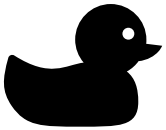

#WhenPOffends

When P is an Offender

21 February 2023

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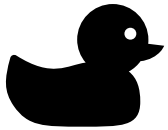

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Contents

- **Introductions** – Alex
- **The broad legal framework** – Ian
- **How capacity assessments might incorporate a risk of, or history of, offending** – Mike
- **"Capacity to commit a criminal offence"** – Mike, Ian and Caroline
- **Protections for people with mental health/capacity issues in the police station** – Caroline
- **The data around mental health / cognitive impairment in prisons and approaches to sentencing** – Gavin and Jess
- **Medical treatment decisions for prisoners** – Donna and Ben
- **Questions and Answers** – Alex et al

The Broad Legal Framework: Five strange things said in CoP proceedings (and in the Administrative Court)

1. "The Mental Capacity Act has nothing to do with people who offend. They will be dealt with under the Mental Health Act."
2. "It is in P's best interests to offend and enter the forensic system, that's the only way they will learn consequences."
3. "If you want to interview P as a suspect, you will have to apply to the Court of Protection."
4. "Everyone in prison has capacity, otherwise they would have been found not fit to plead or would have been transferred under section 47 of the Mental Health Act."
5. "P has the mental capacity to commit criminal offences and the mental capacity to be arrested."

Use section 2 MHA as a comparator

2 Admission for assessment.

(1) A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below in pursuance of an application (in this Act referred to as "an application for admission for assessment") made in accordance with subsections (2) and (3) below.

(2) An application for admission for assessment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and

(b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.

(3) An application for admission for assessment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with.

(4) Subject to the provisions of section 29(4) below, a patient admitted to hospital in pursuance of an application for admission for assessment may be detained for a period not exceeding 28 days beginning with the day on which he is admitted, but shall not be detained after the expiration of that period unless before it has expired he has become liable to be detained by virtue of a subsequent application, order or direction under the following provisions of this Act.

Start with the principles in section 1 MCA

1 The principles

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) 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 two questions in every case where "P offends"

Is P's offending linked to an incapacitous area of decision making? (Or is P's offending all linked to decisions they are making – perhaps unwise decisions).

If P's offending is linked to an incapacitous area of decision making then what is in P's best interests in that area? (That doesn't mean what is in the best interests of the commissioner, the police, or the public at large).

What types of decision are we talking about?

- Mostly:
  - Access to the internet (see *A (Capacity: Social Media and Internet Use: Best Interests*) [2019] EWCOP 2)
  - Contact with others / support in the community (see *DY v A City Council & Anor* [2022] EWCOP 51)
  - Capacity to engage in sex (see *JB* [2021] UKSC 35)
- Other decisions which have come before the courts:
  - Capacity to engage in parole proceedings (*EG, R (On the Application Of) v The Parole Board of England and Wales* [2020] EWHC 1457 (Admin))
  - Capacity to consent to being ABE interviewed (as a victim of crime) (*Enfield v SA, FA, KA* 2010 EHWC 196 [Admin]).

But remember…

With some Ps who have offended, they won't be able to make certain decisions for themselves anyway, they will be outside of the MCA, as the decision is made for them, for example:

- Licence conditions (A capacitous offender, but see for example *R (on the application of Goldsworthy) v Secretary of State for Justice* [2017] EWHC 2822 (Admin));
- Sexual harm prevention order prohibitions (See as an example *DY* [2022] EWCOP 51);
- Bail conditions;
- Other ancillary orders of the criminal court.

Likewise, a prisoner does not need to be subject an urgent/standard authorisation in hospital, they remain in the custody of the Secretary of State for Justice: see sections 13(2) and 22(b) of the Prison Act 1952.

As ever…

Is it, contact with others? Or a particular group? Or a particular care plan?

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

Does this include a proven risk of offending?

"…Mr McKendrick argued that this inappropriately extended the requisite information in order to protect the other person or members of the public. He submitted that this was not the purpose of the MCA, which was confined to the protection of P, and did not extend to the protection of members of the public. Moreover, he contended that the protection of the public was the purpose of the criminal law and that such protection could also be obtained by making a sexual risk order under section 122A of the Sexual Offences Act 2003. I disagree. The information relevant to the decision includes information about the "reasonably foreseeable consequences" of a decision, or of failing to make a decision, which consequences are not limited to the consequences for P…"

SEE LORD STEPHENS IN JB AT PARAGRAPH 92

And best interests

The person making the determination must consider all the relevant circumstances

Section 4(2)

Y County Council v ZZ [2012] EWCOP B34

I have come to the clear conclusion, for all the reasons given by the various doctors, that it is lawful as in Mr ZZ's best interests to deprive him of his liberty in accordance with the local authority care plan, pursuant to schedule A1 of the Mental Capacity Act 2005. I make that declaration. In doing so, I am following the advice of the expert professionals who know Mr ZZ so well. Indeed, the Official Solicitor accepts, on his behalf, that I should do so. I make it clear to Mr ZZ that I have no doubt that the restrictions upon him are in his best interests. They are designed to keep him out of mischief, to keep him safe and healthy, to keep others safe, to prevent the sort of situation where the relative of a child wanted to do him serious harm, which I have no doubt was very frightening for him, and they are there to prevent him from getting into serious trouble with the police.

