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Safeguarding Freedom? Liberty Protection Safeguards, Social Justice and the Rule of Law

*Rosie Harding**

Abstract: The issue of when and how disabled people can be lawfully deprived of their liberty is a major contemporary challenge for mental capacity law. People who lack capacity to consent to treatment that deprives them of their liberty must have access to safeguards to protect their rights under Article 5 ECHR. The current Deprivation of Liberty Safeguards are widely considered to be unfit for purpose, and a replacement scheme, the ‘Liberty Protection Safeguards’ (LPS) were proposed by the Law Commission of England and Wales in 2017. These safeguards were legislated for in 2018/19 in the Mental Capacity (Amendment) Act and are expected to be implemented in 2022. At the time the reforms were being debated in Parliament, multiple stakeholders expressed serious reservations about the proposals, some going so far as to claim that they are not ‘good law’. In this paper, I evaluate to what extent the LPS is (or has the potential to be) ‘good law’, drawing on two contrasting conceptual frameworks to guide that analysis: Bingham’s (2007) sub-principles of the rule of law; and the capabilities approach developed by Sen and Nussbaum (among others). I argue that despite the technical problems with the legislation that caused such concern during its passage through parliament, if the implementation process is grounded in a strong social justice conceptual frame, the LPS has the potential to be a positive legal reform.

Key words: Capabilities Approach; Deprivation of Liberty; Disability; Liberty Protection Safeguards; Mental Capacity; Rule of Law; Social Justice.

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1. Introduction

During the coronavirus pandemic of 2020–21, everyone in the UK had a taste of what it feels like to be deprived of our liberty, in order to protect our own health and the health of others. For many of us, these restrictions will (we hope) eventually fade into distant memories as we readjust to living our lives with the levels of personal freedom that we were all, previously, used to. For some citizens, some members of our communities, deprivation of liberty is not an exceptional state, only taking place in times of emergency. For many people with learning disabilities, with dementia or other neurodegenerative conditions, or with acquired brain injury, limitations on the freedoms that the rest of us usually take for granted are a part of their everyday lives.

The issue of when and how disabled people can be lawfully deprived of their liberty poses a number of thorny conceptual, practical and legal challenges. It has been a point of tension in mental capacity law in England and Wales since 2004, when the European Court of Human Rights (ECtHR) held that HL, a man with severe autism who had been informally admitted to a psychiatric hospital, was unlawfully deprived of his liberty, in breach of his rights under Article 5 of the European Convention of Human Rights (ECHR).¹ This was in contrast with the decision of the House of Lords in HL's case,² where it had been held that the common law doctrine of necessity provided sufficient legal authorisation to lawfully justify detention of 'persons of unsound mind' under Article 5(1)(e) of the ECHR. The problem became known as the 'Bournewood Gap', which refers to any situation where a person of 'unsound mind' who lacks the capacity to consent receives care and/or treatment in circumstances where they cannot leave, but do not clearly object, and are therefore not covered by the legal safeguards associated with the Mental Health Act 1983, as amended.

The first attempt to bridge the Bournewood Gap came through the Deprivation of Liberty Safeguards (DoLS). The DoLS were inserted by the Mental Health Act 2007 as amendments to the Mental Capacity Act 2005,³ and came into force on 1 April 2009. The original DoLS scheme applied only to deprivations of liberty that took place in care homes and hospitals and only in relation to adults over the age of 18. Deprivations of liberty of intellectually disabled people aged 16–17 or those that take place outside formal care institutions had to be authorised by the Court

¹ *HL v United Kingdom* (2004) 40 EHRR 32.

² *R v Bournewood Community and Mental Health NHS Trust Ex Parte L* [1999] 1 AC 458.

³ Mental Capacity Act 2007, s 4A, s 4B, Schedule A1 and associated regulations.

of Protection. As I will outline in more detail below, the DoLS have proved themselves to be unfit for purpose, and the general consensus across all those who are tasked with their use, interpretation and implementation is that a replacement scheme is required.⁴

A decade later, a new statutory scheme for bridging the Bournewood Gap, now called the 'Liberty Protection Safeguards' (LPS) completed the final stages of its turbulent journey through Parliament.⁵ This new scheme applies to any deprivation of liberty under Article 5(1)(e), where the person lacks capacity to consent and is not subject to Mental Health Act arrangements. The new LPS are wider than the DoLS, and can apply to care and treatment in hospitals, care homes, or in the community. The Mental Capacity (Amendment) Act 2019 has not yet been implemented, though it is planned that the new scheme will come into force in April 2022.⁶

My aim in this paper is to explore the socio-legal conditions that made reform of the DoLS necessary, and to evaluate the new statutory 'Liberty Protection Safeguards' (LPS) scheme against understandings of what makes for good law, and ideas of social justice. To do so, I begin with a brief history of relevant legal moments in the path towards the LPS. I explore the controversy surrounding the Mental Capacity (Amendment) Bill during its journey through Parliament, and the changes and compromises achieved during the parliamentary process. Given the significant debate about the LPS scheme, there remains some doubt in health and social care practitioner communities about the appropriateness and workability of the scheme. In part 3 of the paper, in response to these concerns, I evaluate whether the LPS scheme, as enacted in the Mental Capacity (Amendment) Act 2019 has the potential to be good law. To do so, I draw on Bingham's eight sub-principles of the rule of law.⁷ I do not intend to argue that Bingham's sub-principles are either necessary or sufficient to evaluate whether law is effective, rather I think that they provide a useful starting point for evaluating a legal framework that is not yet in force. Evaluation of the LPS in this way highlights problems that persist

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

⁵ Mental Capacity (Amendment) Act 2019.

⁶ The Minister for Care announced the Department for Health and Social Care's intention to bring the LPS into force on 1 October 2020 in a letter lodged with Parliament on 10 June 2019: Statement made by Helen Whately MP on the Implementation of Liberty Safeguards (HCWS377, 16 July 2020) <<https://questions-statements.parliament.uk/written-statements/detail/2020-07-16/HCWS377>> accessed 28 September 2021. Delays in co-producing the Code of Practice as a result of Brexit planning, the December 2019 General Election and COVID-19 meant that this implementation date has been delayed until April 2022. The new Code of Practice was due to be published for consultation in spring 2021, but has not yet been at time of writing.

⁷ Lord Bingham, 'The Rule of Law' (2007) 66 *The Cambridge Law Journal* 67.

within the new framework, which I evaluate in some depth. I conclude that while the LPS provide a reasonable solution to the DoLS problem, questions remain both about its alignment with international human rights norms, and whether it will prove to be a stable bridge over the Bournemouth Gap. A key reason for the remaining difficulties with implementing the safeguards, I will argue, is that (in line with the broader procedural turn in human rights)⁸ they approach the problem (safeguarding disabled people's freedoms) from a proceduralist perspective, rather than evaluating the impact and effects of the LPS on the lives of the disabled people who will be subject to them. I will argue that we need to step away from this proceduralist approach to human rights in the domestic context, and instead look at law and rights from the perspective of how they affect, improve or worsen the quality of life of those whose lives they regulate. In part 4, I argue that the capabilities approach, as set out by Amartya Sen and Martha Nussbaum (among others) provides a set of conceptual tools that might offer us a different, and perhaps better, way of thinking about the challenges posed by the Bournemouth Gap, and therefore offer alternative solutions to it, founded in social justice.

2. *From DoLS to LPS: A Potted History*

Many of the problems with the DoLS have been detailed by the House of Lords Select Committee on the Mental Capacity Act,⁹ the Law Commission,¹⁰ and academic commentators.¹¹ There is not space here to provide in depth commentary on all the failings of the DoLS regime, which former Vice-President of the Court of Protection, Mr

⁸ See further, E Brems, 'The 'Logics' of Procedural-Type Review by the European Court of Human Rights' in E Brems and J Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 17; OM Arnardóttir, 'The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance' (2017) 15 *International Journal of Constitutional Law* 9.

⁹ Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (HL 2013-14, 139).

¹⁰ T Spencer-Lane, 'Mental capacity and deprivation of liberty: the Law Commission's review of the deprivation of liberty safeguards' (2017) 19 *Journal of Adult Protection* 220.

¹¹ Eg JS Phull, 'The Deprivation of Liberty Safeguards: observations and limitations' (2011) 51 *Medicine Science and the Law* 187; R Cairns and others, 'Mired in confusion: making sense of the Deprivation of Liberty Safeguards' (2011) 51 *Medicine Science and the Law* 228; J Tingle, 'Deprivation of liberty safeguards: a human rights issue' (2012) 21 *British Journal of Nursing* 554; C Lennard, 'Deprivation of Liberty Safeguards (DoLS) – where do we go from here?' (2015) 17 *Journal of Adult Protection* 41.

