

Mental capacity and the deprivation of liberty in England – where are we now and what does that mean in practice?

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Structure

- The Mental Capacity Act 2005
 - What does the law say?
 - The current state of practice
- Deprivation of Liberty Safeguards
 - What does the law say?
 - The current state of practice
- Why does this matter for Autistic adults?
- Human Rights and International Conventions
- The future – Liberty Protection Safeguards?

Throughout: Practical implications for care and support for Autistic adults

What is legal capacity?

- Adults have the legal right to make a wide range of decisions about their own lives
- In most countries there is a legal procedure where an individual can be judged to **lack legal capacity** because they are (or are seen as) unable to make their own decisions because of a disability/illness
- → Someone else making decisions **on the person's behalf** and loss of the legal right to choose differently
- Many autistic people subject to these procedures

“The right to legal capacity is one of the most invisible human rights issues in Europe today, and is also one of the most important” ([Hammarberg, 2013](#))



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England: Mental Capacity Act 2005



1 Capacity assumed

2 All practicable steps

3 Unwise decisions

4 Best Interests

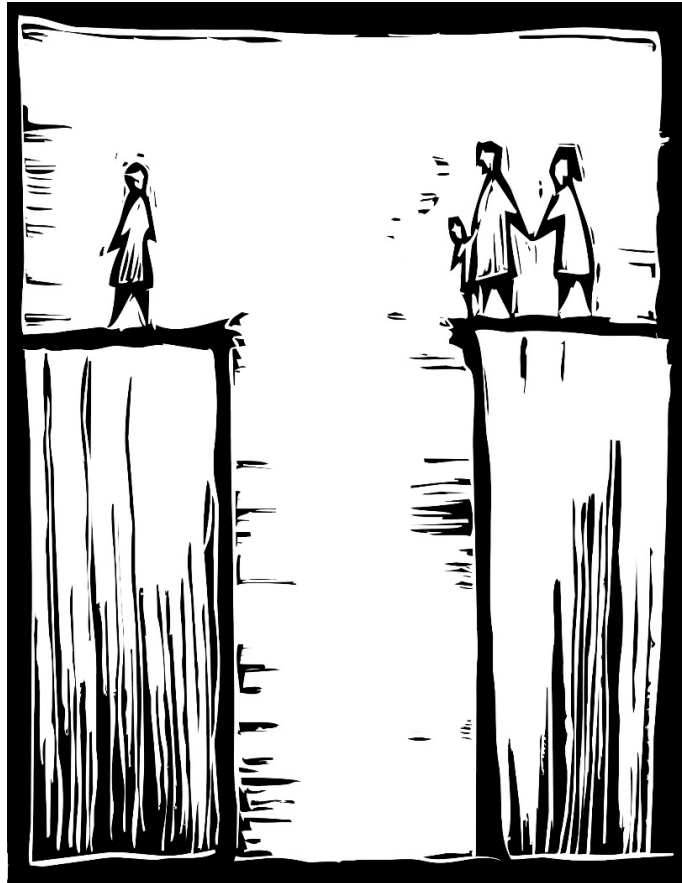
5 Least Restrictive

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Theory vs Practice



- P, 19, SLD and Autism
- Bruising to chest after school trip
- Mother reported to GP and respite
- Respite noticed further bruising and initiated Safeguarding
- Detained away from family for over a year
- No application to COP and family not told of their rights
- Failure to discover crucial information from school

CQC State of Care report 2016/17: MCA generally

“Capacity is an important area where providers and staff often seemed to lack understanding. There was often not enough time spent assessing a person’s changing capacity.”

- Poor practice in Best Interests decision making
- Poor recognition of restraint/restrictive practices and failure to develop alternatives – [tool available](#)
- Blanket restrictions applied to groups without consideration or review

Health and Safety Myths!

"We have a duty to let any harm come to the public on the side of

Best practice is safest

Best Interests

“the purpose of the best interests test is to consider matters from the patient's point of view”

Wye Valley NHS Trust v Mr B (by his litigation friend, the Official Solicitor)
[2015]



England: The Mental Capacity Act 2005

Pros	Cons
Strong principles including: Presumption of capacity	Capacity all or nothing – either have or have not In practice, often presumptions of incapacity
Not purely on basis of diagnosis	But only applies to those with brain/mind based conditions
Requirement for all practicable steps to support first	Really good autism-specific decision making support is very rare
No assumption on basis of unwise decision	In practice, unwise decisions by Autistic adults often lead to assumption of incapacity
Best interests principle (when properly understood!)	Fundamentally substituted decision making
Capacity is decision specific (when properly implemented!)	

The current English situation

“The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.”

[Select Committee post-legislative scrutiny, House of Lords \(2014\)](#)

Deprivation of Liberty - When is it legitimate to take away someone's freedom?

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Who is affected and why does it matter?

