
 - (a) varying or terminating the standard authorisation, or
 - (b) directing the supervisory body to vary or terminate the standard authorisation.
- (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.

Similar powers pertain for urgent authorisations. I have already discussed the issues around what criteria must be satisfied in Part 1, but I will reiterate that it strikes me that the court must satisfy itself of much more stringent criteria under s21A MCA than under s72(4) MHA. And that furthermore, it seems that they are likely to consult a wider range of views, and the evidence and parties to the case are likely to be less medically dominated under the MCA than the MHA.

One important contrast between the powers of tribunals in relation to guardianship and the powers of the Court of Protection in relation to DoLS, is that the former seems, to me, to be much more insensitive to *where* a person is placed. A person applies to a tribunal to be discharged from guardianship, not to be discharged from their placement. There seems to be no obvious way that a person can ask the tribunal to consider the decisions of the guardian themselves. It seems possible that a person might not have a problem with having a guardian, but they might not like their particular placement. It also means that focus of the court's attention is likely to be on the individual's mental health, rather than the capabilities of the placement to cater to their needs and best interests. This is a much more medicalised criterion, much less sensitive to the lessons of the social model of disability that a person's needs arise in interaction with their social context and physical environment. In *Stanev v Bulgaria*, one reason for finding his Article 5(4) rights had been violated was a lack of any mechanism to review the *placement*, as opposed to his reception into guardianship (see paragraphs 174-8).

It is technically possible for a person to seek judicial review of the use a local authority puts their powers of guardianship to. In *Kent County Council ex p Marston* (1997), an unreported case from the administrative court (kindly brought to my attention by Belinda Schwehr; I can't find this case on BAILII, Westlaw, Lexis or MHLO, but it is briefly touched upon in [this](#) article by Fenella Morris and Victoria Butler-Cole), the court found that the court could quash the decisions of guardians if they acted unreasonably or *ultra vires*. This case was brought before the advent of the Human Rights Act 1998 (HRA), and the power to seek judicial review for a violation of a person's human rights might well be more potent. Still, although this is a theoretical possibility, seeking judicial review doesn't

have any of the enabling infrastructure of the tribunal system, or even s21A MCA appeals, and would be a far less desirable remedy.

S21A MCA seems to me to be a much, much more flexible legal device than s72(4). For a start – unlike the tribunal – the Court of Protection can make declarations as to whether a person has been unlawfully detained; a separate case would need to be brought for a person who was unlawfully detained under an MHA regime in the administrative courts. The ability to vary the standard authorisation is very significant; the court can direct the conditions under which a person is detained, which offers them much greater power over details of care and treatment than a tribunal has. For some, this may be a bad thing and risk the court straying too close to ‘case management’, but I have heard tribunal judges bemoan their lack of comparable powers to do anything but recommend a particular course of treatment. If a person is detained to hospital under the MHA, the tribunal can make recommendations (non-binding) about his treatment if they do not discharge him (s72(3A)), but even this power to recommend doesn’t seem to apply in the case of guardianship. [John Horne](#) (himself a tribunal judge, as well as solicitor, social worker and academic) has complained that ‘...the twin straitjackets of easy-to-satisfy statutory criteria and limited powers enable the Tribunal to readily adopt the role of a toothless tiger’ (that quote is from his talk at the [SLSA 2011](#), but you can watch another version of this talk, given in Manchester 2010, [here](#)).

In the context of community based forms of detention, a simple power to discharge may become problematic. Unlike community care, a person is not detained to hospital for the purposes of giving them a long-term home (which is not to say that people – especially those with learning disabilities – do not languish in hospitals for far longer than anyone considers desirable). If detention is taken to mean the extreme end of the spectrum of restrictions on liberty, it becomes tricky to understand what discharge means if a person is likely to always be subject to significant restrictions. For very many cases – like that of ‘P’ in Cheshire, like [MIG and MEG](#) – it’s hard to make sense of what ‘discharge’ could realistically mean. If there is a dispute about an alternative residence, then discharge may mean that they are discharged to that residence. However, it seems possible that some people might be effectively deprived of their liberty *wherever* they lived, so it would be more useful to have a power which enabled particular restrictions to be lifted, or the conditions of a person’s detention be varied (e.g. to a different placement).

