

# MENTAL CAPACITY ACT FACTSHEET

## DEPRIVATION OF LIBERTY SAFEGUARDS

This factsheet looks at the Deprivation of Liberty Safeguards (DoLS) for adults, in England and Wales and the information in this factsheet is correct at the time of writing in December 2016.

The safeguards apply to adults who lack capacity to consent to a care plan which is thought to deprive that person of their liberty and only applies to adults in a hospital or care home setting.

For information on Deprivation of Liberty safeguards in Community settings, please see our factsheet on Community DoLS.

### Why were the Deprivation of Liberty Safeguards introduced?

The Deprivation of Liberty Safeguards were introduced to provide a legal framework around the deprivation of liberty. Specifically, they were introduced to prevent breaches of the European Convention on Human Rights (ECHR) such as the one identified by the judgment of the European Court of Human Rights (ECtHR) in the case of *HL v the United Kingdom* (commonly referred to as the 'Bournemouth' judgment).

To prevent further similar breaches of the ECHR, the Mental Capacity Act 2005 has been amended to provide safeguards for people who lack capacity specifically to consent to treatment or care in either a hospital or a care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty, and where detention under the Mental Health Act 1983 is not appropriate for the person at that time. These safeguards are referred to as 'deprivation of liberty safeguards'. (*Deprivation of Liberty Safeguards Code of Practice p14*)

### What are the Safeguards?

- To provide legal protection to vulnerable people who are or may become, deprived of their liberty in a hospital or a care home. The safeguards exist to provide a legal process and protection where deprivation of liberty seems unavoidable and is deemed to be in the person's best interests.
- To provide a process for a deprivation of liberty to be made lawful through an authorisation. The process includes urgent and standard authorisations and gives a right to challenge deprivation of liberty authorisation.



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## Who do the safeguards apply to?

The safeguards apply to people in England and Wales who have a mental disorder and lack capacity to consent to the arrangements made for their care or treatment, but for whom receiving care or treatment in circumstances that amount to a deprivation of liberty may be necessary to protect them from harm and appears to be in their best interests.

The safeguards apply to adults in care homes and hospitals. Both self-funded and publicly funded residents are covered by the safeguards.

For people being cared for somewhere other than a care home or hospital, deprivation of liberty will only be lawful with an order from the Court of Protection.

The safeguards relate only to people aged 18 and over. If the issue of depriving a person under the age of 18 of their liberty arises, other safeguards must be considered – such as the existing powers of the court, particularly those under section 25 of the Children Act 1989, or use of the Mental Health Act 1983.

*The DoLS should not be used if a person meets the criteria for detention under the Mental Health Act 1983.*

## How do the safeguards relate to the rest of the Mental Capacity Act 2005?

The deprivation of liberty safeguards are in addition to, and do not replace, other safeguards in the Mental Capacity Act 2005. This means that decisions made, and actions taken, for a person who is subject to a deprivation of liberty authorisation must fulfil the *requirements* of the Act in the same way as for any other person. In particular, any action taken under the deprivation of liberty safeguards must be in line with the principles of the Act. (See *MCA Project Factsheet on the 5 Principles*)

## What is deprivation of liberty?

The Deprivation of Liberty Code of Practice states that there is no simple definition of deprivation of liberty but provides guidance in chapter 2 on how to assess if a care plan might be depriving a person of their liberty.

*The difference between deprivation of liberty and restriction upon liberty is one of degree or intensity. It may therefore be helpful to envisage a scale, which moves from 'restraint' or 'restriction' to 'deprivation of liberty'. (DoLS, COP at s.2.3)*



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Section 2.5 of the DoLs Code of Practice lists a number of factors which might amount to deprivation of liberty. The listed factors are:-

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant period.
- Staff exercise control over assessments, treatment, contacts and residence.
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
- A request by carers for a person to be discharged to their care is refused.
- The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- The person loses autonomy because they are under continuous supervision and control.

It is important to remember that this list is not exclusive.

### Supreme Court clarification of deprivation of liberty–*Cheshire West*

The Supreme Court judgment of 19 March 2014 in the case of *Cheshire West* clarified an “acid test” for what constitutes a “deprivation of liberty”. The acid test states that an individual is deprived of their liberty for the purposes of Article 5 of the European Convention on Human Rights if they:

- Lack the capacity to consent to their care/ treatment arrangements
- Are under continuous supervision and control and
- Are not free to leave?

All three elements must be present for the acid test to be met.

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include the person’s compliance or lack of objection to the proposed care/ treatment and the reason or purpose behind a particular placement. It was also held that the relative normality of the placement, given the person’s needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty.



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## Who is responsible for applying the safeguards?

It is the responsibility of the care home or hospital (known as the 'managing authority') to ensure that any deprivation of liberty is lawful. If someone is identified as being deprived of their liberty, or at risk of being deprived of their liberty, the managing authority (the hospital or care home managers) must consider whether:

- It is in the person's best interests and necessary to protect them from harm;
- There are alternative, less restrictive care regimes that do not amount to deprivation of liberty.

If it is believed to be in the person's best interests and a less restrictive regime is not possible, the hospital or care home managers must apply to the supervisory body for authorisation of the deprivation of liberty.

