

CR10 - Deprivation of Liberty Safeguards Policy and Procedure

Purpose

- | To comply with The Deprivation of Liberty Safeguards (DOLS) regulations, which are an amendment to the Mental Capacity Act (MCA) 2005.
- | To prevent breaches of the European Convention of Human Rights. "The safeguards provide a framework for approving the deprivation of liberty "for people who lack the capacity to consent to treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty." The safeguards legislation contains detailed requirements about when and how deprivation of liberty may be authorised. It provides for an assessment process that must be undertaken before deprivation of liberty may be authorised and detailed arrangements for renewing and challenging the authorisation of deprivation of liberty." (Dept. of Health 2008).

Scope

- | Anyone dealing with people aged 18 year or over who has a mental disorder and who lacks the ability to give consent, who may be deprived of their liberty.

Policy

- | The Deprivation of Liberty Safeguards Code of Practice, published by the Ministry of Justice, will be followed in respect of all Service Users. A link to the Code of Practice can be found at the end of this document.
- | The Deprivation of Liberty Safeguards - Forms and Record Keeping Guide for Managing Authorities in England (Hospitals and Care Homes) will be used to manage DOLS. A link to these forms can be found at the end of this document.
- | This policy should be read in conjunction with the following policies (where applicable):
 - | Door Access Restrictions Policy and Procedure.
 - | Mental Capacity Act 2005 Policy and Procedure.

Procedure

- | Good practice indicates that the care home should take reasonable steps to try and avoid a deprivation of liberty occurring. These steps include:
 - | Effective Care Planning that is reviewed regularly;
 - | Involvement of the Service User's family in decision making;
 - | Exploring alternative and less restrictive ways of providing care consistent with protecting the person from harm;
 - | Assessing the person's capacity to make decisions about their care.
- | Where a Service User may be being deprived of their liberty, the managing authority has responsibility for applying for an authorisation of the deprivation. In the case of the Service User being in an NHS hospital, the managing authority is the NHS hospital. In the case of the Service User being in a care home or private hospital, the managing authority is the person registered as manager under part 2 of the Health and Social Care Act. The managing authority should apply to the supervisory body for the area in which the person is ordinarily resident.
- | In England and Wales, for people in care homes, the supervisory body is the local authority. For people in NHS hospitals in England the supervisory body is also the local authority. For people in hospitals in Wales, the supervisory body is the Local Health Board in the area where the hospital is situated.

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- | In applying for an authorisation the care home or hospital should use the forms and procedures produced for the purpose of application and management of a Deprivation of Liberty Safeguard authorisation which are contained in The Deprivation of Liberty Safeguards - Forms and Record Keeping guide for Managing Authorities in England (Hospitals and Care Homes) which can be found in the Useful Documents section of the QCS system (in your Quick Links box). A recent review of these forms has reduced the number of forms necessary and these can be found at the link below. These revised forms include a new form for informing the Coroner in the event of a death.
- | The managing authority must keep a written record of each application and the reasons for the request.
- | The managing authority should tell the Service User's family, friends and carers, and any Independent Mental Capacity Advocate (if there is one already involved) that it has applied for an authorisation, unless it is impractical or impossible to do so, or it would be undesirable in the interest of the Service User's health or safety.
- | If a standard authorisation is given, the supervisory body must appoint a relevant person's representative (RPR) to maintain contact and support the person. The managing authority must make sure the person and their RPR understand the nature of the authorisation.
- | Where someone dies whilst subject to a Deprivation of Liberty authorisation, the care home or hospital should report the death to the Coroner, in accordance with the Coroners and Justice Act 2009 and subsequent guidance given by the Chief Coroner in December 2014 regarding deaths of people deemed to be in state detention. There is a link at the end of this policy to statutory forms which includes a form for reporting a death to the Coroner. There is also a link to the Chief Coroner's guidance regarding people subject to Deprivation of Liberty Safeguards.

