



Deprivation of Liberty in Supported Housing

This viewpoint is intended to stimulate consideration and debate on two separate, but related issues:

1. With the new revised and more encompassing definition of “deprivation of liberty” issued in a recent supreme court ruling, are there people living in supported housing (and other housing settings) who fall into that definition and for whom authorisation needs to be sought? What are the issues and implications for the housing sector and their residents?
2. What would be the issues and implications of extending the “Deprivation of Liberty Safeguards” to “supported living” settings as recommended by the House of Lords in the Mental Capacity Act post-legislative scrutiny report?

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2. What would be the issues and implications of extending the “Deprivation of Liberty Safeguards” to “supported living” settings as recommended by the House of Lords in the Mental Capacity Act post-legislative scrutiny report?

The first question applies now. The definition and scope have been extended. The second question relates to a proposal, the outcome of which the housing sector should help to shape.

1. DEPRIVATION OF LIBERTY – THE SUPREME COURT JUDGEMENT

Being deprived of liberty and the mechanisms by which authorisation is obtained for depriving somebody of their liberty are two separate things and should not be confused.

Defining Deprivation of Liberty

Deprivation of liberty is a term used in Article 5 of the European Convention on Human Rights about circumstances when a person’s freedom is taken away. Its meaning in practice is defined through case law. Under the Mental Capacity Act, it is lawful to restrict or restrain a person who lacks the capacity to consent to such restriction as long as it is the least restrictive option **and** is in the person’s best interests. Distinguishing between restricting someone’s liberty and depriving them of their freedom has never been straight forward.

In March 2014, the Supreme Court handed down a judgement which is significant in determining *“whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.”*¹

There are three questions that must be considered:

- a) Does the person have the mental capacity to consent to the arrangements? If not:
 - b) ***“Is the person subject to continuous supervision and control? All three elements must be present – the oversight must be continuous (though does not have to be ‘in line of sight’), it must amount to supervision, and have a clear element of control, AND***
 - c) ***“Is the person free to leave? The person may not be asking to go or showing by their actions that they want to but the issue is about how staff would react if the person did try to leave or if relatives/friends asked to remove them”***²

“The Supreme Court ruled that the following factors are no longer relevant to whether or not someone is deprived of their liberty:

- 1) *The person’s compliance or lack of objection*

¹ Department of Health Letter: Deprivation of Liberty Safeguards (DoLS) 28th March 2014

² Care Quality Commission Briefing for providers on the Deprivation of Liberty Safeguards 4th April 2014

- 2) *The suitability or relative normality of the placement (after comparing the person's circumstances with another person of similar age and condition) and*
- 3) *the reason or purpose leading to a particular placement*

The judges said: "A gilded cage is still a cage" and that "we should err on the side of caution in deciding what constitutes a deprivation of liberty."

Though of course all these factors are still relevant to whether or not the situation is in the person's best interests"³

Settings where deprivation of liberty may occur

The Supreme Court also ruled that:

"deprivation of liberty can occur in domestic settings where the state is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements that must be authorised by the Court of Protection"⁴

The following are relevant extracts from the Care Quality Commission briefing for Health and Social Care Providers⁵ which are also relevant to housing providers.

"(1) Widening of scope: The annex to this guidance gives a short account of the cases that were considered by the Supreme Court. These clarify for providers of care to people with learning disabilities the sort of situations that now may come within the definition of deprivation of liberty, but which might not have been recognised as such before the Supreme Court judgement.

It is clear, however, from the way the deprivation of liberty safeguards are used already, that the many of the people who might be deprived of their liberty in their own best interests are older people, often in care homes (currently about 75% of all authorisation requests). Following this judgement, more older people at risk of deprivation of liberty are likely to be identified in domestic settings such as supported living or extra-care housing. They are living with dementia or with acquired brain injury, for example from a stroke, or with neurological conditions such as Parkinson's disease or Huntington's disease; they often have complex health and care needs.

A typical situation that might now fall within the expanded definition of deprivation of liberty is that of an older person with dementia, living at home with considerable support. Staff monitor her well-being continuously at home because she forgets to eat, is unsafe in her use of appliances, and leaves the bath taps running; she is accompanied whenever she leaves her home because she forgets where she lives and is at risk of road accidents or abuse from others. She shows no sign of being unhappy or wanting to live elsewhere, but, in her best interests, she would not be allowed to leave to go and live somewhere else even if she wanted to.

