



**Law**  
**Commission**  
Reforming the law

# The review of the deprivation of liberty safeguards

**Horatio Waller**  
**Tom Pontre**

**Housing and Support Alliance - 20 July 2015**

# The Law Commission

- ❖ Independent body created by statute
- ❖ Role is to keep under review the law in England and Wales, and recommend reform
- ❖ Two thirds of reports have been implemented
- ❖ Currently on our 12<sup>th</sup> programme of law reform

# Timetable for the Review

## Stage 1: Pre consultation

## Stage 2: Public Consultation

7 July 2015

Publication of consultation paper

July to October 2015

4 month public consultation

## Stage 3: Final Report and Draft Bill

Publication by the end of 2016

Legislation introduced in the next session of Parliament?

# The DoLS

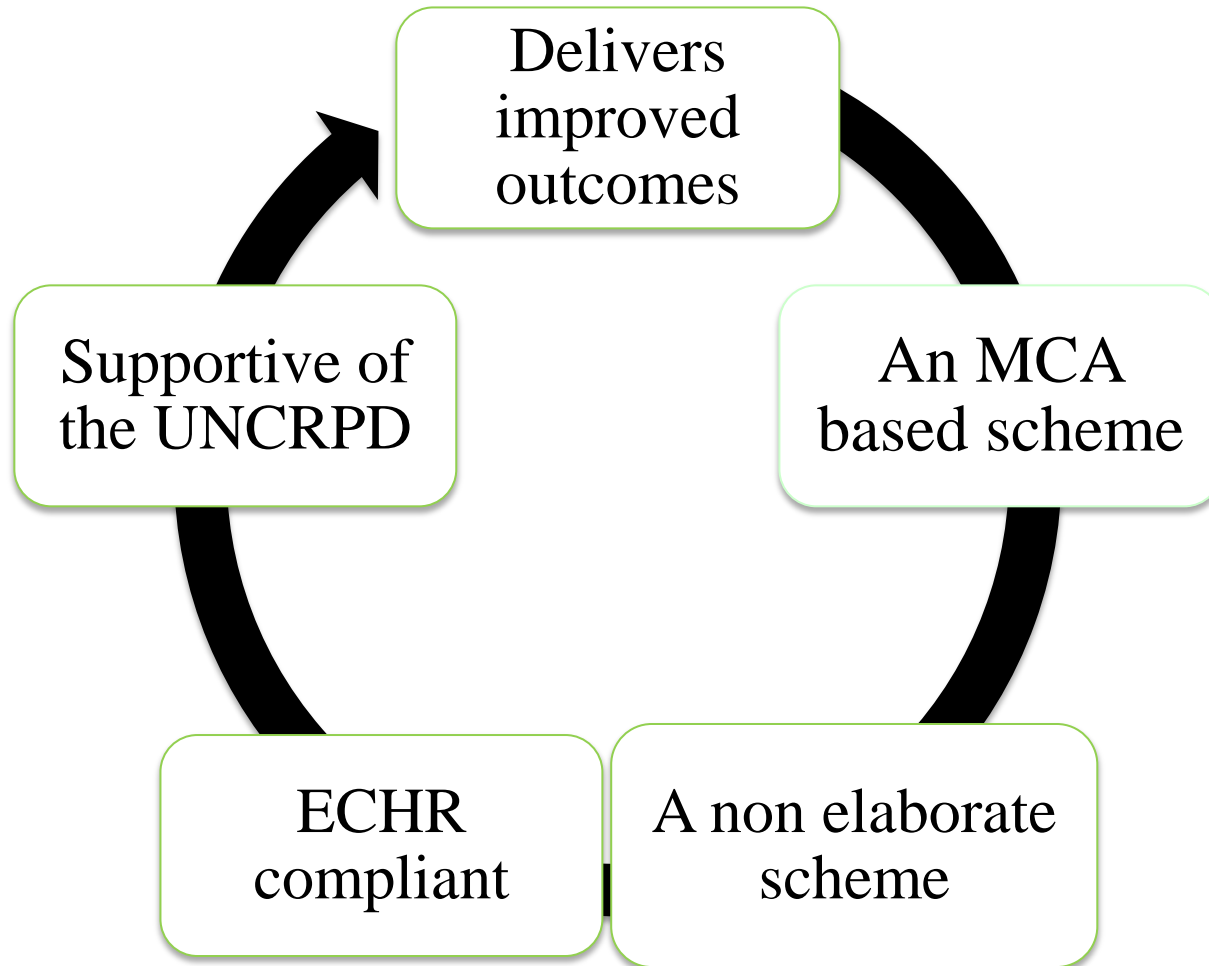
- ❖ HL v. UK
- ❖ Administrative system for authorising deprivation of liberty for people lacking mental capacity in their best interests
- ❖ Applies in hospitals and care homes

