

Children, decision-making, and human rights

World Social Work Week
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Children's and adults' services
Salford City Council



Keeping vulnerable adults safe

IN Salford

In today's session

- Legal overview
- Developing and supporting good practice
- Case examples
- Questions



Legal overview

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Outline

- Mental Capacity Act
- What is deprivation of liberty?
- Who can authorise DoL?
- Practice points
- Resources



Mental Capacity Act 2005

- Most provisions apply from 16th birthday
- Five principles:
 1. Presumption of capacity
 2. Scope to make unwise decisions
 3. Supported decision-making
 4. Best interests decisions
 5. Least restrictive option



Mental Capacity Act 2005

- Having mental capacity means:
 - Understanding the relevant information
 - Retaining it long enough to make a decision
 - Using and weighing the information
 - Communicating the decision somehow
- Capacity is specific to the decision and time
- Incapacity must be related to disturbance in, or impairment of, the mind or brain



Mental Capacity Act

- Young person has capacity under the MCA:
 - YP makes the decision (if it's his/hers to make)
 - Parents probably can't over-rule
 - High Court *can* over-rule using inherent jurisdiction (but will be very cautious in doing so)
- Young person lacks capacity under the MCA:
 - Parents make best interests decisions/use PR if their PR is not in question
 - But parents can't force professionals to act against their judgment
 - Court of Protection to rule in disputes



What is deprivation of liberty?

- European Convention on Human Rights
- Article 5
 - Qualified right to ‘liberty and security of person’
 - State can interfere for a “legitimate purpose”
 - “detention of a minor ... for educational supervision” (5.1.d),
 - “Persons of unsound mind” (5.1.e)
 - Must be necessary and proportionate
 - Necessary = person will be harmed otherwise
 - Proportionate = positive balance of benefit over harm
 - Subject to “speedy determination by a court” (5.4)



What is deprivation of liberty?

Three components:

1. Objective component – “confinement in a particular restricted place for a non-negligible length of time”
2. Subjective component – lack of valid consent (*Fraser/MCA*)
3. State responsibility –the deprivation is “imputable to the state”



What is deprivation of liberty?

- What counts as DoL (and the justification for it) depends on the child's age and level of maturity
- Relevant comparison is with “another child of the same age” – not another child with the same disabilities
 - E.g. children younger than 10 unlikely to be “confined”
- Different legal frameworks apply at different ages
- Some restrictions can be justified using other legal frameworks, e.g. health and safety legislation



What is deprivation of liberty?

Law Society guidance on 16-17 year olds:

- Restrictions on contact with others
- Locked doors
- Use of “safe spaces”, physical restraint etc
- Restrictions on phone use, internet etc
- Medication to manage behaviour
- Restricted access to belongings
- Supervision in the home/community
- Fixed timetables
- All “compared with other young people”



Who can authorise DoL?

- 0-16
 - Parents can authorise DoL if their parenting has not been questioned
 - If parenting is in question then High Court (not Family Court) can authorise under the inherent jurisdiction
 - Local authority can't authorise DoL even if PR is shared under a care order



Who can authorise DoL?

16-17

- Parents cannot authorise DoL (*Re D*, 2019)
- Young person lacks capacity under the MCA :
 - Court of Protection makes a best interests decision
- Young person has capacity under the MCA:
 - Young person is placed in s25 accommodation
 - Young person is detained under the Mental Health Act
 - OR
 - High Court ruling under its inherent jurisdiction



Practice points

- Each case is different and very sensitive to its facts
- ‘Blanket’ restrictions are not acceptable
- What does the child/young person want?
- Can the restrictions be avoided/reduced, now/later?
- Are the restrictions ‘typical’ for a child of that age?
- Update permissions as child turns 16 especially for DoL
- 16+: most young people will have capacity under the MCA (but may have problems with anger, trauma etc)
- Liberty Protection Safeguards: a new scheme covering DoL for 16-17 year-olds: consultation now open!



Childrens Services – Identifying a Shared Need.

Shared learning identified.

Collaborative working between Childrens and Adults Services.

SQAUD approach – a partnership approach to identify service need and shared objectives.



Childrens Services - Embedding Learning into Practice.

- A visual aide, to support the understanding of the DOLS pathway and promote consistency in practice.
- A top tips guide – translating the legal framework into practice examples.
- Delivery of multi agency training and reflection.

What Next –

- Upskilling champions assigned to each service area – intended impact to embed learning and provide high support to individual teams.
- Evaluate the impact on outcomes for our children and families.



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Resources

- [Mental Capacity Act 2005 \(legislation.gov.uk\)](https://legislation.gov.uk)
- [Deprivation of liberty safeguards: a practical guide | The Law Society](#)
- [Deprivation of liberty and 16-17 year olds: Practice Guide \(researchinpractice.org.uk\)](https://researchinpractice.org.uk)
- [39 Essex Chambers | COP Cases – 39 Essex Chambers](#)
- [Liberty Protection Safeguards factsheets - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