(2) What is relevant to identifying a deprivation of liberty: It is essential to separate the question of whether restrictions amount to a deprivation of liberty, in terms of the new

³ Care Quality Commission Briefing for providers on the Deprivation of Liberty Safeguards 4th April 2014

⁴ Department of Health Letter: Deprivation of Liberty Safeguards (DoLS) 28th March 2014

⁵ CQC Briefing 14th April 2014

www.cqc.org.uk/service-providers/registered-services/guidance-meeting-standards/how-mental-capacity-act-2005-affect

Supreme Court test above, from whether staff actions are necessary, proportionate, and in the person's best interests. The former determines whether the situation must be assessed independently: the latter are crucial to deciding whether it will be authorised as being in the person's best interests. The most important step for providers who suspect that they may be depriving someone of their liberty is to reduce restraint and any restriction on the person's freedoms wherever possible.

.....

(5) For all other settings, such as supported living, adult placement/shared lives or domiciliary care, the deprivation of liberty safeguards cannot be used, so an application must be made to the Court of Protection.

In these settings, care providers (where appropriate, with local authority care managers) should examine the situation of people who lack the mental capacity to agree to their living arrangements, to see if they appear to be deprived of their liberty in the light of the Supreme Court judgement. They may wish to seek legal advice, and liaise with the commissioners of the service, if they think they might be depriving someone of their liberty and cannot find a less restrictive option for providing care or treatment.⁶

Implications for housing providers

Previous case law had defined deprivation of liberty more narrowly. It is likely that there are many more people living in housing settings ranging from their own homes in the wider community to specialist housing, who might technically fall within the new definition. More people with learning difficulties, who may lack capacity to consent to being deprived of their liberty, now live in housing settings rather than care homes. There is also a growing number of people with dementia, some of whom may need to be deprived of their liberty for their own safety if they lose the capacity to go out safely without supervision, and to consent to being prevented from going out, and they also need continuous supervision and control.

In light of the above, the following issues and questions come to mind:

The role of housing providers in the identification of people who may be deprived of their liberty

Most of this probably applies to providers of supported housing where the housing provider also delivers care and/or support, or at least has a presence from time to time at the scheme. If they themselves provide the care and/or support they clearly have a responsibility with others for identifying occupants whose living situation may amount to a deprivation of that person's liberty within the new definition. They would also need to collaborate with other to support their residents in the least restrictive way commensurate with their best interests. Ideally a housing ethos is to empower people to live lives that are as independent and fulfilling as possible.

Even if they do not provide care or support, housing providers would have responsibility for safeguarding their residents by monitoring what is going on in their schemes and identifying someone who appeared to be deprived of their liberty, and at a minimum, raising the issue with the local authority and care provider. In addition, they may be able to work with partners to help develop arrangements which would be less restrictive while still providing the necessary safeguards from harm.

⁶ CQC Briefing 14th April 2014
www.cqc.org.uk/service-providers/registered-services/guidance-meeting-standards/how-mental-capacity-act-2005-affect

Under which living and care arrangements is authorisation required and under which are they not?

What does the term “supported living” include for the purposes of the Supreme Court Judgement? The Care Quality Commission indicates clearly that it applies to supported living (housing) for people with learning disabilities, shared lives and Housing with Care (extra care housing) for older people. But what are the limits to the definition of “supported living”? Would it, for example, include sheltered housing where the provision of care is not a specific part of the offer but can be obtained from domiciliary care agencies, and housing-related support is provided? In addition to “supported living arrangements” the Care Quality Commission also refers to people receiving domiciliary care without specifying the settings in which this is provided. Could it extend to general needs housing or owner-occupied housing? It all seems rather unclear at present.

Providers of housing-related services may be aware of scenarios in any of the above where family members deprive relatives of their liberty by keeping them locked in their own home “for their own safety”. The family carer may be the sole care giver or there may also be domiciliary care being purchased privately. Article 5 “only really protects people whose care is attributable to the state.” (Wayne Martin – director of Essex Autonomy project)⁷ What, apart from a safeguarding alert, should happen here?

Housing with Care (HWC)

Irrespective of the answer to the issue of where supported living begins and ends, it is clear that it does encompass Housing with care.

Housing with Care (HWC) for older people, otherwise known as Extra Care Housing, differs from residential care in a number of important ways:

- Occupants have assured tenancies or leases unlike most residential care where licenses apply. This means that HWC occupants have security of tenure
- They have their own front door and the right to control who crosses their threshold
- The care provided on site would be registered, but – importantly – as a form of domiciliary care, not as a care home
- Those entitled to state financial support would access support for their housing costs via welfare benefits such as Housing Benefit and Pension Credit, whereas local authorities with responsibility for adult social care at present cover both accommodation and care costs in residential care, and only contribute to care, possibly support and related costs in HWC. (Even when the Care Act social care funding provisions come into force in 2016, the separate funding streams for the two sorts of provision will remain.)
- A fundamental element of HWC is to promote wellbeing through supporting occupants to live as independently as possible.