# Criticism of the DoLS

- ❖ narrow focus on article 5
- ❖ disconnect with the Mental Capacity Act
- ❖ local authority conflicts of interest
- ❖ limited scope
- ❖ “one-size-fits-all” approach
- ❖ lack of oversight and effective safeguards
- ❖ length and complexity
- ❖ scale of the problem post-*Cheshire West*
- ❖ Ill-suited and inadequate terminology

the new “protective care” scheme

# Principles of the new scheme



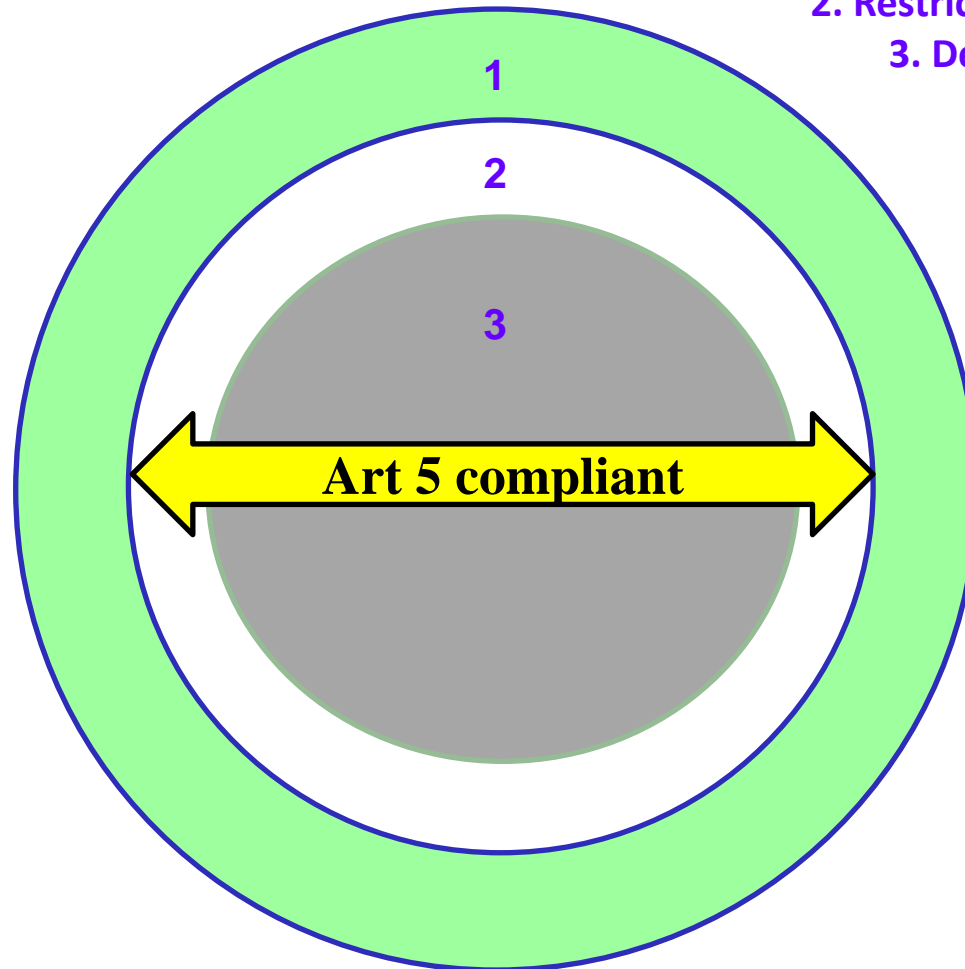
# Remit of the new scheme

- ❖ Care homes, supportive living, extra-care housing and shared lives arrangements
- ❖ Hospitals and palliative care
- ❖ Domestic and family settings
- ❖ Mental health care and treatment
- ❖ 16 and 17 year olds



