Factsheet 62

Deprivation of Liberty Safeguards

March 2025

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, the procedures and protections required once someone has been deprived of their liberty, and what can be done if there are concerns about a deprivation of 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 2025 to February 2026.

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. 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.

Contents

1 Recent developments

The previous government planned to replace the Deprivation of Liberty Safeguards with the *Liberty Protection Safeguards* (LPS), but this was delayed. It is not known whether the current government will bring the LPS into force.

2 What are Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards (DoLS) procedure is designed to protect your rights if the care or treatment you receive in a hospital or care home means you are, or may become, deprived of your liberty, and you lack mental capacity to consent to those arrangements.

Under the *Mental Capacity Act 2005*, mental capacity means being able to understand, weigh up and retain information in relation to a specific decision at the time it needs to be made, and the ability to communicate that decision. You must be assessed as lacking mental capacity before a decision can be made on your behalf.

You can only be deprived of your liberty where (1) it is shown to be in your *'best interests'* to protect you from harm, (2) a proportionate response to the likelihood and seriousness of that harm, and (3) there is no less restrictive alternative available.

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. This includes the right of access to speedy judicial proceedings to challenge the lawfulness of their detention. For information see www.echr.coe.int/european-convention-on-human-rights. The Law Society produce their *Identifying a deprivation of liberty: a practical guide,* that aims to help identify when a deprivation of liberty may occur.

2.1 Mental Capacity Act principles

There are five principles underpinning the Act. They inform the approach required if someone else must make a decision on your behalf if you lack mental capacity, including under DoLS. They are:

- **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.
- **Support 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.
- **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 or eccentric.
- **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 protecting you from harm. They should respond proportionately, based on the Act's principles and must abide by the DoLS 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 – you have not validly consented to confinement
- the detention being attributable to the state.

The Supreme Court has previously 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 applying for authorisation of a deprivation of liberty. It must make a DoLS application if it is likely that your care or treatment arrangements will deprive you of your liberty, and you lack mental capacity to consent. They are 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 to protect you from harm and is a proportionate response, and
- 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.

The supervisory body must then carry out a series of assessments to determine whether the DoLS qualifying requirements are met. This includes an assessment of whether the deprivation of liberty is necessary, proportionate and in your best interests.

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.

If the local authority is the supervisory body, it is the authority where you are ordinarily resident, usually 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, carers or anyone else.

3.1 When should an application be made?

The *Code* says that 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 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 older residents are at a high risk of falls, leading to restrictions in their access to the community.

The practical guidance 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.

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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 treatment if you have created one, or
- a decision of your attorney under a health and care decisions Lasting Power of Attorney or court-appointed personal welfare deputy.

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 provide the support you need to participate. They must take into account the views of:

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

A best interests assessor can recommend conditions that must be included in an authorisation. 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

Independent advocacy

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 in the course of the assessments. For more information about IMCA's, see section 4.6.

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 should 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 the assessors.

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 your care or treatment or decisions about your care.

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 alternative 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

Assessments must be completed within 21 days for a standard authorisation or, where an urgent authorisation has been given, before the urgent authorisation expires. You may wish to challenge the supervisory body if it does not complete the assessments within the timescales. See section 7.3.

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

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 standard authorisation procedure is not completed.

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, your Relevant Person's Representative (see section 5) and any IMCA involved (see section 4.6)
- the managing authority
- every interested person consulted by the best interests assessor.

The DoLS authorisation only relates to the matter of depriving you of your liberty. It does not give authority to provide you with treatment, or anything else requiring your consent. If you lack mental capacity to consent to care or treatment, the care home or hospital must comply with the MCA, including the requirement to act in your best interests.

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, any IMCA involved, 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 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 Advocacy duty

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, the supervisory body must appoint an IMCA if you or your Relevant Person's Representative (RPR) request one, unless your RPR is a paid representative. See section 5.2.

