

Factsheet 62

Deprivation of Liberty Safeguards

February 2017

About this factsheet

This factsheet looks at the Deprivation of Liberty Safeguards (DoLS). DoLS relate to people who lack mental capacity who need to be placed and detained in care homes or hospitals for their treatment or care and 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 that 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 December 2016–November 2017.

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

- The Law Commission has been reviewing the Deprivation of Liberty Safeguards (DoLS) procedure since July 2015. An Interim Statement was published in May 2016, with a final report and recommendations for a draft Bill expected in March 2017. The review aims to streamline the DoLS procedure and extend protections to settings beyond care homes and hospitals, such as supported living and extra care sheltered accommodation.
- The Law Commission Interim Statement notes a tenfold increase in DoLS applications in England since the *Cheshire West* judgment in the Supreme Court in March 2014, leading to major processing delays.
- Coroners will no longer be required to hold an inquest for anyone who dies while subject to DoLS, under an amendment to the Policing and Crime Bill. At the time of writing, the Bill is in the House of Lords.

2 What are the Deprivation of Liberty Safeguards?

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 may 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 of this is the need to be placed in a care home.

Having mental capacity means being able to understand and retain information and to 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 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.

The care home or hospital where you will be staying must apply for, and be granted, a DoLS authorisation from a local authority. In any other type of location, your deprivation of liberty requires an application to the Court of Protection to be lawful.

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

2.1 Why were they introduced?

DoLS came into force in England and Wales in April 2009 under amendments to the *Mental Capacity Act 2005*. This was because, in 2005, the European Court of Human Rights (ECHR) decided in a case that our legal system did not give adequate protection to people who lacked mental capacity to consent to care or treatment and who needed limits put on their liberty to keep them safe from harm.

There is no specific definition of deprivation of liberty in the *Mental Capacity Act 2005*, but it must adhere to the principles of the ECHR and its relevant case decisions. The *European Convention on Human Rights* ('the Convention') gave rise to the UK's *Human Rights Act 1998*.

Article 5 of the *Convention* guarantees your right to personal liberty and provides that no one should be deprived of their liberty in an arbitrary manner. Article 5(1)(e) permits the lawful detention of, among others, 'persons of unsound mind' in accordance with a procedure prescribed by law. Article 5 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. The DoLS is the 'procedure proscribed by law'.

The ECHR decided that a deprivation of liberty has three elements:

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

Article 5 of the *Human Rights Act 1998*, the right to liberty and security, can be found in an Appendix to this factsheet.

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
- give you or your representatives the right to challenge a decision.

2.2 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 if you lack capacity should consider all effective alternatives and choose the one least restrictive of your basic rights and freedoms.

Any professional considering a deprivation of your liberty must have sufficient skills to balance your right to autonomy and self-determination with your right to safety. They should respond proportionately based on the best interest principles and must adhere to a Code of Practice (see section 2.4).

For more information on mental capacity, see factsheet 22, *Arranging for someone to make decisions on your behalf*.

2.3 Defining deprivation of liberty – *Cheshire West*

The Supreme Court handed down 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. These provided clarification on 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 also 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.

The Law Society has published *Identifying a deprivation of liberty: a practical guide*. This aims to help solicitors and health and social care professionals identify when a deprivation of liberty may be occurring in a number of health and care settings.

***Cheshire West*: universal application?**

The 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 (see section 8). This includes a placement in a supported living arrangement in the community.

Where there may be a deprivation of liberty in such placements, it must be authorised by the Court of Protection.

2.4 The Code of Practice

The *Deprivation of Liberty Safeguards Code of Practice* ('the Code') was published in August 2008. It 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 should refer 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 by the ECHR and UK courts 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 5). *The Code* requires the assessor to take into account the following:

- 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?

The Code states that 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
- 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 whether someone's liberty is being deprived, they should make an application for authorisation.

3 Responsibility for applying the safeguards

The care home or hospital is responsible to ensure your proposed deprivation of liberty is lawful. It must make a DoLS application if there is any uncertainty. The hospital or care home 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.

In **England**, the supervisory body is the local authority if you are going into a care home or hospital. In **Wales**, the supervisory body is the local authority for a care home and the Local Health Board for a hospital. It is the authority where you are ordinarily resident, which means the place where you live.

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.

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?

An application for authorisation should not only be considered when someone moves into a care home or hospital. The situation should be monitored so that 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 just a restriction of liberty?

The Law Society guidance provides assistance to help professionals 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.

It has a list of examples of the type of restrictions on liberty found in care homes including:

- 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 give rise to 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. He had a stroke last year, which left him blind and with significant short-term memory impairment. He can get disorientated and needs assistance with all the activities of daily living. He needs a guide when walking. He is married but his wife Jackie has struggled to care for Peter and with her agreement Peter has been 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 service users would 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 that 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 in this case:

- 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 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

The purpose of this assessment is to establish whether an authorisation to deprive you of your liberty would conflict with other existing authority for 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
- the 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.

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 if you have them
- anyone interested in your welfare
- someone with a Lasting Power of Attorney, if there is one
- a Court of Protection appointed deputy, if there is one.

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).

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

Forms and guidance on the assessment procedure can be found at: www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance.

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 because 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.

The best interests assessor can be an employee of the supervisory body or the managing authority, but must not be involved in your care or treatment. Sometimes there may be situations where the managing authority and the supervisory body are the same, for example a care home run by a local authority. In this case the best interests assessor must not be an employee of that authority and an independent assessor must be appointed.

