

Chapter 15: The Court of Protection and the Deprivation of Liberty Safeguards

1. What is the difference between restraint, and a deprivation of liberty?

This is not an easy distinction. The Code of Practice provides guidance, pointing out that it is a question of degree rather than substance. It would be useful to think of some examples for your own experience and see if others agree with distinctions you make.

2. Explain in your own words why it is necessary to protect incapacitated persons from unauthorised deprivations of liberty.

This is over to you. Think about the case law, and what injustices were perpetrated upon those who went to court. It is very easy to forget that we need to be justified when we interfere with people's liberty, because we are so sure that we are acting in someone's best interests. But the powers that the state can exercise against an individual must always be exercised within the limits of the law.

3. What do you think, if anything was wrong with the DOLS regime?

Read the Law Commission's analysis and see if you agree with it. There seems to be a lot of bureaucracy in the DOLS regime and it imposes extensive burdens on local authorities. Perhaps the extent of the bureaucracy means that short cuts are taken – see concerns about practices during Covid-19.

4. Do you think legal safeguards against deprivation of liberty should apply in domestic and community settings?

Again this is a question of opinion, but it does seem to be very intrusive into what seems to be common sense ways of caring for people. On the other hand it is easy to abuse the liberty of an incapacitated person.

5. Does the new legislation address the needs of people lacking mental capacity?

Arguably the new legislation – the Mental Capacity Amendment Act 2019 - has been designed to make the local authority role easier to manage. Local authorities will no longer be responsible for having to authorise all deprivations of liberty as they will no longer be authorising cases where the care is provided mainly in an NHS hospital or is CHC funded. However that is not what the question asked. What do you think that people lacking mental capacity need in connection with their right to liberty? The new system of Liberty Protection Safeguards will be implemented in 2022 and the DOLS system will run alongside it for a year.

A contribution to Lucy Series blog, 'The Small Places' from a social worker says this about what the legislation should provide,

Overall we need a system which focusses support and expertise where it is most effective, which balances empowerment and protection, where professionals are looking to open doors rather than lock them. This way the most vulnerable receive both the safeguards they need and the rights they deserve, and if funded appropriately will this will happen in a timely manner.

What she thinks is needed in addition to the new legislation is..

... to focus our efforts on the further changes needed to make a scheme work. A key element is a definition of deprivation of liberty relevant to care and support, in order to focus protection on those who need it. We need to strengthen rights within the MCA itself by ensuring the excellent principles there are firmly embedded in practice. We need to strengthen the role of AMCP beyond objection only and link this to the concepts of necessity and proportionality giving clarity about their application, not opening further flood gates inadvertently by allowing harm to others to creep in unnoticed.

Do you agree?