In England, the supervisory body is the local authority and will be the local authority where the person is ordinarily resident. In Wales the supervisory body is the local authority for a care home and the Local Health Board for a person in hospital.

## The DoLS assessment

The Supervisory body arranges for the DoLS assessment to take place. There will be a minimum of two people completing the assessments and the assessors must have the appropriate qualifications and training. The assessment process covers a range of issues- including the person's capacity to consent to care and whether the care provided is in the person's best interests. For detailed information of the assessment process- please refer to the DOL Code of Practice.

There are two types of application for DoLS

- If a person is due to come in to a care home or hospital in the next 28 days and it is anticipated they will need to be deprived of their liberty- the care home or hospital can apply for a **standard authorisation**.
- If a person is already in a care home or hospital and is already receiving care which is thought to be depriving the person of their liberty- the care home /hospital must make an **urgent authorisation and submit an application for a standard authorisation at the same time**. Urgent authorisations give the care home/ hospital authority to carry on delivering the care for 7 calendar days and the supervisory body should ensure the DoL assessments are completed within the 7 days.



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*Following the Cheshire West judgment in 2014- there has been a large rise in the number of DoLs applications. The Supervisory Bodies have been unable to keep up with the demand for assessments and so are unable to meet the timescales laid down. This means that many applications wait months or longer for an assessment. It is widely recognised that the DoLs process is not “fit for purpose” and so the law commission is currently reviewing DoLs.*

## What happens if authorisation is granted?

If an authorisation is given it must state how long it will last, (up to a maximum of 12 months) and any conditions attached to it.

A copy of the authorisation must be given to:

- The relevant person- the person being deprived of their liberty
- The Managing Authority;
- The Relevant Person’s Representative – identified by the Supervisory Body
- Every interested person consulted by the best interest’s assessor.

Authorisation does not authorise particular care or treatment, only the deprivation of liberty.

At the end of the authorised period, a new standard authorisation must be applied for if deprivation is still required and the assessment procedure must be repeated. Any continued deprivation of liberty without authorisation will be unlawful

## What happens if authorisation is refused?

If any of the criteria for the six assessments are not met, the Supervisory Body must refuse authorisation. Any continuing deprivation of liberty will be unlawful.

## The Relevant Person’s Representative

If authorisation is given, someone must be appointed to represent the interests of the person whose liberty is being deprived. The role of the Relevant Person’s Representative (RPR) is to keep in contact with the person and to make sure that decisions are being made in their best interests.

The RPR will usually be a relative or friend of the person who is being deprived of their liberty. If there is no appropriate friend or relative, it will be someone appointed



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by the Supervisory Body (possibly a paid professional). It must be someone who can keep in regular contact with them.

The RPR is there to support and represent the person in any matter relating to the deprivation of liberty. They have a duty to act in the best interests of the person.

## Reviewing and monitoring a deprivation of liberty

Authorisation of a deprivation of liberty must be removed when it is no longer necessary. The duration specified in the authorisation is the maximum allowed without further authorisation but if there is a change in circumstances before the end of this period it means the criteria for authorisation no longer apply and the Managing Authority must inform the Supervisory Body so that the DoL can be terminated.

## Temporary changes in mental capacity

A person's mental capacity to make certain decisions will often fluctuate. If someone being deprived of their liberty regained capacity to decide themselves whether they should stay in the care home or hospital they would no longer meet the requirements for authorisation of the deprivation.

However, if this was only on a temporary short-term basis, it could be impractical for a supervising authority to temporarily go through the review procedure, and remove the authorisation if it would be required again as the person's capacity fluctuates. A balance should be struck, based on individual circumstances.

In a situation like this the Code of Practice advises that a suitably qualified person must make a clinical judgement on whether there is evidence of a longer term regaining of capacity. If the person is only likely to have capacity on a short-term basis, the authorisation should be kept in place.

## When someone dies who is on a DoLS

The death of an individual who has a DoLS authorisation must be reported to the local Coroner. In a care home, the doctor who comes out to certify the death and care home manager must carry out this task. This requirement may be amended by the Police and Crime Bill in 2017.



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## When can someone be lawfully deprived of their liberty?

There are three occasions when a deprivation of liberty can occur in order to act in someone's best interests. (Section 4A of the Mental Capacity Act)

These are:

1. Under the Deprivation of Liberty Safeguards of the MCA ( known formally as Schedule A1)
2. When the Court has made an order for someone to have their liberty deprived in order to receive the care they need.
3. Under Section 4B of the MCA where a decision-maker is authorized to deprive a person of their liberty under section 4B "for the purpose of providing him with emergency medical treatment for either a physical or mental disorder while a decision as respects any relevant issue is sought from the Court" This *third option is essentially authorisation to deprive someone of their liberty in order to deliver emergency, life-sustaining treatment whilst a decision is waiting from the court.*

Please note- if the care delivered is considered a restriction of liberty – then section 6 of the MCA may be applied- see *MCA Project Fact sheet on Restraint.*

## Further information on DoLS

For further guidance/ information you can contact your local authority's DoLS Office and /or consult the Deprivation of Liberty Safeguards Code of Practice

[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476)

