

Deprivation of Liberty Safeguards

About this factsheet

This factsheet looks at the Deprivation of Liberty Safeguards (DoLS). The DoLS are part of broader legislation brought in to protect the rights of people who lack mental capacity. The factsheet covers:

- what deprivation of liberty means;
- what you can do if you are concerned that someone is being unlawfully deprived of their liberty;
- the procedure for obtaining authorisation to deprive someone of their liberty;
- support for people who are deprived of their liberty.

The information in this factsheet is correct for the period October 2014 – October 2015. Rules and guidance sometimes change during the year.

This factsheet describes the situation in England and Wales. There are differences in the rules for Northern Ireland and Scotland. Readers in these nations should contact their respective national Age UK offices for information specific to where they live – see section 13 for details.

For details of how to order other Age UK factsheets and information materials mentioned inside go to section 13.

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1 Recent developments

- The *Care Act 2014* received Royal Assent (became law) in May 2014. This is the most significant reform of adult social care for more than 60 years, replacing a wide range of existing legislation with a single statute and introducing many new principles and procedures. For example the introduction of the principle of the promotion of 'wellbeing' as the basis for any action or decision taken in relation to meeting someone's social care needs; or service planning. The Act will come into force in two stages – in April 2015 and April 2016, supported by various regulations and statutory guidance, which will be published in October 2014.

It should be noted that large swathes of the measures contained in the *Care Act* affect England only and will **not** apply in Wales. New legislation, the *Social Services and Well-being (Wales) Act 2014*, is the main mechanism in Wales for similar wide reaching reforms in regard to social care. The Act became law on 1 May 2014. However, the bulk of the provisions will not be implemented until April 2016.

- Following the Supreme Court ruling (see section 3.2) in March 2014, which provided clarification on the definition of what amounts to a deprivation of liberty, the Government has asked the Law Commission to review the legislation on which it is based, and related guidance. This is in the context of intense criticism of the system, for example from a House of Lords Select Committee (see Appendix). There has also been a surge of cases in the wake of the Supreme Court ruling. A consultation paper is to be published by the Law Commission in the summer of 2015, with a final report in 2017. This project will also amend the legal framework to include certain settings beyond care homes and hospitals, for example supported living, which presently require a direct application to the Court of Protection to authorise a deprivation of liberty.

2 What are the Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards came into force in England and Wales on 1 April 2009 under amendments to the *Mental Capacity Act 2005*. They were introduced following a decision in the European Court of Human Rights (ECHR). The ECHR found that our law did not give adequate protection to people who lacked mental capacity to consent to care or treatment, and who needed limits on their liberty to keep them safe¹. Article 5 of the *Human Rights Act 1998* requires that no one should be deprived of their liberty except in certain, pre-defined, circumstances; there must also be an appropriate, legally based, procedure in place to protect the individual's rights. See the Appendix for the full text of Article 5.

When someone lacks mental capacity to consent to care or treatment, it is sometimes necessary to deprive them of their liberty in their best interests, to protect them from harm.

Having mental capacity means being able to understand and retain information and to make a decision based on that information.

The safeguards are intended to:

- protect people who lack mental capacity from being detained when this is not in their best interests;
- to prevent arbitrary detention; and
- to give people the right to challenge a decision.

The legislation sets out a procedure for care homes and hospitals to obtain authorisation to deprive someone of their liberty. Without that authorisation the deprivation of liberty will be unlawful. These safeguards are intended to protect individuals from being deprived of their liberty unless it is in their best interests to protect them from harm and there is no other less restrictive alternative.

¹ *HL v UK [2004] EHRC 471* known as the 'Bournewood case'

More information about making decisions on behalf of people who may lack mental capacity and about the provisions of the *Mental Capacity Act 2005*, can be found in Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*. Also see the DoLS Code of Practice, discussed in more detail in section 8.

2.1 Who do the safeguards apply to?

The safeguards apply to:

- people in hospitals;
- people in care homes.

Both self-funded and publicly funded residents are covered by the safeguards.

For people being cared for somewhere other than a care home or hospital, deprivation of liberty will only be lawful with an order from the Court of Protection. See section 9 for related guidance on DoLS and private individuals and section 3.2 on domestic settings.