The Deprivation of Liberty Safeguards

Summary

- | These safeguards apply to people who have a mental disorder and lack capacity to consent to arrangements made for their care or treatment, and that care or treatment is being provided in a way that amounts to a deprivation of liberty. This applies to people living in a hospital or care home. Hospitals and care homes will need to be aware of the distinction between mere restrictions and deprivation of liberty.
- | A person can only be lawfully deprived of their liberty if it:
 - | Is in their best interest to protect them from harm;
 - | It is a proportionate response to the likelihood and seriousness of the harm;
 - | There is no less restrictive alternative.
- | The Mental Capacity Act does not include a definition of what constitutes a deprivation of liberty. However, a judgement in the Supreme Court (P v Cheshire West and Chester Council [2014] UKSC 19) clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances: "The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements." The Supreme Court held that factors which are not relevant to determining whether there is a deprivation of liberty include the person's compliance or lack of objection and the reason or purpose behind a particular placement. A link to a guidance note issued by the Department of Health in the light of this judgement is included at the end of this policy.
- | The Code of Practice to the Deprivation of Liberty Safeguards (Ministry of Justice 2008) includes some indicators of where the level of restraint is such that it constitutes a deprivation of liberty:
 - | Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
 - | Staff exercise complete and effective control over the care and movement of a person for a significant

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period.

- i Staff exercise control over assessments, treatment, contacts and residence.
- i 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.
- i A request by carers for a person to be discharged to their care is refused.
- i The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- i The person loses autonomy because they are under continuous supervision and control.

How can a DOL be authorised?

- i A managing authority has responsibility for applying for an authorisation. Where a Service User may be being deprived of their liberty, the managing authority should apply to the supervisory body for their area for an authorisation of the deprivation, where it appears that the Service User meets the six qualifying requirements of the DOLS regulations which are:
 - i The age requirement; that the person is aged 18 or over;
 - i The mental health requirement; that the person has a mental disorder;
 - i The mental capacity requirement; that the person lacks capacity to decide where they should be accommodated;
 - i The best interests requirement; whether it is in the person's best interest to be deprived of their liberty;
 - i The eligibility requirement; that the person is eligible for a deprivation of liberty and this is not inconsistent with any obligations required by the Mental Health Act;
 - i The no refusals requirement; that there is no conflict with any existing authority to make decisions for the person.
- i Managing authorities should have a procedure in place to allow for consideration of an application for authorisation of deprivation of liberty. (The DOLS Code of Practice includes a flowchart contained in Annex 2 that can guide managing authorities in this process The Code of Practice gives full information regarding the six qualifying requirements).
- i When making an application, if there is no friend or family member appropriate to consult, the managing authority should inform the supervisory body who must then instruct an Independent Mental Capacity Advocate (IMCA).
- i A supervisory body is responsible for considering the request, commissioning six statutory assessments and, if appropriate, authorising the DOL. Where the DOL concerns someone in a NHS hospital that body shall be the CCG, or where the person is in a care home, the body shall be the local authority in which the person is ordinarily resident. The supervisory body is responsible for ensuring sufficient assessors are available to meet their needs.
- i The 6 statutory assessments to be undertaken before a DOL can be authorised are as follows to determine whether the person meets the qualifying requirements:
 - i Age assessment;
 - i No refusals assessment;

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- i Mental capacity assessment;
 - i Mental health assessment;
 - i Eligibility assessment;
 - i Best interests assessment.
- i Assessments must be completed within 21 days of the supervisory body receiving the request for a standard deprivation of liberty authorisation. However where the deprivation will commence before the authorisation has been obtained, the managing authority can give itself an urgent authorisation. The managing authority must complete the appropriate form and send this to the supervisory body. In this way the managing authority can deprive the person of their liberty for up to 7 days. If necessary this can be extended (for up to a further 7 days) if the supervisory body agrees to this. The urgent authorisation is not a substitute for standard authorisation. If a managing authority grants itself an urgent authorisation, it must at the same time make an application for a standard authorisation. It is important where granting itself an authorisation that the managing authority records accurately the time and date of the authorisation, and records any consultation with family members and others concerned with the care of the person and their views. The managing authority should also have reasonable expectation that that the six qualifying requirements for a standard authorisation which will be met. Forms and guidance on urgent authorisations can be found in a link at the end of this policy.

