

**Impact case study (REF3b)**

<p><b>Institution:</b> University of Essex</p>
<p><b>Unit of Assessment:</b> 32 – Philosophy</p>
<p><b>Title of case study:</b> Autonomy and Best Interests Decision-Making Policy</p>
<p><b>1. Summary of the impact</b></p> <p>In 2008 the Philosophy Department decided to organise its impact strategy around the research activities of the Essex Autonomy Project (EAP). EAP research has been conducted in two distinct strands with different research outputs and impacts. This case study summarises the impact of our work concerning the legal concept of best interests decision-making. Through EAP public policy roundtables, EAP technical reports, and through work with public organisations and public officials, EAP research has informed professional and public discussion of the law of best interests, has had impact in the development of public policy guidelines for implementing legal requirements, and has played a role in the review and reform of existing regulatory frameworks.</p>
<p><b>2. Underpinning research</b></p> <p>The principle of beneficence has long been recognised as a fundamental principle of medical ethics and the ethics of care more generally. The primary aim of medicine is to benefit patients; doctors and other care-providers must therefore act in the best interests of care-recipients. However, as soon as one moves beyond this intuitive and universally agreed principle, problems arise both in theory and in practice. In 2005, Parliament adopted <i>The Mental Capacity Act (MCA)</i>, a landmark piece of legislation that reshaped health-care and social-care practice. Among other things the MCA created a new Court of Protection for adjudication of disputes over best interests decisions taken on behalf of care-recipients.</p> <p>The Essex Autonomy Project (EAP) has studied the philosophical, ethical, and legal problems that arise in the cases that have been brought before the Court of Protection. Three problems in particular have loomed large in recent legal controversies:</p> <ul style="list-style-type: none"> <li>▪ To what extent can or should the assessment of the best interest of P (the care-recipient) take into account the interests of others (e.g. P’s family, care-providers, etc.)?</li> <li>▪ When and under what circumstances does best interests decision-making amount to an objectionably paternalistic intervention in the autonomy rights of P?</li> <li>▪ Is best interests decision-making ever permissible, or is it always an inadmissible restriction of P’s autonomy?</li> </ul> <p>The EAP has made research contributions in connection with all three of these challenges. In consultation with judges, lawyers, psychiatrists, and social care professionals, they have produced a series of position papers and research articles analysing the ethical and legal issues arising from the application of the principle of best interests in health- and social-care contexts:</p> <ul style="list-style-type: none"> <li>▪ Szerletics traces the history and development of the best interests standard in English case law and statute [1];</li> <li>▪ Szerletics and O’Shea analyse the controversies surrounding the interpretation of ‘Deprivation of Liberty’ in care-home settings [3];</li> <li>▪ Martin identifies an antinomial tension in English legal provisions governing best interest assessments, and proposes a strategy for resolving it [4];</li> <li>▪ Martin, Freyenhagen, Hall, O’Shea, Szerletics, Ashley diagnose and criticise a trend towards hyperindividualism in guidance definitions of ‘best interests’ [5].</li> </ul> <p>Two critical results that have emerged in this research concern (a) the importance of overcoming ‘zero-sum’ models of the relationship between paternalistic intervention and respect for autonomy and (b) the error in defining ‘best interests’ in narrowly individualistic terms that preclude</p>

consideration of the interests of others. The cited body of research taken together develops both a legal and an ethical argument in support of these two negative points, and proposes alternative framings of the concept of best interests that avoid them.

*Essex Autonomy Project 'Best Interests' researchers:* Prof. Wayne Martin (Professor in Philosophy from 2009, EAP Director 2010 – present); Dr. Fabian Freyenhagen (Lecturer in Philosophy from 2009, Reader from March 2012, EAP Co-Director 2010 – present); Dr. Tom O'Shea (EAP Senior Research Officer 2010 – 2013); Antal Szerletics (EAP Senior Research Officer 2010 – 2011).