The Deprivation of Liberty Safeguards should not be used if a person meets the criteria for detention under the *Mental Health Act 1983*.

2.2 Who is responsible for applying the safeguards?

It is the responsibility of the care home or hospital (known as the 'managing authority') to ensure that any deprivation of liberty is lawful. If someone is identified as being deprived of their liberty, or at risk of being deprived of their liberty, the managing authority (the hospital or care home managers) must consider whether:

- it is in the person's best interests and necessary to protect them from harm;
- there are alternative, less restrictive care regimes that do not amount to deprivation of liberty.

If it is believed to be in the person's best interests and a less restrictive regime is not possible, the hospital or care home managers must apply to the supervisory body for authorisation of the deprivation of liberty. The supervisory body is the local authority (for a person in a care home) or the Clinical Commissioning Group (for a person in a hospital in England)/ the Local Health Board (for a person in hospital in Wales).

If there is any uncertainty as to whether the care regime amounts to a deprivation of liberty then the managing authority should apply for authorisation. An assessment will then be carried out to ascertain whether or not the person needs to be deprived of their liberty to keep them safe (see section 4 'The assessment procedure').

Authorisation of deprivation of liberty should be seen as a last resort; 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.

2.3 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 made. For example, if someone had capacity when they moved in but has since lost capacity to decide whether to remain there, and deprivation of liberty is taking place, an application for authorisation must be made.

3 What is deprivation of liberty?

There is no specific definition of deprivation of liberty in the *Mental Capacity Act 2005*. However, it must encompass the definition set down in Article 5 of the *European Convention on Human Rights* (ECHR) and related case law. The *Human Rights Act 1998*, Article 5, is set out in full in the Appendix. This is the directly applicable equivalent of the ECHR within UK law.

Whether someone has been deprived of their liberty depends on the particular circumstances of each case.

The Code of Practice accompanying the safeguards 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'.

The Code of Practice also includes a list of factors (see the list below) that have been taken into account by the European Court of Human Rights and UK courts when deciding what amounts to deprivation of liberty. These are only factors and not conclusive on their own. It will be a question of degree or intensity.

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant 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, for example, would not necessarily be enough on its own to amount to a deprivation of liberty. Equally a person could be deprived of their liberty without locked doors if staff exercised total control over their movements. The situation should be looked at as a whole, taking into account factors such as those in the above list.

When considering whether someone is being deprived of their liberty, the decision on whether the way someone is being treated amounts to a deprivation of liberty lies with the 'best interests assessor' (see section 4) during the assessment procedure. The Code of practice requires the decision maker to take into account the following points:

- All the circumstances of the case.
- What measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet?
- What are the views of the relevant person, their family or carers? Do any of them object to the measures?
- How are any restraints or restrictions implemented? Do any of the constraints on the individual's personal freedom go beyond 'restraint' or 'restriction' to the extent that they constitute a deprivation of liberty?
- Are there any 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?

If a care home or hospital is in doubt about whether someone's liberty is being deprived, they should make the application for authorisation.

3.1 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* authorises someone providing care or treatment to someone lacking capacity to consent to it to use restraint if:

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

Unlike restraint, a restriction is not defined in the Code of Practice 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.

See Appendix for a discussion of some relevant recent legal cases focusing on the dividing line between restriction, restraint and deprivation of liberty.

3.2 Recent Supreme Court clarification

In March 2014, the Supreme Court handed down its judgments in the cases of *P v Cheshire West and Chester Council and another* and *P and Q v Surrey County Council*.

These very significant judgements have provided clarification on the definition of a deprivation of liberty and have reduced the widespread confusion that service users, their representatives and professionals have been grappling with over the past few years.

The Supreme Court found that there is a deprivation of liberty for the purposes of Article 5 of the *European Convention on Human Rights* in the following circumstances:

The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements.

The Supreme Court held that factors which are not relevant to determining whether there is a deprivation of liberty include: the person's compliance or lack of objection to their care arrangements; the purpose of the deprivation of liberty; and the extent to which it enables them to live a relatively normal life.

