Factsheet 62

Deprivation of Liberty Safeguards

March 2020

About this factsheet

This factsheet looks at the Deprivation of Liberty Safeguards (DoLS). These relate to people who lack the mental capacity to make decisions about their care and treatment, and who are deprived of their liberty in a care home or hospital.

This factsheet covers what deprivation of liberty means, the required procedure for authorisation, what can be done if there are concerns a deprivation of liberty is unlawful, and the procedures and protections required once someone has been deprived of their liberty.

Further information about mental capacity is in factsheet 22, *Arranging for someone to make decisions on your behalf.*

The information in this factsheet is correct for the period March 2020 – February 2021.

The information in this factsheet is applicable in England and Wales. If you are in Scotland or Northern Ireland, please contact Age Scotland or Age NI for their version of this factsheet. Contact details can be found at the back of this factsheet.

Contact details of any of the organisations mentioned in this factsheet can be found in the *Useful organisations* section.

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1 Recent developments

Under the *Mental Capacity (Amendment) Act 2019*, Deprivation of Liberty Safeguards will be replaced by *Liberty Protection Safeguards* (LPS). It is expected that LPS will come into force in late 2020 or 2021.

2 What are Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards (DoLS) procedure is designed to protect your rights if you are deprived of your liberty in a hospital or care home in England or Wales and you lack mental capacity to consent to being there.

If it is assessed that you do not have mental capacity to consent to care or treatment, it may be necessary, in your best interests, for other people to decide to place you somewhere to receive it. The *Mental Capacity Act 2005* allows other people to make best interest decisions on your behalf, for example if it is felt the risk is too high if you stay where you are and all other alternatives have been explored to assist you to stay there. The most common example is the need to be placed in a care home.

Mental capacity means being able to understand and retain information and make a decision based on that information. A lack of mental capacity must be established before a decision can be made on your behalf.

The care home or hospital where you stay must apply for, and be granted, a DoLS authorisation from a *'supervisory body'*. In England, this is always the local authority. Different rules apply in Wales, depending on whether the deprivation of liberty is in a hospital or care home. See section 3 for more information. In other locations, your deprivation of liberty requires an application to the Court of Protection to be lawful, see section 9 for more information.

The *Mental Capacity Act 2005* and Code of Practice

The law governing the application of DoLS is the *Mental Capacity Act 2005* ('*the Act*'). Anyone with responsibility for applying the safeguards must have regard to the *Deprivation of Liberty Safeguards Code of Practice* ('*the Code*'), which supplements the *Mental Capacity Act 2005 Code of Practice*. Staff in Wales should also have regard to *Guidance for Supervisory Bodies working within the Mental Capacity Act Deprivation of Liberty Safeguards*.

The law is based on Article 5 of *the European Convention on Human Rights (ECHR),* which protects your right to personal liberty and requires safeguards to be provided to those deprived of liberty, including the right of access to prompt judicial proceedings to challenge the lawfulness of their detention. A guide to Article 5 of the ECHR is at www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

The Law Society *Identifying a deprivation of liberty: a practical guide* aims to help identify when a deprivation of liberty may occur.

2.1 Best interest principles

The '*best interests*' principle is central to the *Mental Capacity Act 2005*. It informs the approach required if someone else has to make a decision on your behalf if you lack mental capacity. It includes:

- **Presumption of capacity** – you have the right to make your own decisions and must be assumed to have capacity to do so, unless it is proved otherwise.
- **Right to be supported to make your own decisions** – all practicable steps must be taken to help you make your own decision, before anyone concludes you are unable to do so.
- **Right to make eccentric or unwise decisions** – you are not to be treated as being unable to make a decision simply because the decision you make is seen as unwise.
- **Best interests** – any decision made, or action taken, on your behalf if you lack capacity must be made in your best interests.
- **Least restrictive intervention** – anyone making a decision on your behalf must consider all effective alternatives and choose the less restrictive of your basic rights and freedoms in relation to risks involved.

Anyone thinking of depriving you of liberty must be skilled in balancing your right to autonomy and self-determination with your right to safety. They should respond proportionately, based on best interest principles and must abide by a Code of Practice. For more information, see factsheet 22, *Arranging for someone to make decisions on your behalf*.

2.2 Basic principles of DoLS

A deprivation of liberty has three elements:

- objective element - confinement in a restricted space for a non-negligible period of time
- subjective element - the person has not validly consented to confinement
- the detention being attributable to the state.