This, clearly, strays into the territory of general best interests. It is often very difficult to separate out best interests matters from the court’s powers under DoLS. Linked to a s21A appeal, of course, the Court of Protection may also be called upon to use its powers under s15 or s16 to make declarations or orders relating to P’s capacity and best interests. This strays into all kinds of horrible territory around legal aid eligibility for cases that straddle s21A MCA and s16 MCA. My personal view is that if a person is subject to a major interference with their human rights on the basis of alleged incapacity, then it is outrageous that they should have to dip into their own resources to challenge that in court. Given the ‘general rule’ on not awarding costs in the Court of Protection, they are unlikely to recoup their losses if they do bring a case under s15/16 MCA. I’d prefer to see non-means tested legal aid for all major Article 8 issues in the Court of Protection.

One further important consideration for using guardianship to authorise detention, is that currently the burden of proof rests on the person subject to guardianship to satisfy the tribunal ‘that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that

the patient should remain under such guardianship' ([s72\(4\)\(b\) MHA](#)). This is a reversal of the position for those detained under the MHA. Following the ruling in [R \(H\) v MHRT \[2001\] EWCA Civ 415](#) it has been accepted that it would be incompatible with a patient's Article 5 rights to place them under a burden to satisfy a tribunal that the grounds for detention are *not* met (see a nice summary of that case by [Rosalind English](#)). After the ruling in *H v LMHRT*, the government introduced an amendment to the MHA ([Mental Health Act 1983 \(Remedial\) Order 2001](#)) which shifted the burden of proof onto the detaining authorities to satisfy the tribunal that the criteria for detention *are* met. I had not appreciated, under Phil Fennell pointed it out to me, that this did not change the position for guardianship; consequently if guardianship was used for the purposes of detention this would need to be amended in order to comply with the Human Rights Act 1998. It is an interesting question what happens to the burden of proof when one appeals against detention in the Court of Protection under [s21A MCA](#). It is one that we are not well equipped to answer due to the dearth of publicly available information about the court's procedures when it receives an application under s21A MCA.

So, the powers of the tribunal in relation to guardian, and even the MHA as a whole, are much more restrictive. This may be problematic in community settings, where it is more likely to be useful to have powers to 'vary' the conditions of detention, then simply 'discharge'. Furthermore, the ability of the Court of Protection to exercise its discretion to look into other matters of capacity and best interests is very useful. For example, if a person is being detained to prevent them from having sex because they lack capacity to it, it seems daft if the court can't actually address their capacity to consent to sex if they seek to challenge that detention. If a person is being deprived of their liberty in a care home because of safeguarding allegations in the family home, it would be problematic if the court could not make findings of fact regarding those allegations. In certain respects the Court of Protection seems better equipped to deal with these matters, but this is partly what makes Court of Protection hearings so lengthy, and therefore so costly and prone to delays.

Terminology and stigma

I just want to say a few words about terminology and stigma, as they are often cited as factors against a MHA regime. In the first place, guardianship is obviously a very different regime from detention under the MHA; and I am unclear whether any studies or research has been done to suggest it carries the same stigma (certainly I can't find any). And indeed, for some people working in community care, I think guardianship may be more acceptable than 'deprivation of liberty safeguards' as a title for frameworks for detention. Initially the DoLS were to be called 'protective care', and in all but one of the Bournemouth Consultation responses I have read respondents were pretty keen on this; I'm not clear why it was changed. The Mental Health Alliance have expressed a preference for this term, as it is less likely to be offputting to care managers, social care professionals, and perhaps – I can imagine – to family members who support the detention. I can definitely see the logic of this approach; care homes are far more likely to agree that a person needs 'protecting' than 'depriving of their liberty', and perhaps would be more likely to make use of a regime bearing that name. I also wonder sometimes whether the courts would be more willing to agree that a person needed 'protective care' than that they were deprived of their liberty; they seem (in my view) to be excessively taken by factors like whether a person's bedroom is 'personalised' or

'homely' (or [as the Official Solicitor put it](#), whether or not there are roses around the front door) and not enough to the degree of control exercised over them.