It was also held that the relative normality of the placement, given the person's needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty.

The judgments suggest that the definition of a deprivation of liberty is wider than previously thought. It also implies that there should have been more applications in the past. Councils have reported a sharp increase in the number of applications since the judgments.

Deprivation of liberty in domestic settings

The Supreme Court held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes a placement in a supported living arrangement in the community. Where there is, or is likely to be, a deprivation of liberty in such placements, it must be authorised by the Court of Protection.

The full judgments can be found on the Supreme Court's website at the following link: http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

4 The assessment procedure

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

Age assessment

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

No refusals assessment

This is to establish whether the person, or someone with authority to decide on their behalf, has refused the deprivation of liberty. Authorisation cannot be given if it conflicts with:

- a valid and applicable advance decision refusing the particular care or treatment;
- the decision of an attorney under a Lasting Power of Attorney;
- the decision of a court-appointed deputy.

For information on advance decisions, Lasting Powers of Attorney, and deputies, see Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*, and Factsheet 72, *Advance decisions, advance statements and living wills*.

Mental capacity assessment

This is to establish whether the person lacks mental capacity to decide for themselves if they should be accommodated in the particular care home or hospital, for the purpose of the care or treatment. Authorisation cannot be given if they are able to make this decision themselves.

The *Mental Capacity Act 2005* requires an assessment that is focused on the specific decision to be made, at that time, and not on generalisations or assumptions about someone's possible mental capacity to make various decisions.

Mental health assessment

Authorisation can only be given if the person is suffering from a mental disorder (within the meaning of the *Mental Health Act 1983*).

Eligibility assessment

The person is not eligible for authorisation if they are:

- detained under the *Mental Health Act 1983* (or they meet the criteria for detention);
- subject to a requirement under the *Mental Health Act 1983* as to where they live; or
- subject to powers of recall under the *Mental Health Act 1983*.

Best interests assessment

The best interests assessor establishes whether deprivation of liberty is actually occurring, or is likely to occur. The best interests assessor also establishes if deprivation of liberty is in the person's best interests, necessary to keep them 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 the person to be consulted;
- the person's carers;
- anyone interested in the person's welfare;

- an attorney (if there is one);
- a deputy (if there is one).

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

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

4.1 **Who carries out the assessments?**

There will be a minimum of two assessors because the mental health and best interests assessments must be carried out by different people. Ideally, the assessment procedure would not involve a series of different interviews by different assessors because that might cause unnecessary stress or disruption to the person being assessed.

There are specific requirements for the qualifications, experience and training of people carrying out each of 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 full details of who can carry out each test are in the Code of Practice (see section 8).

The best interests assessor can be an employee of the supervisory body or the managing authority, but must not be involved in the care or treatment of the person. There will sometimes be situations where the managing authority and the supervisory body are the same organisation, for example when a care home is run by a local authority. In this case the best interests assessor must not be an employee of that authority; an independent assessor must be appointed.

4.2 What is the timescale for the assessments?

The assessment procedure for 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 the hospital or care home itself if it is necessary to deprive the 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 authorisation is given it must state how long it will last, up to a maximum of 12 months and any conditions attached to it.

A copy of the authorisation must be given to:

- the relevant person;
- the managing authority;
- the Relevant Person's Representative (RPR, see section 5);
- every interested person consulted by the best interests assessor.

Authorisation does not authorise particular care or treatment, only the deprivation of liberty. The principles of the *Mental Capacity Act* must be applied to decisions on care and treatment; this includes the principle that decisions must be made in the person's best interests. For information on the principles of the Act, see Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

At the end of the authorised period, a new standard authorisation must be applied for if deprivation is still required and the assessment procedure must be repeated. Any continued deprivation of liberty without authorisation will be 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 authorisation. Any continuing deprivation of liberty will be unlawful. See section 7.3 for information on challenging an unauthorised deprivation at the Court of Protection.

If authorisation cannot be given, notice of this fact must be given to the same people as listed above.