The Supreme Court ruled that there is a deprivation of liberty for the purposes of Article 5 if you are under continuous supervision and control and are not free to leave, and you lack the mental capacity to consent to these arrangements. Factors identified as **not relevant** to a deprivation of liberty determination include:

- whether you agree or disagree with your detention
- the purpose for your detention
- the extent to which it enables you to live what might be considered a relatively normal life. This means you should not be compared with anyone else in determining whether there is a deprivation of liberty.

3 Responsibility for applying the safeguards

The care home or hospital is responsible for ensuring your proposed deprivation of liberty is lawful. It must make a DoLS application if there is any possibility of this happening. The care home or hospital is known as the **‘*managing authority*’**.

If you are identified as being deprived of your liberty, or at risk of being deprived of your liberty, the hospital or care home manager must consider whether:

- it is in your best interests and necessary to protect you from harm
- there are alternative, less restrictive care regimes that do not amount to deprivation of liberty.

If it is believed to be in your best interests and a less restrictive arrangement is not possible, the hospital or care home manager must apply to the **‘*supervisory body*’** for authorisation of your deprivation of liberty. An assessment is carried out to decide whether you need to be deprived of your liberty to keep you safe and to have care or treatment.

In **England**, the supervisory body is the local authority if you go into a care home or hospital.

In **Wales**, the supervisory body is the local authority for care homes and the Local Health Board for hospitals.

It is the authority where you are ordinarily resident, meaning the place where you live.

Authorisation of a deprivation of liberty should be seen as a last resort and less restrictive alternatives that do not amount to deprivation of liberty should be put in place wherever possible. Authorisation should never be used simply for the convenience of staff or carers.

3.1 When should an application be made?

The *Code* says in most cases, it should be possible for the managing authority to plan ahead and apply for an authorisation before the potential deprivation of liberty begins. The managing authority must request a *‘standard’* authorisation where it appears likely that you will be deprived of your liberty within in the next 28 days.

If you need to be deprived of your liberty before the standard authorisation can be requested or dealt with, the managing authority can grant itself an *‘urgent’* authorisation, providing a short-term basis for the deprivation of liberty while the standard authorisation process is completed. See section 4.3 for more information.

3.2 Is it a deprivation or a restriction of liberty?

The Law Society practical guidance can help decide whether a DoLS application is required. It can be hard to decide whether a restriction on liberty is actually a deprivation of liberty requiring authorisation, within the wide range of circumstances that may occur.

Examples of types of restrictions on liberty in care homes includes:

- keypad entry system
- assistive technology such as sensors or surveillance
- observation and monitoring
- expecting all residents to spend most of their days in the same way and in the same place
- care plan saying someone can only go into the community with an escort
- restricted opportunities for access to fresh air and activities (including as a result of staff shortages)
- set times for access to refreshment or activities
- limited choice of meals and where to eat them (including restrictions on residents' ability to go out for meals)
- set times for visits
- use of restraint in the event of objections or resistance to personal care
- mechanical restraints such as lap-straps on wheelchairs
- restricted ability to form or express intimate relationships
- assessments of risk not based on the specific individual; for example, assuming all elderly residents are at a high risk of falls, leading to restrictions in their access to the community.

It has case studies of situations that are likely, may, or are unlikely to be a deprivation of liberty in a care home. This example is a situation likely to give rise to a deprivation of liberty:

Peter is 78 and had a stroke last year, leaving him blind and with significant short-term memory impairment. He can get disorientated and needs assistance with all activities of daily living. He needs a guide when walking. He is married but his wife Jackie struggles to care for him and with her agreement, Peter is admitted into a residential care home.

Peter has his own room at the home. He can summon staff by bell if he needs help. He tends to prefer to spend time in his room rather than with other residents in the communal areas. He can leave his room unaccompanied at any time he wishes. Due to his visual and cognitive impairments, he does not feel safe doing this. He has access to the communal garden, the dining room, the lounge area and any other resident's room.

He is able to use the telephone when he wants. It is in a communal area of the home. He is unable to remember a number and dial it himself. He rarely asks to make phone calls. He is visited regularly by Jackie. She has asked to be allowed to stay overnight with Peter in his room but this request has been refused.

The home has a key pad entry system, so residents need to be able to use the keypad to open the doors to get out into the local area. Peter has been taken out by staff after prompting and does not ask to go out. He would not be allowed to go out unaccompanied. Most of the time Peter is content but on occasions he becomes distressed saying he wishes to leave. Members of staff reassure and distract Peter when this happens.