Justice Charles notoriously described working with as ‘as if you have been in a washing machine and spin dryer’.¹² There are, however, some key moments in the life of the DoLS that both catalysed and accelerated the need for change, and require further elaboration in order to understand why reform is required.

A major catalyst for change to the DoLS has been the rising backlog of incomplete DoLS applications, which stood at 129,780 on 31 March 2020.¹³ Importantly, these statistics represent people who may be unlawfully deprived of their liberty, without access to procedural safeguards and in breach of their Convention rights. Unlawful deprivation of liberty is an actionable human rights infringement and can give rise to claims for damages under the Human Rights Act 1998.¹⁴ In *Neary*, Stephen Neary was found to have been deprived of his liberty without a DoLS authorisation in place for some three months. The failure of the current system means that very many people are potentially being deprived of their liberty without proper authorisation for much longer periods, leaving local authorities at risk of liability for significant sums if these unlawful deprivations were to be challenged.

The backlog developed as a consequence of an exponential increase in DoLS applications following the *Cheshire West* decision.¹⁵ *Cheshire West* provided clarification of the definition of ‘deprivation of liberty’ for the purposes of the DoLS. In that case, Lady Hale set out the ‘acid test’ for deprivation of liberty, which is that the person: 1) lacks the capacity to consent to their care/treatment arrangements; 2) is under continuous supervision and control; and 3) is not free to leave. The deprivation of liberty also has to be imputable to the state in order to fall under Article 5 ECHR. The Court of Appeal subsequently clarified that ‘not free to leave’ means not free to leave ‘in the sense of removing himself [sic] permanently in order to live where and with whom he

¹² Oral Evidence of Mr Justice Charles to House of Lords Select Committee on the Mental Capacity Act 2005, Q293, referred to in Select Committee on the Mental Capacity Act, *Post Legislative Scrutiny* (n 9) para 271.

¹³ NHS Digital, ‘Mental Capacity Act 2005, Deprivation of Liberty Safeguards England, 2018-19’ (NHS Digital 2020) <<https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/england-2018-19>> accessed 19 February 2021.

¹⁴ *London Borough of Hillingdon v Neary* [2011] EWHC 1377.

¹⁵ *Cheshire West and Chester v P; Surrey CC v P* [2014] UKSC 19, [2014] AC 896.

chooses'.¹⁶ A person can, therefore, be deprived of their liberty under the acid test if they are able to leave their accommodation temporarily, to go out on trips for example, but must always return to the place where they are deprived of their liberty. The *Cheshire West* decision was not, however, the only reason for the backlog. The inability of local authorities to process the increased numbers of DoLS applications following *Cheshire West* was also a consequence of the bureaucratic nature of the DoLS regime itself, in combination with falling local authority budgets during the 'austerity' politics of the successive Conservative/Liberal Democrat coalition and Conservative Governments of 2010–2019.

Initially, the DoLS process was relatively rarely used, and in the first full year of the DoLS being in force, just 7,157 applications were made under the scheme.¹⁷ This was a lower than expected number of applications: the government's impact assessment suggested that there would be around 21,000 applications in the first year, gradually

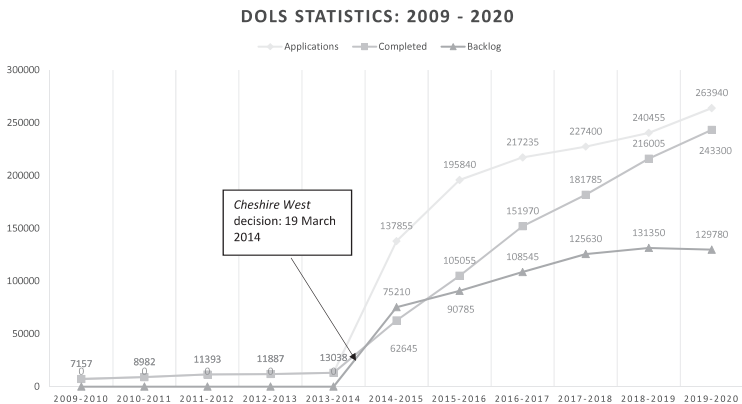


Figure 1: DoLS Statistics 2009 - 2020.¹⁸

¹⁶ *D (A Child)* [2017] EWCA Civ 1695, [2018] 2 FLR 13 [22] (Sir James Munby P), citing *JE v DE* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150 [115].

¹⁷ NHS Digital, 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments - England, 2009-2010, First report on annual data' (NHS Digital 2010) <<https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments-england-2009-2010-first-report-on-annual-data>> accessed 5 December 2019.

¹⁸ Source: NHS Digital (2010 - 2020) Mental Capacity Act 2005, Deprivation of Liberty Safeguards available at: <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments> accessed on 19 February 2021.

dropping to a steady state of around 6,600 in 2015/16.¹⁹ In fact, the opposite was the case, with numbers of application growing steadily from April 2009—March 2014. The year following *Cheshire West* showed an exponential increase in applications. Numbers of applications, completed DoLS applications, and incomplete applications have all been steadily rising ever since (see figure 1), with only a small reduction in the backlog in the most recent year.

Importantly, statistics on incomplete DoLS applications only tell part of the story of the problems with DoLS. The backlog of applications reported in the official statistics only applies to deprivation of liberty scenarios which fall within the DoLS regime. As noted above, the current DoLS regime only applies to adults over the age of 18, who are deprived of their liberty in care homes and hospitals. Deprivations of liberty that take place in other locations (e.g., supported housing, community placements, shared lives placements), or that relate to people over 16 but under 18 years old, must be authorised by the Court of Protection. Anecdotal evidence to the Law Commission suggested that applications to the Court of Protection for authorisation of liberty deprivations in these groups were not prioritised by local authorities.²⁰ The Government ‘best estimate’ of the number of community DoLS and those for 16–17 year olds that will be needed under the new system is 59,800 per year.²¹ Court of Protection DoLS applications are, however, currently much lower than these estimated numbers, though they do show a similar exponential increase in applications (and a similar proportionate backlog of orders) since the *Cheshire West* decision (see figure 2). The high costs associated with Court of Protection applications, particularly where there are contentious elements in the case, mean that far fewer cases are brought for authorisation by the courts than should be. This then leaves disabled people unlawfully deprived of their liberty in community placements, without access to legal or procedural safeguards.

¹⁹ Ministry of Justice MOJ and Department of Health DH, *Impact Assessment of the Mental Capacity Act 2005 deprivation of liberty safeguards to accompany the Code of Practice and regulations* (UK Impact Assessment 2008 No 96, 2008) <<https://www.legislation.gov.uk/ukia/2008/96>> accessed 30 September 2021.

²⁰ Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Law Com CP No 222, 2015).

²¹ Department of Health and Social Care, *Impact Assessment of the Mental Capacity (Amendment) Act 2019* (28 January 2021) <<https://www.gov.uk/government/publications/impact-assessment-of-the-mental-capacity-amendment-act-2019>> accessed 28 September 2021.

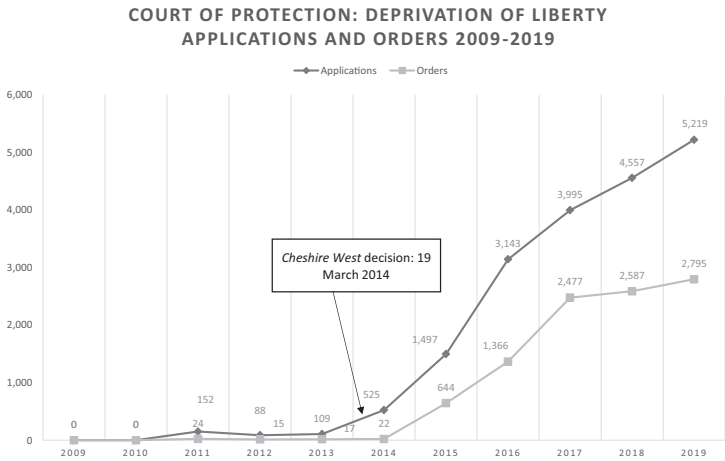


Figure 2: Deprivation of Liberty Applications in the Court of Protection.²²

The issue of care and treatment that deprives 16 and 17 year olds of their liberty has been the subject of considerable litigation. In *R(C) v A Local Authority and Others*²³ it was held that only the Court of Protection could authorise care and treatment arrangements for children over the age of 16 and under the age of 18 that amounted to a deprivation of their liberty in any kind of state authorised or facilitated placement (including, for example, hospitals, care homes and foster care settings). In 2019 the Supreme Court clarified that parental responsibility does not extend to being able to give proxy consent to care and treatment arrangements that would amount to a deprivation of liberty for 16 and 17 year olds.²⁴ As a consequence, all care and treatment that would deprive a person aged 16 or 17 of their liberty must be authorised by the Court, or via the Mental Health Act processes, where relevant. The full impact of the Supreme Court decision in *Re D* is yet to be felt in the statistics, but there remains potential for wide ramifications, especially if the implementation of the Liberty Protection Safeguards is further delayed.