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

4.6 The role of the Independent Mental Capacity Advocate

If there is no appropriate family or friend who can support the person during the assessment procedure, an Independent Mental Capacity Advocate 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 challenge decisions on behalf of the person they are representing. They should find out information about the person (such as their beliefs, values and previous behaviour) to help assess what is in their best interests. For more information about the role of IMCAs in supporting people who may lack mental capacity, see Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

If authorisation is given, someone must be appointed as the Relevant Person's Representative but the IMCA may still have a role in supporting that person (see section 5).

4.7 Future advocacy rights as a result of new legislation

In England – advocacy rights in the Care Act 2014

The IMCA role will work in tandem with the proposed creation of a right to an independent advocate under the *Care Act 2014*, from April 2015. Local authorities will have a duty to arrange this to facilitate the involvement of a person in their assessment, care planning, means-test and service reviews, if two conditions are met:

- where a person has substantial difficulty in being fully involved in these processes; and
- where there is no one appropriate available to support and represent the person's wishes.

The role of the independent advocate is to support and represent the person, and to facilitate their involvement in the key processes and interactions with the local authority. At point 7.8, the draft *Care and Support Statutory Guidance 2014* states that:

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.

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

The IMCA role will work in tandem with the proposed creation of a right to an independent advocate under the *Social Services and Well-being (Wales) Act 2014*. This right will apply for certain people with care and support needs. At the time of writing (October 2014), the Welsh Government have not detailed any specific regulations in regard to these advocacy services – i.e. the conditions that would have to be met for this new right to apply have not, as yet, been published. It is likely that draft proposals will be consulted on during 2015, with subsequent implementation of any new regulations in 2016.

Therefore, at the present time it is also unknown how advocacy services will be provided if a person were to qualify for advocacy under the Social Services and Well-being (Wales) Act 2014 and the Mental Capacity Act 2005.

Further information on the Social Services and Well-being (Wales) Act can be found at: www.wales.gov.uk/topics/health/socialcare/act/

5 The Relevant Person's Representative

If authorisation is given, someone must be appointed to represent the interests of the person whose liberty is being deprived. The role of the Relevant Person's Representative is to keep in contact with the person and to make sure that decisions are being made in their best interests.

5.1 Who should be chosen as the RPR?

The RPR will usually be a relative or friend of the person who is being deprived of their liberty. If there is no appropriate friend or relative, it will be someone appointed by the supervisory body (possibly a paid professional). It must be someone who can keep in regular contact with them. The RPR will be chosen by:

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

But 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 the relevant person's 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

The RPR is there to support and represent the person in any matter relating to the deprivation of liberty. They have a duty to act in the best interests of the person.

For more information about deciding what is in someone's best interests, see Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

The RPR must be given written notice of the authorisation including the purpose of the deprivation of liberty and the duration of the authorisation. They must also be provided with information on the person's care to enable them to check that decisions are being made in their best interests and that any conditions attached to the authorisation are being complied with.

The RPR can apply for a review of the 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 (see section 6 on reviews).

The RPR can also apply to the Court of Protection on the person's behalf to challenge the authorisation. Non means-tested legal aid will be available for this.

Both the RPR and the relevant person have the right to be supported by an IMCA (see section 4.6), unless the RPR is a paid representative. An IMCA is an independent professional who can support the RPR by making sure they understand their role and can carry it out effectively.

5.3 Replacement of the RPR

If the RPR cannot keep up their duties, for example if they move away and can no longer visit the person regularly, they should be replaced. If the RPR feels they cannot carry out the role effectively any longer they should notify the supervisory body (the local authority or Clinical Commissioning Group/Local Health Board). If the care home or hospital has concerns that the 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.

The person whose liberty is being deprived can also object to the RPR (if they have the capacity to make this decision), in which case the supervisory body should replace the RPR.

The replacement RPR should be selected following the recommendation of someone qualified to be a best interests assessor (see section 4). An IMCA should be appointed while there is no RPR in place, if the person has no family or friends to support them.

6 Reviewing and monitoring a deprivation of liberty

Authorisation of a deprivation of liberty must be removed when it is no longer necessary. The duration specified in the authorisation is the maximum allowed without further authorisation but if there is a change in circumstances before the end of this period it means the criteria for authorisation no longer apply, the authorisation must be ended.