Although I am not an expert in supported living for people with learning disabilities, I believe these features apply to many other long-term supported housing schemes including those for people with learning disabilities. There are some important questions and implications to be considered within the industry. Most of the following discussion is based on Housing with Care as that is my area of expertise.

⁷ www.communitycare.co.uk/2014/03/19/supreme-court-ruling-heralds-sharp-rise-deprivation-liberty-safeguards-cases/

Defining “state responsibility for imposing such arrangements”

What is meant by “*the State [being] responsible for imposing such arrangements, including a placement in a supported living arrangement in the community*”?

Unless they are unitaries or metropolitan authorities, local authorities with responsibility for adult social care do not have housing responsibilities. Lower tier authorities and housing associations do. Currently, in the context of Housing with Care, local authorities with responsibility for adult social care should arguably not consider themselves as “making a placement” into HWC, but rather taking part in considering the suitability of HWC for a particular individual and, if that individual is offered a tenancy or lease by the housing provider, possibly arranging and funding their care. By contrast, they do make placements into residential care.

Should it be taken that anyone who lacks the capacity to agree to a move to supported housing and/or to signing the occupancy agreement, and the move has been mediated in some way by the LA or NHS, has been “placed”?

If so and they move into a setting which also provides care, would that result in the tenancies being deemed sham, and the facility being seen to provide “accommodation and care together” and therefore automatically fall into the category of a care home? This would destroy for the ethos and funding basis of Housing with Care. It also potentially undermines the option of HWC for people with dementia, unless they very clearly have the capacity to agree to the move, and probably even sign the tenancy.

Loss of capacity once already living in HWC

The scenario which may be more likely for people with dementia is that they have capacity to agree to the move and sign the occupancy agreement at the point of entry, but that their cognition declines to the point where they are no longer safe to go out on their own and need constant supervision and control. Would authorisation be needed, given that they were not actually “placed” in that setting by the state but chose to move there, gave capacitated consent and may even be funding themselves? Is this an example where the Human Rights Act would apply and authorisation would be needed if the care was arranged or funded by the local authority, but not otherwise? What if the local authority was represented on the allocation panel when the conclusion was reached that the individual’s needs would best be met in HWC?

Whose responsibility is it in a supported living scheme to initiate action and apply for authorisation?

In supported living arrangements there is often a separate housing and care provider. It is the housing provider who has overall responsibility for the scheme, but the care provider’s to deliver the care, a fundamental difference from residential care. At present everything written in relation to protecting⁸ people who may be deprived of their liberty refers only to health and care providers. Whether via the Court of Protection or DoLS (if the House of Lords recommendations were to be implemented), whose responsibility would it be to initiate the process if authorisation might be needed – the housing provider or the care provider? And whose responsibility is it to apply to the Court of Protection? Since the briefings all talk about state arranged/imposed arrangements, presumably it would be the local authority.

⁸ I use the term “protecting” rather than “safeguarding” here so as not to confuse the issues with the DoLS procedures

2. HOUSE OF LORDS RECOMMENDATIONS – EXTENDING DoLS

At present, the mechanism for authorising deprivation of liberty in situations where individuals lack the capacity to consent differs depending on where the individuals reside: the Deprivation of Liberty Safeguards (DoLS) in the case of care homes and hospitals, and application to the Court of Protection in the case of people in housing settings. The House of Lords has recommended that the DoLS mechanism should be extended to “those accommodated in supported living arrangements.”

“296. Vulnerable adults living in supported accommodation are at risk of being unlawfully deprived of their liberty because they fall outside the scope of the Deprivation of Liberty Safeguards. Although recourse to the Court of Protection is available, evidence of the barriers individuals face in accessing the Court, and of the failure by local authorities to bring cases to Court when necessary, suggests that this is unlikely to provide the safeguards intended.

297. We recommend that replacement legislative provisions extend to those accommodated in supported living arrangements.”⁹

This recommendation appears to have grown out of the increase in supported living for people with learning difficulties but has much wider implications as discussed above.

Questions and Issues

All of the issues and questions explored in relation to the Supreme Court judgement apply also to the House of Lords recommendation to extend the DoLS mechanism of authorisation. In addition:

Do the numbers justify it?