As the above discussion of the effects of *Cheshire West* and the position of 16 and 17 year olds makes clear, the decade that the DoLS regime has been in force has been a legally eventful time in England and

²² Source: Family Court Statistics Quarterly available at <https://www.gov.uk/government/collections/family-court-statistics-quarterly> accessed on 19 February 2021. It is important to note that these do not differentiate between different types of applications (s. 21 applications, 'Re X' applications and others).

²³ [2011] EWHC 1539 (Admin).

²⁴ *Re D* [2019] UKSC 42.

Wales. There have, however, also been significant changes in the international context of disability human rights in the same period. The UK ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in June 2009. The CRPD approaches the issue of the right to liberty and security of the person rather differently from the ECHR. Whereas Article 5(1)(e) of the ECHR makes provision for the lawful deprivation of liberty of persons of ‘unsound mind’, Article 14 CRPD declares that ‘the existence of a disability shall in no case justify a deprivation of liberty’, and that persons with disabilities shall enjoy this right ‘on an equal basis with others’. These bifurcated perspectives on the scope of the right to liberty for mentally, intellectually and psychosocially disabled people²⁵ present additional challenges for reform of these safeguards against arbitrary deprivation of liberty for disabled people.

The Committee on the Rights of Persons with Disabilities (CommitteeRPD) issued guidelines on the right to liberty and security of persons with disabilities as an annex to their report to the 72nd session of the UN General Assembly.²⁶ The guidelines are unequivocal that: ‘article 14(1)(b) prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty’;²⁷ and according to the CommitteeRPD, this remains the case even where the additional factors or criteria are a ‘perceived danger they allegedly pose to themselves or others’.²⁸ The right to liberty, as interpreted by the CommitteeRPD, therefore, is much wider than that contained in the ECHR, and the two positions are difficult to reconcile.

Whereas Article 5 ECHR is directly justiciable in domestic courts as a consequence of the Human Rights Act 1998, the United Kingdom is also bound by the provisions of the CRPD, having ratified it along with the Optional Protocol. The optional protocol of the CRPD allows for individual complaints to the CommitteeRPD, alongside a general inquiry process.²⁹ Many other Council of Europe member

²⁵ The UN CRPD applies equally to all persons with disabilities, including those with mental, intellectual and psychosocial disabilities.

²⁶ Committee on the Rights of Persons with Disabilities, ‘Report of the Committee on the Rights of Persons with Disabilities’ (2017) UN Doc Supp No 55 (A/72/55).

²⁷ *ibid* para 8.

²⁸ *ibid* para 13.

²⁹ The CRPD inquiry process was the mechanism under which the CommitteeRPD found that UK welfare reforms since 2010 had led to systematic violations of the rights of persons with disabilities: Committee on the Rights of Persons with Disabilities, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention* (24 October 2017) UN Doc CRPD/C/15/4.

states have also ratified the CRPD, as has the European Union. It is possible that as member states revise their laws to reflect the CRPD position, ECtHR jurisprudence will, in time, narrow the margin of appreciation and move closer to the CommitteeRPD position on the right to liberty for disabled people, despite the existence of the Article 5(1)(e) ECHR provisions on persons of ‘unsound mind’.³⁰

These factors in combination led to the DoLS being declared not fit for purpose,³¹ and a review by the Law Commission took place from 2015–2017,³² which called for the DoLS to be replaced with ‘pressing urgency’. The proposed replacement framework, called the Liberty Protection Safeguards (LPS) will apply in a wider range of settings (including in private domestic settings), to a wider range of people (including 16 and 17 year olds), and be able to be authorised by a wider range of ‘responsible bodies’, not just local authorities. The Law Commission also recommended further changes to the Mental Capacity Act 2005, to bring the MCA closer into compliance with the UN CRPD. The proposed framework was modified by the 2017-2019 minority Conservative government, and introduced into Parliament in July 2018 as the Mental Capacity (Amendment) Bill [HL] (MC(A)B).

When the MC(A)B was first introduced into the House of Lords, it became apparent that the amendments made by the Government had stripped the Law Commission’s proposals of many of their careful controls. The MC(A)B had also removed the wider amendments to the MCA to bring it into line with the CRPD and the proposed statutory tort of ‘unlawful deprivation of liberty’ from the Law Commission’s draft Bill. In place of these, the MC(A)B proposed a significantly greater role for registered care home managers in the LPS.³³ The passage of the Bill through Parliament introduced a number of changes which strengthened the safeguards it contains. These amendments included: ensuring that any deprivation of liberty was necessary to protect a person from risk or harm, and proportionate to that risk or

³⁰ So far, the jurisprudence has not moved significantly, despite evaluation of the CRPD by a Grand Chamber of the ECtHR, though there has been clarification that detention under Article 5(e) must have a therapeutic purpose: *Rooman v Belgium* [2019] ECHR 105 [208].

³¹ Select Committee on the Mental Capacity Act, *Post Legislative Scrutiny* (n 9).

³² Law Commission, *Mental Capacity Consultation Paper* (n 20); Law Commission, *Mental Capacity and Deprivation of Liberty* (n 4); Spencer-Lane ‘Mental capacity and deprivation of liberty’ (n 10).

³³ Mental Capacity (Amendment) Act 2019, Schedule 1, paras 19, 20, 23(1)(a) (regarding LPS authorisations), paras 35-36 (regarding renewals) and para 38(1) and (9) (regarding reviews).

harm; extending the LPS to cover 16 and 17 year olds; and introducing checks and balances on some of the power that had been devolved to care home managers. In October 2020, the Department for Health and Social Care announced that the parts of the Act that created a wider role for care home managers in the LPS would not be implemented with other parts of the Act in 2022. It is not clear, yet, whether this applies to the entire new role for care home managers, or only those parts concerned with authorisations and renewals, which is where most of the controversy lay.

The criticism levelled at the MC(A)B has meant that many working in the health and social care sector, who will be tasked with using the LPS in practice, were deeply sceptical of the new scheme when it was completing its journey through Parliament. Over 100 social care organisations signed an open letter to the Minister of State for Social Care in February 2019, which called for pause and reflection on the new Bill.³⁴ Concerns expressed included the limited consultation, problems associated with the new role for care home managers, and the lack of robust impact assessments. There is, therefore, a danger that the outrage that surrounded the passage of the Bill through Parliament may lead to general distrust of the LPS when they are brought into force. If the LPS are not fully engaged with by the social care sector, however, there is a real danger that the key problems of the DoLS (backlog, delay, and many thousands of people being unlawfully deprived of their liberty without access to legal safeguards) will be remade in the new system. In the next part, I evaluate the Mental Capacity (Amendment) Act (MC(A)A), in its final form, to see whether the changes have successfully addressed the concerns expressed by the health and social care sector, disabled people's organisations, and legal commentators.

3. Is the Mental Capacity (Amendment) Act Good Law?

The amendments to the new LPS scheme through the parliamentary process reinstated many of the Law Commission proposals, but questions remain about whether the LPS constitutes an improvement on the DoLS, or will be workable in practice. There are also concerns about whether the final scheme of the amendments to the MCA meets

³⁴ 'Human Rights Reform' (VODG, 2019) <<https://www.vodg.org.uk/news/human-rights-reform-outrage-social-care-sector-unites-in-open-letter-to-ministers-criticising-careless-mental-capacity-amendment-bill/>> accessed 28 September 2021.

the aim of bridging the ‘Bournewood Gap’, in light of changing interpretations of the right to liberty for disabled people in international human rights law. In this part, I evaluate whether the LPS, as enacted, is a good law.

Evaluating whether a statutory scheme is ‘good law’ is not a straightforward process. Without the benefit of judicial interpretation, we are limited to evaluating whether it meets the various criteria that have been put forward as vital to law in a general sense, alongside normative evaluation of the content of the law overall. Legal theorists have proposed a wide range of conceptual frameworks for evaluating law, and any one of these might provide a reasonable approach for evaluation. Taking a natural law approach, for example, might lead us to explore the LPS in a way that simultaneously explores the rules along with their moral basis. For example, we might use Fuller’s eight desiderata for excellent law—that law must be based on rules which are published, prospective, intelligible, not contradictory, possible to comply with, reasonably stable through time and congruent between the rules and their administration—as our starting point.³⁵ Alternatively, a positivist approach such as that proposed by Hart would eschew any necessary connection between law and morality, focusing on whether the law in question meets the criteria of the fundamental ‘rule of recognition’ to be constitutionally valid, before evaluating and interpreting whether it is morally good and worthy of being followed.³⁶ That the Mental Capacity (Amendment) Act gained Royal Assent means, in Hart’s terms that it is law,³⁷ but the statutory Code of Practice, which will guide the implementation and practice of the LPS has a more tenuous position.