### 3. References to the research

1. Szerletics, A. (2011) Best Interests Decision-Making Under the Mental Capacity Act, *Essex Autonomy Project Green Paper Report*, University of Essex: Essex Autonomy Project [Green paper report]: <http://autonomy.essex.ac.uk/best-interests-decision-making-under-the-mental-capacity-act> [Available from HEI on request]
2. O'Shea, T. (2011) Best Interest Decision-Making: Legal, Ethical and Clinical Issues: A Public Policy Digest, *Essex Autonomy Project Green Paper Report*, University of Essex: Essex Autonomy Project [Green paper report]: <http://autonomy.essex.ac.uk/wp-content/uploads/2011/08/Report-on-Best-Interests-Public-Policy-Rountable.pdf> [Available from HEI on request]
3. Szerletics, A., and T. O'Shea (2011) Deprivation of Liberty and DoLS, *Essex Autonomy Project Green Paper Report*, University of Essex: Essex Autonomy Project [Green paper report]: <http://autonomy.essex.ac.uk/deprivation-of-liberty-and-dols> [Available from HEI on request]
4. Martin, W. (2012) Antinomies of Autonomy: German Idealism and English Mental Health Law *International Yearbook or German Idealism / Internationales Jahrbuch des deutschen Idealismus*, 191-213 [peer-reviewed journal article]. DOI: 10.1515/9783110283747.191
5. Martin, W., F. Freyenhagen, E. Hall, T. O'Shea, A. Szerletics, and V. Ashley (2012) 'An Unblinker View of Best Interests' *British Medical Journal*, 345 [peer-reviewed journal article]. DOI: 10.1136/bmj.e8007

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### 4. Details of the impact

EAP research has resulted in a series of engagements with policy makers, mental health advocacy groups, senior members of the judiciary, social-care and health-care professionals, and civil servants. Through these engagements the EAP has guided and informed policy debate and discussion of how best to implement the legal standard of best interests, and in some cases whether best interests decision-making is acceptable at all.

In 2010 EAP was awarded a 27-month, £337,315 AHRC grant. The grant allowed the Essex research team to add research staff, build a network of connections with senior members of the UK judiciary, and fund a series of public-policy engagements with these contacts. Since 2010 members of the Essex team have worked directly with the Office of the Public Guardian, the Law Commission, the Court of Appeal, the Department of Health, the Ministry of Justice, the Official Solicitor, the Court of Protection, the British Medical Association, the Royal College of Medicine, the Royal College of Psychiatry, Amnesty International Ireland, and the Mental Health Foundation.

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EAP's engagement with these institutions has included organising and contributing to practitioner events (Community Care Conference, November 2012; working seminar at the Royal College of Psychiatrists, April 2013; public debate with a KCL Professor of Law and Judge Gordon Ashton of the Court of Protection, March 2013) and two public policy roundtables. The roundtables were organised by the EAP and co-sponsored by the Office of the Public Guardian. These were closed-door meetings, held under the Chatham House Rule, in which discussion of best interest decision-making was guided by briefing documents drafted by members of the EAP research team and based on EAP research. The roundtables have ensured mutual benefit for EAP and their judicial partners, keeping EAP research informed of the problems faced by public policy professionals, and feeding EAP research into public policy decision-making.

The roundtables were held on 25 July 2011 and 16 January 2012. Attendees included:

Lord Justice Munby (Then Chair of the Law Commission and Current Member of the Court of Appeal)

Martin John (The Public Guardian)

Paul Gantley (MCA Implementation Manager, Department of Health)

Alistair Pitblado (The Official Solicitor)

John Leighton (Social Care Institute of Excellence and Cambridgeshire County Council)

Caroline Hilder (Judge of the Court of Protection)

Julian Sheather (Ethics Committee of the British Medical Association)

Joan Goulbourn (Ministry of Justice)

Heather Hurford (Care Quality Commission)

One output of the meetings was a digest report of each roundtable summarising the meeting's recommendations. These digests have been posted on the EAP website; one digest was picked up by and hosted on Mental Health Law Online, an online mental health practitioner resource [corroborating source 1].

The digest adds to a body of online resources that the EAP have developed for policy makers concerned with the legal concept of best interests decisions. The EAP website hosts Green Paper Reports (7 thus far), Technical Briefings (5), and Research Articles (6), each of which present EAP research in a form accessible and relevant to the concerns of public policy professionals. The EAP website receives over 17,000 unique visitors per year [based on July 2012-June 2013 analysis, corroborating source 2].