- People who are cared for in circumstances where their freedom of choice is so restricted as to mean they are being deprived of their liberty
- Wide range of people but includes many Autistics
- Includes people who don't object and seem 'happy'
- Includes situations where the care is in the person's best interests
- Process needed to protect rights and ensure **independent** review
- Fundamentally about who is in control of an adult's life

The current English situation: Deprivation of Liberty Safeguards (DOLS)

- A statutory scheme since 2009 (Schedule A1)
- Care homes and hospitals only
- DOL must be authorised by ‘supervisory body’ (usually the local authority), reviewed at least once per year and can be appealed to Court of Protection
- DOL in community settings (e.g. supported living, own home etc.) must be authorised by Court of Protection
- 2014 Cheshire West – “a gilded cage is still a cage”
- “human rights are for everyone, including the most disabled members of our community and those rights include the same right to liberty as everyone else” (Lady Hale)

Continuous Supervision and Control

Does the care plan require always knowing (broadly) at any given time:

- **Where the individual is?**
- and
- **What they are doing?**

If both, then strong pointer to continuous supervision and control (Law Society guidance, 2015)



Not free to leave

- **Doesn't mean** whether the door is locked!
- **What would those providing care do if the person** (alone or with the support of family members) **left the premises?**
- If attempts would be made to return them, this strongly points to 'not free to leave'



What **isn't** relevant to whether there is a Deprivation of Liberty?

- The nature of P's disability
- Whether P is **able** to leave (e.g. not physically capable)
- Whether P is trying/wants to leave
- How appropriate/good the care provided is
- How 'normal' P's life is
- Everyone agreeing that this is the best place for P
- Whether P's family are happy with the arrangements

Restraint and Restrictions

- using locks or key pads which stop a person going out or into different areas of a building
- the use of some medication, for example, to calm a person
- close supervision in the home, or the use of isolation
- requiring a person to be supervised when out
- restricting contact with friends, family and acquaintances, including if they could cause the person harm
- not allowing a person to take part in certain activities
- physically stopping a person from doing something which could cause them harm
- removing items from a person which could cause them harm
- holding a person so that they can be given care, support or treatment
- bedrails, wheelchair straps, restraints in a vehicle, and splints
- the person having to stay somewhere against their wishes or the wishes of a family member
- repeatedly saying to a person they will be restrained if they persist in a certain behaviour.

What a DOLS authorisation DOESN'T cover



- Risk to OTHERS (risk must be to P)
- Medical treatment (including medication)
- Professionals 'getting their way' when there is a dispute about what is in P's best interests
- Settings other than Care Homes, Hospitals
- Under 18s

CQC Annual State of Care report 2016/7: DoLS

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“eight years on from the introduction of the DoLS, our adult social care, hospitals and mental health inspectors continue to find variation in their implementation and use.”

“A concern from our inspectors is that DoLS is often viewed very much as a paper exercise with the application as the end point, rather than the beginning of the care planning process.”

- Backlog of applications continues
- Staff do not fully understand aspects of the legislation and are not supported to fully apply their DoLS training to real life practice (often training only via e-learning)
- Staff shortages and pressures leading to lack of time
- DoLS seen as separate and not embedded in Care Planning

This can lead to:

- the use of overly restrictive practices;
- generalised decisions around a person's capacity;
- a lack of person-centred care.



Why is this an autism issue?

- Large numbers of Autistic adults are affected - although no-one knows how many
- DOL can be lifelong so different needs from larger elderly group
- Capacity assessment and care issues due to poor levels of autism knowledge, so independent review particularly important

International Conventions

ECHR – the Human Rights Act 1998*

- Article 5 – Right to Liberty
- Article 8 – Right to respect for home, private and family life
- But, written in 1950s. Lacks modern understanding of Disability Equality.

UNCRPD – current legal status in England

- Sets a very high standard. So is an ideal to strive for (but, realistically, in stages)
- Article 5 requires non-discrimination – a challenge to any diagnosis based element in judgement of capacity
- Article 12 requires equal recognition before the law and specifically legal capacity on an equal basis and support in exercising it

*Will not be affected by Brexit

The future? Liberty Protection Safeguards – the Law Commission's proposals

- Same essential purpose as DOLS i.e. to protect human rights of those unable to consent
- Administrative rather than court based process
- Ensure that question of whether Depriving the person of their Liberty is justified is considered BEFORE care arrangements are made (rather than afterwards as now)
- Cover arrangements for residence, care, treatment and transport across all relevant settings
- Cover 16+
- Place responsibility with NHS where NHS is main commissioner (i.e. hospital care and CHC) and with Local Authorities where they are main commissioner (i.e. social care)
- Relevant people must have been consulted (including family members and friends)
- Care arrangements must be “necessary and proportionate”

The future

- DoLS Reform: Government response promised for Spring 2018



- UNCRPD and [Supported decision-making](#)

Mental Capacity and Deprivation of Liberty in England