The guidance identifies key factors pointing to a deprivation of liberty:

- the extent to which Peter requires assistance with all activities of daily living and the consequent degree of supervision and control this entails
- Peter is not free to leave the home, either permanently or temporarily.

4 The assessment procedure for authorisation

The supervisory body must arrange a series of assessments, when it receives a DoLS request for authorisation.

Age assessment

To confirm you are aged 18 or over, as DoLS do not apply to under 18's.

No refusals assessment

To establish whether an authorisation to deprive you of your liberty would conflict with another existing authority about decision-making for you. Authorisation cannot be given if it conflicts with:

- a valid and applicable advance decision refusing some or all of the particular care or treatment if you have created one, or
- a decision of your attorney under a Lasting Power of Attorney or court-appointed deputy within the scope of their authority if you have either.

For more information, see factsheet 22, *Arranging for someone to make decisions on your behalf*, and factsheet 72, *Advance decisions, advance statements and living wills.*

Mental capacity assessment

To establish whether you lack mental capacity to decide for yourself whether you should be accommodated in the particular care home or hospital for care or treatment. Authorisation cannot be given if you are able to make this decision yourself. The *Mental Capacity Act 2005* requires an assessment focused on the specific decision to be made, at that time, and not on generalisations or assumptions about your possible mental capacity to make various decisions in the future.

Mental health assessment

Authorisation can only be given if you have a mental disorder within the meaning of the *Mental Health Act 1983*.

Eligibility assessment

You are not eligible for authorisation if you are subject to the *Mental Health Act 1983* in certain circumstances, including where:

- you are detained (‘*sectioned*’), or
- you are subject to a requirement, such as living in a particular place, that would conflict with the deprivation of liberty.

MIND can provide information and advice on the *Mental Health Act 1983*.

Best interests assessment

The best interests assessor establishes whether a deprivation of liberty is actually occurring, or is likely to occur. They must establish if it is in your best interests, necessary to keep you from harm, and a proportionate response to the likelihood and seriousness of that harm.

The best interests assessor must involve you in the process as much as possible and take into account the views of:

- anyone named by you to be consulted
- family and friends
- your carers
- anyone interested in your welfare (such as family and friends)
- someone appointed by you under a Lasting Power of Attorney
- Court of Protection appointed deputy.

If there is no one appropriate to consult, other than those providing care or treatment to you in a paid or professional capacity, the supervisory body must appoint an Independent Mental Capacity Advocate (IMCA) to represent you. For more information about IMCA’s, see section 4.6.

A best interests assessor can recommend conditions that must be included in an authorisation, such as being allowed contact with certain people. They can recommend the length of time the authorisation should last, up to a maximum of 12 months.

In **England**, forms and guidance are at www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance.

In **Wales**, forms and guidance are at www.gov.wales/mental-capacity-act-deprivation-liberty-guidance-and-forms and guidance for supervisory bodies and managing authorities at www.bit.ly/2rxb8v8.

4.1 Who carries out the assessments?

There must be a minimum of two assessors because the mental health and best interest assessments must be carried out by different people. Ideally, the assessment procedure does not involve a series of different interviews by different assessors as that might cause you unnecessary stress or disruption. There are specific requirements for the qualifications, experience, and training of people carrying out the tests.

For example, the best interests assessment must be carried out by an approved mental health professional, social worker, nurse, occupational therapist, or psychologist, with the required training and experience.

A best interests assessor can be employed by the supervisory body or the managing authority, but must not be involved in decisions about your care or treatment.

If the managing authority and the supervisory body are the same, the rules are different in England and Wales.

In England

The best interests assessor must not be an employee of that authority and an independent assessor must be appointed.

In Wales

The local authority or Local Health Board must show how they are assured the best interest assessor is separate from anyone making decisions on your care and treatment and what actions they have taken to ensure they are genuinely autonomous.

4.2 Timescale for assessment

The Code of Practice states:

> *Assessments must be completed within 21 days for a standard deprivation of liberty authorisation, or, where an urgent authorisation has been given, before the urgent authorisation expires.*

4.3 Urgent authorisations

The managing authority can grant itself an urgent authorisation if it is necessary to deprive you of your liberty before standard authorisation can be obtained. They must simultaneously apply for standard authorisation (if not already done).

The urgent authorisation can allow deprivation to take place while the assessment is carried out. An urgent authorisation can last up to seven days, but can be extended once by the supervisory body for another seven days if the assessment procedure is not completed.