Links to external documents:

- i <http://www.gov.uk/government/publications/mental-capacity-act-2005-deprivation-of-liberty-safeguards-forms-for-managing-authorities>
- i <http://www.adass.org.uk/mental-health-Drugs-and-Alcohol/key-documents/New-DoLS-Forms/>
- i <http://www.legislation.gov.uk/ukpga/2009/25/section/1>
- i <http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>
- i You will find other helpful guides relating to DoLS in the QCS Useful Documents section located on your dashboard.

Deprivation of Liberty for someone receiving care in their own home or supported living situation.

- i The Deprivation of Liberty Safeguards do **not** apply to people residing or staying in situations other than a hospital or care home, such as a supported living or a supported tenancy situation, or receiving domiciliary care in their own home or a relative's home.
- i For people in such situations who are being deprived of their liberty, this would be in violation of Article 5 of the European Convention on Human Rights. For such a deprivation of liberty to be lawful, the deprivation would need to be authorised by the Court of Protection under section 16 of the Mental Capacity Act 2005. (The Court of Protection is a specialist court created under the Mental Capacity Act 2005. It has jurisdiction over the property, financial affairs and personal welfare of people who it claims lack mental capacity to make decisions for themselves.) If domiciliary care agencies, or other professionals are working with people in such situations and they believe the person they are working with **may** be being deprived of their liberty, and they lack mental capacity to make decisions about their care, then advice should be sought from the local authority. (Each local authority will have a lead officer who manages Mental Capacity Act issues and they should be contacted in the first instance). An application to the Court of Protection would normally be made by the organisation commissioning the care, whether that is an NHS body or a local authority. Human Rights law applies to public bodies, not private individuals. However it is important to note that whilst family members may well be fully involved with care arrangements, these would still be the responsibility of any public body that was managing the package of care.
- i Taking a view as to whether someone may be being deprived of their liberty should take into account the guidance given in the Code of Practice to the Deprivation of Liberty Safeguards and the summary of the Cheshire West and Chester judgement given in the Deprivation of Liberty Safeguards Summary section of this

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document. In addition domiciliary care providers should consider factors specific to someone's own home or supported living situation such as:

- i Physical restrictions such as doors being locked or CCTV or sensors that alert staff to someone leaving their home;
 - i Administration of medication with a sedative effect, or use of physical restraint within the person's home;
 - i Restricted access to parts of the property, and constant supervision in other parts by paid carers.
- i Domiciliary care providers should work with others to ensure Care Plans are reviewed regularly. Part of that review process is to be vigilant to any restrictions on the person, and whether those restrictions may constitute a deprivation of the person's liberty.

References specific to domiciliary care and supported living providers:

- i <https://www.nice.org.uk/guidance/ng21/resources/home-care-delivering-personal-care-and-practical-support-to-older-people-living-in-their-own-homes-1837326858181>
- i <https://www.gov.uk/guidance/deprivation-of-liberty-orders>

Key Lines of Enquiry Table

Key Line of Enquiry	Primary	Supporting	Mandatory
R.S1 - How are people protected from bullying, harassment, avoidable harm and abuse that may breach their human rights?	✓		✓
R.E2 - Is consent to care and treatment always sought in line with legislation and guidance?	✓		✓
R.E5 - How are peoples individual needs met by the adaptation, design and decoration of the service?	✓		

Note: All QCS Policies are reviewed annually, more frequently, or as necessary.

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