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

If there is a change in 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 also be requested at any time by the person deprived of their liberty, their RPR or an IMCA. There is a standard letter that can be used to request a review, which can be downloaded from the Department of Health website – see section 12 'Useful organisations' for details (in Wales, a similar letter template can be found on the NHS Wales website; also see section 12).

The supervisory body must decide whether any of the qualifying requirements need to be reassessed, i.e. whether the person still meets the age, no refusals, mental capacity, mental health, eligibility and best interests requirements – see section 4. It will not always be necessary for all the assessments to be carried out; it could be only the best interests assessment or the mental capacity assessment that is required.

The person deprived of their liberty, their RPR, the 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 of the outcome of the review.

The outcome of the review could be to end the authorisation, to change or add conditions to it, or change the reasons for which authorisation is given. If the authorisation is ended, any continued deprivation of liberty will be 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 decides it is no longer necessary to protect the person from harm, steps must be taken to make sure the person is no longer deprived of their liberty. They can then apply for a review to have the authorisation formally ended.

6.1 **Temporary changes in mental capacity**

A person's mental capacity to make certain decisions will often fluctuate. If someone being deprived of their liberty regained capacity to decide themselves whether they should stay in the care home or hospital they would no longer meet the requirements for authorisation of the deprivation.

However, if this was 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 the person's capacity fluctuates. A balance should be struck, based on individual circumstances.

In a situation like this the Code of Practice advises that a suitably qualified person must make a clinical judgement on whether there is evidence of a longer term regaining of capacity. If the person is only likely to have capacity 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, if the person has capacity to decide for themselves not to remain in the care home or hospital, or if 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 someone is being deprived of their liberty without authorisation can:

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

If there is a deprivation of liberty the full assessment procedure will go ahead.

There are standard letters to send to the care home or hospital, and to the supervisory body to request an assessment. These can be downloaded from the Department of Health website/NHS Wales website (see section 12 'Useful organisations' for details). They are not compulsory; you can use your own wording in a letter, or make a verbal request, but it is always useful to have written evidence confirming when the request was made.

If you think an unauthorised deprivation of liberty is taking place and you raise this with the care home or hospital, you should expect them to deal with it urgently: the Code of Practice states that this would usually mean 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 be consulted, an IMCA must be appointed.

An unauthorised deprivation of liberty can be challenged at the Court of Protection. See section 7.3.

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 (see section 6).

If authorisation is given and you don't think it is in the person's best interests, you should ask the supervisory body and the managing authority for evidence of what alternatives to deprivation were considered, and why they were rejected.

An authorisation can be challenged at the Court of Protection.

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 that involve mental capacity matters.

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

However, 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 as a matter of urgency.

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 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 how take a case to the Court of Protection, see Age UK's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

7.4 The role of the regulatory bodies

In England – the role of the Care Quality Commission

Hospital and care home service providers must be registered with the Care Quality Commission under the *Health and Social Care Act 2008*. The Care Quality Commission (CQC) monitors the Deprivation of Liberty Safeguards. It has the power to visit and interview parties, and access all relevant records. The visits are carried out as part of its normal visiting programme, rather than to investigate an individual case, and inspection by the CQC is not intended to be an additional review or appeal.

Concerns about an individual case that cannot be resolved with the managing authority or supervisory body should be referred to the Court of Protection. Under amended CQC registration Regulations, a service provider must now notify the CQC of a request or application for the DoLS to apply and also the outcome of the request².

In Wales – the role of the Care and Social Services Inspectorate Wales and the Healthcare Inspectorate Wales

Care home service providers must be registered with the Care and Social Services Inspectorate Wales (CSSIW).

The Health Inspectorate Wales (HIW) is the independent inspector and regulator of NHS and independent healthcare organisations in Wales.

Both organisations have a role in monitoring the use of the Deprivation of Liberty Safeguards in the respective areas they cover. Both the CSSIW and HIW have the power to visit and interview parties, and access all relevant records. Any visits are carried out as part of their normal visiting programmes, rather than to investigate an individual case, and inspection by either body is not intended to be an additional review or appeal. Concerns about an individual case that cannot be resolved with the managing authority or supervisory body should be referred to the Court of Protection.