The managing authority must have a reasonable expectation that the requirements for a standard authorisation are likely to be met.

4.4 What happens if authorisation is granted?

If a DoLS authorisation is granted, it must state what it is for, how long it lasts, up to a maximum of 12 months as well as any conditions attached.

A copy of the authorisation must be given to:

- you or your representative, for example attorney or deputy
- the managing authority
- your Relevant Person's Representative (see section 5), and
- every interested person consulted by the best interests assessor.

Authorisation does not authorise particular care or treatment. It covers the deprivation of your liberty and the purpose of care or treatment to avoid harm. This must be carried out in line with best interest principles.

At the end of your authorised period, a new authorisation must be applied for if required and the assessment procedure must be repeated. Continued deprivation of liberty without authorisation is unlawful.

4.5 What happens if authorisation is refused?

If any of the criteria for the six assessments are not met, the supervisory body must refuse an authorisation request. If authorisation cannot be given, notice must be given to you, the managing authority, an IMCA, and everyone consulted by the best interest assessor.

The managing authority must ensure your care is arranged in a way that does not amount to a deprivation of your liberty. The supervisory body, or a relative, or anyone else who is commissioning your care, has a responsibility to purchase a less restrictive care package to prevent deprivation of liberty in this type of situation.

See section 7.1 for challenging an unauthorised deprivation.

4.6 Your right to advocacy

If there is no one appropriate to consult during the assessment process, other than those providing you with care or treatment in a paid or professional capacity, an Independent Mental Capacity Advocate (IMCA) must be appointed straight away by the supervisory body.

An IMCA is an independent person with relevant experience and training who can make submissions to the people carrying out the assessments and, if necessary, challenge decisions on your behalf. They should find out information about you (such as your beliefs, values and previous behaviour) to help assess what is in your best interests.

If authorisation is given, someone must be appointed as your Relevant Person's Representative but an IMCA may still have a role in supporting you.

England – advocacy rights in the *Care Act 2014*

A right to a mental capacity-related IMCA may overlap with a right to an independent advocate under the *Care Act 2014*. Local authorities have a duty to arrange this to facilitate involvement in their assessment, care planning, and service reviews if two conditions are met:

- you have substantial difficulty being involved in these processes, and
- there is no appropriate person to represent and support you, other than those providing your care or treatment in a professional or paid capacity.

The *Care and Support Statutory Guidance* states:

> *Many of the people who qualify for advocacy under the Care Act will also qualify for advocacy under the Mental Capacity Act 2005. The same advocate can provide support as an advocate under the Care Act as under the Mental Capacity Act. This is to enable the person to receive seamless advocacy and not to have to repeat their story to different advocates.*

Wales – advocacy rights in the *Social Services and Well-being (Wales) Act 2014*

A right to a mental capacity-related IMCA may overlap with a right to an independent advocate under the *Social Services and Well-being (Wales) Act 2014*. If there is no one to help you, local authorities **must** arrange the provision of an independent professional advocate if this is the only way to overcome barriers to your full participation in the assessment, care and support planning, review and safeguarding processes.

If there is an overlap, the authority must meet its duties and work with both advocates. Wherever possible, they should seek to agree a single advocate to support you.

5 Relevant Person's Representative (RPR)

If your DoLS authorisation request is granted, someone must be appointed to represent your interests, called the Relevant Person's Representative (RPR).

The role of the RPR is to keep in contact with you and represent and support you with everything relating to the deprivation of liberty, for example seeking a review or challenging the authorisation.

5.1 Who is the RPR?

The RPR is usually a relative or friend. If there is no appropriate person, someone must be appointed by the supervisory body, possibly a paid professional. They must be able to keep in regular contact with you.

Becoming the RPR means you are taking on important legal responsibilities, as you are representing someone else's best interests.

The RPR is chosen by:

- you, as the person whose liberty is being deprived, if you have capacity to choose, or
- your attorney or deputy if there is one with authority to make this decision, or
- the best interests assessor, or
- the supervisory body.

The RPR must not be:

- financially interested in the managing authority (for example, the director of the care home) or related to someone who is
- employed by (or providing services to) the care home (where the managing authority is a care home)
- employed by the hospital in a role that is or could be related to their care (where the managing authority is a hospital), or
- employed by the supervisory body in a role that is, or could be, related to your case.

The person chosen or recommended to be the RPR can refuse the role, in which case an alternative person must be identified.

5.2 The role of the RPR

Your RPR should support and represent you in any matter relating to your deprivation of liberty. They have a duty to act in your best interests.

