

Minding the Gap: Liberty Safeguards for People with Impaired Capacity

Aged Residential Care Without Consent
“This is not my home”
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SUPPORTING INDEPENDENT
LEGAL THINKING.

Some facts.....



People with impaired capacity for decision-making:

- 45% of patients in psychiatric settings
- 34% of patients in general medical settings

P Lepping et al (2015) International Review

- One million people with dementia by 2025

UK Alzheimer's Society



New Zealand: PPPR Act 1988

- Protection of Personal and Property Rights Act 1988
- Adult guardianship law
- Financial, healthcare and welfare decisions
- In need of review:
 - No public register for EPOAs/advance directives
 - No public body to champion the law



Right 7(4) and the principle of necessity

Decision can be made where:

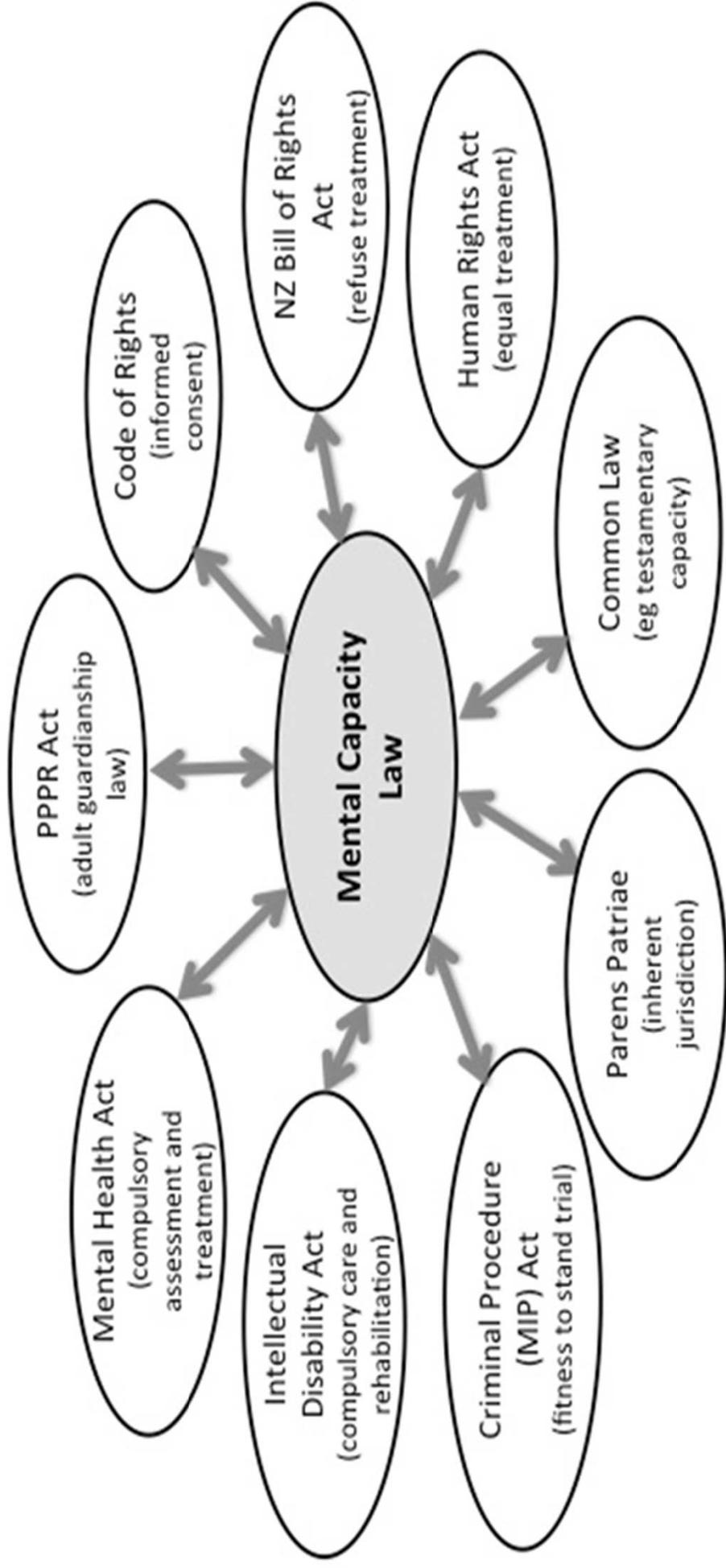
- Person lacks capacity to consent
- No EPOA or welfare guardian
- in the person's **best interests**