However, I think we need to be cautious about the language of guardianship. I fully acknowledge that 'guardianship' under the MHA means a very different thing to guardianship in most international jurisdictions, but in debates in the international disability rights community it carries a very heavy negative valence. Like 'protection' it is regarded as a paternalistic and disempowering term. I do wonder if the label 'deprivation of liberty safeguards' at least keeps people's minds attuned to the issues of liberty that are at stake here. I don't want to single anybody out, but reading through the Bournemouth Consultation responses, and looking at the massive mess that is the DoLS and the DoLS case law, I do get the feeling that many actors take issues of liberty in the community far less seriously than in a hospital setting. There is nothing in Article 5 to support that view, and since the ECtHR's [recent trinity of rulings on detention in social care](#) there is much to suggest they take it very seriously. I'm sure if you asked Mr DE (JE v DE), or Steven Neary and his family, they would not support that view. I'm sure if you asked the near-hundred people abused in supported living services in Cornwall, who were said at the time to be deprived of their liberty, they would not support that view. In any case, it's not often suggested that the language of guardianship and protection carries a stigma all of its own; but I think for many people it just might, and there may be advantages to retaining a focus on liberty.

Monitoring detention

The current monitoring arrangements for both the DoLS and guardianship under the MHA have been very poor in the past, but are – I believe – going to improve. I've written previously about [the problems for CQC in monitoring DoLS](#), and a lot of the problem – it has to be said – is attributable to two factors. The first, that monitoring is left to the ordinary compliance inspectors instead of a specialist body like the MHA commissioners. The second, that the Department of Health in their wisdom have blocked CQC's only avenue to monitor the activities of the supervisory body by [cancelling the annual performance assessment](#). Guardianship is technically monitored by the CQC in their MHA monitoring context, but there's no real discussion of it in either of their last two reports on the MHA. This is fair enough in some ways, it's a much smaller population, but I think it's something that would need to be addressed if we do go back to the drawing board with DoLS. It is my understanding that CQC are planning to look at guardianship in the future. And I know, as a member of the CQC's DoLS advisory group, that they really are working hard to improve their monitoring of the DoLS. It's a bit of an uphill struggle as it's very challenging for them to get access to detainees under DoLS, and it's very challenging for them to monitor the activities of supervisory bodies, but they are trying to approach this in a creative way – I predict much better things for 2013.

Another consideration is the UN Optional Protocol on the Convention against torture ([OPCAT](#)), which requires independent monitoring of all places of detention, to prevent abuse and mistreatment. Currently CQC is the OPCAT monitoring body for the MHA – this role used to be undertaken by the Mental Health Act Commission. Today, the old Mental Health Act Commissioners continue to monitor people detained under the MHA using their special, rights-oriented, methodology. But people who are detained under DoLS, or de facto detained, just get ordinary compliance inspection. Compliance inspections do not use the same methodology as MHA detention, for example detainees are not interviewed in private, and there are no routine checks to ensure their rights under DoLS are

respected. The most scary thing is the situation of people who are deprived of their liberty in settings which are not registered hospitals or care homes, such as supported living. They get *no site inspections at all*. This is a clear breach of OPCAT, and it's a breach the government have known about since 2005 when the abuse in Cornish supported living services came to light. I have seen several consultation responses where the old Mental Health Act Commission have alerted the government to this, but they have yet to act on it.

Ironically, guardianship might have a trick up its sleeve on this one – as guardians can require professionals to be given access to the detainee. It might be possible to build in an amendment to guardianship whereby guardians must allow the CQC to visit and interview the detainee. There would have to be some kind of notification system to alert the CQC to this. The CQC would not be able to use their ordinary powers of inspection to visit the person. Section 62(4) Health and Social Care Act 2008 would appear to prohibit CQC staff from using their powers of entry for inspection purposes, and their powers to interview service users appear to be contingent on their powers of entry (s63 HSCA). However, s120 MHA requires that they 'keep under review... the exercise of the powers and the discharge of the duties' of guardians, as well as detaining authorities. Section 120(3)(b) also contains powers to allow them to access non-regulated places if access is granted, which I've already suggested could be by the guardian. They would have all the usual MHA monitoring powers to interview the person, and so on. So, in summary, with some minor modifications, the monitoring regime under guardianship could potentially be much better than the DoLS.