Your RPR must be given written notice of the authorisation including the purpose of the deprivation of liberty and its duration. They must be given information on your care to enable them to check decisions are being made in your best interests and that any conditions attached to the authorisation are being complied with.

Your RPR can apply for a review of your deprivation of liberty. This could be necessary if there is a change of circumstances and the managing authority has not informed the supervisory body of this.

Note
An RPR can apply to the Court of Protection on your behalf to challenge your DoLS authorisation. Legal aid is available for this.

You and your RPR have the right to be supported by an IMCA, unless your RPR is a paid representative. An IMCA is an independent professional who can support your RPR by making sure they understand their role and can carry it out effectively.

5.3 Replacement of the RPR

If your RPR cannot keep up their duties, for example they move away and can no longer visit you regularly, they should be replaced. If the RPR feels they can no longer carry out the role effectively, they should notify the supervisory body.

In **England**, this is the local authority. In **Wales**, it is the local authority for care homes and the Local Health Board for hospitals.

If the care home or hospital is concerned your RPR is not carrying out the role properly, they should discuss this with the RPR and if still not satisfied, they should notify the supervisory body.

You can object to your RPR continuing in their role if you have the capacity to make this decision. If you lack mental capacity, your Lasting Power of Attorney or deputy can object on your behalf if it is within their authority to do so. In either case, the supervisory body must end the RPR's appointment and a new RPR must be chosen.

A replacement RPR should be chosen following the process set out at section 5.1. An IMCA should be appointed while there is no RPR in place, if you have no family or friends to support you.

Case law

The case of *AJ v Local Authority [2015] EWCOP 5* gives guidance about the RPR role, IMCAs and the local authority in ensuring a person lacking capacity is able to challenge their deprivation of liberty.

A relative appointed as an RPR did not communicate the resident's views about not wishing to be placed in residential care, as they disagreed with them. The judgment found the local authority should have replaced the RPR as they knew about this disagreement.

6 Reviewing and monitoring DoLS

Authorisation of your deprivation of liberty must be removed when it is no longer necessary. The duration specified in your authorisation is the maximum time allowed without further authorisation. However, if your circumstances change before the end of this period, this may mean the criteria for authorisation no longer apply and the authorisation ends.

If there is a change in your circumstances which could mean that one or more qualifying requirements are no longer met, or a condition to the authorisation should be added, removed or amended, the managing authority should inform the supervisory body, which must arrange for a review to be carried out.

The managing authority should have systems for monitoring your deprivation of liberty, so they can identify when a review by the supervisory body is required.

A review can be requested at any time by you if you have capacity, or your RPR or IMCA. The supervisory body must decide whether any of the qualifying requirements need to be reassessed, i.e. whether you still meet the no refusals, mental capacity, mental health, eligibility and best interests requirements.

It is not always necessary for all the assessments to be carried out. It may be only the best interest assessment or the mental capacity assessment that is required.

You, your RPR, your IMCA, and the managing authority must be informed by the supervising authority that a review is going to be carried out and the outcome of the review.

The outcome of the review could be to end the authorisation, to change, remove or add conditions, or change the reasons for which authorisation is given. If authorisation ends, your continued deprivation of liberty is unlawful.

It is not necessary for a managing authority to wait for the authorisation to be removed before they end the deprivation of liberty. If a care home or hospital decide it is no longer necessary, steps must be taken to ensure you are no longer deprived of your liberty. They can apply for a review to have the authorisation formally ended.

In **England**, use form 10 to ask for a review, at www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance.

In **Wales**, use form SA6 at www.bit.ly/2AnyQdw from the NHS Wales website.

6.1 Temporary changes in mental capacity

You may have a condition where your mental capacity to make decisions fluctuates. If you are being deprived of your liberty and regain capacity to decide whether you should stay in a care home or hospital, you no longer meet the requirements for authorisation of the deprivation.

If this is only temporary or short-term, it may be impractical for a supervising authority to temporarily go through the review procedure, and remove the authorisation if it will be required again as your capacity regularly fluctuates. A balance must be struck, based on your individual circumstances.

The *Code* advises a suitably qualified person must make a clinical judgement on whether there is evidence of a possible longer term regaining of capacity. If you are only likely to have capacity again on a short-term basis, the authorisation should be kept in place, but with the situation kept under ongoing review.

