

## Independent Mental Capacity Advocates

Family, friends and carers must be informed by the managing authority that it has applied for an authorisation. They must then be given the opportunity to input their views on whether the deprivation of liberty is in the person's best interests and must be involved in the best interests assessment process as well. There are three circumstances where IMCAs should be instructed by the supervisory body:

- **39a\* IMCA** must be instructed when an authorisation is applied for and it is deemed that there is no-one else (family or friends) appropriate to consult with.
- **39c\* IMCA** must be instructed when an authorisation is already in place, the person has been appointed a representative\*\* but then there is a gap in the availability of that representative (for example they are on holiday for a significant period of time or are unable to continue to be involved due to illness or death). The role of the 39c IMCA is intended to only fill that gap until another representative is appointed.
- **39d\* IMCA** must be instructed when an authorisation is in place and the person and/or their unpaid representative request that an IMCA is instructed to support them OR the supervisory body believes that instructing an IMCA will help to ensure the persons rights are protected. Unpaid representatives therefore must be informed about the availability of an IMCA.

\*\* When an authorisation is granted the person should be appointed a 'relevant persons representative' (RPR) which will be an unpaid RPR (the person's family or friend) or a paid RPR (usually an advocate or IMCA)

*\*relevant sections of the MCA 2005*



For further information regarding our training courses, workshops and consultancy please contact us via one of the following methods.

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# Mental Capacity Act Information Sheet 4



## DEPRIVATION OF LIBERTY SAFEGUARDS

The Mental Capacity Act 2005 was implemented by parliament in 2007 and is a vitally important piece of legislation for England and Wales. Applying to all people over the age of 16 it offers the opportunity to plan ahead as to how decisions should be made about you if you ever lose the capacity to decide how you would want to be cared for or make decisions about medical treatment. It also provides a framework and a safeguard for anyone who is currently unable to make decisions for themselves for a number of reasons to ensure they are at the heart of decision making when decisions are being made on their behalf. Certain professionals are legally required to abide by it including doctors, nurses, paid carers, dentists to name a few.

In 2009 the government added new provisions to the Act known as Deprivation of Liberty Safeguards (DoLS). The safeguards focus on some of the most vulnerable people in society who lack capacity to consent to certain accommodation and treatment regimes that have the effect of depriving them of their liberty but are deemed to be in their best interests.

In this leaflet:

- What are the safeguards and why were they introduced
- What is a deprivation of liberty
- How is a deprivation of liberty applied for and authorised
- What are the rights of the person who is deprived of their liberty
- What rights do family members have

# Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards were introduced as a result of the case of an autistic man (HL) who lacked the capacity to consent to care and treatment in a psychiatric hospital. He was admitted as an informal patient under common law in his best interests, but this decision was challenged by his carers. The case *HL v the United Kingdom* went to the European Court of Human Rights (ECtHR) and a judgement was made that his admission had deprived him of his liberty in breach of Article 5 of the Human Rights Act 1998. The ECtHR has stated that the following factors in a person's care or treatment may amount to a deprivation of liberty:

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant 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.

There is no formal definition of Deprivation of Liberty but where any of the above factors are part of a person's care or treatment, consideration must be given to whether they are being deprived of their liberty.

The safeguards apply in England and Wales to people who have a mental disorder and lack capacity to consent to care or treatment in circumstances that amount to a deprivation of liberty which is deemed to be in their best interests to protect them from harm. A large number of these people will have significant learning disabilities, dementia or similar disability including those with a neurological condition, for example as a result of a brain injury.

The safeguards only apply for someone receiving care or treatment in a hospital or care home.

# Deprivation of Liberty Safeguards

Outside of care homes or hospital settings, if there are concerns that a deprivation of liberty is occurring, for example in a person's own home or a day centre then only the Court of Protection can authorise this and legal guidance should be sought.

## Deprivation of Liberty authorisation process

There are two bodies that oversee this process and they are known as the **managing authority** and the **supervisory body**.

The **managing authority** is the organisation responsible for arranging the care or treatment (this means either the NHS body OR the care home/private hospital that is registered under the Care Standards Act 2000). The managing authority is responsible for applying for an authorisation in circumstances where they believe the person will be deprived of their liberty as a result of proposed care or treatment OR in urgent circumstances where a deprivation of liberty is occurring that was not planned, for example a person has become acutely unwell and the need to deprive them of their liberty needs to be authorised urgently.

The **supervisory body** is either the **PCT** that commissions the relevant care or treatment where the decision about authorisation is within a hospital or the **local authority** for where the person is ordinarily resident where the decision is related to care or treatment in a care home. They are responsible for considering requests for authorisations and responsible for commissioning the required assessments\*

\*6 assessments are required before a deprivation of liberty can be authorised, the two main assessments are the Best Interests and Mental Capacity assessment which determine whether the deprivation is in the person's best interests and whether the person lacks capacity. The mental capacity assessment must also consider how the person's mental health is likely to be affected by being deprived of their liberty.

There are 2 authorisation possibilities, one is a **standard authorisation**, this is applied for where proposed care or treatment is expected to deprive a person of their liberty and is planned to take place within 28 days. Wherever possible authorisation should be obtained in advance. Where this is not possible the managing authority must give itself an **urgent authorisation** and then obtain a standard authorisation within 7 days.