CSSIW and HIW publish an annual joint monitoring report on the DoLS.

² *The Care Quality Commission (Registration) and (Additional Functions) and Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2012, Regulation 5*

8 The Code of Practice

The DoLS Code of Practice sets out guidance for care homes and hospitals on how to avoid unlawful deprivation of liberty. It also provides useful further guidance to how the deprivation of liberty safeguards system works. Anyone with responsibility for applying the rules should refer to the Code of Practice, which is meant to supplement the main Mental Capacity Act 2005 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

9 Deprivation of liberty by a private individual

*In a recent case, A Local Authority v A*³, it was stated 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.

These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. This case is not the same as those related to the procedures above because it relates to a possible deprivation of liberty by a private individual. However, the circumstances of an individual deprived of their liberty may be similar in practical terms.

The case also appears to address possible abuse issues and a local authority's related safeguarding duties. For further information about this subject and actions that can be taken if abuse may be occurring, see Age UK's Factsheet 78, *Safeguarding older people from abuse*.

³ 5 [2010] EWHC 978 (Fam), (2010) 13 CCLR 404 at [95] by Munby LJ.

10 Equality and human rights

The age element of the *Equality Act 2010* became legally enforceable in health and social care in October 2012. This means that an individual must not be treated differently due to his or her age when receiving a service unless there is good reason, known as 'objective justification'. If a person is treated differently, and this is to their detriment, then this could amount to illegal discrimination. The following list shows the other 'protected characteristics' that are included within the *Act*: disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Article 5 of the *Human Rights Act 1998* is cited a number of times in this Factsheet as the basis for the DoLS. It is also important to be aware that public bodies must uphold and promote all of the elements of this Act. Service users have a right to be treated with dignity, to be safe from harm and to be assisted to make their own choices wherever possible.

11 Appendix

Health Select Committee report in July 2013

A recent Health Select Committee report, published in July 2013, covering general mental health legislation and policy, also addressed major concerns about the DoLS. Regarding the DoLS, it stated that "despite fine words in legislation [people] are currently widely exposed to abuse because the controls which are supposed to protect them are woefully inadequate."

The evidence it had heard regarding the variable application of DoLS revealed "a profoundly depressing and complacent approach to the matter".

There was also considerable confusion reported about the scope of the DoLS and how and when to apply them in practice.

Commenting on the report when it was published, Stephen Dorrell MP, chair of the Health Select Committee, stated that, "The provisions for DoLS are not working well. We found that it is commonplace for DoLS to be ignored leaving many people at heightened risk of abuse."

The Committee recommended that the Department of Health should initiate an urgent review of the implementation of DoLS and called for the review to be presented to Parliament within twelve months, together with an action plan to deliver improvements.

The Government has now asked the Law Commission to work on amending DoLS in-light of the above criticisms and in response to the recent Supreme Court ruling summarised in section 3.2.

This is a link to the Committee's report:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/584/584.pdf>

Human Rights Act 1998

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.

12 Useful organisations

Action on Elder Abuse (AEA)

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.

Action on Elder Abuse, PO Box 60001, Streatham, London SW16 6BY

UK Helpline: 080 8808 8141 (free phone)

Website: www.elderabuse.org.uk

Email: enquiries@elderabuse.org.uk

Alzheimer's Society

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.

Devon House, 58 St Katherine's Way, London E1W 1LB

Helpline: 0300 222 11 22

Tel: 020 7423 3500

Website: www.alzheimers.org.uk

Email: enquiries@alzheimers.org.uk

Care and Social Services Inspectorate Wales

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

Tel: 0300 7900 126

E-mail: cssiw@wales.gsi.gov.uk

Website: www.cssiw.org.uk

The Care Quality Commission

The independent regulator of adult health and social care services in England, whether provided by the NHS, local authorities, private companies or voluntary organisations. Also protects the rights of people detained under the Mental Health Act.