7 Challenging a deprivation of liberty

You may want to challenge a deprivation of liberty if you think:

- someone is being unlawfully deprived of their liberty when there is no authorisation in place, or
- an authorisation is in place but the requirements are not met; for example, the person has capacity to decide not to remain in the care home or hospital, or the deprivation of liberty is not in their best interests.

7.1 Challenging an unauthorised deprivation of liberty

A third party (e.g. a member of staff, family member, friend or carer) who thinks you are being deprived of your liberty without authorisation can:

- ask the care home or hospital to apply for authorisation, or to change the care regime so you are not deprived of your liberty, and
- if this is not done, apply to the supervisory body for an assessment of whether you are being deprived of your liberty. This assessment must be carried out within seven calendar days.

If there is a deprivation of liberty, the full assessment procedure must go ahead. They can write a letter or make a verbal request, but it is always useful to have written evidence confirming when the request was made.

The person appointed to assess whether a deprivation of liberty is taking place should consult the person who raised the concern, the person themselves, and any friends and family. If there is no family or friend to consult, an IMCA must be appointed.

An unauthorised deprivation of liberty can also be challenged at the Court of Protection.

7.2 Challenging an authorisation

The person being deprived of their liberty, their RPR, or an IMCA can apply for an authorisation to be reviewed. If authorisation is given and it is not thought to be in the person's best interests, the supervisory body and managing authority should be asked for evidence of what alternatives to deprivation were considered and why they were rejected.

7.3 Taking a case to the Court of Protection

The Court of Protection, created by the *Mental Capacity Act 2005,* oversees actions taken under the Act, including those about DoLS, and resolves disputes involving mental capacity.

A case is usually only taken to the Court of Protection if it has not been possible to resolve the matter with the managing authority and supervising body, either by asking for an assessment to be carried out or a review of an existing authorisation. This may be a formal complaint.

Due to the serious nature of depriving someone of their liberty, you should not delay involving the Court if a managing authority or supervisory body is not dealing with a request to assess or review in a timely manner. The following people can bring a case to the Court of Protection:

- the person being deprived of liberty, or at risk of deprivation
- an attorney under a Lasting Power of Attorney
- Court of Protection appointed deputy
- person named in an existing Court Order related to the application
- the RPR.

Other people, such as an IMCA or any other third party, can apply to the Court for permission to take a case relating to the deprivation of liberty.

For more information on the Court of Protection, see factsheet 22, *Arranging for someone to make decisions on your behalf.*

8 Legal background to DoLS

DoLS came into force in England and Wales in April 2009 under an amendment to the *Mental Capacity Act 2005*. The European Court of Human Rights (ECHR) decided in 2004 that our legal system did not give adequate protection to people lacking mental capacity to consent to care or treatment and who need to be deprived of their liberty.

Article 5 of *the European Convention on Human Rights* protects your right to personal liberty and requires safeguards to be provided to those deprived of liberty, including the right of access to prompt judicial proceedings to challenge the lawfulness of their detention. Article 5 is transposed into UK law by the *Human Rights Act 1998*.

The ECHR decided a deprivation of liberty has three elements:

- objective element - confinement in a restricted space for a non-negligible period of time
- subjective element - the person has not validly consented to confinement
- the detention being attributable to the state.

In summary, DoLS intend to:

- protect you from being detained if it is not in your best interests
- prevent arbitrary detention when other possible alternatives have not been fully considered
- provide a legal procedure including giving you or your representatives the right to challenge the deprivation of liberty.

8.1 Defining deprivation of liberty – *Cheshire West*

The Supreme Court judgment in the cases of *P v Cheshire West and Chester Council and another* and *P and Q v Surrey County Council* (known as '*Cheshire West*') in March 2014 clarified the definition of '*a deprivation of liberty*'.

The Court found there is a deprivation of liberty for the purposes of Article 5 of *the Convention* in circumstances where the person is under continuous supervision and control and is not free to leave, and they lack the mental capacity to consent to these arrangements.

In *Cheshire West,* the Court identified three factors not relevant to a deprivation of liberty determination:

- whether you agree or disagree with your detention
- the purpose for your detention
- the extent to which it enables you to live what might be considered a relatively normal life. This means you should not be compared with anyone else in determining whether there is a deprivation of liberty.

Cheshire West: universal application?

Law Society guidance advises there could be limitations on the general application of the *Cheshire West* judgement.

For example, in hospital intensive care units where authorisation may serve no useful purpose and result in unnecessary distress to those involved. This should not affect the general presumption that an authorisation application should be made if there is a chance of a deprivation of liberty.