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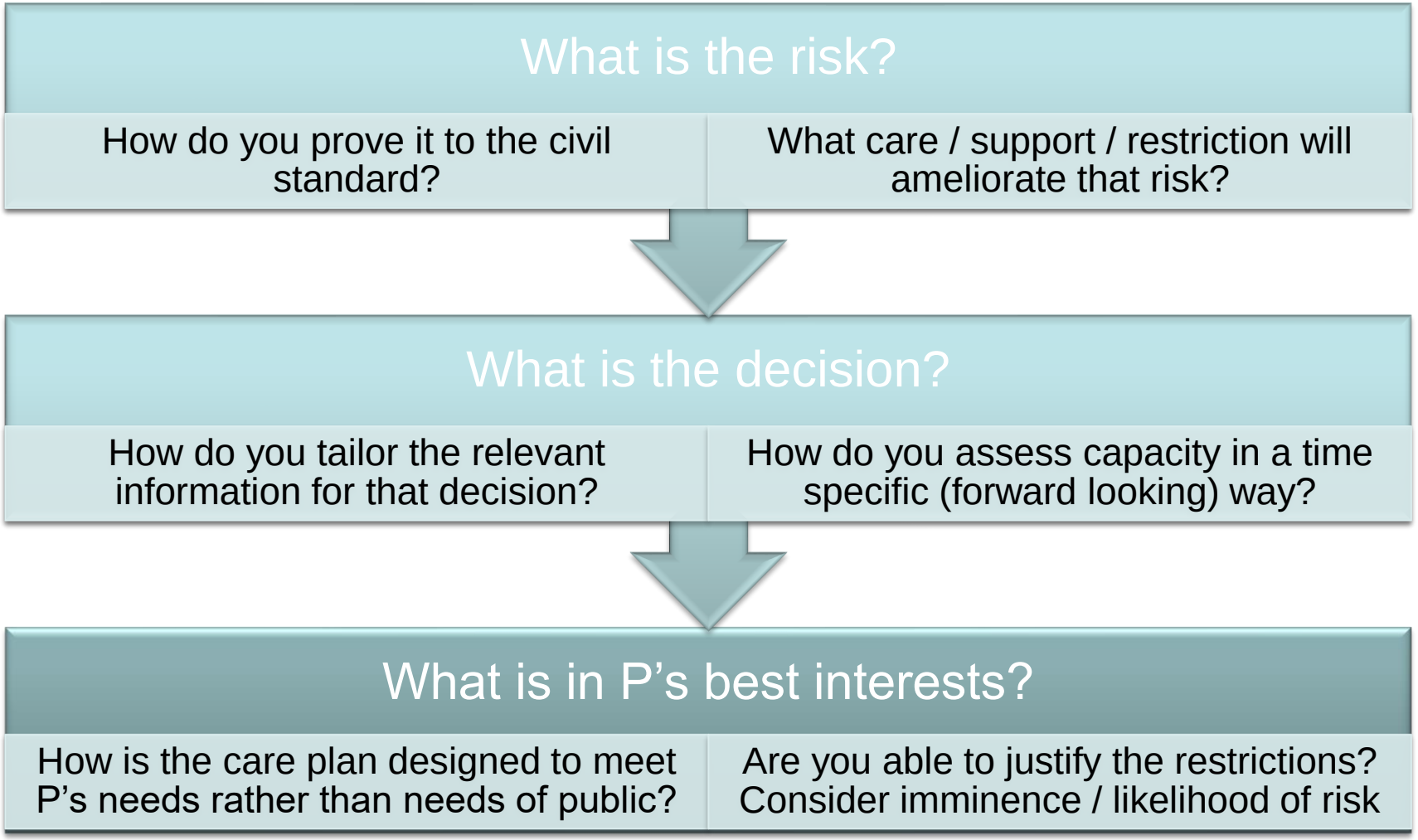
A false dichotomy?
DY

The primary purpose of the care plan

19. It is the applicant's case, disputed by the respondents, that the primary purpose of the care plan is the protection of the public rather than to prevent harm to DY. Whilst such a motive would be understandable it is not permissible under the Act.

20. Having heard and read the evidence and submissions on this point, I have come to the conclusion that the primary purpose of the care plan is to avoid harm to DY. There is no doubt that he poses a risk to the public, but it is also clear that it would be very harmful to DY himself were he to commit further offences. DY is a young person who is vulnerable and has engaged in self harming behaviour (albeit not recently). The social worker stated in her evidence that when DY becomes stressed and anxious that this leads to him ruminating and in turn puts him at risk of self harm. If he were to reoffend he would be very distressed, and engage in self loathing. There would also be the risk of retribution from the public. I agree with Lieven J in *Birmingham City Council v SR; Lancashire County Council v JTA* [2019] EWCOP 28 that it is a false dichotomy to conclude that the protection of P cannot also include protecting him from harming members of the public. As in that case, it is strongly in DY's best interests not to commit further offences, or place himself at risk of further criminal sanctions. In my judgment this falls squarely within the meaning of the qualifying requirement in paragraph 16 schedule A1, 'to prevent harm to the relevant person'. That this harm would come about by his harming others does not detract from this.

If the risk of offending is going to be incorporated into a decision?



Thanks for listening

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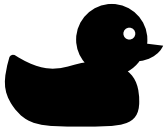

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