EAP's contribution to debate about mental health policy has also reached international beneficiaries. The REF impact period coincided with a period of intense scrutiny of mental health law in Ireland, where policy makers have been debating how to write new legislation to comply with the UN Convention on the Rights of Persons with Disabilities. One of the most controversial issues addressed in the debate has been whether this new legislation should incorporate best interest provisions. This debate has culminated in the Irish parliament's publication of the Assisted Decision-Making (Capacity) Bill in July 2013. EAP's contribution to this process has been achieved primarily through two events. In June 2012 Martin was invited by Amnesty International Ireland to facilitate a seminar attended by fifteen organisations, including government agencies, professional bodies, and public sector lobbying groups, who had been working together to develop recommendations for Irish legislators drafting a new bill. This seminar was followed in November 2012 by a workshop facilitated by EAP, in which Amnesty International Ireland's 'citizens' jury' were asked to explain their process and decisions to NGOs and professionals engaged in the development of new mental health legislation in Ireland. Martin's contribution to Amnesty's campaign on Ireland's new legislation was well received by their Public Affairs Executive:

The Essex Autonomy project was of significant help to our mental health campaign. Wayne Martin's expertise and enthusiasm shone through, and this married with the unique philosophical approach was of great help...Both workshops were successful in challenging people to be more creative in their thinking about autonomy and were catalysts for stimulating and challenging discussions.

*Public Affairs Executive, Amnesty International Ireland*

The most recent development of EAP policy impact has been their collaboration with EDSECT, the Eating Disorders Section of the Royal College of Psychiatrists. In April 2013, Prof Martin was invited to facilitate a day-long meeting of EDSECT. The meeting was held at the London headquarters of the Royal College and involved 40 professionals from the UK and Europe who work with patients with Eating Disorders. The focus of the meeting was a pair of Court of Protection cases in which the MCA best interests framework had been applied for the first time to cases involving life-threatening Anorexia Nervosa. That meeting culminated in a collaborative session in which Prof Martin coordinated a discussion to generate draft guidelines concerning best interests decision-making for patients with severe and enduring Anorexia Nervosa [all above EDSECT impact corroborated by source 4]. In July 2013, EDSECT invited Prof Martin to incorporate the results of the April meeting into a formal submission to the House of Lords Select Committee on the Mental Capacity Act [corroborating source 5]. This invitation will lead to further impacts beyond the end of the REF impact period, both influencing the Royal College of Psychiatrists in their submission of evidence, and potentially influencing the Select Committee in their post-legislative scrutiny of the Mental Capacity Act.

Given constraints of space, we include here just one example of feedback received from public officials concerning the impact of the Essex work on best interests:

Their small-scale public policy seminars have fostered frank and free exchange of ideas across the usual professional divides, and have helped explore and communicate important recent developments in the law that governs social care. The 'Green Paper Technical Reports' and 'Seminar Digests' available on their website provide valuable and accessible analysis of key developments and dispute. For example, their document 'Deprivation of Liberty and DoLS' provides a useful analysis of early reactions to the Court of Appeals ruling in *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257. I recently made reference to this digest in my keynote address to a large audience of local authority officials and social workers at Leeds.

*Former Chair of the Law Commission and current Member of the Court of Appeal*

#### **5. Sources to corroborate the impact** [All sources saved on file with HEI, available on request]

1. Tom O'Shea, 'Deprivation of Liberty and DoLS':  
<http://www.mentalhealthlaw.co.uk/images/Essex-Autonomy-Project-Digest-of-Deprivation-of-Liberty-and-DoLS-Roundtable.pdf>
2. Website analysis produced by Statistics into Decisions
3. Public Affairs Executive, Amnesty International Ireland
4. Consultant Psychiatrist, Eating Disorders Unit, South London and Maudsley NHS Foundation Trust
5. Chair of the Executive Committee of the Eating Disorders Section of the Royal College of Psychiatrists
6. Former Chair of the Law Commission and current Member of the Court of Appeal