CQC National Correspondence, Citygate, Gallowgate, Newcastle upon Tyne, NE1 4PA

Tel: 03000 616 161 (free call)

Website: www.cqc.org.uk

The Court of Protection

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

The Royal Courts of Justice, Thomas More Building, Strand, London, WC2A 2LL

E-mail: courtofprotectionenquiries@hmcts.gsi.gov.uk

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

Website: www.gov.uk/court-of-protection

Department of Health

Information and guidance on the safeguards can be downloaded from the DH website. The following standard letters are also available to download:

- 1: Letter to managing authority concerning unauthorised deprivation of liberty
- 2: Letter to supervisory body concerning unauthorised deprivation of liberty
- 3: Letter to a supervisory body from a person subject to a standard authorisation requesting a review
- 4: Letter to a supervisory body from a relevant person's representative requesting a review

All at

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

Website: www.gov.uk/government/organisations/department-of-health

Health Inspectorate Wales

The independent inspector and regulator of all healthcare in Wales.

Tel: 0300 062 8163

E-mail: hiw@wales.gsi.gov.uk

Website: www.hiw.org.uk

MIND (National Association for Mental Health)

Offers support for people in mental distress and their families.

15-19 Broadway, Stratford, London E15 4BQ

Advice line: 020 8519 2122

Mindinfo line: 0300 123 3393

Website: www.mind.org.uk

NHS Wales

The NHS Wales website contains information and guidance on the safeguards. A number of standard letters are also available to download, including:

- 1: Letter to managing authority concerning unauthorised deprivation of liberty
- 2: Letter to supervisory body concerning unauthorised deprivation of liberty
- 3: Letter to a supervisory body from a person subject to a standard authorisation requesting a review
- 4: Letter to a supervisory body from a relevant person's representative requesting a review

They can be accessed at:

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

Main website: www.wales.nhs.uk

Office of the Public Guardian

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.

Tel: 0300 456 0300

Website: <http://www.justice.gov.uk/about/opg>

Solicitors for the Elderly

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

Suite 17, Conbar House, Mead Lane, Hertford, Herts, SG13 7AP

Tel: 0844 567 6173

Website: www.solicitorsfortheelderly.com

Welsh Government

The devolved government for Wales.

Tel: 0300 060 3300 or 0300 060 4400 (Welsh)

Email: CustomerHelp@Wales.GSI.Gov.UK

Website: www.wales.gov.uk

13 Further information from Age UK

Age UK Information Materials

Age UK publishes a large number of free Information Guides and Factsheets on a range of subjects including money and benefits, health, social care, consumer issues, end of life, legal, employment and equality issues.

Whether you need information for yourself, a relative or a client our information guides will help you find the answers you are looking for and useful organisations who may be able to help. You can order as many copies of guides as you need and organisations can place bulk orders.

Our factsheets provide detailed information if you are an adviser or you have a specific problem.

Age UK Advice

Visit the Age UK website, www.ageuk.org.uk, or call Age UK Advice free on 0800 169 65 65 if you would like:

- further information about our full range of information products
- to order copies of any of our information materials
- to request information in large print and audio
- expert advice if you cannot find the information you need in this factsheet
- contact details for your nearest local Age UK

Age UK

Age UK is the new force combining Age Concern and Help the Aged. We provide advice and information for people in later life through our publications, online or by calling Age UK Advice.

Age UK Advice: 0800 169 65 65

Website: www.ageuk.org.uk

In Wales, contact:

Age Cymru: 0800 022 3444

Website: www.agecymru.org.uk

In Scotland, contact Age Scotland

by calling Silver Line Scotland: 0800 470 8090

(This line is provided jointly by Silver Line Scotland and Age Scotland.)

Website: www.agescotland.org.uk

In Northern Ireland, contact:

Age NI: 0808 808 7575

Website: www.ageni.org.uk

Support our work

Age UK is the largest provider of services to older people in the UK after the NHS. We make a difference to the lives of thousands of older people through local resources such as our befriending schemes, day centres and lunch clubs; by distributing free information materials; and taking calls at Age UK Advice on 0800 169 65 65.

If you would like to support our work by making a donation please call Supporter Services on 0800 169 87 87 (8.30 am–5.30 pm) or visit www.ageuk.org.uk/donate

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