



## Any the wiser? Deprivation of Liberty in Housing

In August 2014, I wrote the Housing LIN Viewpoint 65 on Deprivation of Liberty in Supported Housing. My aim was to raise awareness of the Cheshire West Supreme Court judgement which lowered the threshold at which somebody would be considered to be deprived of their liberty if they lacked the capacity to consent to it. Based on my understanding at the time, I also sought to explore some of the issues and implications of the judgement for housing with care, along with consideration of what it might mean if the mechanism known as the Deprivation of Liberty Safeguards (DoLs) were to be extended to housing settings.

Since writing that, some points have become clearer – including which aspects remain grey areas, even amongst those within the legal profession. With the Law Society Guidance recently published, and the Law Commission consultation pending, it seems timely to build on that Viewpoint. In so doing, I must reiterate, I am not a lawyer and what I am writing here is my own understanding of the current position. Nevertheless it may be a useful adjunct to the formal guidance.

Written for the Housing Learning and Improvement Network by **Sue Garwood**, Extra Care Housing specialist and Dementia lead for the Housing LIN

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I am not going to go into the Legal framework for this issue as the Law Society Guidance<sup>1</sup> and a forthcoming Housing LIN and National Housing Federation briefing will do that far more knowledgeably than I could. I just want to share a couple of basics...

Under section 5 of the European Convention on Human Rights (ECHR), it is against the law for the state to deprive a person of their liberty for the purpose of care or treatment if they lack the capacity to agree, without fulfilling certain conditions. It must be:

- Necessary
- In the person's best interests
- Proportionate to the level of harm being prevented
- The least restrictive option possible

Section 5 of the Mental Capacity Act 2005 (MCA) allows people to do certain things related to the care, wellbeing or treatment of someone without his or her capacitated consent, and be immune from prosecution if the above conditions apply. This does not, however, extend to deprivation of liberty without proper authorisation which, in the case of people living in housing settings, is through an application to the Court of Protection.

## Acid Test

As I outlined in the Housing LIN Viewpoint, *Deprivation of Liberty in Supported Housing* (No.65)<sup>2</sup>, the Supreme Court Judgement in March 2014 set out what is known as the "acid test" for deprivation of liberty:

Does person have capacity to consent to arrangements? If not:

- Is person subject to continuous supervision and control? (Does not have to be in line of sight) AND
- Is the person free to leave (even if s/he shows no wish to do so)? AND
- Is the confinement the responsibility of the state?

The relative normality of the arrangements and the person's compliance or lack of objection are irrelevant; so is the purpose behind the arrangements. This is relevant to whether the arrangements are in the person's best interests or not (and therefore whether the deprivation should be authorised or not) but not to establishing whether the arrangements amount to a deprivation of liberty.

The acid test looks straightforward until one starts delving. For example, in a housing with care scheme, if someone isn't actually supervised all the time but is monitored remotely, or an alert is triggered if they leave their property or the building, and they are persuaded back in, do either of these constitute continuous supervision and control? What about if they are free to go out but their whereabouts can be tracked using smart technology?

There is debate about whether "freedom to leave" applies only to having the freedom to move to live elsewhere, or also the freedom to come and go on a day-to-day basis. Some say the latter is covered by the supervision and control question. It is clear from the judgement, that

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<sup>1</sup> [www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9546](http://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9546)

<sup>2</sup> [www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9290](http://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9290)

wherever it sits, freedom to come and go from day to day is a relevant factor to take into account in determining whether the person is deprived of their liberty or not.

The question of what constitutes state confinement is also not 100% clear. It is clear that if the local authority has arranged the care and the other criteria in the acid test are met, then it would be state confinement, but what if the local authority has been notified of the confinement of a self-funder in a housing with care scheme? Again, legal opinion does appear to differ, but there's a paragraph in the Judgement which states "on occasions, the state may be accountable even for arrangements which it has not itself made"... "if authorities have or ought to have knowledge."

All of these matters can probably only be clarified, if at all, through further case law. There are many more grey areas in relation to the acid test which are discussed in Neil Allen's excellent article, *The (not so?) great confinement*.<sup>3</sup>

### **At what point would deprivation of liberty kick in?**

A tenancy agreement (TA) is not the mechanism by which someone would be deprived of their liberty in a housing setting, so at what point might an incapacity to consent trigger a potential deprivation of liberty (DoL) in supported housing?