England – advocacy duty in the *Care Act 2014*

The duty to appoint an IMCA may overlap with the independent advocacy duty under the *Care Act 2014*. The local authority has a duty to appoint you with an advocate to facilitate your involvement in the needs assessment and care planning process, where 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* (para.7.9) 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 duty in the *Social Services and Well-being (Wales) Act 2014*

The duty to appoint an IMCA may overlap with the independent advocacy duty under the *Social Services and Well-being (Wales) Act 2014*. If there is no one to help you, the local authority **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, wherever possible, a single advocate should be appointed to support you. The duties of the different types of advocate have been closely aligned so as to facilitate this. Where it is not possible for a single advocate to be appointed, the advocates should liaise and work closely together.

5 Relevant Person's Representative (RPR)

If the DoLS authorisation is given, the supervisory body must, as soon as possible, appoint someone to represent you, called the Relevant Person's Representative (RPR). The role of the RPR is to keep in contact with you and to represent and support you with everything relating to the deprivation of liberty.

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. This can be a paid professional. They must be able to keep in regular contact with you. Becoming the RPR means you are taking on important responsibilities. You should carefully consider whether you are willing and able to comply with those responsibilities before agreeing to be the RPR.

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 so interested
- 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 must 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. The managing authority must ensure your RPR understands the effect of the authorisation, how it can be reviewed and challenged and how they can request the support of an IMCA.

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.

An RPR can apply to the Court of Protection on your behalf to challenge your DoLS authorisation. Legal aid is available for this. See section 7.4.

IMCA support

The supervisory body must appoint an IMCA if you or your RPR request this, unless your RPR is a paid professional. The purpose of an IMCA in these circumstances is to provide any extra support you or your RPR need and, if required, assistance with using the review process or challenging the deprivation of liberty at the Court of Protection.

5.3 Replacement of the RPR

If your RPR is unwilling or unable to comply with their responsibilities, for example they move away and can no longer visit you regularly, they should be replaced.

If the RPR believes 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, someone acting under a 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. In these circumstances, the IMCA carries out the role of an RPR.

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. 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.

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.

A review can be requested at any time by you, 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 interests assessment or the mental capacity assessment that is required, for example.

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

The outcome of the review could be to end the authorisation, or to change, remove or add conditions, or to change the reasons for which authorisation is given. If authorisation ends, your continued deprivation of liberty is unlawful. Written notice of the outcome of the review must be given to you, your RPR, and any IMCA involved.

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, they must immediately take steps to ensure you are no longer deprived of your liberty. They should then apply for a review to have the authorisation formally ended.

In **England**, form 10 is used for reviews and is at www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance. In **Wales**, form 10 is used for reviews and is at www.gov.wales/mental-capacity-act-deprivation-liberty-guidance-and-forms

6.1 What happens if I move to a new care home or hospital?

The standard authorisation only authorises deprivation of liberty in the specific care home or hospital where you are accommodated. This means if you move to a different care home or hospital, a fresh standard authorisation is needed for any deprivation of liberty in the new setting, even if your stay there is temporary.

The managing authority for the new care home or hospital must apply for a standard authorisation if it is likely that you will be deprived of your liberty. Ideally, the application should be made before you move. If this is not possible, an urgent authorisation may be needed (see section 4.3).

If the supervisory body approves the new application for a standard authorisation, the previous standard authorisation automatically ends.

6.2 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 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, you have capacity to decide not to remain in the care home or hospital, or the deprivation of liberty is not in your 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.

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

The person appointed to assess whether a deprivation of liberty is taking place should consult the person who raised the concern, the person subject to the possible deprivation of liberty, and any friends and family. If there is no family or friends 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 to the supervisory body for an authorisation to be reviewed. This may be where there is a concern that depriving you of your liberty is not in your best interests, or not a proportionate or necessary response in your circumstances. See section 6 for information about DoLS reviews.

7.3 Challenging delays

If the manging authority has made an application for a standard authorisation, but this is not dealt with by the supervisory body within the statutory timescale, the person concerned may be being deprived of their liberty unlawfully during the period of delay.

If you are concerned a person is being deprived of their liberty in these circumstances, raise this with the supervisory body, and if necessary, through a formal complaint.

Ask the supervisory body to explain when the application will be dealt with and what steps are being, or will be, taken to ensure this is done as soon as possible.