Deprivation of liberty in domestic settings

In *Cheshire West,* the Court confirmed a deprivation of liberty can occur in domestic settings, if the State is responsible for imposing the arrangements. This includes a placement in a supported living arrangement in the community. If there may be a deprivation of liberty in such placements, it must be authorised by the Court of Protection.

8.2 The Code of Practice

The *Deprivation of Liberty Safeguards Code of Practice* ('*the Code*') sets out guidance for care homes and hospitals on how to avoid an unlawful deprivation of liberty and how to act in your best interests.

Anyone with responsibility for applying the safeguards must have regard to *the Code*, which supplements the provisions of the *Mental Capacity Act 2005 Code of Practice*. Staff in Wales should also have regard to *Guidance for Supervisory Bodies working within the Mental Capacity Act Deprivation of Liberty Safeguards*. They must also have regard to Court of Protection case law.

The *Code* states:

> *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'.*

It includes a list of factors taken into account when deciding what amounts to deprivation of liberty. These are only factors and not conclusive on their own – there are also questions of degree or intensity. These include whether:

- restraint is used, including sedation, to admit a person to an institution where that person resists 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.

Note

The fact that doors in a care home or hospital are locked does not necessarily amount to a deprivation of liberty. Equally, a person can be deprived of their liberty without locked doors if staff have total control over their movements. The situation must be looked at as a whole, taking account of the factors listed above.

When considering whether the way someone is being treated amounts to a deprivation of liberty, the decision lies with a '*best interests assessor*' within an assessment procedure (see section 4).

The *Code* requires the assessor to take into account:

- all the circumstances of the case
- what measures are being taken in relation to the person and when are they required?
- how long do they last and what are the effects of any restraints or restrictions on the person? Why are they necessary? What aim do they seek to meet?

- how are restraints or restrictions implemented? Do any of the constraints on their personal freedom go beyond '*restraint*' or '*restriction*' to the extent they constitute a deprivation of liberty?
- are there less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?
- does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not?

What is restraint?

Restraint is the use, or threat, of force to enable something to be done which the person is resisting; or the restriction of the person's movement (whether or not they resist). This is different to deprivation of liberty. The *Mental Capacity Act 2005* authorises someone providing care or treatment to use restraint to someone lacking capacity if:

- they reasonably believe it is in the person's best interests
- they believe it is necessary to prevent harm to them, and
- it is proportionate to the likelihood and seriousness of the harm.

Unlike restraint, a restriction is not defined in *the Code* beyond being characterised as an act imposed on a person that is not of such a degree or intensity as to amount to a deprivation of liberty.

If a care home or hospital is in any doubt about your liberty is being deprived, they should make an application for authorisation.

9 Other settings for deprivation of liberty

If a person is deprived of their liberty in their own home, or other accommodation such as supported or extra care housing, authorisation must be sought from the Court of Protection by the local authority or NHS. This is because the DoLS process only applies to care homes and hospitals.

For care arrangements to count as a deprivation of liberty, therefore requiring authorisation from the Court, they must in some way involve the state. Regarding care in the person's own home, the Law Society guidance says this is likely to be the case in circumstances where:

- the local authority or NHS makes the arrangements to commission and provide the care
- direct payments are provided by the local authority or NHS to a family member or professional carers to provide and arrange the care
- the Court of Protection has made the decision on the person's behalf to live and be cared for at home, or the local authority or NHS has been involved in making that decision in the person's best interests.

Similar arrangements made for a person living in other accommodation, such as supported or extra care housing, are also likely to been seen as involving the state, meaning authorisation from the Court of Protection must be sought.

In other cases, it may be less clear that the state is involved. However, there are potential positive obligations by the state to protect vulnerable people from deprivations of liberty, even when it may only be indirectly or partially involved in the arrangements.

In a case called *A (Adult) and Re C (Child); A Local Authority v A [2010] EWHC 978 (Fam),* it was decided that:

> *Where the state – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Article 5 [Human Rights Act 1998 right to liberty] will be triggered.*

There have been a number of Court of Protection cases since 2010 considering the significance of different levels of state awareness or involvement with regard to this positive obligation.

The case of *Staffordshire County Council v SRK & Another [2016] EWCOP 27* considered the positive obligation. It was decided that a privately arranged and funded 24-hour care regime for someone lacking mental capacity in their own home came under deprivation of liberty protections, as it was sufficiently attributable to the state.