- The person lacks capacity to sign the TA but understands and agrees to a move – Someone who is authorised to do so can sign and relinquish the tenancy (LPA, Court deputy, Court order) on the person's behalf and this would not amount to a DoL
- The person is unable to understand and agree to the move and the terms of the tenancy, nor sign the agreement – I don't think this on its own would constitute a DoL but I haven't really had a clear answer from anyone. In terms of the tenancy itself, as above, an authorised person can sign it on the person's behalf.
- The person lacks the capacity to all of the above and it is anticipated that in their new abode they will be under continuous supervision and control, and not be free to leave – this is likely to constitute a deprivation of liberty that needs authorisation in the Court of Protection (CoP), albeit that it is not the tenancy that's doing the depriving.
- The person has the capacity to agree to a move AND sign the tenancy or lease, but their cognition declines to the point that they need continuous supervision and control and are not free to leave – authorisation is likely to be needed for this arrangement, and also, in theory for relinquishing the tenancy or lease.

### **Setting**

In my original Viewpoint, I pondered upon the limits of supported living for the purposes of authorisation. It is now clear to me that the type of housing setting is irrelevant from the point of view of requiring authorisation for a deprivation of liberty, if the acid test is met. It could become relevant if the Law Commission recommendations were to differentiate between different settings, but my hunch is that they are unlikely to do this. Were it to be relevant, the definition of supported living in the Care Act would probably serve as the starting point – but perhaps not the end point.

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<sup>3</sup> N. Allen, 'The (not so?) Great Confinement' (2015) Elder Law Journal 45  
[www.jordanpublishing.co.uk/practice-areas/private-client/news\\_and\\_comment/the-not-so-great-confinement#VUyNdpPSy88](http://www.jordanpublishing.co.uk/practice-areas/private-client/news_and_comment/the-not-so-great-confinement#VUyNdpPSy88)

## **Tenancy rights and deprivation of liberty**

There is a view within the housing world that having a tenancy or lease confers an absolute right to freedom of movement and control over who comes into your home and that therefore it is not possible to lawfully deprive someone of their liberty within it. While I agree that there appears to be a fundamental incompatibility between the concept of someone living in their own home with associated housing rights and being lawfully deprived of their liberty within it, it has become increasingly clear to me that it can be lawful under certain circumstances.

It is s5 of the Mental Capacity Act (MCA) that enables things to be done without breaking the law that would ordinarily need informed consent – if they are necessary, proportionate, in the person's best interests and the least restrictive option. A tenancy or a lease does not confer an absolute right to freedom to come and go, decide who to let in etc. When an individual loses the mental capacity to exercise that right, then their safety and wellbeing – what is in their best interests – trumps the fact that they have a tenancy/lease and that it is their own home, even if the two principles seem, at face value, mutually incompatible. And when the actions needing to be taken amount to depriving the person of their liberty, then the MCA provides mechanisms to ensure legal scrutiny in the form of the deprivation of liberty safeguards in the case of care homes and hospitals, and applications to the Court of Protection in the case of people living in their own homes – whether these are in supported living settings or non-specialist housing.

### **Whose responsibility ... ?**

#### ***To apply to the court of protection?***

Given that the deprivation is related to an individual's care and support arrangements, not their housing contract, that the local authority is most likely to be the state body to arrange this care, and that LAs also have the lead responsibility for safeguarding and Deprivation of Liberty Safeguards (DoLs), it is they who would normally apply to the Court of Protection.

#### ***To alert the local authority?***

While it is the care and support provider that is implementing the care and support plan and therefore has the primary responsibility for alerting a local authority – if the authority does not already know about it – given that under the MCA, nobody is allowed to deprive someone of their liberty without consent, and both housing and care providers have safeguarding responsibilities under the Care Act, both have a responsibility to alert the local authority if they have concerns. This would apply whether or not the housing provider is deemed to be a public body or not.

#### ***What has been happening on the ground?***

Our request for evidence and examples of what is happening in the housing world in response to the Supreme Court judgement produced a rather sparse response. I would summarise it as follows, though I do not claim this to be a true or typical picture, merely the impression gained:

- Local authorities have been so inundated with DoLs requests by care homes and hospitals that possible deprivation in housing settings hasn't really reached their radar
- One or two local authorities appear to have responded by a greater reluctance to refer people to housing with care who may need to be deprived of their liberty in the future. They have also been more risk averse in enabling them to remain. In both cases this seems to be because of a reluctance to make an application to the Court of Protection.

