Chapter 1:

Legal reflections on the human rights of restraint reduction

Sam Karim and Mathieu Culverhouse

Part 1: Ethics, statutory provisions and guidance

“The key principles underpinning the guidance:

- Compliance with the relevant rights in the European Convention on Human Rights at all times
- Understanding people’s behaviour allows their unique needs, aspirations, experiences and strengths to be recognised and their quality of life to be enhanced
- Involvement and participation of people with care and support needs, their families, carers and advocates is essential, wherever practicable and subject to the person’s wishes and confidentiality obligations
- People must be treated with compassion, dignity and kindness
- Health and social care services must support people to balance safety from harm and freedom of choice
- Positive relationships between the people who deliver services and the people they support must be protected and preserved.”

Department of Health (2014) Page 16
The purpose of this chapter is to consider the legal parameters of restraint and seclusion in England and Wales. Part 1 considers the relevant statutory provisions and guidance. Part 2 gives an overview of human rights laws and considers relevant case law to demonstrate what amounts to ‘lawful’ restraint or seclusion, and when such practices amount to a deprivation of liberty.

Before one undertakes such a task, a brief overview of the ethical underpinnings is necessary.

**Restraint reduction: ethical justification**

A proper starting point for considering restraint reduction must be Paley’s chapter (Paley, 2009) on seclusion and time out. She sets out three possible rationales for the use of seclusion:

- **Positive therapy** – to help a person to calm more quickly and enable them to learn to ‘manage’ their own emotional states by reflecting on their behaviour and emotional expression. This approach sees seclusion as leading to some kind of beneficial therapeutic change in the individual.

- **Containment** – placing a person in a room alone preventing them from harming others in a time of crisis. As above, this approach sees seclusion as leading to some kind of beneficial therapeutic change in the individual.

- **Punishment** – seclusion is seen as an intentional aversive intervention, the intention being to withdraw the individual from all positive experiences.

Literature has confirmed, see for instance Lyon and Pimor (2004), that seclusion should only be used in extreme cases; and as such, it is an emergency procedure to be implemented only when there is significant risk. Nelstrop et al (2006) conclude that there was insufficient evidence to support seclusion (or restraint) being safe or effective in the short-term management of people in psychiatric settings. It is clear that a restrictive physical intervention carries increased risk; the use of seclusion or ‘time out’ may also increase the risk to an individual.
The legal parameters: the law in England and Wales

When looking at the use of restraint practices in relation to people who lack capacity, it is vital to consider the legal framework and background in which any form of restraint is used.

**The Court of Protection**

The jurisdiction of the Court of Protection is defined by the provisions of the Mental Capacity Act 2005 which came into force in 2007 in England and Wales. A decision made by the court under the Mental Capacity Act (MCA 2005) must be in the best interests of the protected person, P. Section 1(6) of the MCA 2005 says that, “before the act is done or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.” The Act is generally only concerned with persons over the age of 16, although provision is made (in Section 21 and regulations therein) for the transfer of proceedings relating to 16 and 17 year olds. For children below the age of 16 years of age a similar scheme is followed under the Children Act 1989. For instance, a statutory order can be sought under the Children Act 1989 (Section 25) for an authorisation to keep a child in secure accommodation.

There is power in section 48 of the MCA 2005 to grant interim declarations provided that the relevant person lacks capacity in relation to the matter and it is in the best interests of that person to make the order or make the directions without delay.

The manner in which a best interest decision is to be made by a decision maker, including the court, is addressed in Section 4. Section 4(2) states that a court must consider all the relevant circumstances and Section 4(4) says so far as is reasonably practicable; the court must permit and encourage the person concerned to participate in the decision affecting him. Section 4(6) which deals with P’s past and present wishes and feelings, beliefs and values and other factors which P would be likely to consider if he were able to do so.