In the remainder of this part, I evaluate the MC(A)A from the perspective of the pragmatic approach to the eight ‘sub-rules of the rule of law’ proposed by Lord Bingham,³⁸ and which rests on a long tradition of legal

³⁵ L. Fuller, *The Morality of Law* (revised edn, Yale University Press 1969).

³⁶ HLA Hart, *The Concept of Law* (Oxford University Press 1961).

³⁷ As it is primary legislation and it has been enacted by the Queen in Parliament.

³⁸ Bingham (n 7). These eight sub-rules, which I discuss in detail below, can be summarised as: 1) that the law should be accessible, clear and predictable; 2) questions of legal right and liability should be resolved by application of law, not by discretion; 3) the laws of the land should apply equally to all; 4) the law must afford adequate protection of fundamental human rights; 5) means must be provided for resolving disputes, without prohibitive cost or inordinate delay; 6) ministers and public officers must exercise their powers in good faith, and without exceeding the limits of their powers; 7) adjudicative procedures should be fair; and 8) the rule of law requires compliance with international law obligations.

theory from Dicey³⁹ to Fuller,⁴⁰ Raz⁴¹ and others. In part four, I turn to look at the MC(A)A from the perspective provided by the capabilities approach to social justice.⁴² My aim in using these contrasting frameworks to analyse the LPS is threefold: first, to evaluate the potential success of the LPS as a statutory scheme to bridge the Bournemouth Gap; second, as a mechanism for highlighting the importance of a conceptual approach in law-making and regulation; and third, to demonstrate the potential gains from thinking differently about disability rights.

A. *Evaluating the LPS through Bingham's Eight Sub-Rules of Law*

Despite (or perhaps because of) the longstanding endeavours of legal theorists, there is no single accepted framework for evaluating the efficacy or appropriateness of any given statutory scheme. Bingham's eight sub-rules of law offer a useful descriptive account of the kinds of issues with legislation that are engaged with by judges when seeking to evaluate law. As a result, they have a level of practical use in providing a set of interrogative questions to ask of the new LPS scheme. Before moving on to set out these sub-rules of law, it is important to make clear that I use them here as a heuristic device, rather than a normative or descriptive one. In so doing, I do not wish to suggest that Bingham's framework for the rule of law is either necessary or sufficient to evaluate if any given law is good law. It is far more appropriate, in most circumstances, to evaluate law from the perspective of how it works in practice rather than in theory. Yet, as the statutory scheme in question is not yet in force, an alternative approach is needed to highlight some

³⁹ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (reprint of 8th edn, Macmillan 1915, Liberty Classics 1982).

⁴⁰ Fuller (n 35).

⁴¹ J Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 249.

⁴² A Sen, *Commodities and Capabilities* (Oxford University Press 1985); M Nussbaum, 'Women and equality: the capabilities approach' (1999) 138 *International Labor Review* 227; M Nussbaum, 'The Capabilities of People with Cognitive Disabilities' in EF Kittay and L Carlson (eds), *Cognitive Disability and its Challenge to Moral Philosophy* (Wiley-Blackwell 2010); C Hatton, 'The capabilities approach as a framework for understanding the lives of people with intellectual disabilities' (2012) 56 *Journal of Intellectual Disability Research* 816; L Barclay, 'Natural Deficiency or Social Oppression? The Capabilities Approach to Justice for People with Disabilities' (2012) 9 *Journal of Moral Philosophy* 500; C Harnacke, 'Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention' (2013) 41 *Journal of Law Medicine & Ethics* 768; M Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2013).

of the legal issues that remain potentially troublesome in this reform. My analysis will, inevitably, highlight areas where the effectiveness of the law will depend very much on how it is applied, and used, in everyday life. Being attentive to these issues will, I hope, enable that implementation to proceed with disability social justice, rather than procedural expediency, in mind.

There is little doubt that the LPS as enacted is a much better law than the 'adjusted' LPS scheme that was first introduced in Parliament, but I am not sure that anyone would be willing to describe the LPS as a perfect framework. Bingham's first principle is that the law should be accessible and so far as possible intelligible, clear and predictable. The LPS are certainly clearer than the DoLS; no washing machine spin cycles for those using the LPS, we hope. Importantly, the LPS need to be accessible to a wide range of people: capacity lawyers, specialist social workers, approved mental capacity professionals, frontline care and support workers, care home managers and independent advocates will all have to work with the LPS on a regular basis. It also needs to be clear enough to be understood by lay people acting as 'appropriate persons', who are tasked, under the LPS scheme, with representing and supporting the cared-for person, and to all those consulted about the arrangements and the proposed deprivation of liberty. Crucially, this includes those who find themselves in the position of being deprived of their liberty through the framework provided by LPS. There are specific provisions in the MC(A)A that require a range of public bodies⁴³ to publish information about the LPS, including about process, effects, and the different roles like Independent Mental Capacity Advocates and 'appropriate persons'.⁴⁴ There is also a duty to provide that information in ways that are accessible to 'cared-for persons' (the term used for persons subject to a LPS authorisation) and appropriate persons.⁴⁵

Importantly, however, much of the clarity, intelligibility and accessibility of the LPS as a framework will depend heavily on the Code of Practice, which, at the time of writing was due to be published for consultation in 2021. The new Code of Practice will be integrated into the main Mental Capacity Act 2005 code of practice, which is also being updated to take account of legal changes

⁴³ Including Local authorities, hospital managers, clinical commissioning groups and Local Health Boards.

⁴⁴ Mental Capacity (Amendment) Act 2019, Schedule 1, para 14.

⁴⁵ *ibid* para 14(3). Duties to provide accessible information as a reasonable adjustment also apply under the Equality Act 2010.

since that Act came into force in 2008.⁴⁶ One place where particular vigilance will be required is in the definition of ‘deprivation of liberty’, which will be included in the Code of Practice. The definition of deprivation of liberty was a contentious factor throughout the passage of the Mental Capacity (Amendment) Act 2019. In their report that formed the basis of the LPS scheme, the Law Commission had recommended that the LPS scheme should not include a statutory definition, because the meaning of deprivation of liberty is shaped by the interpretation of the Strasbourg court.⁴⁷ In contrast, the Joint Committee on Human Rights argued that a statutory definition would bring clarity ‘for families and frontline professionals’.⁴⁸ Paradoxically, the short lived definition that found its way into the MC(A) Bill during its passage through parliament was far from clear.⁴⁹ Instead, it was littered with double negatives and sought to narrow the definition of deprivation of liberty from that set out in the Supreme Court’s ‘acid test’.⁵⁰ Had that definition made it to the statute book, it would have done little to decrease the numbers of disabled people deprived of their liberty without access to safeguards, and have led to a new round of costly litigation. This litigation would, in turn have had to interpret the definition in line with Strasbourg jurisprudence,⁵¹ leading to a likely reinstatement of the ‘acid test’ from *Cheshire West*. At the time of writing, it is not yet clear whether or not the LPS will be accessible, intelligible, clear and predictable, because the Code of Practice and the accompanying regulations have not yet been published. Given the layers of dialogue and consultation that have been woven into the post-legislative process, it is to be hoped that the Code of Practice and accompanying definition of ‘deprivation of liberty’ will be as clear as possible, whilst reflecting the current law.

Bingham’s second sub-rule of law is that questions of legal right and liability should ordinarily be resolved by application of the law, not the

⁴⁶ The LPS Code of Practice was initially drafted through a co-production process, involving a wide range of stakeholders with relevant interests, before being finalised by the DHSC.

⁴⁷ Law Commission, *Mental Capacity and Deprivation of Liberty* (n 4).

⁴⁸ Joint Committee on Human Rights, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards* (2017-19, HC 890, HL 161).

⁴⁹ For the text of the definition, see Mental Capacity (Amendment) HL Bill (2017-19) 161 <<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0161/18161.1-5.html>> accessed on 19 February 2021. The definition was inserted through Commons amendments and rejected during ‘ping pong’.

⁵⁰ *Cheshire West* (n 15).