Seeking authority

Aside from all the things that can go wrong with the review and appeal processes, one of the fundamental problems with the DoLS is underuse. Simply put, care homes and hospitals are not seeking authorisation to detain when they should be. This is for a whole range of reasons:

- There is such **poor agreement over the meaning of deprivation of liberty** that [even professionals can't agree](#) (some might say that even the judges can't agree...), so it's unsurprising that care home managers and ordinary doctors, who have plenty more on their plate than keeping on top of Court of Protection jurisprudence, don't really understand what's expected of them. I recognise the dangers of a statutory definition, but note that it would reduce the degree of confusion overall and could always be 'topped up' by regulations if the ground shifts again in Article 5 case law. For penalties to apply for non-compliance, certainty and foreseeability is a must.
- Care providers are said to be **put off by the phrase 'deprivation of liberty'**, and don't want to acknowledge that they are restricting people's liberty because they see themselves as helping and protecting people. Ben Troke [has written](#) that *Cheshire* in fact supports this view.
- The **DoLS involve a lot of work** for both care providers or hospital staff, and the supervisory body, which is a disincentive. I often hear people complain about the forms in particular, although some have responded that the forms are designed to meet a legal need and can't be altered (although apparently the boxes to fill in are too small and inflexible, which is

clearly not a legal requirement; and I would think that in this day and age of technological whizzery somebody could set up the forms so that you don't need to re-enter the same 'cover sheet' details on each one?).

- The **DoLS invite scrutiny into care planning and care delivery** which may very well be unwelcome. They also offer a means for any awkward or objecting family members to litigate the very bodies that are supposed to be applying the safeguards, which is potentially a serious disincentive.
- There are **very few pressures to comply with the duty to seek authorisation for unlawful detention**. It seems probable, especially in the light of rulings like *Stanev*, that many thousands, probably tens of thousands, possibly approaching a hundred thousand, of people are unlawfully deprived of their liberty in England and Wales. Yet, we have seen only a handful of court cases which have found this, and even fewer yet where compensation for unlawful detention has been awarded. I've argued that [for privately funded care home placements, and for supported living services, there is no clear risk of litigation for unlawful deprivation of liberty at all](#). To the best of my knowledge, *Neary* is the only such case (it was rumoured, but never confirmed, that compensation was sought in *G v E*). The CQC very, very, rarely take enforcement action for unlawful detention.

Given that you're basically more likely to end up in court if you follow the letter of the law and apply the safeguards than if you don't, what incentive do managing authorities and supervisory bodies have to comply with the safeguards?

Guardianship under the MHA is not a panacea that will solve this, the most significant, of all the ills under the DoLS regime. In fact, given that guardianship relies upon an application by the local authority, and there is no obligation upon the care provider, it's unclear how detentions within privately arranged care would ever come to the attention of the supervisory body. This is especially problematic for people who are deprived of their liberty as a result of privately arranged care home admissions – and these may well form a large proportion of the detained population (it's impossible to estimate how many people subject to DoLS are privately funded, I once tried but nobody had any decent data on it).

Guardianship may address some of the problems in the DoLS regime around conflicts of interest and the rights of families. If an automatic referral to the court or a tribunal were introduced it may offer a more adequate Article 5(4) mechanism. The guardianship criteria could be amended to reflect modern approaches to mental capacity, and a best interests checklist approach. However, what guardianship will not do is ensure compliance with the regime on the ground; it will not ensure it is applied where it should be. I have thought, and thought, and thought about this problem. I think the DoLS regime, like the rest of the MCA, paradoxically tries to promote autonomy whilst already assuming that a disabled person - whose liberty is restricted by others - is in a position to challenge human rights violations through formal legal channels. This is clearly a highly problematic assumption. There must be some other mechanism to pick up on unlawful detention, and ensure they are subject to some kind of external monitoring framework. I think there should be automatic penalties for providers and public authorities who do not apply legal frameworks for detention when they should, to increase pressure to comply. I can think of only one body potentially in a position to

do this: the CQC. And, as I have written many times previously on this blog, currently I can't see how they are up to this job.