Even though arranged by private individuals, the state knew, or ought to have known, about the situation on the ground. This conclusion was based on the fact a Court had awarded damages following a road traffic accident and another had appointed the person's deputy. The Courts being public authorities and arms of the state triggered the positive obligations under Article 5 of *the Convention*.

Consequently, care arrangements in similar types of cases may need to be authorised by the Court of Protection. In these types of situations, the local authority should be informed if there is any concern that the person is being deprived of their liberty. The local authority should investigate and decide whether an application to the Court is required.

10 Safeguarding from abuse and neglect

If you are concerned that an older person is at risk of, or experiencing, abuse or neglect, you should raise this with the local authority, who have an adult safeguarding duty. They must investigate concerns and take action to protect an older person where necessary.

For more information, see factsheet 78, *Safeguarding older people from abuse and neglect.* In Wales, see factsheet 78w, *Safeguarding older people in Wales from abuse and neglect*. The Action on Elder Abuse helpline offers confidential advice and support.

11 The role of the regulatory bodies

DoLS are monitored by the Care Quality Commission in England and in Wales, the Healthcare Inspectorate Wales and the Care Inspectorate Wales. They write regular reports on the use of deprivations of liberty, but they cannot investigate individual cases on your behalf if you have a complaint or want to challenge a deprivation of liberty.

12 Coroner duties and deprivation of liberty

Section 178 Of the *Police and Crime Act 2017* removed the automatic duty of a coroner to investigate the death of someone subject to an authorised deprivation of liberty from 3 April 2017.

Prior to this, guidance to coroners was that an authorised deprivation of liberty created a form of state-related detention triggering an automatic duty to investigate when the person died.

However, depending on the circumstances, a coroner may still need to investigate the death of someone in these circumstances.

Useful organisations

Action on Elder Abuse (AEA)
www.elderabuse.org.uk
Telephone Helpline 080 8808 8141 (free phone)

Works to protect and prevent the abuse of vulnerable older adults. UK wide helpline, open every weekday from 9am to 5pm is confidential and provides information and emotional support in English and Welsh.

Alzheimer's Society
www.alzheimers.org.uk
Telephone Helpline 0300 222 11 22

Campaigns for and provides advice and support to people affected by all types of dementia and their relatives and carers. There are local branches across the UK.

Care Inspectorate Wales
www.careinspectorate.wales/
Telephone 0300 7900 126

Oversees the inspection and regulation of social care services in Wales and monitors the use of DoLS in care homes.

Care Quality Commission
www.cqc.org.uk
Telephone 03000 616 161

Independent regulator of adult health and social care services in England, covering NHS, local authorities, private companies and voluntary organisations and people detained under the *Mental Health Act*. Monitors the use of DoLS in hospitals and care homes.

The Court of Protection
www.gov.uk/courts-tribunals/court-of-protection
Telephone 0300 456 4600

The Court makes decisions in relation to the property and affairs, healthcare and personal welfare of adults who lack capacity. The Court has the power to make declarations about whether someone has the capacity to make a particular decision, for example about where to live.

Healthcare Inspectorate Wales
www.hiw.org.uk
Telephone 0300 062 8163

The independent inspector and regulator of all healthcare in Wales. They also monitor the use of DoLS in hospitals.

Law Society
www.lawsociety.org.uk
Telephone 020 7242 1222

Independent professional body for solicitors. Produces *Identifying a deprivation of liberty: a practical guide.*

MIND (National Association for Mental Health)
www.mind.org.uk
Telephone 0300 123 3393

Charity offering information and advice on the Mental Health Act and mental capacity.

Office of the Public Guardian
www.gov.uk/government/organisations/office-of-the-public-guardian
Telephone 0300 456 0300

Monitors and registers attorneys and deputies for people lacking mental capacity. It publishes a range of guidance for professionals and the public.

Solicitors for the Elderly
www.sfe.legal/
Telephone 0844 567 6173

A national organisation of lawyers specialising in legal issues affecting older people, including issues relating to mental capacity.

Age UK

Age UK provides advice and information for people in later life through our Age UK Advice line, publications and online. Call Age UK Advice to find out whether there is a local Age UK near you, and to order free copies of our information guides and factsheets.

Age UK Advice
www.ageuk.org.uk
0800 169 65 65
Lines are open seven days a week from 8.00am to 7.00pm

In Wales contact

Age Cymru Advice
www.agecymru.org.uk
0800 022 3444

In Northern Ireland contact

Age NI
www.ageni.org
0808 808 7575

In Scotland contact

Age Scotland
www.agescotland.org.uk
0800 124 4222

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