= a defence to Code liability

Inadequate basis for protecting legal rights of people with impaired capacity

- Research
- Detained in care/deprived of liberty





UN Convention on the Rights of Persons with Disabilities
(legal capacity and supported decision-making)

UN Convention on the Rights of Persons with Disabilities (CRPD)

Ratified by NZ in 2008, 160 countries Nov 2015

Article 12:

- **Legal capacity:** equal recognition before the law
- **Supported decision-making** – the right to make as many independent decisions as possible, for as long as possible and if necessary with support from others.



CRPD: safeguards against abuse

The safeguards in Article 12(4) must ensure that:

“... measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.”

Article 14: Liberty and Security of the Person

United Kingdom and Ireland

Law reform steps towards CRPD compliance

N Ireland
Mental Capacity Act

Scotland
Adults with Incapacity
Act 2000

Ireland
Assisted Decision-Making
(Capacity) Act 2015



England and Wales
Mental Capacity Act 2005
[Revision of DoLS 2016]

Human Rights, Autonomy and Cultural Diversity

Magna Carta 1215

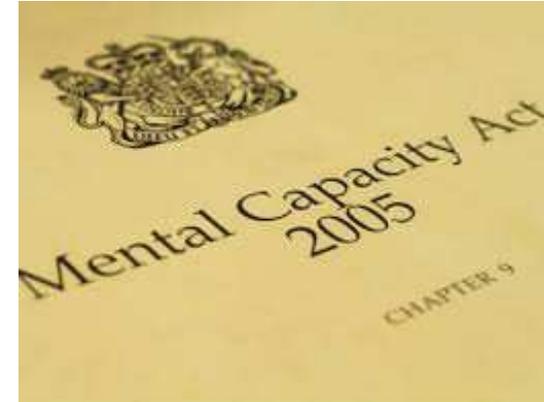


Te Tiriti o Waitangi 1840



Mental Capacity Report: Key Findings

- Supported Decision-making
- Defining Capacity
- Best Interests
- Code of Practice/ Toolkit for Assessing Capacity
 - + two major gaps in the law:
- Liberty Safeguards for people detained in care
- Research on people with impaired capacity



Capacity and Supported Decision-making



***CC v KK* [2012] EWHC 2136 (COP)**

- 82 years, Parkinson's disease, vascular dementia and a physical disability
- Initially living at home with support care
- Admitted into a nursing home –wished to return to her own home
- Held: K had capacity to decide where to live – not give the detailed options “relevant information” – should not start with a “blank canvas”

Avoiding the Protection Imperative



CC v KK Baker J:

*There is, I perceive, a danger that **professionals, including Judges, may objectively conflate a capacity assessment with the best interests analysis and conclude that the person under review should attach greater weight to the physical security and comfort of a residential home and less importance to **the emotional security and comfort that the person derives from being in their own home.*****

Best Interests – a Standard for Decision-making



Mental Capacity Act checklist– how to assess “best interests”

Factors include:

- a person’s past and present wishes, feelings and values that would be likely to influence a person’s decision - **will and preferences**
- Welfare –medical, social and psychological - in the widest sense
- “The patient’s point of view”

Aintree University Hospitals NHS Foundation Trust v James

[2013] UKSC 67 Lady Hale.

Re M [2013]

(Best Interests: deprivation of liberty)



- M aged 67, minor mental impairment and diabetes
- Refused to accept support at home and admitted to hospital with a potentially fatal diabetes-related condition, broke her hip when discharged, bed-bound, incontinent and confused
- “I want to be out of here quick or dead”

Court held: M lacked capacity to decide where she should live but it was in M’s best interests, despite very significant health needs and risks, to return to her home with a care package.