# Overview

1. Supportive care
2. Restrictive care and treatment
3. Deprivation of liberty



Supportive care

# Qualifying criteria

1. The person is moving into (or already living in) care home, supported living or shared lives accommodation
2. The person lacks mental capacity to decide their accommodation arrangements

# Supportive care safeguards

- ❖ an assessment when a person is moving into (or already living in) the accommodation
- ❖ confirmation that the relevant legal safeguards have been followed
- ❖ oversight of tenancy arrangements
- ❖ care planning safeguards
- ❖ ongoing monitoring and review
- ❖ rights to advocacy and an “appropriate person”

restrictive care and treatment

# Qualifying criteria

1. The person is moving into (or already living in) care home, supported living or shared lives accommodation
2. Restrictive care and treatment is being proposed
3. The person lacks capacity to consent to the care and treatment

# “restrictive care and treatment”

Any one of these:

- Continuous supervision and control
- Not free to leave
- Use of barriers in the premises
- Use of control (physical force, restraints or medication)
- Any care and treatment that the person objects to
- Severe restrictions over contact, diet and clothing
- Unable to leave premises without assistance

# Restrictive care and treatment safeguards

- ❖ An assessment takes place which is overseen by an independent professional (the “AMCP”)
- ❖ Power to recommend conditions and make recommendations
- ❖ Care planning safeguards
- ❖ Ongoing monitoring and review
- ❖ Right to appeal to a tribunal
- ❖ Rights to Care Act advocacy and an “appropriate person” and RPR



# The “Approved Mental Capacity Professional”

- ❖ builds on existing role and expertise of the Best Interests Assessor
- ❖ all assessments referred to the AMCP
- ❖ AMCP has responsibility for ongoing oversight of the restrictive care and treatment
- ❖ acting as independent decision-maker on behalf of the local authority
- ❖ regulated by the Health and Care Professions Council and Care Council for Wales

# deprivations of liberty

The care plan is the authority for the care provider to detain the person

The AMCP will need to ensure objective medical expertise

Deprivations of liberty can be authorised in domestic and family settings

# First-tier Tribunal

- Key advantages of tribunal system:
  - Existing knowledge base ✓
  - Accessibility and formality ✓
  - Efficiency and cost effectiveness ✓
  - The complexity of the judicial determinations ?
- Right of appeal to Upper Tribunal or Court of Protection
- Automatic reviews

# The hospital and palliative care scheme

# General hospitals and palliative care

- ❖ a person may be deprived of liberty for up to 28 days in a hospital
- ❖ assessment made by clinician and certified by a registered medical practitioner.
- ❖ a responsible clinician must be appointed and a care plan produced.
- ❖ further authorisations for a deprivation of liberty would require the agreement of an AMCP

# Mental Health Treatment

- ❖ A new mechanism under the Mental Health Act to admit to hospital people who lack capacity and are not objecting to their care and treatment.
- ❖ Safeguards include an independent advocate, a second medical opinion for certain treatments and rights to appeal to the tribunal.
- ❖ The Mental Capacity Act (and our new scheme) could not authorise the hospital admission of incapacitated people who require treatment for mental disorder.

# Other key areas

Consolidation of advocacy		A legal supported decision-making scheme	
	Reform of the best interests check-list		Is a new criminal offence needed?
Continuation of RPR role (but not paid RPR)		Reform of coroners legislation	
	Ability to consent to a future deprivation of liberty		Governance & oversight By CQC, CSSIW and HIW



# Law Commission

Reforming the law

## My contact details:

Email	<a href="mailto:tim.spencer-lane@lawcommission.gsi.gov.uk">tim.spencer-lane@lawcommission.gsi.gov.uk</a> <a href="mailto:Horatio.waller@lawcommission.gsi.gov.uk">Horatio.waller@lawcommission.gsi.gov.uk</a>
Website	<a href="http://www.lawcommission.justice.gov.uk">www.lawcommission.justice.gov.uk</a>