⁵¹ Human Rights Act 1998, s 3.

exercise of discretion. This is because over-use of discretion can lead to arbitrary and unpredictable outcomes. Happily, there are clear rules in the LPS framework that set out when it is lawful to deprive a person of their liberty through the LPS—these are called the ‘authorisation conditions.’ The authorisation conditions are the primary legal safeguard in the LPS. They are:

- that the person lacks capacity to consent to the arrangements;
- that the cared for person has a mental disorder; and
- that ‘the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person’.

No deprivation of liberty can be authorised or renewed under the LPS scheme that does not fulfil these authorisation conditions. It will be important to guard against falling back on shorthand and discretion in practice, rather than using these rules. It is only lawful under the LPS to deprive a disabled person of their liberty, when it is both necessary and proportionate to do so in these terms. There are, however, some elements of the authorisation conditions that are not entirely clear on the face of the statute, and could require further elucidation. It will, for example, be important to clarify what must be understood (the information relevant to the decision)⁵² for a cared-for person to consent to care and support arrangements that deprive them of their liberty. It will also be necessary to clarify precisely what ‘mental disorder’ means for the purposes of the LPS, given that it may not have precisely the same meaning as ‘persons of unsound mind’ under Article 5(1)(e) ECHR.

Lord Bingham’s third sub-rule is that of equality before the law. This will be difficult for the liberty protection safeguards to fulfil. Article 5 ECHR (which is the guiding framework for the LPS), sits uneasily beside similar principles in the CRPD (which the UK has also ratified and has therefore agreed to be bound by). As outlined above, whereas Article 5 ECHR provides for the deprivation of liberty of persons of ‘unsound mind’, Article 14 of the CRPD declares that ‘the existence of a disability shall in no case justify a deprivation of liberty’. Similarly, the Human Rights Committee have observed that ‘the existence of a disability shall not in itself justify a deprivation of liberty’, alongside noting particular harms of involuntary confinement, and has stressed the need for adequate community and social-care based services as an alternative to confinement for people with psychosocial

⁵² Mental Capacity Act 2005, s 3.

disabilities.⁵³ In time, the jurisprudence of the ECtHR may well move towards that of the CRPD, through the living instrument doctrine, and a decreasing margin of appreciation for depriving people with intellectual and psychosocial disabilities of their liberty. A shift in that direction will undoubtedly help to ensure greater equality before the law for disabled people. For now, the way through this apparent tension is likely to be to focus on the *safeguarding* nature of the LPS. Notwithstanding their procedural function, the LPS are *safeguards against the arbitrary detention of disabled people*. The reason they exist is not (only) to provide a legal/procedural solution to the Bournewood Gap, but rather to ensure that restrictions on, and deprivations of, liberty are only imposed where these are both necessary to protect disabled people from harm and proportionate to that harm.

The fourth sub-rule of law is that public officials should exercise their powers in good faith, and not exceed them. All those who are tasked with making decisions under the Act, whether as representatives of the responsible body who will be authorising the deprivation of liberty, or as Authorised Mental Capacity Professionals (AMCP) will be well aware of the need to act in good faith and within their powers. If they do not, then any ultra vires decisions can, and should, be challenged through the courts.

Bingham's fifth sub-rule is that the law should protect fundamental rights. Again, the LPS are designed to do this; their purpose is to provide procedural safeguards to protect disabled people from being deprived of their liberty. Here, though, there is some work to be done by those implementing the LPS. Of particular concern is the review and renewals processes: LPS authorisations can be renewed for up to three years at a time after an initial renewal period of 12 months, and there are no time limits for regular reviews specified on the face of the Act. The ability to renew authorisations is one of the mechanisms by which these new safeguards will be less costly and bureaucratic than the current DoLS. But it will be extremely important, in upholding and protecting the fundamental rights of a person who is deprived of their liberty under the LPS that in each and every review and renewal process, those responsible for the review or renewal give due consideration to whether or not the authorisation conditions are still met. If not, then the LPS will not be doing its job and it will not be safeguarding disabled people's human

⁵³ Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 [19]. See also Independent Review of the Mental Health Act, *Modernising the Mental Health Act: Increasing choice, reducing compulsion: Final Report* (Crown Office 2018) Annex B, which sets this out in much more detail.

rights. There are some legal questions about these review periods as well. The European Court of Human Rights (ECtHR) have never approved such a long period without review under Article 5(1)(e).

The sixth and seventh sub-rules of law are that a method shall be provided, at reasonable cost, to resolve civil disputes; and that adjudicative procedures provided by the state should be fair. The requirement that responsible bodies publish accessible information about rights to request a review gives some reassurance here, as does the requirement for pre-authorisation reviews to be carried out by an AMCP if it is reasonable to believe that the cared for person objects to the proposed care and treatment arrangements. The Court of Protection will be responsible for adjudicating on disputes about the LPS, and non means-tested legal aid will be available to those challenging an LPS authorisation. There will, however, likely be a gap in access to non-means tested legal aid where a person is challenging a deprivation of liberty that is not authorised through the LPS process. This would arise, for example, where issues relating to a deprivation of liberty arise in a case brought under a different provision of the MCA—like, for example, a personal welfare decision under s 16. How this will work in practice remains to be seen, but it is vital that a route to a fair adjudication of disputes about deprivation of liberty is available to all, irrespective of the technical features of their case.

Finally, Lord Bingham cautioned that the rule of law requires the state to comply with its obligations in international law. There remains, as outlined above, a tension between the ECHR, which allows for the lawful detention of people of ‘unsound mind’ and the CRPD which makes very clear that the existence of a disability is never a sufficient justification for depriving a person of their liberty. The incorporation of Convention Rights from the ECHR into domestic law through the Human Rights Act 1998 means that the ECtHR’s interpretation of those rights contained in the ECHR (and those of the protocols to the Convention that the UK has ratified) have greater legal traction than other binding international treaties, even where there is normative disagreement.⁵⁴ It is hard to predict how (or even if) these tensions will be resolved. In the event that ECtHR jurisprudence moves closer to the CRPD approach, the regular review of the definition of deprivation of liberty in the Code of Practice that is required by the MC(A)A⁵⁵ should allow it to be responsive to future changes in our international human rights obligations.

⁵⁴ The UK has ratified the optional protocol to the CRPD, allowing individual and collective complaint to the Committee on the Rights of Persons with Disabilities. But this is far more remote than the direct justiciability of ECHR rights in domestic courts.

⁵⁵ Mental Capacity (Amendment) Act 2019, s 4.

In summary then, evaluating the Liberty Protection Safeguards against Lord Bingham's sub-principles for the rule of law suggests that the scheme introduced by the Mental Capacity (Amendment) Act 2019 has the potential to be 'good law'. By the time they come into force, the LPS will, with the assistance of the Code of Practice, be accessible, clear and intelligible. The Code of Practice should also enable people who are deprived of their liberty under the LPS to be confident that the interference with their rights is necessary, proportionate and in accordance with the law. The LPS will be backed up by an accessible and fair adjudicative process through the Court of Protection, and supported by non-means tested legal aid. Given that the LPS is based on a scheme drawn up by Law Commission of England and Wales, it is to be expected that it will provide a procedurally appropriate mechanism for authorising deprivations of liberty under Article 5(e).

There are, however, two problems that remain troublesome, notwithstanding the procedural efficacy of the LPS; neither are problems that a procedural approach to human rights can easily resolve. First, Article 5(1)(e) of the ECHR *permits* the deprivation of liberty of persons of 'unsound mind'; this is not, in my view, sufficient justification for the view that we *should* deprive people with autism or learning disability of their liberty. We need to have a broader conversation about that, including with disabled people. The LPS (and the DoLS which preceded them) do not enable us to question whether it is right that the Bournewood Gap exists at all. They are a procedural bridge to allow persons of 'unsound mind' to be deprived of their liberty to protect them from harm. They are a lawyer's solution to a legal problem, which provide little consideration of the realities of disabled people's lives, or the reasons why the care and support that they receive involves such interference with their freedom that it requires authorisation by a legal process. The tensions between the ECHR and CRPD about disability rights, particularly the conflicting understandings of the right to liberty and security of the person (article 5 ECHR/Article 14 CRPD) and the right to live independently in the community (Article 19 CRPD) need to be interrogated and, if possible, resolved. We also need to, collectively, decide why and whether Article 5(1)(e) should apply in contexts beyond those that have been discussed and authorised by the ECHR. Importantly, whilst the DoLS, as they currently apply in institutional settings have been affirmed by the ECtHR as being lawful under Article 5(1),⁵⁶ the Court has not yet been asked to adjudicate on

⁵⁶ *RB v United Kingdom* (Application No 6406/15).

the lawfulness of deprivation of liberty in a community setting (rather than in an institution) under Article 5(1)(e). Indeed, some of the ECtHR jurisprudence suggests that only deprivations of liberty in institutional contexts would be lawful under Article 5(1)(e).⁵⁷