The court is not obliged to give effect to the decision which P would have arrived at if he had capacity to make the decision for himself and was acting reasonably (sometimes referred to as a ‘substituted judgement’), but rather it applies an objective test as to what is in his best interests taking into consideration the factors which P would be likely to have considered if he had capacity including
what $P$ would have decided if that can be deduced. Section 4(7) states that the court must take into account, if it is practicable and appropriate to consult them, the views of other persons.

**Lack of capacity**

A person is considered to lack capacity according to section 2 of the Act where:

“at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”

Section 2 applies when a person cannot understand the information relevant to the decision, retain that information, use or weigh that information or communicate his decision. The Act sets out various additional rules about how these matters are determined (Section 3), as well as various rules about what must and must not be taken into account when determining ‘best interests’ (Section 4).

Examples of an impairment or disturbance in the functioning of the mind or brain may include: some forms of mental illness; dementia; significant learning disabilities and the symptoms of alcohol or drug abuse. A person’s capacity concerns his ability to make a specific decision. It would be contrary to the guiding principles of the MCA 2005 to make blanket findings as to a person’s capacity. For example, in the community care context, rather than ask simply whether a person ‘lacks capacity’, it will be necessary to ask whether the person has capacity to determine where he should live, what sort of care he wishes to receive and when, if moving to residential care, he wished to be visited by his family. Questions about capacity, therefore, need to be ‘person’ and ‘decision’ specific.

**Best interests**

All acts and decisions made on behalf of a person who lacks capacity should be taken in his or her best interests. This requirement encompasses a wide range of medical, emotional and welfare issues.

Section 4 of the MCA 2005 sets out a checklist of factors that must always be considered in determining the best interests of a person lacking capacity. The decision maker must, among other things:
consider whether it is likely that a person will at some time have capacity in relation to the matter in question and, if so, when that is likely to be; it may be that the decision should be deferred, to enable the person to gain or regain capacity

so far as reasonably practicable, permit and encourage the person to participate, or improve his ability to participate, as fully as possible in the decision, even though he is unable to make the decision himself

consider the person's past and present wishes and feelings, in particular any relevant written statement made while the person had capacity

consider the person's beliefs, values and other factors that would have been likely to influence his decision if he had capacity, eg cultural background, religious and political beliefs

consult with appropriate persons, eg anyone engaged in caring for the person, anyone with a lasting power of attorney and any deputy appointed for the person by the Court of Protection

**The role of the Court of Protection**

The Court of Protection has now taken over the functions of the High Court's inherent jurisdiction to determine questions concerning the capacity of adults and the best interests of adults lacking capacity. That jurisdiction was described by Munby J as follows:

“It is now clear … that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well established parens patriae or wardship jurisdictions in relation to children. The court exercises a ‘protective jurisdiction’ in relation to vulnerable adults just as it does in relation to wards of court.”

*A Local Authority v MA, NA and SA (by her children's guardian LJ)* [2005] EWHC 2942 (Fam)

The court can regulate everything that contributes to the incompetent adult’s welfare and happiness.
The core jurisdiction of the court is conferred by Section 16 of the MCA 2005, which empowers it to make substituted decisions for persons lacking capacity, applying the principles of the Act. Section 17 provides a number of particular instances:

- deciding where the person is to live
- what contact he is to have with specified persons
- making an order prohibiting a named person from having contact with the person
- giving or refusing consent to medical treatment

Notable recent disputes have concerned the removal of individuals from the family home to residential care homes and whether this constitutes a mere restriction, which is now authorised under Section 6 of the Act, or engages Article 5 of the European Convention on Human Rights (‘ECHR’) as an unlawful deprivation of liberty. In JE v Surrey County Council [2006] EWHC 3459 (Fam) there was a finding of deprivation of liberty where a vulnerable adult was admitted to a residential care home, contrary to his wife’s wishes and without a declaration of the court. More cases relating to the above can be found further in this chapter.

The Government has proposed remedying the problem identified in JE v Surrey County Council [2006] through amendments to the Act, based on an admissions procedure for care homes to be supervised by the local authority and independent mental capacity advocates.