4.2 Timescale for the assessments

The assessment procedure for a standard authorisation must be completed within 21 calendar days of the application being received by the supervisory body.

4.3 Urgent authorisations

An urgent authorisation can be issued by a hospital or care home if it is necessary to deprive a person of their 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 and 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)
- 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 in section 2.2.

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 for challenging an unauthorised deprivation.

4.6 Your right to advocacy

If there is no appropriate family or friend who can support you during the assessment procedure for a DoLS authorisation, 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 2014* 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*. Local authorities in Wales **must** arrange the provision of an independent professional advocate if you can only overcome barriers to participating fully in the assessment, care and support planning, review and safeguarding processes with assistance from an appropriate individual, but there is no-one available.

The Welsh Government recognise the potential confusion where you may qualify for different entitlements to advocacy at the same time – for example, under the *Social Services and Well-being (Wales) Act*, an authority may identify a duty to provide an IMCA under the *Mental Capacity Act 2005*. If so, the authority must meet its duties in relation to working with the IMCA as well as those with an independent professional advocate under the *Social Services and Well-being (Wales) Act 2014*.

Wherever possible, parties involved should seek to agree a single advocate to support you.

5 Relevant Person's Representative (RPR)

If your DoLS authorisation request is successful, 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 the person who is being deprived of their liberty. 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.

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)
- 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 and 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 provided with 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

Your RPR can apply to the Court of Protection on your behalf to challenge your DoLS authorisation. Non means-tested 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.

This is the local authority in England and in Wales, 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, in which case the supervisory body should replace them.

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 role of the RPR, 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 also an example of where a short-term care home placement became permanent without the proper DoLS authorisation.

6 Reviewing and monitoring a deprivation of liberty

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 there is a change in your circumstances before the end of this period, this may mean the criteria for authorisation no longer apply and the authorisation end.

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 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.

A review can be requested at any time by you (if you have capacity), your RPR or IMCA. A link to documents provided by the Department of Health and ADASSS on aspects of DoLS procedures for professionals is in the Useful Organisations section. Form 10 is for review requests. This appears to be a suitable template for review requests by anyone with authority to do this. In Wales, see Useful Organisations for NHS Wales with a link to the equivalent documents.

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 the care home or hospital decide it is no longer necessary to protect you from harm, steps must be taken to make sure you are no longer deprived of your liberty. They can then apply for a review to have the authorisation formally ended.

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

The Code advises that 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.

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 for themselves 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

Any 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 that you are not being deprived of your liberty
- 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.

If they think an unauthorised deprivation of liberty is taking place and they raise this with the care home or hospital, they should expect them to deal with it urgently. *The Code* states this usually means within 24 hours.

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 was created by the *Mental Capacity Act 2005* to oversee actions taken under the Act, including those relating to DoLS, and to resolve any 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 in form of 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 who is 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 taking a case to the Court of Protection, see factsheet 22, *Arranging for someone to make decisions on your behalf*.

8 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 predominantly cared for privately, but there is some state involvement and therefore a potential deprivation of liberty. Case law from the courts has clarified when this applies, although there remain variations in approach.

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.

This case identified potential positive obligations the state has 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.

This reflects the broad scope of the ECHR protections identified within case decisions. 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 the view that if a private arrangement appears to meet the *Cheshire West* deprivation of liberty threshold, then it should be treated as if the state is involved. They justify this by stating this is because:

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 the 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 that a Court had awarded damages following a road traffic accident; 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.

9 The role of the regulatory bodies

Deprivations of liberty are monitored by the Care Quality Commission (England) and, in Wales, the Healthcare Inspectorate Wales and the Care and Social Services 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 required 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.

10 Appendix

Human Rights Act 1998 (based on the European Convention of Human Rights)

Article 5 Right to liberty and security:

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Deprivation of Liberty Safeguards Code of Practice

It is available to download from the Publications section of the Department of Health website at:

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

Law Society *Identifying a deprivation of liberty: a practical guide*

www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/

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. AEA offer a UK wide helpline, open every weekday from 9am to 5pm. The helpline 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 and Social Services Inspectorate Wales

www.cssiw.org.uk

Telephone 0300 7900 126

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

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 or voluntary organisations and people detained under the *Mental Health Act*.

The Court of Protection

www.gov.uk/courts-tribunals/court-of-protection

Telephone 0300 456 4600 - Monday to Friday, 9am to 5pm

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.

Department of Health

www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance

The Department of Health and ADASS (the association of directors of adult social services in England) have produced documents to help local authorities acting as supervisory bodies for Mental Capacity Act DoLS. In Wales, see the entry for NHS Wales.

Healthcare Inspectorate Wales

www.hiw.org.uk

Telephone 0300 062 8163

The independent inspector and regulator of all healthcare in Wales.

MIND (National Association for Mental Health)

www.mind.org.uk

Telephone 020 8519 2122

Charity offering support for people in mental distress and their families.

NHS Wales

www.wales.nhs.uk

Telephone 0845 46 47 (NHS Direct Wales)

The NHS Wales website contains information and guidance on the safeguards. There are standard letters available to download at:

www.wales.nhs.uk/sites3/page.cfm?orgid=744&pid=36053

Office of the Public Guardian

www.gov.uk/government/organisations/office-of-the-public-guardian

Telephone 0300 456 0300

The role of the OPG is to protect people who may lack 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.

Welsh Government

www.gov.wales/splash?orig=/

Telephone 0300 060 4400

The devolved government for Wales.

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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