Finally, one of the key drivers for changes to the legal framework for authorising deprivation of liberty was the finding in *Cheshire West* that Article 5 rights to procedural safeguards against deprivation of liberty also apply in community settings. In other words, it is possible for a disabled person to be deprived of their liberty when living in a community setting, including in their family home, if they have a care plan that restricts their freedoms in ways a person without a disability would not be subject to. In many respects, this is conceptually challenging. Many family carers, for example, find it difficult to reconcile the care and support they provide to enable a disabled family member to live as well as they can with the legal concept of 'deprivation of liberty'. A recent example of this is the case of *Re AEL*,⁵⁸ where disagreements over whether or not a care plan and living arrangements amounted to a deprivation of liberty led to protracted proceedings over a period of more than 3 years. There remains considerable resistance to the idea of deprivation of liberty in the community, and it is an issue that needs to be explored more openly, not least because the case needs to be made for why the LPS are a positive framework, rather than a mere administrative and bureaucratic burden. Evaluating the procedural legal approach to the LPS framework cannot help us to address these problems. Instead, I will show in the next part that the lens provided by the 'capabilities approach' to justice⁵⁹ offers a set of conceptual tools that enable some of these remaining tensions in the LPS to be resolved.

⁵⁷ Eg, *Winterwerp v The Netherlands* 6301/73 [1979] ECHR 4, (1980) 2 EHRR 387; *Ashingdane v United Kingdom* 8225/78 [1985] ECHR 8, (1985) 7 EHRR 528; *OH v Germany* (2012) 54 EHRR 29:1025. Whilst it would be interesting to speculate on what the ECtHR might do if presented with cases of community deprivation of liberty authorised by the LPS procedure, space precludes a discussion of that here.

⁵⁸ *AEL, Re (Mental Capacity Act 2005)* [2021] EWCOP 9.

⁵⁹ A Sen, *Development as Freedom* (Oxford University Press 1999); Sen, *Commodities and Capabilities* (n 40); A Sen, *The Idea of Justice* (Oxford University Press 2010); A Sen, *Inequality Reexamined* (Oxford University Press 1995); N Hedge and A MacKenzie, 'Putting Nussbaum's Capability Approach to work: re-visiting inclusion' (2012) 42 *Cambridge Journal of Education* 327; Nussbaum, *Creating Capabilities* (n 40); M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007); Nussbaum, 'Women and equality' (n 40); Nussbaum, 'The Capabilities of People with Cognitive Disabilities' (n 40); C Rogers, 'Inclusive education and intellectual disability: a sociological engagement with Martha Nussbaum' (2013) 17 *International Journal of Inclusive Education* 988.

4. *A Capabilities Approach to Liberty Protection*

The capabilities approach to justice has developed over the last three decades as an alternative to resource-based accounts of justice,⁶⁰ and utilitarian accounts of happiness.⁶¹ The capabilities approach takes as its starting point what people need in order to *be* and to *do* the things that they value. Sen understands capabilities as practical opportunities—the actual material opportunities that people have to do the things they value. According to Sen, our focus should be ‘on the freedom that a person actually has to do this or be that—things that he or she may value doing or being’.⁶² One reason for focusing on these practical opportunities is that the capabilities approach allows the additional support that disabled people may require to have the practical opportunity to do the things they value to be included in deliberations about how support should be distributed. Sen makes no claims that his capability approach provides any specific formula for how policy decisions about resources should be made, merely that inequality of capabilities is relevant in the assessment of social disparities.

Nussbaum’s approach to capabilities is somewhat different from Sen’s. Her approach focuses more clearly on social policy issues, and one area where Nussbaum takes a clear departure from Sen’s approach is in identifying a list of ten ‘Central Capabilities’ which are: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; control over one’s political and material environment.⁶³ Several of Nussbaum’s central capabilities are implicated in the law and policy of deprivation of liberty safeguards. Most obviously, the threshold capabilities of life, bodily health and bodily integrity are brought into play by the third authorisation condition of the LPS that ‘the arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person’.⁶⁴ The LPS also engages a number of Nussbaum’s other central capabilities, including the need to have control over one’s environment, and support for practical reason (engaging in critical reflection about the planning of one’s own life).

⁶⁰ See Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 59).

⁶¹ See further, Sen, *The Idea of Justice* (n 59) 231.

⁶² *ibid* 231–232.

⁶³ Nussbaum, *Creating Capabilities* (n 42) 33–34.

⁶⁴ Mental Capacity (Amendment) Act 2019 Schedule AA1, para 13.

Affiliation, ‘being able to live with and towards others’⁶⁵ is also important here, as is play, ‘being able to laugh, to play, to enjoy recreational activities’.⁶⁶ Nussbaum argues that ‘a decent political order must secure to all citizens at least a threshold level of these ten Central Capabilities’.⁶⁷ The question that I now turn to is whether the LPS, as a law and policy tool for safeguarding the freedoms of intellectually disabled people, helps to create the conditions for securing the basic capabilities of disabled people.

Alongside the identification of these central capabilities, the approach developed by Sen and Nussbaum also places significant value on the importance of public debate in identifying, and giving shape to the capabilities that apply in any given situation. It is important, therefore that there is informed, nuanced public discourse on the appropriate regulatory response to care and support that gives rise to restrictions on and deprivations of liberty for disabled people. In the remainder of this part, I undertake a capabilities informed analysis of three issues with the LPS that I identified above that could not be resolved through a doctrinal analysis: first whether, instead of bridging the Bournewood Gap, we should close it completely; second, whether we need to rethink how disability human rights are protected in England and Wales; and finally, whether and why we need to understand support that is provided to enable disabled people to live in the community as a ‘deprivation of liberty’.

A. *Should We Deprive Disabled People of Their Liberty for Their Own Safety?*

As mentioned above, Article 5(1)(e) of the ECHR allows for ‘the lawful detention of . . . persons of unsound mind’. In contrast, Article 14(1) of the CRPD sets out disabled people’s equal rights to liberty and security of the person, not be deprived of their liberty unlawfully or arbitrarily, and that ‘the existence of a disability shall in no case justify a deprivation of liberty’.⁶⁸ In other words, there is a normative

⁶⁵ Nussbaum, *Creating Capabilities* (n 42) 34.

⁶⁶ *ibid.*

⁶⁷ *ibid.* 33.

⁶⁸ Article 14: 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

- a) Enjoy the right to liberty and security of person;
- b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

disagreement between these two international human rights instruments about whether or not (intellectual or psychosocial) disability should be a reason to deprive a person of their liberty. I do not wish to re-tread the ground I outlined above here. Rather, my concern is that this issue has not been given the level of public attention that it deserves. Occasionally, cases of abuse of disabled people in 'care' institutions are exposed for example through the BBC's Panorama programmes on Winterbourne View in 2011, or Whortlon Hill Psychiatric Hospital in 2019. Following these high-profile exposés, there is usually public outcry, and some individual prosecutions, but often little changes in the wider regulatory milieu surrounding residential and in-patient care for people with intellectual or psychosocial disabilities.⁶⁹ Social media campaigns by family carers of people with learning disabilities or autism who have been incarcerated because of their disability have also helped to bring this issue to public attention, though again, these have tended not to lead to regulatory reform.⁷⁰

Despite efforts from the Committee on the Rights of Persons with Disabilities to highlight the importance of challenging the deprivation of liberty of disabled people as part of the right to enjoy legal capacity on an equal basis with others,⁷¹ an end to non-consensual treatment and deprivation of liberty of people with intellectual and psychosocial disabilities on a global scale seems unlikely at the present time. The 2021 White Paper on Reforming the Mental Health Act proposes to

⁶⁹ See further, R Harding, *Duties to Care: Dementia, relationality and law* (Cambridge University Press 2017); R Harding, 'A relational (re)view of the UK's social care crisis' (2017) 3 Palgrave Communications 17096.

⁷⁰ See, for example, the social medial campaigns by Dr Sara Ryan (#justiceforLB), or by 'Bethany's Dad' (@JeremyH09406697) around (mis-)treatment in Assessment and Treatment Units.