If you cannot resolve the situation with the supervisory body, you can ask the Court of Protection to consider the case. It may be appropriate, for example, for the Court to consider whether any deprivation of liberty is in the person's best interests.

Any concerns that the person is experiencing, or at risk of, abuse or neglect can be raised with the local authority under its safeguarding duties. See section 10 for further information.

7.4 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 section 11 of factsheet 22, *Arranging for someone to make decisions on your behalf.*

Legal aid

Where a DoLS authorisation is in place, the person being deprived of their liberty, or their RPR, may be entitled to non-means-tested legal aid to pay for a solicitor when taking a case to the Court. In other circumstances, means-tested legal aid may be available.

For further information see factsheet 43, *Getting legal and financial advice*.

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.

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.

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 - see section 9.

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 (para.2.3):

> *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 that should be 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 you to an institution where you resist admission
- staff exercise complete and effective control over your care and movement for a significant period of time

- staff exercise control over your assessments, treatment, contacts and residence
- a decision has been taken by the institution that you 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 you to be discharged to their care is refused
- you are unable to maintain social contacts because of restrictions placed on your access to other people
- you lose autonomy because you 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, you can be deprived of your liberty without locked doors if staff have total control over your movements and you are not free to leave.

The situation must be looked at as a whole and take account of the factors listed above.

In the assessment procedure, the *'best interests assessor*' determines whether you are being deprived of your liberty (see section 4).

The *Code* requires the assessor to take into account all the circumstances of the case and other factors, including:

- what measures are being taken in relation to you and when are they required? Are there less restrictive options for delivering care or treatment that avoid a deprivation of liberty altogether?
- how long do they last and what are the effects of any restraints or restrictions on you? Why are they necessary? What aim do they seek to meet?
- how are restraints or restrictions implemented? Do any of the constraints on your personal freedom go beyond '*restraint*' or '*restriction*' to the extent they constitute a deprivation of liberty?

- does the cumulative effect of all the restrictions imposed on you 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 to you which you are resisting; or the restriction of your movement (whether or not you 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 your best interests
- they believe it is necessary to prevent harm to you, 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 you 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 you are deprived of your liberty in your own home, or other accommodation such as supported or extra care housing, the local authority or NHS may need to seek authorisation from the Court of Protection.

This is because the DoLS process **only** applies to care homes and hospitals.

For care arrangements to count as a deprivation of liberty in your own home or similar setting, and therefore requiring authorisation from the Court, they must in some way involve the state.

Regarding care in your 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, or

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

Similar arrangements made if you live in other accommodation, such as supported or extra care housing, are also likely to been seen as involving the state, so 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 (para.95):

> *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 various Court of Protection cases since 2010 considering the significance of different levels of state awareness or involvement about 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 have duties and powers to investigate concerns and to take action to protect an older person where necessary.

The Hourglass helpline offers confidential advice and support.

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*.

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.

However, you can raise concerns about deprivation of liberty with them and this can help inform their assessment of whether a hospital or care home is complying with their duties under DoLS.

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

Alzheimer's Society
www.alzheimers.org.uk
Telephone Helpline 0333 150 3456

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.

The Association of Lifetime Lawyers
www.lifetimelawyers.org.uk
Telephone 020 8234 6186

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

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 specialist Court to protect the rights of people who lack mental capacity. The Court can consider whether a deprivation of liberty is occurring or whether a deprivation of liberty is in a person's best interests.

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

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

Hourglass
www.wearehourglass.org
Telephone Helpline 080 8808 8141 (free phone, 24 hours)

Works to protect and prevent the abuse of vulnerable older adults. UK wide helpline, open 24 hours a day, seven days a week, is confidential and provides information and emotional support. The helpline number will not appear on your phone bill.

Law Society
www.lawsociety.org.uk
Telephone 020 7320 5650

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

Maintains a register of attorneys and deputies for people lacking mental capacity. Investigates concerns about attorneys and deputies. Publishes a range of guidance for professionals and the public.

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.wales
0300 303 4498

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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The evidence sources used to create this factsheet are available on request.

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