Love later life

Factsheet 62

Deprivation of Liberty Safeguards

March 2019

About this factsheet

This factsheet looks at the Deprivation of Liberty Safeguards (DoLS). These relate to people lacking the mental capacity to make decisions about their care and treatment, who need to be placed and detained in care homes or hospitals for their care or treatment, to protect them from harm.

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 2019 – February 2020.

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

In the summer of 2018, the government published the *Mental Capacity (Amendment) Bill* which proposes reform to the current arrangements for deprivations of liberty. At the time of publication, the Bill is still being debated in Parliament.

2 What are Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards (DoLS) procedure is designed to protect your rights if you need to be detained in a hospital or care home in England or Wales and you lack mental capacity.

If you lose mental capacity and become unable 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.

This can be 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 local authority. In other locations, your deprivation of liberty requires an application to the Court of Protection to be lawful, see section 9.

The *Mental Capacity Act 2005* and Code of Practice

The law governing the application of DoLS is the *Mental Capacity Act 2005* ('*the Act*'). The *Deprivation of Liberty Safeguards Code of Practice* ('*the Code*') has guidance for care homes and hospitals on how to avoid an unlawful deprivation of liberty and how to act in your best interests.

The law is based on Article 5 of *the European Convention on Human Rights (ECHR),* which guarantees 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

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*. Note, DoLS should not be used if you are detained under the *Mental Health Act 1983*.

The Law Society publishes *Deprivation of liberty: a practical guide*. This aims to help solicitors and health and social care professionals identify when a deprivation of liberty may occur in health and care settings.

2.1 Best interest principles

The principle of '*best interests*' 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 has found there is a deprivation of liberty for the purposes of Article 5 if "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." 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 considered?

The Code requires the managing authority to apply for authorisation within the 28 days prior to the commencement of a potential deprivation of liberty. An application for authorisation should not only be considered when someone moves into a care home or hospital. The situation should be monitored so if a change means a deprivation of liberty is taking place, an application is also made.

For example, if you had capacity when you moved in but have since lost capacity to decide whether to stay there and deprivation of liberty is now taking place, an application for authorisation must be made.

3.2 Is it a deprivation or a restriction of liberty?

The Law Society guidance has guidance to help decide whether a DoLS application is required, as it can be hard to decide. It may be difficult to tell 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

On receiving a request for DoLS authorisation, the supervisory body must arrange a series of assessments.

Age assessment

This is to confirm you are over 18, as the safeguards only apply to people over 18.

No refusals assessment

This is 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 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 on advance decisions, Lasting Powers of Attorney, and deputies, 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

This is 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.

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, under the *Mental Health Act 1983,* you are:

- detained, or meet the criteria for detention
- subject to a requirement as to where you live, or
- subject to powers of recall.

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 take into account the views of:

- anyone named by you to be consulted
- your carers
- anyone interested in your welfare
- somebody with a Lasting Power of Attorney
- a Court of Protection appointed deputy.

If you have no family or friends to be involved in the assessment, an Independent Mental Capacity Advocate must be appointed to support and represent you (see section 4.6).

A best interests assessor can specify 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/topics/health/nhswales/mental-health-services/policy/dols and guidance for supervisory bodies and managing authorities at http://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

An urgent authorisation can be issued by a hospital or care home 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.

4.4 What happens if authorisation is granted?

If a DoLS authorisation is granted, it must state 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 your 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 the people listed above.

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 appropriate family member or friend who can support you during the assessment procedure, an Independent Mental Capacity Advocate (IMCA) must be appointed 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 your IMCA may still have a role in supporting you.

England – advocacy rights in the *Care Act 2014*

Your mental capacity-related IMCA right 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, means-test and service reviews if two conditions are met:

- you have substantial difficulty being involved in these processes, and
- there is no appropriate person available to represent your wishes.

The role of the independent advocate is to support and represent you and facilitate your involvement in key processes and interactions with the local authority. 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*

Your mental capacity-related IMCA right may overlap with a right to an independent advocate under the *Social Services and Well-being (Wales) Act 2014*. If no one is available 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 make sure decisions are being made in your best interests.

5.1 Who is the RPR?

The RPR is usually a relative or friend of you. If there is no appropriate friend or relative, it is someone appointed by the supervisory body, possibly a paid professional. It must be someone who can 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 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 cannot carry out the role effectively any longer, 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 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 should appoint a new RPR.

Your replacement RPR should be selected following the recommendation of someone qualified to be a best interests assessor. 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 that 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 appointed an alternative professional RPR because they knew about this disagreement. The case is an example of where a short-term care home placement became permanent without the proper DoLS authorisation.

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 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 the deprivation of liberty is no longer necessary, or a condition to the authorisation should be added 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), 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 if one is involved 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 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 to protect you from harm, 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**, form 10 at www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance is for asking for a review.

In **Wales**, form SA6 at http://bit.ly/2AnyQdw from the NHS Wales website can be used to ask for a review.

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 urgently. 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
- a Court of Protection appointed deputy
- a 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 2005 that our legal system did not give adequate protection to people lacking mental capacity to consent to care or treatment, and who need limits put on their liberty to keep them safe from harm.

Article 5 of *the European Convention on Human Rights* guarantees 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 a decision.

8.1 Defining deprivation of liberty – *Cheshire West*

Supreme Court judgments in the cases of *P v Cheshire West and Chester Council and another* and *P and Q v Surrey County Council* 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 the following circumstances:

> *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 hospitals and intensive care units where authorisation time 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*. 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 someone lacking capacity to use restraint 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

There are circumstances in which a person is cared for in their own home (or some other living arrangement), where they are mainly cared for privately, but there is some state involvement and therefore a potential deprivation of liberty. In such cases, a person cannot be lawfully deprived of their liberty without authorisation from the Court of Protection.

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, for example in a domestic setting.

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 Law Society guidance takes a view that if a private arrangement appears to meet the Cheshire West deprivation of liberty threshold, it should be treated as if the state is involved. They justify this by stating:

> *Private care homes and hospitals are institutions regulated by the State. As such, any notionally 'private' deprivations of liberty taking place in such institutions are – or should – be ones of which the State is aware. This, in turn, triggers the State's positive obligations to secure the Article 5 ECHR rights of the individuals concerned, which are discharged by operation of the authorisation procedure.*

In *Staffordshire County Council v SRK & Another [2016] EWCOP 27*, this principle is restated. 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 and been involved in best interest decisions about his care regime. 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 need to be authorised by the Court of Protection. In these types of situations homecare providers should ask the following questions when deciding whether they need to do this:

- Is the individual confined to a particular place for a not negligible length of time?
- Is the individual unable to validly consent to that confinement?
- Can that confinement be attributed to the State?

In the *Staffordshire* case, all parties agreed the first two criteria were satisfied and the judge set out the state involvement for the third one to be met.

10 Safeguarding from abuse

If you have a concern that an older person is experiencing abuse or neglect, you can 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.* The Action on Elder Abuse helpline offers confidential advice and support.

11 The role of the regulatory bodies

Deprivations of liberty 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.

The CQC registration of health and care services providers shows another state link to add to those discussed in the previous section regarding private deprivations 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 support to people affected by all types of dementia and their relatives and carers. There are local branches across the UK.

Care Inspectorate Wales
http://careinspectorate.wales/
Telephone 0300 7900 126

Oversees the inspection and regulation of social care services in Wales and monitors deprivations of liberty.

Care Quality Commission
www.cqc.org.uk
Telephone 03000 616 161 (free call)

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.

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

Solicitors regulatory body. Produces *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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