⁷¹ Committee on the Rights of Persons with Disabilities, 'General Comment No. 1: Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1, para 40. See further, R Harding, 'The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance' (2015) 78 *Modern Law Review* 945; A Arstein-Kerslake and E Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law' (2015) 20 *The International Journal of Human Rights* 471; Arstein-Kerslake and Flynn, 'The right to legal agency: domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13 *International Journal of Law in Context* 22; C De Bhailis and E Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6; W Martin and others, *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK* (6 June 2016); G Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65 *Current Legal Problems* 333.

move learning disability and autism out of the category of mental disorders warranting compulsory treatment under s 3 of the Mental Health Act, though admission for mental health assessment would still be possible under s 2.⁷² This appears, at first look, to be a positive development. The White Paper states that the Government would like to ‘improve how people with a learning disability and autistic people are treated in law and reduce the reliance on specialist inpatient services’⁷³ under the Mental Health Acts (MHA). It is, however, vital to be attentive to the possibility that instead of the regular reviews mandated by ‘sectioning’ under the MHA, people with learning disability or autism who are admitted for in-patient treatment in mental health settings will instead have their treatment and deprivation of their liberty authorised through the LPS regime. As discussed above, this means that there are no statutory timeframes for regular reviews and that after the initial 12-month renewal period, the authorisation can be renewed for three years.⁷⁴

Exploring this question through the lens of the capabilities approach highlights two important additional dimensions. First, it highlights the importance of a public conversation about how law and regulation, particularly relating to the deprivation of liberty, should affect people with learning disabilities and autism. Civil society actors have been seeking to catalyse this conversation for a number of years, without regulatory success. The consultation on the Mental Health Act White Paper, and on the LPS and revised Mental Capacity Act Code of Practice offer important opportunities for this kind of public conversation. Importantly, however, these conversations and consultations need to be accessible to and inclusive of the people whom they will affect. The lack of accessibility of legal information is a significant issue, and one that I have discussed elsewhere.⁷⁵

Second, the capabilities approach invites us to consider what role deprivations of and restrictions on individual liberty play in ensuring that disabled people have the support and resources they require in order to do the things they value, and to live the life they wish. Most often, a care plan that includes deprivation of liberty includes these

⁷² Department of Health and Social Care and Ministry of Justice, *Reforming the Mental Health Act* (CP 501, 2021).

⁷³ *ibid* 10.

⁷⁴ cf MHA reviews maximum of 6 months.

⁷⁵ R Harding, E Taşcıoğlu and M Furgalska, *Supported Will-Making: A Socio-Legal Study of Experiences, Values and Potential in Supporting Testamentary Capacity* (University of Birmingham, 2019).

kinds of restrictions to safeguard the disabled person from significant harm. In the majority of cases, the harm that the person would be at risk of if they were not subject to constant supervision and control is bodily injury, perhaps as a result of low awareness of the dangers of traffic, or because they would be unable to secure nourishment for themselves. Deprivation of liberty cases under the Mental Capacity Act 2005 heard in the court of protection have, however, covered a very wide range of potential harms to the person. Reported case law on deprivation of liberty has covered situations including those where the person who would be deprived of their liberty ‘would not survive’ without the placement that deprives them of their liberty;⁷⁶ but has also included potential harms from alcohol and substance abuse;⁷⁷ autoerotic asphyxiation;⁷⁸ sexual abuse;⁷⁹ and harms associated with committing sexual offences against children and therefore being at risk of criminal prosecution.⁸⁰ These cases seem to be drawing us further away from the Bournemouth Gap, and into more diffuse restrictions on disabled people’s personal freedoms.

For the avoidance of doubt, I am not arguing here that we should not intervene to protect disabled people from harm. Rather, I consider that the capabilities approach helps to bring into view the ways that deprivation of liberty, as it has developed in Court of Protection jurisprudence since *HL v United Kingdom*, has become much broader than it was in that case. If we look at the DoLS and LPS from the perspective of how they enable disabled people who are subject to authorisations under that framework to do the things they value, or to live the life they desire, then that might help to re-ground these frameworks as, fundamentally, about protecting freedom, rather than authorising restrictions on that freedom. The change in name from ‘Deprivation of Liberty Safeguards’ to ‘Liberty Protection Safeguards’ is one element of this shift in focus, but changing the name will not suffice if in practice the function of the LPS is still merely to authorise restrictions (in a more cost effective way).

To unravel what I am seeking to articulate, it is important to reflect on how we reached this point, legally. *HL* identified the need for access to legal safeguards for those who are informally admitted to a formal care setting, who lack the capacity to consent to that care and

⁷⁶ Eg, *Cheshire West* (n 15).

⁷⁷ *RB v Brighton and Hove Council* [2014] EWCA Civ 561; *RB v United Kingdom* Application no 6406/15.

⁷⁸ *Re AA (Court of Protection: Capacity to consent to sexual practices)* [2020] EWCOP 66.

⁷⁹ *Tower Hamlets LBC v TB* [2015] EWCOP 20.

⁸⁰ *Re N (Deprivation of Liberty Challenge)* [2016] EWCOP 47.

treatment, and who are not clearly objecting to that care and treatment. The issue in *HL* was that he was an ‘informal’ patient, and so not covered by the protections provided by the Mental Health Act 1983, but he was also not permitted to leave hospital. The ‘Bournewood Gap’ was created by the lack of safeguards against the interference with HL’s right to liberty and security of the person, as protected by Article 5 ECHR. The original DoLS created a set of safeguards (bureaucratic, difficult to implement) to address this problem, which applied in formal care institutions (hospitals and care homes). *Cheshire West* identified a similar need for safeguards in community placements, including where the disabled person at the heart of the issue is being supported through a care plan to live as independently as possible in the community. The LPS will offer a new set of safeguards, somewhat less bureaucratic than the DoLS, to enable this without recourse to the Court of Protection. This creeping expansion of the legal framework associated with deprivation of liberty does, however, create challenges, especially where it overlaps with disabled people’s rights to private and family life⁸¹ and their rights to live independently and be included in the community.⁸² One of the drivers of this tension is the complex relationship with (lawful) deprivation of liberty and the need for resources to be allocated to enable disabled people to live independently with support.

B. *Living Independently and Being Included in the Community*

The LPS will sit, as the DoLS do now, within a wider policy context around disability rights, care and support. Policy frameworks surrounding learning disabilities and autism have focused on deinstitutionalisation and increasing the provision of care and support in community settings since the 1980s, though with varying levels of progress.⁸³ For some disabled people, living independently in the community means living in their own home, with support from paid care staff. For others, it involves living with family carers. Some of the most challenging disputes around deprivation of liberty have come up in the context of disabled adults living at home with their parents, who provide care and support either instead of or alongside paid carers.

⁸¹ See, for example, *London Borough of Hillingdon v Neary & Anor* [2011] EWCOP 1377.

⁸² Article 19, CRPD.

⁸³ S Jarrett and J Walmsley, ‘Intellectual disability policy and practice in twentieth-century United Kingdom’ in J Walmsley and S Jarrett (eds), *Intellectual disability in the twentieth century* (Policy Press 2019) 177-194.

In order to explore this issue, I look at one such dispute, *Re AEL*,⁸⁴ recently decided by Her Honour Judge Hilder, senior judge of the Court of Protection, through the lens offered by the capabilities approach. *AEL* was a 31 year old woman who lived at home with her parents, and was described in the judgment as having:

a rare chromosomal condition leading to a number of physical and mental disabilities. She has severe learning disability, significant visual impairment and profound deafness. She suffers from asthma, eczema and severe allergies. She is non-verbal and can only walk short distances. She does not have a regular sleep pattern. At times, she may behave in a way which causes herself injury.⁸⁵

There was no plan to change *AEL*'s living situation, but whether or not *AEL*'s living situation amounted to a 'deprivation of liberty' was the subject of a lengthy disagreement between *AEL*'s father and the local authority responsible for supporting her care. *AEL*'s father vehemently disputed that the arrangements for *AEL*'s care amounted to a deprivation of her liberty; the local authority was clear that, in law, they did. From the history provided in the judgment, it appears that the issue of whether or not the care and support *AEL* received from her family carers and paid care staff amounted to a deprivation of liberty was 'fudged' in a series of orders from 2017–2019 in an (ultimately unsuccessful) attempt to avoid protracted litigation on this issue. The most recent order is made in much clearer terms: *AEL* requires 24 hour care and supervision, and whilst being supported to make choices about her preferences, the decision about whether or not *AEL* is permitted to engage in any activity is subject to risk assessments by her caregivers, and she therefore does not have free choice. This amounts to 'continuous supervision and control' one of the key elements of the 'acid test' set out in *Cheshire West*, and drawing on the jurisprudence of the ECtHR. The other two elements of the acid test are also clear in this case: *AEL* does not have the capacity to consent to the care and support that deprives her of her liberty, and *AEL* is not free to leave. It comes as no surprise, under the current system, that HHJ Hilder made the declaration that *AEL*'s current care arrangements amount to a deprivation of her liberty. When the LPS come into force, *AEL*'s care arrangements will be of a kind suitable for authorisation through that system, which should be less burdensome for all involved.