Re M



Peter Jackson J:

“In M's case there is little to be said for a solution that attempts, without any guarantee of success, to preserve for her a daily life without meaning or happiness and which she, with some justification, regards as insupportable.”

Capacity is not an off-switch to a person's rights and freedoms

Wye Valley NHS Trust v Mr B [2015]

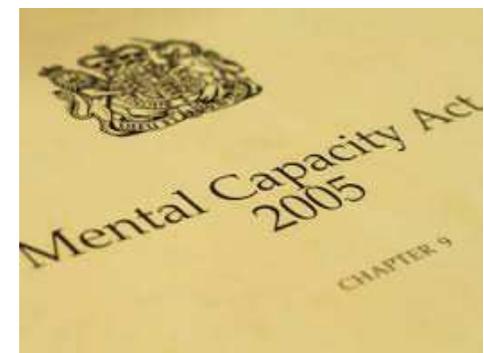
Best Interests and quality of life



Sir James Munby (President of the Court of Protection)

“What good is it making someone safer if it really makes them miserable.”

The Bournemouth gap: Development of Liberty Safeguards



- *Bournemouth* case [1999] HL
- *HL v United Kingdom* [2005] European Court of Human Rights
 - Informal patients NOT subject to Mental Health Act
 - Unable to consent or object to care
 - common law principle of necessity inadequate basis for detention/ art 5 ECHR
- Deprivation of Liberty Safeguards (DoLS)

Cheshire West

2014 UK Supreme Court



- 3 adults with disabilities (*P, MIG and MEG*)– 2 in residential care 1 in foster home - none of the individuals expressed dissatisfaction or a desire to leave
- UK Supreme Court majority: deprived of liberty
- Expansion of DoLS from hospital/institutional care to living arrangements in community settings
- House of Lords report/English Law Commission revision of DoLS (Dec 2016)

Deprivation of Liberty

Lady Hale's 'acid test'



Is the person concerned under continuous supervision and control; and is the person free to leave?

3 elements:

- (1) Objective: confinement to a particular restricted place for a not negligible period of time
- (2) Subjective: person does not/cannot consent
- (3) Responsibility of the State



Restraint vs Deprivation of Liberty

Continuum:

(1) **“Routine” decisions or interventions** – to provide care and treatment (lack capacity/best interests): necessity/s 5 MCA

(2) **Restraint** – use of, or threat of use of force, or restriction of liberty whether or not individual resists: proportionate to the risk and likelihood of harm and to prevent harm/ s6 MCA

(3) **Deprivation of Liberty** – interventions that go beyond “mere” restraint

“A gilded cage is still a cage”



- Human rights are universal regardless of disability
- Compliance/lack of objection rejected
- Any restrictions placed on a person’s liberty must be accompanied by safeguards and access to a Tribunal or Court
- Best interests assessment

Liberty Safeguards: Filling the Bournemouth Gap



1. **Two steps:**
 - **Identify** DoL;
 - **Monitor** DoL;
2. **Rules** governing how such decisions are to be made, by whom, and under what process;
3. **Standard:** best interests (and according to the known will and preferences) of the person;
4. **Speedy mechanism with ready access to review** of the decision by a Tribunal or the Family Court;
5. **Code of Practice** for health and social service providers to operationalise the safeguards;
6. **Advocates:** publicly appointed and independent;
7. **Oversight and monitoring of compliance by a public body or agency.**

Regulatory Gaps – Liminal Spaces



These regulatory gaps are described as “liminal” (the spaces in between). They often exist outside existing formal legal and social structures, and are often in a state of flux. Citizens who also experience flux in their capacity can find themselves in liminal regulatory spaces where at times laws might, or might not, apply to them.

Professor Graeme Laurie, Chair of Medical Jurisprudence and Director of the JK Mason Institute for Medicine, Edinburgh University

Liberty Safeguards for New Zealand



- An independent process that reviews level of care and whether in a person's best interests to be deprived of their liberty.
- Not *whether* but *how* safeguards should apply.