

THE MENTAL CAPACITY ACT 2005 AND THE INSTITUTIONAL DOMINATION OF PEOPLE WITH LEARNING DISABILITIES

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ABSTRACT

When people with learning disabilities are 'placed' in institutional care services, they are exposed to a range of interferences with their choices and freedoms. These interferences include the imposition of rules and regimes by institutional authorities, surveillance, a loss of private space and encroachments upon bodily integrity such as being subjected to restraint, seclusion and sedating medications, and restrictions may be imposed over their dealings with others within and outside of the institution. As Goffman and others have argued, the cumulative and pervasive effects of these regimes can be monumentally detrimental to self and wellbeing. These interferences have been found across the entire spectrum of care services, even in those which were initially designed to replicate the choices and freedoms of living in one's own home.

Various writers have expressed the view that a new statute, the Mental Capacity Act 2005 (MCA), is empowering for people with mental disabilities and some have suggested it may help to ensure such interferences are minimised and occur on a more principled basis. The MCA governs when decisions can be made on behalf of people who lack 'mental capacity' in their best interests and when restraint can be used. It also contains a framework for detention called the deprivation of liberty safeguards (DoLS). In this thesis, I make the paradoxical sounding claim that the MCA is not an 'empowering' statute, but that the DoLS contain many elements which make them better suited to tackling these types of issues.

The argument advanced in this thesis is based on ideas from new civic republican philosophy (Pettit, 1997; Lovett, 2010). Republican philosophers identify exposure to arbitrary interferences in one's choices and freedoms with being in a 'state of domination'. They argue that in order to ameliorate states of domination, social power must be exercised in accordance with clear and well known principles, which are effectively enforced. By showing how they have been variably interpreted by the courts, I argue that the 'elegant' and 'flexible' principles of the MCA do not adequately constrain the actions of those empowered under the Act. For many of the issues of concern in institutional placements, the legal principles derived from the MCA are barely developed at all.

I examine four mechanisms of enforcement of the MCA, in addition to the DoLS: the Independent Mental Capacity Advocacy Service; litigation in the Court of Protection; complaints mechanisms; and regulation by the Care Quality Commission. I show that each mechanism suffers from a variety of shortcomings. One major problem is a lack of independent scrutiny of the *substantive outcomes* of capacity assessments. Another is

that people with learning disabilities have significant difficulties using the law to challenge decisions made under it, and rely upon 'coat tailing' on disputes which break out between families and professionals to access justice.

Despite suffering from significant shortcomings, I argue that the DoLS contain several important ingredients that could potentially overcome some of these problems. A potential strength of the DoLS is the ability to address whether or not a person is in a service which is appropriate for them, alongside whether their treatment within that service is appropriate. Furthermore, the DoLS can help detainees and their families circumvent some of the 'access to justice' issues they would face if they applied to the Court of Protection under the main provisions of the MCA. Nevertheless, as presently constructed, the DoLS themselves contain too much scope for arbitrary interpretation and application to be a credible solution to the problem of domination.

I argue that radical reforms are required to address these difficulties. On the basis of the republican critique I have subjected the MCA and the DoLS to in this thesis, I argue that reformers must be clear about what interferences are tolerable in the lives of people with learning disabilities. Secondly, there must be appropriate and accessible safeguards to enable people with learning disabilities to assert their rights in the face of arbitrary interferences. I argue that efforts at reform founded upon a 'support paradigm', associated with the UN Convention on the Rights of Persons with Disabilities, still establish a risk of institutional domination which must be constrained. Legal reforms which have been tried have failed because they have never been responsive to the needs and concerns of people with mental disabilities. Reform efforts must be dedicated to the recovery of a legalism that is attentive to their needs and concerns. I offer some suggestions for what a more progressive legalism might look like, based on the lessons from the MCA and the DoLS.

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