⁸⁴ *AEL, Re (Mental Capacity Act 2005)* [2021] EWCOP 9.

⁸⁵ *ibid* [5].

Given how doctrinally unsurprising AEL's case is in the English context and following *Cheshire West*, it is ideal for looking at from a different perspective. In *The Idea of Justice*, Sen explores a response to his capabilities approach from Philip Pettit that argues that 'capabilities that are favour dependent do not count as real freedoms.'⁸⁶ Pettit's argument is that if a person can choose between option A or option B, but whether or not they are able to enjoy that choice is dependent on the favour of others to enable it, then that person's does not have the real freedom to choose.⁸⁷ The relevance of this approach to thinking about the LPS is that it seems to me to reflect a particular way of understanding liberty that pervades current understandings of deprivation of liberty as authorised by the Mental Capacity Act 2005. Pettit describes this as a 'republican' approach to liberty, in that it 'requires, not just the absence of interference, but also the absence of a power of arbitrary interference on the part of others: the absence of domination'.⁸⁸ AEL's case is a clear example of exactly this kind of constrained freedom: she is supported to choose what she would like to do, but whether her choice then leads to the realisation of that desire depends on whether her family carers or paid carers are available to support that activity, as well as whether they authorise that activity. AEL does not, therefore, have what Pettit would understand as a 'real freedom'. The legal framework surrounding deprivation of liberty in England and Wales appears to approach this issue from a similar perspective. It requires regular legal checks on whether the care and support arrangements in place remain in the best interests of the person, given that their freedoms are constrained (and sometimes very much so) by their care and support arrangements.

Sen argues for a more pluralistic understanding of freedom. He argues, using the example of 'a disabled person A who cannot do certain things by herself, without help'. He offers three examples:

Case 1: Person A is not helped by others, and she is thus unable to go out of her house.

Case 2: Person A is always helped by helpers arranged either by a social security system in operation in her locality (or, alternatively, by volunteers with goodwill), and she is, as a result, fully able to go out of her house whenever she wants and to move around freely.

⁸⁶ Sen, *The Idea of Justice* (n 59) 305.

⁸⁷ P Pettit, 'Symposium on Amartya Sen's philosophy: 1 Capability and freedom: a defence of Sen' (2001) 17 *Economics and Philosophy* 1.

⁸⁸ *ibid* 18.

Case 3: Person A has well-remunerated servants who obey – and have to obey – her commands, and she is fully able to go out of her house whenever she wants and to move around freely.⁸⁹

Sen argues that his capabilities approach to freedom would see case 2 and 3 as essentially the same, from the disabled person's perspective. In contrast, Pettit's republican approach would only understand case 3 as 'real' freedom, because the disabled person is not reliant on the goodwill of others.⁹⁰ The central issue within the capabilities is approach is whether the person has the capability to do the things in question, not necessarily how that capability comes about. Indeed, if we understand only case 3 as providing freedom to the disabled person, then the vital contributions of social security, support and informal care in unlocking their capabilities would be obscured.

This disagreement between Pettit and Sen helps expose how the capabilities approach might enable a different view of the protection of liberty under Article 5 ECHR; a perspective from an alternative angle than that which has become sedimented through the DoLS, *Cheshire West*, the jurisprudence of the Court of Protection and the LPS. I have some sympathy for those family carers who see the DoLS process as an unnecessary, expensive, time consuming, distraction from the business of caring.⁹¹ This is particularly so for parent carers of adults with learning disability who have lived with the realities of caring for their disabled son or daughter for many years. For someone like AEL's father, who has been caring for his daughter at home for many years, his support for her will not feel like something that interferes with her freedom, but rather as a mechanism for supporting it (and perhaps at the expense of his own freedoms). Evidence to the Joint Committee on Human Rights in their review of the Law Commission's proposals in 2018, suggests that AEL's father is not alone; other family carers find the expansion of the DoLS to placements in family homes to be intrusive and unnecessary.⁹²

A further challenge here is the relationship between deprivations of liberty in community settings and the interpretation of Article 5(1)(e)

⁸⁹ Sen, *The Idea of Justice* (n 59) 306.

⁹⁰ The same cannot be said, of course, for the hypothetical servants!

⁹¹ Indeed, in much of my empirical research with informal carers, I have found that they experienced the 'system' (of which DoLS in one part) as a complex, baffling, bureaucratic maze. See further: Harding, *Duties to Care* (n 69); E Peel and R Harding, "It's a huge maze, the system, it's a terrible maze": Dementia carers' constructions of navigating health and social care services' (2014) 13 *Dementia* 642.

Joint Committee on Human Rights at p. 18-19 (n 48).

by the European Court of Human Rights. The ECtHR have said that public authorities ‘must take reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge’, in order to discharge their duties under the first sentence of Article 5(1).⁹³ Yet ECtHR jurisprudence has also, as a matter of principle, limited the lawful deprivation of persons of ‘unsound mind’ under Article 5(1)(e), repeatedly noting that: ‘the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution’.⁹⁴ The ECtHR has never (unlike the UK Supreme Court) directly ruled that a person living in a community setting with support to help them live their lives as freely as possible, while taking account of the impact of their impairments on their ability to keep themselves safe, is ‘deprived of their liberty’ under Article 5 ECHR.

In other words, the approach that has developed to authorising care and support that amounts to a deprivation of liberty in England and Wales gives more protection to intellectually, mentally and psychosocially disabled people than the approach in Strasbourg. The question that still requires an answer is whether this is a problem. The LPS provides an administratively workable solution that enables regular checks to be made on the care arrangements for people in all kinds of care settings. If your interest is in due process, and the theory of rights, the DoLS/LPS are an important safeguard against arbitrary interference with disabled people’s rights to liberty and security of the person. Family carers, and disabled people, who often have to struggle and fight for every little bit of support that they receive, on the other hand, may view the bureaucratic machinery of the DoLS/LPS as representing a huge waste of public funds. Looking at this issue through the lens provided by the capabilities approach helps us to bring both of these perspectives into view, but does not necessarily lead to a resolution. There will be opportunities for interested parties to comment on the operationalisation of the LPS when the Code of Practice is published for consultation, and when that Code is reviewed under the terms of the Act. Such review and consultation could catalyse the kind of public deliberation recommended by proponents of the capabilities approach, which may help to resolve this matter.

⁹³ *Storck v Germany* (2006) 43 EHRR 6 96-139 at [102].

⁹⁴ *Hutchinson Reid v United Kingdom* (2003) 37 EHRR 9 [48]. See also *Ashingdane v United Kingdom* (n 57) [44]; and *Aerts v Belgium* (2000) 29 EHRR 50; *OH v Germany* (n 57).

5. *Concluding Remarks: Thinking Differently About Disability Rights*

In this paper, I provided a potted history of where the Liberty Protection Safeguards came from, and why reform is required. I then explored the proposed reform in a fairly doctrinal way, drawing on the practical concepts set out by Lord Bingham in his analysis of the rule of law from 2007. I then turned to explore these issues from a different perspective, provided by Sen and Nussbaum through the capability approach. My analysis of the LPS through these three lenses, leads to a conclusion that the LPS has the potential to be a good law, subject to a few caveats. There is no doubt that the LPS is a reasonable solution to the exclusions, bureaucratic framework, and backlog that have emerged from the current DoLS; but it may not be the secure bridge over the Bournemouth Gap that is required. It is a very legalistic solution, with many procedural safeguards. But the issues that came to the fore during the passage of these reforms through parliament suggest that more needs to be done to align legalistic ways of thinking about procedural matters with the way that disabled people, family carers and frontline professionals understand and experience disability (in)justice. The emphasis on public reasoning and debate provided by the capabilities approach might enable us all (especially those of us prone to turn towards proceduralist, lawyerly responses to the challenges of inequality and injustice) to think differently about disability rights. Disability human rights, and disability social justice, suggest that the future for disabled people should be focused around living in the community not institutions. We need to plan for this with frameworks that reflect the reality of disabled people's lives, and that are responsive to changing public understandings of disability equality and disability justice. The focus on public engagement and debate provided by the capabilities approach gives an important conceptual underpinning for how we can resolve these tensions. Public engagement and debate through public consultation and parliamentary review should lead to more careful implementation of reforms and proposals for reform, and to informed ongoing scrutiny. For those who will be engaging with the new Liberty Protection Safeguards, when they are implemented, an important way of ensuring that they keep disability social justice in mind is to ensure that the purpose of the LPS—to safeguard freedom—remains central. It is vital that legal, health and social care professionals do not understand and use the LPS as just another way of authorising (technically permitted) deprivations of liberty that prevent disabled people from being and doing the things they value.