It strikes me that even with the new definition of deprivation of liberty there is some scope for interpretation. Given the physical layout and staffing arrangements in Housing with Care settings, how possible or common is it to provide continuous supervision? However, control and lack of freedom to go out may be quite common. This requires legal advice, debate and thought within the housing sector.

In the context of people with dementia, there is a strong case for arguing that IF they lack the capacity to consent, and require the level of supervision, control and restriction involved in depriving someone of their liberty, then Housing with Care is not a suitable setting for them to move into, although this may be an unpopular view amongst local authorities who may regard Housing with Care for people with dementia as a better and cheaper option than a care home. Making it easier to deprive people of their liberty by applying DOLS to this form of supported living risks local authorities “directing” people to it for the wrong reasons, for example to protect their own budget, rather than genuinely making a best interests decision.

There will be cases in HWC where it would be in the best interests of an individual not to be moved away from their home in Housing with Care when they meet the deprivation of liberty definition, but they should be few in number – or are they? A requirement to apply to the Court of Protection drives home the point that this should be a rare occurrence in Housing with Care settings for older people. It may be less rare in supported living for those with complex needs including learning disability.

⁹ Lords post-legislation scrutiny committee report
www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/news/mca-press-release---13-march-2014

Risk of watering down a fundamental feature of housing

There is also a more “philosophical” question; that of the wider issue of the compatibility (or rather lack of it) between a housing model – whose fundamental ethos is supporting independence – and depriving someone of their liberty within it. Is it preferable to take the approach of protecting this distinctive feature of housing by making the procedure for getting authorisation to deprive someone of their liberty in this setting a “bigger deal” via an application to the Court of Protection as now, or to take a more pragmatic approach and make it easier by allowing DOLS to apply? The latter course would result in the loss or dilution of a key identifying feature of housing that distinguishes it from residential or hospital care, and potentially makes it easier for housing settings to become institutions by another name.

I absolutely recognise the importance of protecting vulnerable adults living in housing settings, and the risk that some people may de facto be deprived of their liberty without the necessary authorisation being sought. This may be due to ignorance of the MCA and associated code of practice and court rulings, inertia, or concern about expense and complexity of the mechanisms involved. However, these issues will not be resolved simply by extending the DOLS mechanism to supported living settings. I don’t have any easy answers, but I am really concerned about possible unintended consequences of extending DOLS to supported living arrangements.

CONCLUSION

I sent a paper voicing some of these concerns to the person at the Department of Health responsible for the Department’s response to the House of Lords’ recommendations and author of the DH communiqué of the 28th March. I emphasised the importance of considering the issues and implications in-the-round and undertaking in-depth consultation with the sector. He had already prepared the government’s response but acknowledged the importance of the issues raised. “We are determined to ensure this is done properly and hence have asked the Law Commission to take the work forwards - with their usual extensive consultation process.”

It has just been announced that the Law Commission will start its review this summer. A draft bill, report and recommendations to government will be published in summer 2017. The Law Commission describes the review thus: “Our project considers how deprivation of liberty should be authorised and supervised in settings other than hospitals and care homes, where it is possible that Article 5 rights would otherwise be infringed. In addition to considering these settings, the project will also assess the implications of this work for DOLS to ensure that any learning which may be relevant is shared.”¹⁰

I do not claim to have considered all the possible issues and implications of the Supreme Court judgement and House of Lords recommendations. I am not a lawyer and my understanding of the relevant legal framework as a whole is limited. Nor do I know a lot about supported living for people with learning disabilities. I have written the Viewpoint to raise the profile of the issues within the housing sector and generate wider debate (and legal comment), both on the sector’s role in minimising and identifying deprivation of liberty and on the issue of extending the Deprivation of Liberty Safeguards. Organisations in the sector need to explore these issues and be ready to respond when the Law Commission goes out to consultation, as well as consider what they should be doing now.

¹⁰ <http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm>

Note

The views expressed in this paper are those of the author and not necessarily those of the Housing Learning and Improvement Network.

About the Housing LIN

Previously responsible for managing the Department of Health's Extra Care Housing Fund, the Housing Learning and Improvement Network (LIN) is the leading 'learning lab' for a growing network of housing, health and social care professionals in England involved in planning, commissioning, designing, funding, building and managing housing, care and support services for older people and vulnerable adults with long term conditions.

The Housing LIN is also a signatory to the Concordat accompanying the Winterbourne View Review and a member and host of the Housing & Safeguarding Alliance at:

www.housinglin.org.uk/AdultSafeguardingAndHousing

Further information about the Housing LIN's comprehensive list of online resources can be found at: www.housinglin.org.uk/Topics/browse/HousingOlderPeople/Safeguarding/

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