- There is one report of a local authority commissioner uninterested or unaware of the relevance of the judgement to housing. It should of course be noted that local authorities can be large, amorphous bodies and the response of one staff member (e.g. service commissioner or social worker) may not be representative.
- There is confusion about various assistive technology devices
- There seems to be a greater interest by the Care Quality Commission with some concern about overstepping remit in some areas
- There is still a lack of awareness and recognition of the issues within the housing sector
- There does not seem to be a consistent pattern across the country

### **A lot of uncertainty but...**

it is clear to me that:

- The current threshold for deprivation of liberty is lower than it used to be
- It is likely that there will be people in housing settings to which it applies
- A person can be lawfully deprived of their liberty in their own home if the requisite conditions are met
- Under the Mental Capacity Act it is unlawful for ANYONE to deprive someone of their liberty without capacitated consent
- Housing providers:
  - need to work with others to minimise restrictions in the person's best interests
  - have responsibilities under the MCA and Care Act safeguarding provisions<sup>4,5</sup>, so need to be aware and raise any concerns with the local authority – probably the local authority's MCA/DoL or safeguarding lead
  - need to keep accurate records of action taken and issues of concern
  - are advised to do their own assessment of the individual's capacity rather than relying totally on others' so they can compare notes and challenge if they have concerns about the assessment
  - could suggest to the local authority that it appoints an independent advocate for the person (or even in extremis, contact the Court of Protection directly for advice on 0300 456 4600?) if there is disagreement amongst the parties about the person's mental capacity, best interests or whether the restrictions could amount to a deprivation of liberty

The Law Society Practical Guide<sup>6</sup> lists potentially liberty restricting measures which may apply in different housing settings and some questions for front-line staff to ask.

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<sup>4</sup> [www.housinglin.org.uk/Topics/browse/HousingOlderPeople/Safeguarding/?parent=9016&child=8914](http://www.housinglin.org.uk/Topics/browse/HousingOlderPeople/Safeguarding/?parent=9016&child=8914)

<sup>5</sup> [www.housinglin.org.uk/library/Resources/Housing/OtherOrganisation/Care\\_Act\\_-\\_The\\_Role\\_of\\_Housing\\_in\\_Safeguarding\\_Adults\\_Nov\\_14.pdf](http://www.housinglin.org.uk/library/Resources/Housing/OtherOrganisation/Care_Act_-_The_Role_of_Housing_in_Safeguarding_Adults_Nov_14.pdf)

<sup>6</sup> [www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9546](http://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9546)

## Wellbeing, human rights and best interests

All of this is about protecting the human rights, wellbeing and best interests of people who are unable to protect themselves. There is a risk that in focusing on the technicalities of what is and what is not a deprivation of liberty, we lose sight of what really matters: wellbeing, quality of life, empowering individuals, personal relationships, protecting from harm, and the quality of the support systems that promote and enable these fundamentals for all vulnerable people. So, for example

- Restrictions that are deemed not to amount to deprivation may be nearly as severe and in need of independent scrutiny as those that do, yet will not necessarily receive it
- The acid test does not include restrictions relating to article 8 of the ECHR about a right to a private and family life and so someone could be restricted in the people they can have contact with, yet technically not be deprived of their liberty

Barrister Neil Allen, who contributed the housing chapters to the Law Society Practical Guide, covers these issues very well in his article, *The (not so?) great confinement*.<sup>7</sup>

It is to be hoped that the Law Commission recommendations address these issues and anomalies, and in the meantime, ALL agencies should be applying the principles of the Mental Capacity Act which place an individual's best interests, not those of the local authority or the provider, at the heart of decision-making for adults who lack the capacity to decide a matter for themselves.

The Law Commission consultation is due to take place from early July through to the end of October. As I submit this Viewpoint for publication, I have no idea whether the new government's intention to repeal the Human Rights Act will affect the Law Commission's work or timetable in any way. But assuming the consultation goes ahead as planned, they really need to hear the views of the housing sector. Watch this space for events which the Commission will be attending, and please submit a written response.

## Note

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

The Housing LIN website on Deprivation of Liberty has all the resources referred to in this Viewpoint apart from Neil Allen's article which is copyrighted.

[www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL](http://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL)

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<sup>7</sup> N. Allen, 'The (not so?) Great Confinement' (2015) Elder Law Journal 45  
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## About the Housing LIN

Previously responsible for managing the Department of Health's Extra Care Housing Fund, the Housing 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](http://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](http://www.housinglin.org.uk/Topics/browse/HousingOlderPeople/Safeguarding)

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